IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Northwestpharmacy.com Inc. v. Yates*, 2017 BCSC 1572

Date: 20170907
Docket: S169416
Registry: Vancouver

Between:

Northwestpharmacy.com Inc.

Plaintiff

And

John Gidden Yates, Debra Ann Yates, Debra Ann Yates as Trustee of the Yates Family Business Trust, Michael John Yates, Sandy Yates, Michael Robert Tozman, Eliane Tozman, Debra LePage, Steven H. Poznanski, 8309469 Canada Limited, Hocgol Processing, Inc., Paymitco LLC, JBI Management Group LLC, Vipci Corp., Paymonex LLP, Epic Capital Group, LLC, John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment
Addressing Territorial Competence and Arbitration

In Chambers

Counsel for the Plaintiff/Applicant:	Dale G. Sanderson, Q.C. Tina L. Mihoc
Counsel for the Defendants John Yates, Debra Yates, Debra Yates as Trustee of the Yates Family Business Trust, Michael Yates, Sandy Yates, Michael Tozman, Eliane Tozman, 8309469 Canada Limited, Hocgol Processing Inc., and Epic Capital Group LLC:	Sean Hern Catherine George
Counsel for the Defendant Debra LePage:	Robbie S. Fleming Matthew N.E. Cowper

No other appearances

Place and Dates of Hearing:	Vancouver, B.C. April 18–20, July 10–12, August 8–10, 2017
Place and Date of Judgment:	Vancouver, B.C. September 7, 2017

Contents

INTRODUCTION

[1] Is this Court territorially competent to hear this case? If so, should it be stayed nonetheless because of a contractual provision to arbitrate?

[2] The Plaintiff sues the Defendants for $1,244,273.80 US. I granted the Plaintiff an *Anton Pillar* order and a *Mareva* injunction on October 14, 2016.

[3] In the current applications, Debra LePage seeks an order dismissing the action on the ground that this Court lacks territorial competence over the dispute. She relies on this province's *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("*CJPTA*" or "the Act").

[4] Other Defendants, those represented by Mr. Hern and Ms. George, also seek that order on the same grounds. Alternatively, they ask that the action be stayed in favour of arbitration pursuant to an arbitration clause in a written contract between the Plaintiff and a company named Omega Group Inc. (I will sometimes refer to the Defendants represented by Mr. Hern and Ms. George as the Yates and Tozman Defendants.)

[5] Oral argument on these applications began April 18, 2017. On the morning of the third day, April 20, the applications had to be adjourned at the request of the Plaintiff. The matter returned to Court July 10. The Defendants argued at that time that certain evidence was inadmissible on the applications, particularly for considering the arbitration issue. The evidentiary motion occupied two days. Then the applications resumed on the merits. However, on July 12, they had to be adjourned, again out of necessity arising in the Plaintiff's camp.

[6] I ruled on the evidentiary question, in reasons given on July 13, reported at 2017 BCSC 1276.

[7] Finally, the Defendants' applications on their merits were heard to their conclusion on August 8, 9 and 10.

THE FACTS

[8] The Plaintiff is a Panamanian company. Its corporate office is in Panama. Its bank accounts are in Panama. Its board of directors are in Panama. A witness for the Plaintiff, a Mr. Arora, said in an affidavit that the Plaintiff's directors are "nominee directors" but that evidence went no further. For example, it did not say who nominated them. At least some of the Plaintiff's management is carried out from Barbados. The Plaintiff is not registered to carry on business in British Columbia. From the voluminous filed evidence, including the 11 volumes in the joint application record, it is apparent that the Plaintiff does not make corporate decisions in this province. The evidence reveals that one person who has at least some decision-making power for the Plaintiff is a Mr. Long Nguyen. He is based in Vietnam.

[9] The Plaintiff markets itself as an "international drugstore". Its business is the online sale of prescription drugs to retail customers who are mostly in the United States. As Mr. Arora states in paragraph 4 of his first affidavit:

> NWP [the Plaintiff] operates a website located at www.northwestpharmacy.com ("NWP's Website") through which consumers in the United States and many other countries can access lower cost prescription medications that are not controlled or narcotic substances. NWP does not sell any controlled or narcotic substances regardless of whether or not a customer has a prescription for a controlled or narcotic substance.

[10] The Plaintiff's business is not licensed or otherwise regulated in the United States. The Plaintiff obtains the prescription drugs from pharmacies in countries the world over. The Plaintiff's customer contracts state that third-party affiliates with which the Plaintiff contracts to ship drugs to customers in the United States are located in Turkey, Mauritius, the United Kingdom, Singapore, Germany, Switzerland, the United States and other countries the Plaintiff may select from time to time. The Plaintiff's customer contracts state that the drugs may be manufactured in any of the countries named above, or other countries, including but not limited to India and Israel.

[11] Omega Group Inc., or "Omega", named above in para. 4, is also a Panamanian company. The Plaintiff's written contract with Omega, containing the arbitration clause, is dated June 25, 2015. The Plaintiff elected not to sue Omega in this proceeding. The reasons for it not suing Omega are not entirely clear, but from the submissions and the evidence before me, I believe a primary reason was to avoid the application of the arbitration clause, which calls for the arbitration of all disputes arising out of or relating to the contract. The arbitration clause was inserted at the Plaintiff's request. I will return to the role of Omega, and to the arbitration clause, later in these reasons.

[12] The witness for the Plaintiff referred to earlier, Mr. Ankur Arora, lives in British Columbia. In his first affidavit, he says he is a "beneficial owner" of the Plaintiff. To describe his ownership interest as indirect would be to understate the point. An organization chart reveals the following: Mr. Arora and his family are beneficiaries in a trust. Mr. Arora is one of the trustees. The trust owns a half interest in a BC company. Mr. Arora himself owns the other half interest in that company. In turn, that company owns 100% of a British Virgin Islands ("BVI") company. The BVI company owns 50% of a Barbados company. The Barbados company owns 100% of the Panamanian Plaintiff. Mr. Arora is legally trained. I expect the corporate and trust relationships shown in the organization chart

provide income tax or other advantages. However, unless Mr. Arora can pierce several corporate and trust veils, his interest in the Plaintiff is remote. He is careful in his evidence to describe his role for the Plaintiff in limited terms. For example, he says in paragraph 3 of this first affidavit:

> ... I had ... been asked and authorized by [the Plaintiff] to communicate with, and gather information from ... [the Yates and Tozman Defendants] ... with respect to the matters that are the subject of this Affidavit.

[13] The evidence as a whole makes it clear that Mr. Arora had no decision-making capacity for the Plaintiff regarding the facts of this case. The relevant decision-maker was Mr. Nguyen in Vietnam, who presumably worked in some manner with other of the Plaintiff's personnel who were in Panama or Barbados. The limit of Mr. Arora's responsibility will be relevant in addressing territorial competence.

[14] Another name on the Plaintiff's side of the case is Mr. Amandeep Banghu. From the organization chart referred to earlier, his link to the Plaintiff parallels that of Mr. Arora. Mr. Banghu's and Mr. Arora's chains of indirect interest in the Plaintiff mirror one another. Mr. Banghu was present at relevant meetings but he has given no affidavit in the applications.

[15] Returning to the events, an issue for the Plaintiff in the carrying on of its business is how it will be paid for the products it sells. The major credit card companies, and their related banks, want nothing to do with the business because they perceive it as being too high-risk. To quote from paragraph 30 of Mr. Arora's first affidavit:

> The perception of many banks that the Industry is high-risk is largely caused by:
>
> (a) concerns about consumer safety and about potential liability for the banks that process transactions as merchant banks for the Industry because of Unsafe Providers and other such merchant rogues; and
>
> (b) the official position taken by the US Food and Drug Administration (the "FDA") that the importation of drugs in the United States, by American citizens, is a misdemeanour.

The Plaintiff therefore needs arrangements to get paid without its customers being able to use their credit cards. The Defendants and Omega agreed to supply the Plaintiff with these needed alternative payment mechanisms. (Here and in most

parts of these reasons, I speak of the Defendants as one, for the sake of simplicity. The underlying facts of course are more complex. For example, Messrs. Yates and Tozman, who live in Ontario, attended relevant meetings in Surrey, British Columbia. Most of the other named Defendants appear to have had no or little involvement in the facts of the case and none of them have any connection with this province. The Defendant, Epic Capital Group, LLC ("ECG"), is a company incorporated in Nevada in the United States. Omega, the Panamanian company named earlier in these reasons, but not named as a Defendant, does business under the name "Paynet Services". Both ECG and Omega offer payment-processing services. The principals of those companies are the Yates and Tozman Defendants. Neither ECG nor Omega is registered extra-provincially to carry on business in British Columbia. Six of the Defendants who were sued appear to have been joined for the purpose of accessing their assets pursuant to an unjust enrichment claim. They include Eliane Tozman, Debra Yates and Sandy Yates, spouses of the Yates and Tozman Defendants. None of those latterly-named Defendants have any connection with British Columbia.)

[16] The Plaintiff was looking to diversify its means of payment processing in early 2015. It was receiving approximately $2 million in orders each month, and needed to process those transactions. As noted earlier, credit card companies were no longer interested. The Plaintiff needed diversification because if one system became unavailable, the Plaintiff's business would be frustrated if there was not a second system in place.

[17] Two of the available payment processing systems are called "Check 21" and "Image Cash Letter" (or "ICL"). The particulars of both systems are set out at para. 23 below.

[18] The Defendant ECG, and Omega, both owned by the Yates and Tozman Defendants, offered those two payment processing systems to the Plaintiff. ECG offered the Check 21 system. Omega offered ICL. The Plaintiff began negotiations with both companies in early 2015. I have noted before that the Plaintiff elected not to sue Omega, and I believe that was primarily to avoid proceeding by arbitration. Were it not for that procedural dilemma, I expect that Omega would have been sued in the ordinary course. When the Plaintiff dealt with Messrs. Yates and Tozman in 2015, it knew that they would employ corporate

vehicles for the payment processing, rather than contracting in their personal names. The Plaintiff did not care what companies Messrs. Yates and Tozman employed for supplying the payment processing. ECG and Omega were the companies they used, and the Plaintiff acknowledges in its pleadings that Messrs. Yates and Tozman said that they represented ECG and Omega.

[19] The Plaintiff's assertion of territorial competence, based on the tort of fraudulent misrepresentation, rests on the fact that pre-contract meetings were held on April 8 and 9, 2015 in this province, rather than in Panama, Ontario, Vietnam or wherever else it may have been convenient for the parties to meet. At those meetings for ECG, a Nevada company, and Omega, a Panamanian company, were Messrs. Yates and Tozman, from Ontario. On the Plaintiff's side, the meetings were attended by Mr. Arora and Mr. Banghu, and perhaps others. As Mr. Arora acknowledged in paragraph 6 of his fourth affidavit:

> I also advised the defendant John Yates [before April 8 and 9] that Aman [Banghu] and I were authorized to meet with him and his partners, as representatives of the plaintiff, to gather information and to pass that information along to the Plaintiff's General Manager of International Relations (Mr. Long Nguyen) [in Vietnam], along with any recommendations that we may have with respect to potential contracts with [Messrs. Yates and Tozman] but that all final decisions would have to be made by Mr. Nguyen. I repeated this advice to [Messrs. Yates and Tozman] during the Meetings as well.

[20] The Defendants' evidence of the events up to and including April 8–9, 2015, is found at paragraphs 25–29 and particularly, paragraph 28, in the second affidavit of Michael Tozman:

> 25. Focused discussions by phone, email and other electronic conferencing methods about what payment processing services ECG and Omega could offer to the plaintiff began in January 2015. Mr. Arora told us that at that time, the plaintiff was receiving Check 21 services from another payment processing company and running all of its payments through its Panamanian bank, Credicorp Bank into the Bank of America and back to Panama. The plaintiff was interested in whether we could provide a secure, lower cost alternative. An example of those discussions is the email chain attached to this affidavit as **Exhibit C**, with the concluding email on January 12, 2015. My email account is recorded as "admin" and admin@ecgpavments.com in that email exchange.
>
> 26. Mr. Arora on many occasions expressed that his interest in doing business with our group was to diversify his payment processing so that if one channel for processing was shut down, the lost

processing capacity could be accommodated by another channel without delay.

27. On March 25, 2015, John Yates sent to Mr. Arora a memorandum titled "ECG Payments ICL Payment Processing Overview". A copy of that email is attached here as **Exhibit D.** By the end of March 2015, the plaintiff had arranged for Credicorp Bank to send to ECG a scanner that could scan the e-checks in a format that would be compatible with bank's computer systems. This event is reflected in an email dated March 31, 2015 which is attached to this affidavit as **Exhibit E.**

28. Further discussions continued into in April and early May 2015. These took place by phone, email and included an in-person meeting in Vancouver for which John and Michael Yates and I flew to Vancouver and met with representatives of the plaintiff, Mr. Arora, Mr. Gill, Aman Banghu and Michael Banghu. The terms of the initial agreement established by these communications were that the plaintiff would be introduced to credit card processing. These terms were discussed by phone on March 25, 2015 and by email on March 30 and 31, 2015, as can be seen in Exhibit D. The terms were further discussed in the meeting in Vancouver on April 2015 and were partially set out in writing and clarified in an email chain dated April 14-20, 2015 between Long Nguyen on behalf of the plaintiff and John Yates, Michael Yates and me as representatives of ECG and Omega. A copy of that email is attached here as **Exhibit F**. I don't know where Mr. Nguyen was located when he was writing those emails, but the ECG/Omega group was in Ontario.

29. By May 14, 2015, ECG had commenced the Check 21 processing but the ICL channel had not been established. ICL processing was a service that Omega provided by way of a master-services type of contract with another payment processing group headed by a company called Paymitco LLC. The person I communicated with whom understood to be Paymitco's representative was Debra LePage. As Omega was organizing the commencement of ICL processing, Mr. Nguyen sent instructions by email on May 14, 2015 that all payments for the plaintiff as a result of ICL processing should be deposited into the Panama bank account of a company called iWell Inc. at Credicorp Bank. A copy of that email is attached as **Exhibit G**.

[21] The Plaintiff's recitation of what it says are the fraudulent misrepresentations by Messrs. Yates and Tozman at the April 8–9, 2015 meetings is found at paragraphs 67–104 of the Arora affidavit sworn October 11, 2016. It is not clear to me which of the Defendants' representations on April 8 and 9 would be argued by the Plaintiff at trial to be fraudulent misrepresentations. However, I do not criticize the Plaintiff's presentation on that question. The case for fraudulent misrepresentation is not simple. Because, for establishing territorial competence,

a plaintiff need show only a serious question to be tried, and because, in these pre-trial applications for determining jurisdiction, the facts are not to be scrutinized as fully as they would be at trial, I am prepared to accept that the Plaintiff has presented sufficient evidence to raise a serious factual question of whether there were fraudulent misrepresentations by the Defendants on April 8 and 9, 2015. However, the legal elements of the tort of fraudulent misrepresentation, and whether they are present in such a way as to support a finding of territorial competence in this Court, are separate issues, which will both be addressed later in these reasons.

[22] The Plaintiff asserts that it entered into three oral agreements during the April 8 and 9, 2015 meetings. Two of the agreements are relevant here. One was for ECG to provide Check 21 processing and the other was for Omega to provide ICL processing.

[23] I accept the Yates and Tozman summary of Check 21 Processing and ICL Processing as summarized in their written submission:

> **Check 21 Processing**
>
> 45. In May 2015, ECG began to process payments for the plaintiff using the Check 21 process. For Check 21 processing, invoices to the plaintiff were issued by ECG. There is no issue that the Check 21 services were sought by the plaintiff and duly provided by ECG.
>
> 46. The transactional routes for the payment processing via Check 21 unfolded as follows:
>
> <u>The Plaintiff</u>
>
> a) In the course of placing their orders, the plaintiff's US customers would authorize the Panamanian plaintiff to deduct from their US bank accounts the amounts attributed to the pharmaceutical product they were buying. They would do this by contacting the plaintiff by phone or over the internet. Those communications were routed by the plaintiff to Corvista, the third party call centre located in BC. The customers would then either send a physical cheque to the call centre, or a copy of it by fax or email, and the banking information from the cheque would be manually entered into a database accessible by the plaintiff. The location of the plaintiff's servers is unknown to the defendants.
>
> <u>ECG</u>
>
> b) ECG would receive a batch file from the plaintiff through a web portal it hosted on servers in New York, providing the US customers' banking information and the amount of their payments;

c) ECG would download the cheque information into an office in Toronto, print them, scan the cheques, and then send the digital cheque images to Creditcorp Bank's servers in Panama.

Creditcorp Bank

d) Creditcorp Bank in Panama would then route the electronic cheques to the Bank of America for clearance through the US Federal Reserve.

Bank of America

e) The Bank of America would then send the money back to Creditcorp Bank which would deliver the funds to the plaintiff's Panama bank account.

iWell Inc.

f) The plaintiff would pay ECG's invoices by wire transfer from a company called iWell Inc. to ECG's Citibank account in Chicago.

...

ICL Processing

48. Starting in early May 2015, Omega began to process a relatively small number of payments for the plaintiff using the ICL process. The plaintiff says this was pursuant to an oral agreement established in approximately April 2015. For ICL processing, invoices to the plaintiff were issued by Omega, doing business as Paynet Services.

49. There was no link to British Columbia in the transactional routes for the payment processing via ICL, which unfolded as follows:

The Plaintiff

a) As with the Check 21 process, the plaintiff's US customers would authorize the plaintiff, a Panamanian company, to deduct from their US bank accounts the amounts attributed to the pharmaceutical product they were buying. They would do this by calling a third party call centre contracted by the plaintiff or ordering online, and would then either send a physical cheque to the call centre, or a copy of a cheque by fax or email, and the banking information from the cheque would be manually entered into a database accessible by the plaintiff. The location of the plaintiff's server is unknown to the defendants.

b) The plaintiff would transmit the customers' billing details to a server in Amsterdam, Netherlands, using a Secure File Transfer Protocol account and then the information would be transmitted to Omega's gateway server location in London, England.

Omega

c) Omega's gateway server would redirect the transmissions to Paymitco's server in Northern Netherlands.

Paymitco

d) Paymitco's server would create a digital cheque image and forward the image to a US Bank associated with one of Paymitco's affiliated corporations that was being used for that particular merchant transaction.

US Banks

e) The US Bank would then clear the customer's cheques payable to the appropriate companies and deposit the money into those companies' accounts.

ECG

f) Paymitco would then transfer funds to ECG's US bank account in Chicago, less Paymitco's fees. ECG received the funds on Omega's behalf.

iWell Inc.

g) ECG, on behalf of Omega, would deduct Omega's fees and wire the balance to the bank account of IWell Inc. in Panama.

[24] In June 2015, the Plaintiff's bank in Panama said it would no longer process Check 21 transactions. Instead, it would require a processing method which could be provided using the ICL process. By June 25, Omega began to handle all of the Plaintiff's payment processing, employing the ICL process.

[25] On June 24, 2015, Omega provided the Plaintiff with a form of written contract. Under that contract, Omega would provide ICL payment processing and the Plaintiff in turn would pay fees for the services performed by Omega.

[26] The Plaintiff reviewed the proposed written contract. The Plaintiff negotiated some changes and signed it on July 6, 2015. As stated at the beginning of the written contract, it was effective as of June 25, 2015. The written contract contains a governing law clause stating that it will be governed by, construed and interpreted in accordance with the laws of Panama. It also contains the following arbitration clause:

> 11.2 – Jurisdiction. The Parties [*i.e.*, Omega doing business as Paynet Services and the Plaintiff, represented by Mr. Long Nguyen] hereby submit to a binding arbitration under the International Rules of the American Arbitration Association with one arbitrator for all disputes arising out of or relating to this agreement and agree that all claims, evidence and rulings shall remain and be confidential.

As Mr. Arora for the Plaintiff said at paragraph 184 of his fifth affidavit:

> It was the Plaintiff that suggested adding the arbitration clause into the proposed written ICL agreement. Up to that point the Plaintiff had not had any issues with the [Yates and Tozman Defendants].

[27] The Plaintiff continued to do business with Omega, and continued to receive money through Omega's payment processing, until at least September or October, 2015. Nearly all of the payments the Plaintiff now claims stemmed from ICL transactions on June 25 or later. The Plaintiff asserts that the money it claims is pursuant to an oral agreement or agreements but, in my view, that is in an effort to ignore the written contract and thereby avoid arbitration. (Of the $1,244,273.80 US now claimed by the Plaintiff in this litigation, only $27,897.13 US stems from ICL processing done between May 6, 2015 and June 24, 2015, a period prior to the written contract being signed.)

[28] In his affidavits, Mr. Arora, for the Plaintiff, asserts repeatedly that the Plaintiff took the view that it was contracting with Messrs. Yates and Tozman, and that "any corporate entity that became involved would merely be the vehicle through which" Messrs. Yates and Tozman would provide their services. As such, Mr. Arora says, the Plaintiff was "prepared to sign a contract with whichever entity" Messrs. Yates and Tozman directed, and "did in fact do so".

[29] In my view, the Plaintiff entered into a written contract with Omega in the ordinary course. Commercial agreements of this size and complexity are almost always entered into between companies instead of individuals. Both sides in this dispute were fully aware that corporate entities would be employed on both sides. As with any such written contract, its terms need to be negotiated by people. That of course does not make the people the parties to the contract. Perhaps to repeat somewhat, but for the Plaintiff's wish to now avoid arbitration, I expect Omega would have been joined as a defendant, and the Plaintiff's claim of $1,244,273.80 US would be proceeding primarily against Omega.

[30] I will next address the issue of territorial competence, and then the arbitration issue.

TERRITORIAL COMPETENCE

[31] The Defendants bring their applications addressing territorial competence under B.C. Supreme Court Rule 21-8(1)(a) and (b):

Rule 21-8 — Jurisdictional Disputes

Disputed jurisdiction

(1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,

(a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,

(b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding ...

[32] Part 2 of the *CJPTA* addresses the territorial competence of this Court. Section 2(2) provides that the territorial competence of a court is to be determined solely by reference to Part 2. Section 10, also in Part 2, lists 12 circumstances in which a real and substantial connection is presumed to exist between British Columbia and the facts on which a proceeding is based. The Plaintiff relies on four of them, set out in paragraphs (e)(i), (f), (g) and (h) of s. 10 as follows:

Real and substantial connection

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

...

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in British Columbia ...

(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,

(g) concerns a tort committed in British Columbia,

(h) concerns a business carried on in British Columbia ...

[33] The parties are on common ground as to the onus and burden in applications arising under s. 10. In *Ewart v. Nippon Yusen Kabushiki Kaisha*, 2016 BCSC 2179, Myers J., at para. 8 of his reasons, adopted what Dillon J. had said in an earlier case, as follows:

> [23] The party arguing for jurisdiction has the initial burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum (*Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 100 (*Club Resorts*); *Right Business Ltd.* at para. 27). The threshold for establishing territorial competence is not high (*JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at para. 59 (*JTG Management*)). Generally, as long as the s. 10 claims are pleaded to trigger one of the presumptions of a real and substantial connection, the plaintiff need not support its allegations with evidence (*Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at para. 21 (*Fairhurst*); *Right Business Ltd.* at para. 44; *Original Cakerie* at para. 22). The basic facts are taken to be proven, if plead, but the presumption is rebuttable (*Stanway* at para. 22; *Fairhurst* at para. 14).
>
> [24] The burden of rebutting the presumption rests upon the party challenging the assumption of jurisdiction by establishing "facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them" (*Club Resorts* at para. 95). It must be plain and obvious that the action as pleaded could not lie within the territorial competence of the court (*Fairhurst* at para. 32; *JTG Management* at paras. 35 and 60). If the defendant tenders evidence that challenges the plaintiff's jurisdictional facts or to demonstrate that the plaintiff's claim is tenuous or without merit, the plaintiff is required to adduce evidence that satisfies the court that it has a good, arguable case that the contentious facts can be established (*Stanway* at para. 70; *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 35 (*Purple Echo Productions*); *Right Business Ltd.* at para. 44; *Original Cakerie* at para. 22). The burden on the plaintiff to show an arguable case in the circumstance where the defendant presents evidence will be discharged if there are facts, alleged or deposed, which, if true, would provide a foundation for jurisdiction (*Purple Echo Productions* at para. 34; *Original Cakerie* at para. 23; *JTG Management* at para. 34). The court is not going to determine whether the facts are true: the task for the plaintiff is to show an arguable case that they can be established (*Purple Echo Productions* at para. 34; *Fairhurst* at para. 20).
>
> [Emphasis added.]

10(e) CONCERNS CONTRACTUAL OBLIGATIONS, AND (i) THE CONTRACTUAL OBLIGATIONS, TO A SUBSTANTIAL EXTENT, WERE TO BE PERFORMED IN BRITISH COLUMBIA

[34] In my view, the Plaintiff cannot demonstrate a serious question to be tried under this heading. The contractual obligations relevant to this dispute were not to be performed in British Columbia. The contracts in question are the oral contracts asserted between the Plaintiff and the Yates and Tozman Defendants, and the written contract between the Plaintiff and Omega. As noted earlier, the Plaintiff is not registered to carry on business in this province, and does not do so. Similarly, there is no evidence that Messrs. Yates and Tozman, or Omega, or any of the

named Defendants, carry on any business in British Columbia. It follows that contractual obligations among the parties were not to be performed in this province. The Plaintiff knew that Messrs. Yates and Tozman would employ one or more companies they controlled for the payment processing. The Nevada company, ECG, and the Panamanian company, Omega, were used. The payment processing at issue took place in Europe, the United States and Panama.

[35] The Plaintiff points to two BC companies, carrying on business in British Columbia, with which the Plaintiff has contracts. One is a call centre in Langley, named Corvista Enterprises Ltd., and the other, also in Langley, Pharmawest Pharmacy Ltd., provides some of the drugs the Plaintiff ships to the US and elsewhere. The existence of those contracts, and the fact that they are carried on in British Columbia, is not important in assessing this Court's territorial competence to hear the dispute between the Plaintiff and the Defendants. The performance of those contracts is not in issue. Certainly, it cannot be said that the facts of the dispute involve contractual obligations which were to be performed in British Columbia to a "substantial extent".

10(f) CONCERNS RESTITUTIONARY OBLIGATIONS THAT, TO A SUBSTANTIAL EXTENT, AROSE IN BRITISH COLUMBIA

[36] In my view, the Plaintiff cannot show an arguable case for territorial competence under s. 10(f). Restitutionary obligations arise at the place from which money is removed, or at the place where the money is wrongfully received. See, *Laxton v. Jurem Anstalt*, 2010 BCSC 1002, at paras. 36–39, aff'd 2011 BCCA 212; and *Right Business Limited v. Affluent Public Limited*, 2011 BCSC 783 at paras. 59–61, aff'd 2012 BCCA 375.

[37] No funds were removed from British Columbia, nor is it the place where money was sent. The Plaintiff does not allege that any of the Defendants received any of the Plaintiff's funds or other property in British Columbia. In the result, restitutionary obligations did not arise here. The fact that paragraph (f) requires the restitutionary obligations to have arisen here "to a substantial extent" further renders the Plaintiff's position unsupportable. There is no restitutionary connection on these facts to this province.

10(g) CONCERNS A TORT COMMITTED IN BRITISH COLUMBIA

[38] The torts the Plaintiff alleges are fraudulent misrepresentation and conspiracy.

Fraudulent Misrepresentation

[39] I concluded above, at para. 21, that the Plaintiff has presented sufficient evidence to raise a serious factual question as to fraudulent misrepresentation arising from the April 2015 meetings, held in Surrey, BC.

[40] Turning to the legal analysis, the applicable law, in my view, is not clear. The law as it stands permits the Plaintiff to argue that there is at least a serious question of fraudulent misrepresentation.

[41] The Defendants rely on *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601 and *Gulevich v. Miller*, 2015 ABCA 411. The point the Defendants endeavour to make from those cases, relying particularly on *Gulevich*, is that a misrepresentation occurs where it is received and acted upon. As they point out, the evidence is clear that any misrepresentation found from the April 2015 meetings in Surrey, BC was not acted upon by the Plaintiff in this jurisdiction. At most, the misrepresentations were only received by the Plaintiff in this jurisdiction. A court may eventually conclude either that the facts here do not support a finding of fraudulent misrepresentation, or that the law requires the fraudulent misrepresentation to have been acted upon in this jurisdiction before this Court has territorial competence. In either case, the Defendants would probably succeed.

[42] However, I find that the Plaintiff has raised a serious question allowing it to argue at trial that mere receipt by the Plaintiff in this jurisdiction of a fraudulent misrepresentation by a Defendant in this jurisdiction is sufficient to establish territorial competence here. Returning to the facts for a moment, the Plaintiff has shown a serious question that Messrs. Arora and Banghu represented the Plaintiff in this province in the April 2015 meetings, and that they received fraudulent misrepresentations at that time.

[43] In *Central Sun*, cited above at para. 41, the plaintiff was an Ontario company with its head office in Toronto. The defendants were American engineering consultants in the mining industry who provided studies for the plaintiff concerning the siting, design and operation of the plaintiff's gold mine in Costa

Rica. The defendants sent the studies to the plaintiff's Vancouver office, where they were reviewed by the plaintiff's technical people, who in turn made recommendations to the plaintiff's head office in Toronto. The plaintiff sued in Ontario in negligent misrepresentation. The court reasoned that the negligent misrepresentations took place in Ontario, finding that they were received not only in Vancouver but also in Toronto, where they were also relied upon. From my reading of *Central Sun*, the court was not asked to determine, and did not determine, whether British Columbia would have also been an acceptable trial jurisdiction.

[44] In relying on *Gulevich*, cited above at para. 41, the Defendants emphasize paras. 44–48 in the reasons of Watson and Rowbotham JJ.A., entitled "Reconciling the *Van Breda* Trilogy with *Moran*". At para. 47, the judges cite *Central Sun* to say that, "... courts have made clear that the *situs* of the tort is the place where the misrepresentation or misinformation is received and relied on or acted upon." [Emphasis added.] In *Gulevich*, the plaintiff had moved to Alberta from Ontario. She brought a claim in negligence in Alberta against her radiologist who was in Ontario. The Court found that the tort occurred in Alberta, because it was there that Ms. Gulevich became increasingly symptomatic but failed to take the course of treatment she would have taken had her radiologist properly diagnosed the tumour in Ontario in 2007.

[45] The Plaintiff, in response, cites *2249659 Ontario Ltd. v. Sparkasse Siegen*, 2013 ONCA 354; *Cannon v. Funds for Canada Foundation*, 2010 ONSC 4517; and *Right Business Ltd.*, cited above at para. 36, and other cases, to argue that fraudulent misrepresentation occurs where the misrepresentation is made or received or acted upon. Alternatively, the Plaintiff argues from the authorities it cites that the misrepresentation occurs where it is made and either received or acted upon.

[46] Where, as here, the Plaintiff need only demonstrate a serious question to be tried, I cannot conclude that the Plaintiff has failed to satisfy the burden upon it. It may be found, on a full consideration of the authorities, that the *locus* of fraudulent misrepresentation is where it is made or received or acted upon, and alternatively where it is made and received or acted upon. In those cases, it may be that the Plaintiff would succeed at trial. Accordingly, the Plaintiff is able to

establish territorial competence on the ground of a serious question to be tried with respect to fraudulent misrepresentation.

Conspiracy

[47] Alternatively, the Plaintiff alleges conspiracy under s. 10(g) of the Act. However, conspiracy occurs where the harm is suffered. See, *Ontario v. Rothmans Inc.*, 2013 ONCA 353 and *British Columbia v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 398. The Plaintiff's claim is confined to compensation for not receiving payments for its products. The Plaintiff is resident in Panama and its bank accounts are there. Its management is in Barbados. It is not registered to carry on business in this province. The Plaintiff, in my view, does not raise a serious question of conspiracy within the application of s. 10(g) of the Act because it suffered no harm here.

10(h) CONCERNS A BUSINESS CARRIED ON IN BRITISH COLUMBIA

[48] It cannot be seriously argued that the Plaintiff's claim concerns a business carried on in British Columbia. None of the Defendants carry on any business in this province. As noted earlier, the Plaintiff is not registered to carry on business here. It happens to contract with two companies unrelated to the Defendants, which companies do carry on business here, but a business within the meaning of s. 10(h) has to be one whose operation concerns the facts on which the proceeding is based. There is no evidence either that the Plaintiff has any dispute with the companies it contracts with in this province, or that conduct of the Defendants could somehow be said to be the conduct of either of those companies.

SECTION 3 OF THE *CJPTA*

[49] The Plaintiff submitted that for establishing territorial competence, the s. 10 analysis is performed first, and if the Plaintiff fails under s. 10, it can then argue alternatively under s. 3. Since the Plaintiff succeeded above under s. 10(g), an analysis under s. 3 is unnecessary. However, it is probably useful that these reasons address s. 3 nonetheless. The Plaintiff relies on paragraph (e) in s. 3, which provides:

Proceedings against a person

> **3** A court has territorial competence in a proceeding that is brought against a person only if
>
> ...
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[50] In addressing s. 3(e), I am guided by the reasoning of Adair J. in *Aleong v. Aleong*, 2013 BCSC 1428 at paras. 105–107, where she addressed the introductory words in s. 10 of the Act, which allow a plaintiff to prove "other circumstances that constitute a real and substantial connection":

> [105] I note Mr. Justice Hall's comments concerning ***Olney*** in ***Dembroski v. Rhainds***, 2011 BCCA 185, at para. 18, indicating that the general statement in ***Olney***, on which Mr. Albi relies, needs to be read in context. Thus, the examination is not limited to looking at the connection between B.C. and the material facts essential to the establishment of the claim. However, when read in context, I do not think that ***Olney*** supports the proposition that s. 10 of the ***CJPTA*** provides the court with a wide-ranging ability to establish other grounds or "other circumstances" that constitute a real and substantial connection. In my view, the idea of the court having a wide-ranging ability to establish other circumstances is very close to the "on-the-fly," case-by-case exercise of discretion rejected by Mr. Justice LeBel in ***Van Breda***. It is not supported by Mr. Justice LeBel's discussion of the real and substantial connection test, or his discussion concerning identification of acceptable new presumptive connecting factors.
>
> [106] In his argument on "other circumstances," Mr. Albi also cited ***Kilderry Holdings Ltd. v. Canpower International B.V.***, 2012 BCSC 691, a case that pre-dated ***Van Breda***. The judgment of the chambers judge was reversed on appeal and the action dismissed, in a judgment delivered after the hearing in this case. The Court of Appeal's judgment is indexed as ***Kilderry Holdings Ltd. v. Addwest Minerals, Inc.***, 2013 BCCA 82. I note Mr. Justice Hall's comments, at para. 9, that he considered "the law on jurisdiction enunciated by the Supreme Court of Canada in *Van Breda*, based as it is on the real and substantial connection test, to be consistent with the applicable principles in this province as set out in *Stanway*."
>
> [107] I conclude, therefore, that the appellate authority in B.C. does not support the proposition that s. 10 of the ***CJPTA*** provides a party with a wide-ranging ability to establish other grounds that constitute a real and substantial connection. Moreover, I do not accept the proposition that the analytical framework described in ***Van Breda*** is narrower than should be applied when considering "other circumstances" under s. 10. In my view, the analytical framework described in ***Van Breda*** is consistent with the applicable principles in this province.
>
> [Emphasis added.]

[51] In my view, s. 3(e), particularly when read in light of the reasoning in *Aleong*, does not provide a further ground for the Plaintiff to establish territorial competence. The only link of any substance to this province is that Messrs. Yates and Tozman came here for the April 2015 meetings. In my view, there is no serious question of any other real and substantial connection between this province and the facts on which the Plaintiff's claim is based.

SECTION 6 OF THE *CJPTA*

[52] Before leaving the Act, I note that the Plaintiff did not seek to invoke s. 6. It provides:

> **Residual discretion**
>
> 6 A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that
>
> (a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or
>
> (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

THE ARBITRATION CLAUSE

[53] A primary reason the Plaintiff did not join Omega in the action was in an attempt to avoid the arbitration clause which the Plaintiff successfully sought to have inserted in the written contract. If the Defendants succeed in their request for a stay, the dispute will be in the hands of the American Arbitration Association, and a sole arbitrator appointed pursuant to its rules.

[54] I have reviewed the written submissions of the parties on the arbitration question. I accept as correct the written submissions of the Yates and Tozman Defendants, as found at paras. 93–138 of their written submissions dated April 18, 2017, as follows:

> 93. In the alternative, if this Honourable Court concludes that it has jurisdiction over the Yates and Tozman defendants pursuant to the *CJPTA*, the applicants seek a stay of the proceedings pursuant to s. 8 of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 (the "**ICAA**").
>
> 94. The Written Contract includes the following clause (the "**Arbitration Agreement**"):
>
> > The Parties hereby submit to a binding arbitration under the International Rules of the American Arbitration Association

with one arbitrator for all disputes arising out of or relating to this Agreement and agree that all claims, evidence and rulings shall remain and be confidential.

95. The Arbitration Agreement meets the definition of an "arbitration agreement" for the purposes of the ICAA as it is an agreement by the parties to submit to arbitration "all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not" (s. 7(1)).

96. Section 8 of the ICAA states that:

> (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before service of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

97. There are three prerequisites to a stay under s. 8(1):

a. The applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;

b. The proceedings must be in respect of a matter agreed to be submitted to arbitration; and

c. The application must be timely, i.e. before the applicant has taken a step in the proceedings (*Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113).

98. The court's task on an application for a stay is not to make a final determination as to the scope of the arbitration agreement or whether a party to the legal proceedings is a party to the arbitration agreement – those are matters that are within the jurisdiction of the arbitral tribunal:

> Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.
>
> Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then ... the stay should be granted and those matters left to be determined by the arbitral tribunal.

Gulf Canada, supra at p. 8; see also *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371 at para. 40; *Aradia Fitness*

Canada Inc. v. Dawn M. Hinze Consulting Ltd., 2008 BCSC 839 at paras. 37–40

99. If the prerequisites are met – or at least arguably met – the court must order a stay unless it determines that the arbitration agreement is null and void, inoperative, or incapable of being performed: s. 8(2); *Swanson v. Mitchell Bay Properties Ltd.*, 2002 BCSC 1434 at para. 31. [Emphasis in original.]

Michael Yates, John Yates and Michael Tozman are arguably parties to the arbitration agreement

100. The plaintiff acknowledges that it is a signatory to the Written Contract and has acknowledged that the contract contains an arbitration clause. There is no question, then, that a party to the Arbitration Agreement has commenced legal proceedings. The plaintiff, however, says that the proceedings are not taken against another party to the Arbitration Agreement, as none of the defendants in this matter are signatories to the Arbitration Agreement.

101. The fact that this proceeding involves parties who are not signatories to the Arbitration Agreement is not determinative of the question of whether any of them are parties to the arbitration agreement: *Hosting Metro, supra* at para. 38. First, under the ICAA, a "party to the arbitration agreement" includes "a person claiming through or under a party" (s. 2). Second, the courts in this province have accepted that the proper parties to an arbitration agreement may include non-signatories to the arbitration agreement in a variety of circumstances, including where there is an agency relationship between a party and a non-signatory; where the corporate relationship between a parent and its subsidiary is sufficiently close so as to justify the piercing of the corporate veil; or where a non-party is bound by an estoppel: *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, 2015 BCSC 2014 at para. 77. [Emphasis in original.]

102. For example, in *CE International Resources Holdings LLC v. Yeap Soon Sit*, 2013 BCSC 1804, Mr. Yeap attempted to resist enforcement of a foreign arbitral award on the basis that he was not a party to the arbitration agreements. The court found the award was enforceable, concluding that the matter of Mr. Yeap's status as a party was a matter for the arbitrator, who had determined that one of the signatory corporations was the alter ego of Mr. Yeap, and that he was estopped from denying that he was a party to the contracts because he knowingly accepted the benefits of the agreement with an arbitration clause. These findings, the court noted, were consistent with the law in British Columbia on non-signatories as parties for the purposes of international arbitration (para. 35).

103. Similarly, in *Aradia Fitness*, the court concluded that there was an arguable case that Dawn M. Hinze was a party to the arbitration agreement, despite the fact that she was not a signatory in her personal capacity, based either on the fact that she had executed a trademark agreement between the parties in her personal capacity or on conduct in respect of the relationship amongst Aradia, the

named corporate signatory to the agreement, and Hinze that could amount to an estoppel in respect of the position she advanced.

104. In *Hosting Metro*, the court again found an arguable case that three corporate entities were parties to the arbitration agreement, despite the fact that they were not signatories to the contract:

> Materials contained within the Application Record suggest that the services provided by Poornam to HM Canada under the Agreement would run in parallel with not dissimilar services provided by Poornam to HM USA, IDigital and Web as part of Poornam's "commercial relationships" with these latter entities (as termed by the plaintiffs), and that the services were not only being managed simultaneously and as part of the same transaction, but related billings and communications were intertwined, involving some of the same key players .... Within this overarching context, and in light of the representative linkages between HM Canada, HM USA, IDigital and Web, it is not “clear” to me that only HM Canada can reasonably be viewed as a party to the Agreement for the purpose of s. 8 of the *ICAA*. [At para. 37.]

105. These cases each involved situations where the applicant sought a stay of proceedings, or to enforce an arbitral award, as against a non-signatory, whereas in this case the parties applying for the stay are non-signatories who seek a stay against a signatory to the arbitration agreement. An analogous situation arose in *Lambsmead Limited v. Pharmawest Pharmacy Ltd.*, 2014 BCSC 218, where the court concluded that, where the plaintiffs treat the defendants as the nominees of a signatory to the contract or as the true parties to the contract containing the arbitration clause, the defendants may apply for and receive a stay under s. 8 of the ICAA.

106. In that case, the principals of the defendants had approached the plaintiff to enter into a contract to supply Botox to the defendants’ US customers. The plaintiff did enter into a contract, but with Redstar International, a Panamanian company put forward as the contracting party by the principals of the defendants (Redstar was later replaced as the purchasing entity by another Panamanian company, Flexlight). In 2012, after a number of invoices from the plaintiff went unpaid by Flexlight, the plaintiff brought an action against the defendants, Pharmawest and Point West Partners Ltd., for the unpaid invoices. The plaintiff argued that Redstar and Flexlight were merely nominees of the defendants and the defendants were the true parties to the contract.

107. The defendants then sought a stay of proceedings based on an arbitration clause in the contract between the plaintiff and Redstar/Flexlight, arguing that they were entitled to rely on the arbitration clause for the purposes of the stay application. The court acknowledged that the defendants were not named parties to the arbitration agreement. However, relying on the fact that the plaintiff alleged that the defendants were the true parties to the contract, the court concluded that, for the purposes of the stay application, it should “not find that the defendants were not parties to the agreement” (para. 20).

108. Mr. Arora repeatedly says that the plaintiff took the view that it was contracting with John Yates, Michael Yates, and Michael Tozman, and that "any corporate entity that become involved, would merely be the vehicle through which" those three provided their services to the plaintiff. As such, the plaintiff was "prepared to sign a contract with whichever entity" the Messrs. Yates and Tozman directed and "did in fact do so." Similarly, in its Notice of Civil Claim, the plaintiff pleads that the contracts are between the plaintiff and Yates, Yates and Tozman, and that they represented that payment processing would be done "through a designated corporate entity owned and/or controlled by one or more of them." The plaintiff signed the Written Contract in the belief that Omega was owned and controlled by Yates, Yates and Tozman.

109. In submissions to this Honourable Court on October 13, 2016, in respect of the *ex parte* application for the Mareva injunction and Anton Piller order, counsel explained that the plaintiff did not plead against Omega in this proceeding because, *inter alia*, when the plaintiff considered who the agreement was actually with, it concluded that the agreement was with Yates, Yates and Tozman and that "they would cause one or more of their companies to provide payment processing services."

110. The plaintiff has thereby asserted that John Yates, Michael Yates and Michael Tozman are the true parties to the contract, as in *Lambsmead*, and are estopped from denying their status as parties claiming through the signatory to the Arbitration Agreement. Alternatively, Yates, Yates and Tozman were acting as agents for Omega in the creation of the Written Contract and are therefore entitled to assert the Arbitration Agreement as parties claiming under or through Omega. On either basis, it is arguable that Yates, Yates and Tozman are properly parties to the arbitration agreement with the plaintiff.

111. As noted above, plaintiff's counsel addressed the reasons why the plaintiff did not plead against Omega in this proceeding when making submissions on the *ex parte* order. In addition to taking the position that the agreement was in fact with Yates, Yates and Tozman, counsel noted that "the arbitration clause is an obstacle and an expensive one." However, it was the plaintiff that in fact negotiated the addition of the arbitration clause to the Written Agreement, as the plaintiff "thought an arbitration would facilitate a quicker cheaper resolution and would preserve the confidentiality of its customers."

112. The Court should not permit a party to avoid an arbitration clause – which that party itself bargained for – by naming related parties as defendants but declining to name the signatory to the contract. To do so would elevate form over substance and permit parties to arbitration agreements to avoid the application of those agreements through selective and artful pleading. Having sought the benefits of the arbitration clause, the plaintiff should not be able to escape the burdens.

113. In analogous circumstances, the Alberta Court of Appeal in *Yaworski v. Gowling Lafleur Henderson LLP*, 2013 ABCA 21, noted

that “arbitrations cannot be avoided by simply having a related party commence a lawsuit claiming relief with respect to arbitrable subject matter” (para. 20). In that case, the chambers judge stayed Mr. Yaworski’s action against Gowlings seeking compensation for professional services, on the grounds that the matter in dispute was subject to an arbitration clause in an agreement between Mr. Yaworski’s professional corporation and Gowlings. The chambers judge found that Mr. Yaworski was estopped from resisting the application of the arbitration agreement, as he had taken the benefits of the partnership via Yaworski PC and could not therefore escape the burdens, which included resolution of disputes by arbitration.

114. On appeal, Mr. Yaworski argued that the stay was not available as the proceedings were not brought by a party to the arbitration agreement. The Court of Appeal disagreed and upheld the decision below, noting, as quoted above, that Mr. Yaworski could not escape the effect of the arbitration clause by suing in his personal capacity instead of with his professional corporation.

115. In the same way, the plaintiff’s decision to name all possible entities except Omega as parties to these proceedings should not provide a basis on which it can avoid the effect of the Arbitration Agreement. In *Gulf Canada, supra*, the Court noted that once an arbitration agreement is shown to exist “the court ought not to construe it narrowly with a view to avoiding the operation of s. 8” (p. 11, per Southin J.A., concurring). Similarly, the applicants submit that the court ought not to construe party status narrowly with a view to permitting the plaintiff to avoid the operation of s. 8 of the ICAA, but should instead conclude that is at very least arguable that Yates, Yates and Tozman are parties to the Arbitration Agreement.

The proceeding concerns matters agreed to be submitted to arbitration

116. As noted above, so long as it is arguable that the dispute falls within the terms of the arbitration agreement, issues of jurisdiction and the scope of the arbitration clause are for the arbitrator to determine: *Swanson*, *supra* at para. 24; *Gulf Canada Resources*, *supra*. The merits of the claims are irrelevant in the context of a stay application; the question is whether the claims raise a dispute that falls within the scope of the Arbitration Agreement: *James v. Thow*, 2005 BCSC 809.

117. In determining whether matters that are the subject of legal proceedings fall within the scope of an arbitration agreement, the court must consider the nature of the disagreement, the words of the arbitration clause, and the terms of the contract as a whole in their factual context: *Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708 at para. 65, quoting *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 21. The pleadings need not be taken at face value; rather, the “underpinning of the allegations contained in the pleadings, and the root cause of the dispute” should be considered to determine whether they are matters arising from the contractual relationship in question (*James*, *supra* at para. 72).

118. The wording of the arbitration clause in this case is very broad; it applies to "all disputes arising out of or relating to this Agreement." By its terms, the Arbitration Agreement is not limited to contractual disputes but embraces any issue that relates to the Written Contract. Broad wording of this type indicates the intention that the clause not be restricted to breach of contract claims, but instead extend to disputes of a wider scope, provided that they are "with reference to or connected with the rights and obligations of the parties" that are the subject of the contract (*Strata Plan BCS 3165, supra* at para. 77).

119. The Written Contract sets out that Omega is to perform electronic check transaction services (set out in detail in Exhibit A to the contract), and in consideration for those services, the plaintiff agrees to pay certain fees relating to the various ICL services performed by Omega. The terms include a time period and amount for rolling reserves relating to the transactions. The rights and obligations of the parties therefore encompass the ICL transactions, payments owing to the plaintiff pursuing to those transactions, and the fees and deductions owing to the applicants. All of the payments which form the basis of the plaintiff's claim were transacted under the Written Contract (with the possible exception (discussed below) of the rolling reserves collected prior to June 24, 2015).

120. Although the plaintiff has not pleaded breach of contract, at its core the proceeding concerns funds allegedly owing to the plaintiff pursuant to the payment processing services that are the subject of the Written Contract. Each of the claims in the plaintiff's Notice of Civil Claim is based, at root, on the funds that are owing pursuant to the contract: for example, under the heading "Unjust Enrichment," the plaintiff pleads that the defendants have been unjustly enriched because they have "failed or refused to pay the amount of $1,244,273.08 USD ... that they collected directly from the Plaintiff's customers, through ICL payment processing, which is owed to the Plaintiffs" (Notice of Civil Claim, Part 3, para. 27). Similarly, in alleging breach of trust, the plaintiff says that these funds are held in trust by the defendants pursuant to a declaration of trust included in the various contracts entered into by the plaintiff and "the Primary Rogues," the term the plaintiff uses for John Yates, Michael Yates and Michael Tozman. Most telling is the pleading regarding the alleged misrepresentations, where the plaintiff pleads that the amount claimed is "properly due and owing to the Plaintiff after all just discounts are taken into account" (Notice of Civil Claim, Part 3, para. 10). The discounts in question can only be those discounts as provided for by the Written Contract, as there is no other contract governing the transactions, and the amounts are due and owing under that contract. These claims are for matters arising out of or relating to the Written Contract and as a result fall within the scope of the Arbitration Agreement.

121. The plaintiff says that its claims are not based on the agreement with Omega but are instead based on the fact that John Yates, Michael Yates and Michael Tozman did the payment processing and wrongfully kept or stole approximately $1.2 million which they

had agreed would be paid to the plaintiff (Application Response, para. 120(d)). However, this position ignores the fact that the agreement to pay the money owing was made in the Written Contract. There is no other contract governing the transactions at issue.

122. Further, the fact that the plaintiff alleges fraud and conspiracy does not bring the claims outside the scope of the Arbitration Agreement. In *Strata Plan BCS 3165*, supra, the court considered a number of cases where one party advanced claims alleging wrongdoing such as fraud, breach of trust or conspiracy in the context of an agreement containing an arbitration clause, and concluded that the arbitration clause there – similar to the one at issue here – was broad enough to capture claims for this type of wrongdoing. As here, where the fraud and conspiracy claims arise out of the services that are the subject of the contract, the arbitrator should determine at first instance if these claims properly fall within the scope of the arbitration clause.

The rolling reserves are matters within the scope of the Arbitration Agreement

123. The plaintiff says that, assuming the Written Contract is enforceable, that some of the funds owing to the plaintiff consist of reserves owing for ICL processing done between May 6, 2015 and June 24, 2015, prior to the effective date of the Written Contract. Mr. Arora deposes that the reserves for this period amount to $27,897.13 USD out of the $1,244,273.80 USD that the plaintiffs say they are owed.

124. The Written Contract was preceded, according to the plaintiff, by a series of oral contracts which were amended as time went on. These contracts were overtaken by the Written Contract, which upon execution governed the ICL payment processing relationship between the parties. In the circumstances, despite the fact that the rolling reserves were collected prior to the effective date of the Written Contract, it is arguable that issues regarding the reserves fall within the scope of the Arbitration Agreement.

125. In the alternative, if this Court concludes that the moneys owed for rolling reserves issued prior to June 24, 2015 are matters beyond the scope of the arbitration clause, the Court may issue a stay of proceedings for matters beyond the scope of an arbitration clause, so long as those matters are intertwined with and may be affected by the outcome of the arbitration: *Strata Plan BCS 3165*, *supra* at para. 129.

126. Finally, if the Court considers that the issues related to the reserves do not fall within the scope of the Arbitration Agreement and are not sufficiently intertwined with the other claims so as to issue a stay, the applicants submit that a partial stay should issue respecting the funds in dispute which do fall within the scope of the Arbitration Agreement, being $1,216,376.67 USD (*Strata Plan BCS 3165*, *supra* at para. 123; *Seidel v. Telus*, 2011 SCC 15, [2011] 1 S.C.R. 531 at para. 50).

The Agreement is not null and void, inoperative, or incapable of being performed

127. The burden of proof to show that an arbitration agreement is null and void, inoperative, or incapable of being performed is on the plaintiff: *Mussche v. Voortman Cookies Limited*, 2012 BCSC 953 at para. 48.

128. Here the plaintiff says the Arbitration Agreement is null and void, inoperable or incapable of being performed on four bases: (1) the contract could be void because it was induced by fraud, or because Omega is being used as an "instrument of fraud" by the Primary Rogues, and the court should resist issuing a stay where the intent was from the beginning to defraud the plaintiffs; (2) it is void because there is insufficient material to establish that Omega is a valid and existing legal entity with the capacity to enter into a contract; (3) it is inoperative because Omega did not do the payment processing and there was no arbitration clause in the other agreements; and (4) the various parties have not said that they will submit to an arbitrator's jurisdiction so it is not clear that the entire proceeding can be heard by way of arbitration.

129. With respect, these positions are not supported by either the evidence or the law on the meaning of "void, inoperative or incapable of performance" in the context of an application for a stay. To begin, allegations of fraud do not necessarily render the arbitration agreement void or inoperative for the purposes of a stay application: *James*, *supra* at para. 99. Rather, the "doctrine of separability" applies: an arbitration clause remains operative even where the validity or existence of the contract itself is challenged or it is argued that it may be rescinded for fraud (*James*, *supra* at para. 83). It is only where the allegation of fraud directly impeaches the arbitration clause, as separate from the contract as a whole, that the court may decline the stay. In that case, there must be sufficient materials before the court on which to base a summary determination that the arbitration agreement itself is void (*James*, *supra* at para. 99). Otherwise, the issue of the validity or existence of the contract remains with the arbitrator for determination.

130. In this case, given that the plaintiff itself negotiated the inclusion of the arbitration clause in the Written Contract, it is difficult to see how the allegations of fraud could impeach the arbitration agreement itself.

131. With regards to Omega, the applicants have provided a copy of the Certificate of Good Standing for the corporation, issued by the Public Registry of Panama. This is sufficient to indicate that Omega, at least at the time of the Written Contract, was a valid and existing legal entity with the capacity to enter into a contract; nothing in the plaintiff's evidence suggests otherwise.

132. As for the allegation that Omega did not perform the payment processing services, some of the plaintiff's own evidence contradicts this position. For example, communications between the plaintiff's representatives and Omega regarding payment processing were done by representatives with Paynet (i.e., Omega)

e-mail addresses. Invoices were issued by Omega, other than a few which included ECG's information, which Michael Tozman deposes was a clerical error. Mr. Arora on behalf of the plaintiff repeatedly refers to the use of the "Paynet software portal" as an element of the ICL payment processing system. Based on this evidence, Omega clearly played a role in the ICL transaction processing, even if it relied on the services of third parties for portions of the transaction chain. Additionally, in submissions on the *ex parte* application, plaintiff's counsel admitted that the Yates and Tozman defendants "did provide through Omega payment processing services which were largely fulfilled", relying on this as a basis to say that the plaintiff saw "no good legal reason" to sue Omega.

133. The terms "inoperative" and "incapable of being performed" have been given a narrow interpretation. The fact that there are multiple parties and multiple issues that are inter-related and only some of the parties are bound by an arbitration agreement does not render an arbitration agreement inoperative: *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 at para. 37 (C.A.). Rather, "inoperative" refers to the situation where an arbitration agreement has ceased to have future effect, such as where it has been rescinded by a court, or ceased to operate by reason of some further agreement between the parties. Incapable of being performed connotes something more than difficulty, inconvenience, or delay; the "incapacity must come from something beyond the control of the parties; for example, where the arbitration agreement specifies a particular arbitrator must hear the matter, but he or she is not available" (*McElhanney*, *supra* at para. 35, quoting J.B. Casey, *International and Domestic Commercial Arbitration*). The fact that there are additional parties here who are not subject to the Arbitration Agreement and who have not agreed to attorn to an arbitration is not reason for the court to conclude that the contract is inoperative or incapable of performance.

A stay of the proceedings should issue against the Spousal Defendants, the Trust, and the Applicant Corporate Defendants

134. In addition to staying the proceedings against those who are parties to the Arbitration Agreement, the court may stay proceedings against parties to the litigation who are not parties to the arbitration agreement so long as the claims against those third parties involve substantially the same issues or are otherwise intertwined with the issue raised by the matter for arbitration: *Mussche, supra* at paras. 63-68; *James, supra* at paras. 59, 105; *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 66 B.C.L.R. (2d) 225 (S.C.).

135. In this case, the proceedings against the Spousal Defendants, the Trust, and the Unrelated Corporate Defendants are inextricably intertwined with the issues that are subject to the Arbitration Agreement.

136. In its Notice of Civil Claim, the plaintiff pleads that the Spousal Defendants have "directly and indirectly benefitted, and continue to benefit, from monies wrongfully obtained and kept from the Plaintiff

by other Defendants" (Part 2, para. 28; see also Part 3, para. 28, emphasis added). The essence of the claim against the Spousal Defendants and the Trust, as the plaintiff says in its application response, is a claim for unjust enrichment based on the use and receipt of the funds at issue in the remainder of the claim. The plaintiff also alleges that the Trust is a sham trust and responsible for fraudulent conveyances, and seeks a declaration that conveyances to the Trust are void and of no effect to the extent necessary for the plaintiff to fully satisfy its judgment. Neither of these claims involves a stand-alone claim for damages; in each case they are claims that are ancillary to the main claim, for the $1,244,273.08 USD that the plaintiff says it is owed pursuant to the payment processing arrangements. These are therefore disputes arising out of the Written Contract or are, at the very least, inextricably intertwined with those disputes. The claims against the Spousal Defendants and the Trust cannot proceed without a determination of the claim for the moneys owing under the contract. [Emphasis in original.]

137. The claim against the Corporate Defendants (8309469 Canada Limited, Hocgol Processing Inc., and ECG) is the same as the claim against the Yates and Tozman Defendants – a claim for the $1.2 million owing under the payment processing contract (see for example Notice of Civil Claim, Part 3, para. 10). The plaintiff does not distinguish between these parties for the purposes of liability and it is therefore clear that the claim against the Unrelated Corporate Defendants is intertwined with the claims against the Yates and Tozman Defendants and should be dealt with in arbitration so as to avoid multiple proceedings or inconsistent decisions.

138. As a result, the applicants submit that the claims against the Spousal Defendants, the Trust, and the Unrelated Corporate Defendants should be stayed pursuant to s. 8(1) of the ICAA.

[55] Regarding paras. 124–126 in the Yates and Tozman argument, quoted above, it is my view that the $27,897.13 US, referred to in para. 123, should not be treated separately from the $1,216,376.67 US. The stay will apply with respect to the full amount of $1,244,273.08 US. I find that the oral agreement giving rise to the reserves of $27,897.13 US was subsumed by the written contract containing the arbitration clause. Alternatively, the matters related to the $27,897.13 US are intertwined with the arbitration, and may be affected by its outcome.

[56] Regarding paragraph 97c in the Yates and Tozman's submissions, quoted above, the timeliness of the stay application was, properly in my view, not placed in issue.

[57] I adopt the following paragraphs from the reply submissions of the Yates and Tozman Defendants on the arbitration question:

> 45. The crux of the plaintiff's argument – the thread that winds through all of their submissions on the arbitration stay, both for the purposes of saying that Omega is an instrument of fraud, that the written contract doesn't apply, or that there is no dispute that could be taken to arbitration – is that Omega allegedly did not do the processing and permitted unrelated third parties to do the processing and access their customers' information. While the defendants don't concede the factual points, our position is that, if accepted, this establishes nothing more than a breach of the contract between the parties. Even if Omega did none of the processing itself or did nothing more than maintain a server which exchanged information (which, to be clear, is not the defendants' position), this would not be a reason to find that it was not a real company. If the plaintiff considered that it was a term of the contract that Omega perform all the services itself, without recourse to third parties, then the plaintiff's remedy is in a breach of contract claim against Omega – in arbitration. To suggest that a party which breaches its obligations under a contract loses capacity to contract, or that doing so renders the arbitration clause void or inoperable, would be to up-end the law of contract and arbitration entirely.
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> ...
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> 47. However, the plaintiff has taken the position in its submissions that there is no arbitration agreement because Omega was incorporated for the purpose of being an instrument of fraud, or, alternatively, was used in that way vis-a-vis the plaintiff, and that Omega as a result did not have the capacity to contract for the arbitration agreement.
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> 48. The plaintiff suggests, at para. 7 of its submissions, that the question of whether or not the arbitration agreement exists in the circumstances is a question of law which rests on the determination of two questions which it also characterizes as questions of law: (1) whether Omega had capacity to enter into an arbitration agreement if it was incorporated as an instrument of fraud? (2) If Omega had capacity, is the agreement nevertheless unenforceable because its enforcement would be contrary to public policy or unreasonable in the circumstances?
>
> 49. None of these are questions of law so as to take them outside of the "arguable" approach mandated by *Gulf*. In *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34, which the plaintiff cites on this point, Deschamps J. said as follows:
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> > 84 First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to

which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

85 If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. [Emphasis in original.]

...

59. While it is clear that none of the defendants in this proceeding are signatories to the Arbitration Agreement, this is not determinative of the question of whether any of them are parties to the arbitration agreement: *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371 at para. 38. The courts have recognized a number of circumstances where a non-signatory may be found to be a proper party to an arbitration agreement: (1) where there is an agency relationship between a party and a non-signatory; (2) where the corporate relationship between a parent and its subsidiary is sufficiently close so as to justify the piercing of the corporate veil; (3) or where a non-party is bound by an estoppel: *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, 2015 BCSC 2014 at para. 77. [Emphasis in original.]

60. The defendants' main submission on this point is based on *Lambsmead Limited v. Pharmawest Pharmacy Ltd.*, 2014 BCSC 218, where the court concluded that, where the plaintiffs treat the defendants as the nominees of a signatory to the contract or as the true parties to the contract containing an arbitration clause, the defendants may apply for and receive a stay, despite the fact that they are not signatories to the agreement.

...

70. The plaintiff relies heavily on *Cut & Run Holdings v. Booze Bros. Holdings et al.*, 2005 BCSC 167, as a case featuring a broad arbitration clause in which the court concluded that the dispute in question did not fall within the scope of the clause. That case is distinguishable; it involved two parties, Cut and Run and Booze Brothers, who were equal shareholders in a store called Liquor Quicker. Booze Brothers, however, operated the store pursuant to a retail store licensee agreement. That contract contained an arbitration clause. Cut and Run sought a number of remedies under the oppression provisions of the Business Corporations Act. It argued, and the court accepted, that the contract containing the

> arbitration clause was concerned with the operation of the liquor store, but not the corporate relations between Cut and Run and Booze Brothers as shareholders in Liquor Quicker (paras. 27–28, 41–43). The decision to decline the stay was based on the fact that the operating agreement for the store did not govern the shareholder rights or status of the parties, which was the subject of the dispute before the court.
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> ...
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> 75. In *Gulf Canada, supra*, the Court noted that once an arbitration agreement is shown to exist "the court ought not to construe it narrowly with a view to avoiding the operation of s. 8" (p. 11, per Southin J.A., concurring). The fact that the plaintiff says, *ex post facto*, that it did not intend that the arbitration clause to apply to circumstances like those at issue is irrelevant to the analysis of the scope of the clause and should not be used as a basis to construe the clause narrowly.

[58] The stay of proceedings will also apply as against the Defendant Debra LePage, who is based in Florida. The Plaintiff does not seek relief against Ms. LePage beyond that which it seeks from the other Defendants. The claim against Ms. LePage is somewhat peripheral. It would be unjust to allow the case here to proceed against her only.

CONCLUSION

[59] The Plaintiff has shown a serious question that there was a fraudulent misrepresentation in British Columbia. However, the Plaintiff is to live by the arbitration clause which it caused to be added to the written contract. This action is stayed in favour of the arbitration.

[60] Costs were not addressed before me in any detail. If costs are in issue, the parties can make arrangements to argue costs orally in a half-day hearing.

"MACINTOSH J."