

NOT FOR PUBLICATION

FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

|  |   |                  |
|--|---|------------------|
| <b>Terranova, Inc.,</b>                    | ) |                  |
|  | ) |                  |
| Plaintiff,                                 | ) | Civ. No. 2000-13 |
|  | ) |                  |
| v.   | ) |                  |
|  | ) |                  |
| <b>The S/Y Terra-Nova, Official Number</b> | ) |                  |
| <b>645970, in rem, and Jay L. Zellner,</b> | ) |                  |
| <b>in personam,</b>                        | ) |                  |
|  | ) |                  |
| Defendant.                                 | ) |                  |
| _____                                      | ) |                  |
|  | ) |                  |
| <b>Jay L. Zellner,</b>                     | ) |                  |
|  | ) |                  |
| Defendant/Counterclaimant,                 | ) |                  |
|  | ) |                  |
| v.   | ) |                  |
|  | ) |                  |
| <b>Terranova, Inc. and Vincent</b>         | ) |                  |
| <b>Terranova,</b>                          | ) |                  |
|  | ) |                  |
| Counterclaim Defendants.                   | ) |                  |
| _____                                      | ) |                  |

**ATTORNEYS:**

**Lorren D. Caffee, Esq.**  
St. Thomas, U.S.V.I.  
*For Terranova Inc. and Vincent Terranova,*

**Gregory H. Hodges, Esq.**  
St. Thomas, U.S.V.I.  
*For Jay Zellner.*

**MEMORANDUM**

Moore, J.

Counterclaim defendant Vincent Terranova ["Terranova"] moves to dismiss defendant/counterclaim plaintiff Jay Zellner's

["Zellner"] counterclaims on the ground that this Court lacks personal jurisdiction over him. Zellner has opposed Terranova's motion. For the reasons set forth below, I will grant Terranova's motion to dismiss.

### **I. FACTUAL BACKGROUND**

In or around October 1996, Terranova and Zellner entered into a business arrangement whereby Zellner agreed that he would assume responsibility as Captain and Master of the S/Y Terra-Nova,<sup>1</sup> a vessel for which Terranova booked Caribbean charters through his company Terranova, Inc. Over the next several years, various disagreements arose between the parties regarding the scheduling of charters (or lack thereof) and the failure of Terranova to reimburse Zellner for maintenance and crew expenses. Wanting to terminate their association, Terranova, as an officer of Terranova, Inc., instructed Zellner to surrender possession of the vessel on December 23, 1999 when the vessel was docked in Trinidad. According to Terranova, Zellner disregarded this instruction and fled from Trinidad.<sup>2</sup> Terranova subsequently

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<sup>1</sup> According to Zellner, he and Terranova had agreed in June of 1994 that Zellner would provide Terranova with \$27,000 toward the purchase price of S/V Terra-Nova in return for an ownership interest in the vessel. Terranova disputes this claim.

<sup>2</sup> According to Zellner, he had informed Terranova that he would be returning the vessel to St. John in December of 1999 at the end of hurricane season.

notified the United States Coast Guard that the vessel was stolen. According to Terranova, the Coast Guard intercepted the vessel on January 17, 2000, in the territorial waters of the U.S. Virgin Islands, but did not seize it after Zellner claimed that he was the owner. Instead, the Coast Guard allegedly contacted Terranova to inform him that the boat was in St. John. Zellner disputes the veracity of this allegation as he claims that the Coast Guard encounter never happened. In any event, Terranova then caused the U.S. Marshals to arrest the vessel and filed suit against Zellner for damages. Zellner filed counterclaims against Terranova and Terranova, Inc. for breach of partnership agreement, fraud, conversion, entitlement to an accounting, maritime lien, wrongful discharge, declaratory relief, and wrongful arrest of the vessel. Terranova now moves to dismiss Zellner's counterclaims against him because (1) the Court lacks personal jurisdiction,<sup>3</sup> (2) Zellner failed to state a claim as Terranova acted as a corporate officer and cannot be liable for the corporation's obligations, and (3) the return of service was

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<sup>3</sup> Counterclaim defendant Terranova, Inc. apparently does not dispute this Court's jurisdiction over it, and rightfully so. First, Terranova, Inc. initially brought suit in this Court and has, therefore, consented to jurisdiction. Second, as Terranova, Inc. transacts business in the Virgin Islands with its charters, the Virgin Islands long-arm statute, 5 V.I.C. § 4903, would extend this Court's jurisdiction over the charter company.

defective.<sup>4</sup> This Court has jurisdiction pursuant to section 22(a) of the Revised Organic Act of 1954<sup>5</sup>, 28 U.S.C. § 1332, and 28 U.S.C. § 1333.

## II. DISCUSSION

### A. Personal Jurisdiction/Legal Standard

A federal court's exercise of personal jurisdiction over a non-resident defendant must comport with the long-arm statute of the forum and with the Due Process Clause of the United States Constitution. See FED. R. CIV. P. 4; *Government of the V.I. v. Lansdale*, 172 F. Supp. 2d 636, 645 n.6 (D.V.I. 2001), *In re Tutu Wells*, 846 F. Supp. 1243, 1264 (D.V.I. 1993); see also *Nicholas v. Saul Stone & Co. LLC*, 224 F.3d 179, 184 (3d Cir. 2000) (applying New Jersey law); *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197 (3d Cir. 1998) (applying Pennsylvania law). The plaintiff bears the burden of establishing personal jurisdiction over the defendant. See *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir. 1996), *Carteret Sav. Bank v.*

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<sup>4</sup> As I will grant the motion to dismiss this case for either lack of personal jurisdiction or failure to state a claim, I do address the issue of defective service.

<sup>5</sup> 48 U.S.C. § 1612(a). The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp.2001), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2001) (preceding V.I. CODE ANN. tit. 1).

*Shushan*, 954 F.2d 141, 146 (3d Cir. 1992); see also *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 689 (3d Cir. 1990) ("Once a defendant has properly raised a jurisdictional defense, the plaintiff must demonstrate sufficient contacts with the forum state to establish in personam jurisdiction."). Although the plaintiff must make this showing at trial by a preponderance of the evidence, he must only establish a prima facie case for this pretrial motion. See *In re Tutu Wells*, 846 F. Supp. at 1264; see also *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1387 (8th Cir. 1995). In assessing whether plaintiff has made such a case, the Court must consider all allegations of jurisdictional facts "in a light favorable to an assertion of in personam jurisdiction." *In re Tutu Wells*, 846 F. Supp. at 1264; see also *Carteret Sav. Bank*, 954 F.2d at 142 n.1.

**B. This Court Lacks Personal Jurisdiction over Terranova, or in the Alternative, Zellner Failed to State a Claim**

The Virgin Islands long-arm statute, 5 V.I.C. § 4903, pertinently provides:

- (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's
  - (1) transacting any business in this territory;
  - (2) contracting to supply services or things in this territory;
  - (3) causing tortious injury by an act or omission in this territory;

(4) causing tortious injury in this territory by an act or omission outside this territory if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this territory;

. . .

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

5 V.I.C. § 4903 (1997). Despite Zellner's assertion that subsections (a)(1) through (a)(4) apply to Terranova's actions in this case, the facts alleged do not support such a claim. Zellner has failed to establish whether any of Terranova's visits to this jurisdiction were for other than his own personal vacations. Thus, I cannot find that any of Zellner's business-related injuries arose from Terranova's visits to the Territory. See, e.g., 5 V.I.C. § 4903(a)(1) (noting that the Court's jurisdiction for "claims for relief arising from the person's transacting any business in this territory") (emphasis added); see *id.* § 4903(a)(4) (noting that the Court's jurisdiction for "claims for relief arising from the person's causing tortious injury in this territory by an act or omission outside this territory if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial

revenue from goods used or consumed or services rendered, in this territory.") (emphasis added).<sup>6</sup>

Moreover, even if Zellner could ultimately establish that Terranova did in fact transact business or contract to supply services or things in this Territory, this Court's exercise of personal jurisdiction over him would still be unwarranted because Terranova would have been acting in his capacity as a corporate officer of Terranova, Inc. As I noted previously in *Government of the Virgin Islands v. Lansdale*, 172 F. Supp. 2d 636 (D.V.I. 2001), "[j]urisdiction over an individual cannot be based solely on jurisdiction over his or her corporation. An individual's transaction of business in the Territory solely as a corporate officer does not create personal jurisdiction over the officer, even though the corporation is subject to in personam jurisdiction." See *id.* at 645 (citing 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069, at 370-74 (1987)). Accordingly, any acts performed by Terranova on behalf of Terranova, Inc., such as opening a local bank account or contracting for services or repairs to the vessel, would not subject Terranova to this Court's jurisdiction. They do, of

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<sup>6</sup> As Zellner cannot establish the applicability of the Virgin Islands long-arm statute, there is no need to address whether the exercise of jurisdiction over Terranova would violate due process.

course, support this Court's jurisdiction over Terranova, Inc., which is not in dispute.

**C. Piercing the Corporate Veil**

Zellner relies on my decision in *Lansdale* for the proposition that Terranova, Inc. is Terranova's alter ego and, thus, this Court should pierce Terranova, Inc.'s corporate veil to assert personal jurisdiction over Terranova. As the facts in *Lansdale* are readily distinguishable from the facts here, there is no basis for the Court to pierce the corporate veil.

The alter ego concept is a "tool of equity [that] is appropriately utilized 'when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from public liability for a crime.'" *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1521 (3d Cir. 1994) (citations omitted); see also *Pan E. Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1131-33 (5th Cir. 1988) (noting that courts use the alter ego concept when the corporation is used (1) as a mere business conduit for another corporation, (2) for an illegal purpose, or (3) to perpetrate a fraud). Since Terranova, Inc. is a Delaware corporation, I look to the law of Delaware to determine what conduct warrants disregarding the corporate fiction. See *Lansdale*, 172 F. Supp. 2d at 646.

Under Delaware law, piercing the corporate veil is appropriate where the corporation is merely an instrumentality or alter ego of its owners. See *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 793 (Del. Ch. 1992). Although the term "alter ego" is often used synonymously with "piercing the corporate veil," it is but one basis for bypassing the corporate shield. Other relevant factors in determining whether to disregard the corporate entity include whether it is "in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable considerations among members of the corporation . . . are involved." *Pauley Petroleum, Inc. v. Continental Oil Co.*, 43 Del. Ch. 516, 239 A.2d 629, 633 (Del. 1968). Also to be considered are whether the dominant shareholders siphoned corporate funds; whether the corporation is a facade for the dominant shareholders; whether a corporation was adequately capitalized and solvent; and whether corporate formalities were followed, including payment of dividends and upkeep of corporate records. See *Alberto v. Diversified Group, Inc.*, 55 F.3d 201, 205 (5th Cir. 1995) (quoting *Harco Nat'l. Ins. Co. v. Green Farms, Inc.*, 1989 Del. Ch. LEXIS 114, No. 1131, 1989 WL 110537, \*5 (Del. Ch. Sept. 19, 1989)).

*Id.* In *Lansdale*, I pierced the corporate veil of the defendant corporations after being presented with multiple and specific examples of William and Marianthi Lansdale, the companies' sole shareholders, commingling personal and corporate funds and using corporate assets to secure personal loans. See *Lansdale*, 172 F. Supp. 2d at 642-43, 646-49. Although Zellner has also presented this Court with examples of Terranova's acts in support of his argument to pierce the corporate veil, none of these acts rises to the level of duplicity found in *Lansdale*.

For example, Zellner has submitted a copy of Terranova, Inc.'s American Express Corporate Platinum Card statement<sup>7</sup> as evidence that Terranova used corporate funds for his own benefit. (See Countercl. Pl.'s Opp. to Mot. to Dismiss Countercl., Ex. H.) A review of the statement does reveal some questionable purchases, such as jewelry and women's apparel from Victoria Secret. The credit card statement, however, only indicates that the purchases were made. It does not reveal whether corporate funds were actually used to pay for these items. It is possible that Terranova charged these items to the company's credit card and then reimbursed the company with his own personal funds. It is also possible that there was some reasonable business purpose for these purchases. Therefore, Terranova's use of the company's credit card does not rise to the level of fraud or illicit conduct to warrant piercing the corporate veil.

Another example Zellner used in support of his argument is the bank account opened by Terranova at The Chase Manhattan Bank in St. John. Terranova alleged that he opened up the account in the name of "Vincent Terranova d/b/a Terranova, Inc." (See *id.*, Ex. F, Answers of Terranova and Terranova, Inc. to Interogs. Nos.

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<sup>7</sup> The corporate cardmember name is Captain Vinny Terranova.

10-11.)<sup>8</sup> Zellner countered that the actual bank account statement makes no reference to "d/b/a Terranova," signifying that Terranova used corporate funds for his own personal use. Although a review of the bank statement reveals no reference to "d/b/a Terranova," the checks issued to the account are in fact addressed to "Vincent Terranova d/b/a Terranova, Inc." (See Countercl. Defs.' Reply to Opp. to Terranova's Mot. to Dismiss Countercl., Ex. F.) Moreover, Zellner himself had authorization to sign checks on this account, which he did to pay off corporate expenses and reimburse himself for expenses related to the vessel. Finally, Zellner has offered no evidence, other than his conclusory allegations, that Terranova used this account for his own personal benefit. Accordingly, it is apparent that the bank account was used for a corporate purpose and does not justify piercing the corporate veil.

Finally, Zellner argues that Terranova is the alter ego of Terranova, Inc. because the company failed to follow corporate formalities and was never solvent. (See Countercl. Pl.'s Opp. to Mot. to Dismiss Countercl., at 15.) But here again, such

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<sup>8</sup> Terranova claimed that he could not open a local account in Terranova, Inc.'s name because the company did not intend to do business in the Virgin Islands and would therefore be unable to provide the bank with the necessary documents. (See Countercl. Pl.'s Opp. to Mot. to Dismiss, Answers of Terranova and Terranova, Inc. to Interogs. Nos. 10(b) (noting that the bank required a certified copy of the company's articles of incorporation, bylaws, a certificate of good standing, and its Virgin Islands business license in order to open an account).)

examples are not enough to support piercing the corporate veil.

First, the failure of Terranova, Inc. to follow corporate formalities is not fatal to its case.

Not every disregard of corporate formalities or failure to maintain corporate records justifies piercing the corporate veil. That remedy is available only if it is also shown that a corporation's affairs and personnel were manipulated to such an extent that it became nothing more than a sham used to disguise the alter ego's use of its assets for his own benefit in fraud of its creditors. In short, the evidence must show that the corporation's owners abused the legal separation of a corporation from its owners and used the corporation for illegitimate purposes.

*Kaplan*, 19 F.3d at 1521 (citation omitted). As evidenced above, Zellner has not established that Terranova manipulated the affairs of Terranova, Inc. for any fraudulent or illicit endeavors. In fact, from the evidence before me, it is clear that Terranova, along with Zellner, operated Terranova, Inc. as a legitimate enterprise engaged in the chartering business. Second, the apparent insolvency of Terranova, Inc.<sup>9</sup> does not provide an equitable justification to pierce the corporate veil and bring Terranova into this matter in his personal capacity. Should Zellner ultimately prevail in his counterclaim and Terranova, Inc. is unable to satisfy the award, he may be able to look to Delaware law for authority to file suit against Terranova

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<sup>9</sup> Although the parties dispute Terranova, Inc.'s relative solvency, this Court notes that the company has apparently sold its only asset, the vessel S/Y Terra-Nova.

personally in his capacity as the company's officer, director, and sole shareholder. See DEL. CODE ANN. TIT. 8 § 325 (2001). As Delaware law may provide Zellner with an equitable remedy should Terranova, Inc. default on any potential award in the future, it is not appropriate to pierce the corporate veil of a legitimate, functioning corporation at this time.

### III. CONCLUSION

As the Territory's long arm statute, 5 V.I.C. § 4903, does not apply, this Court cannot exercise personal jurisdiction over Terranova. In the alternative, even if section 4903 applied, Terranova is immune from jurisdiction as he performed any business transactions for Terranova, Inc. in his capacity as a corporate officer. Finally, Zellner failed to provide any evidence that Terranova treated Terranova, Inc. as his alter ego. Accordingly, I will dismiss Zellner's counterclaims against Terranova.

**ENTERED this 18th day of March, 2003.**

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

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**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

By: \_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk

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DIVISION OF ST. THOMAS AND ST. JOHN

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| <b>Terranova, Inc.,</b>                    | ) |                  |
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| Plaintiff,                                 | ) | Civ. No. 2000-13 |
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| <b>The S/Y Terra-Nova, Official Number</b> | ) |                  |
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| <b>in personam,</b>                        | ) |                  |
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| <b>Terranova,</b>                          | ) |                  |
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| Counterclaim Defendants.                   | ) |                  |
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**ATTORNEYS:**

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 St. Thomas, U.S.V.I.  
*For Terranova Inc. and Vincent Terranova,*

**Gregory H. Hodges, Esq.**  
 St. Thomas, U.S.V.I.  
*For Jay Zellner.*

**ORDER**

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

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**ORDERED** that counterclaim defendant Terranova's motion to  
dismiss (Docket No. 51, 95) is **GRANTED**.

**ENTERED this 18th day of March, 2003.**

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

**By: \_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk**

cc: Hon. G.W. Barnard  
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