UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action arises out of the Strategic Alliance Agreement ("SAA") entered into on February 28, 1998, by Continental Casualty Company ("CCC") on the one hand, and IGF Insurance Company ("IGF"), IGF Holdings, Inc. ("IGFH"), and Symons International Group, Inc. (Indiana) ("SIG") (collectively the "IGF Parties"), on the other. Pursuant to the SAA, CCC sold its Multiple Peril Crop Insurance ("MPCI") and Crop Hail insurance business to IGF in return for a future payment from the IGF Parties based upon a pre-negotiated formula (the "Put" or "Put Mechanism"). In the interim, the parties shared the profits of the combined businesses based on the actual performance of IGF's and CCC's pooled businesses until the Put Mechanism was exercised. (TX 1554). A few months after the purchase was complete, IGF began to experience financial difficulties. Three years after the purchase of CCC's crop insurance book of business, CCC exercised its right under the SAA for full payment of the purchase price. IGF was unable to pay CCC the debt it owed. Facing severe financial distress, IGF sold its crop insurance business to Acceptance Insurance Companies, Inc. ("Acceptance") in May 2001.

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

On June 27, 2001, CCC and 1911 Corp. filed their Counterclaim against the IGF Parties and two affiliated companies, Goran Capital, Inc. ("Goran") and Granite Reinsurance Company, Ltd. (Barbados) ("Granite Re"). Five months later, on December 13, 2001, CCC and 1911 Corp. amended their Counterclaim to add five new defendants –

Pafco General Insurance Company ("Pafco"), Superior Insurance Company ("Superior"), G. Gordon Symons, Alan G. Symons, and Douglas H. Symons[1] – and two claims. In toto, the Amended Counterclaim alleges that the IGF Parties breached the terms of the SAA (Counts I and II); that IGFH breached the terms of a promissory note (Count III); and that IGF fraudulently transferred assets to Goran, SIG, Granite Re, Pafco and Superior (Count IV). Count V alleges that the Individual and Corporate Counterdefendants should be liable for the contractual liabilities of IGF and IGFH under an alter ego theory (Count V).

On March 22, 2007, the court granted CCC's unopposed Motion for Summary Judgment against the IGF Parties, and on March 31, 2007, the court granted CCC's Motion for Summary Judgment on Counts I and II of their Amended Counterclaim.

The parties tried Counts III, IV, and V of CCC's and 1911 Corp.'s Amended Counterclaim to the court on November, 18, 19, 20, and 21, 2008, and January 8 and 9, 2009. On March 26, 2009, the parties filed proposed findings of fact and conclusions of law. Being duly advised, the court finds that CCC has proven, by a preponderance of the evidence, that the Counterdefendants fraudulently transferred assets under Section 14(2) and Section 15 of the Indiana Fraudulent Transfer Act, as alleged in Count IV of the Amended Counterclaim. The court also finds that CCC has proven, by clear and

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[1] IGF, IGFH, Granite Re, Goran, Pafco, SIG, and Superior are known collectively as the "Corporate Counterdefendants." Gordon Symons, Alan Symons, and Douglas Symons are known collectively as the "Symons Family" or the "Individual Counterdefendants." The Individual and Corporate Counterdefendants are known collectively as the "Counterdefendants."

convincing evidence, that the Counterdefendants fraudulently transferred assets under Section 14(1) of the Indiana Fraudulent Transfer Act, as alleged in the Count IV of the Amended Counterclaim. In addition, the court finds that CCC has proven, by a preponderance of the evidence, that the Individual Counterdefendants, SIG, Goran, Granite Re, IGF, IGFH, Pafco and Superior, were alter egos of one another, and thus the court finds it appropriate to pierce the corporate veil, as alleged in Count V of the Amended Counterclaim. Lastly, the court finds that 1911 Corp. failed to introduce any evidence with respect to IGFH's alleged breach of a promissory note under Count III of the Amended Counterclaim, and thus, the court finds in favor of IGFH and against 1911 Corp. on that claim. Given that ruling, the court finds that 1911 Corp. may not recover under Counts IV and V the Amended Counterclaim.

The court now issues its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a):

FINDINGS OF FACT[2]

I. Background

A. The Parties

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

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

3. IGF was an Indiana insurance company engaged in the crop insurance business, and an original plaintiff in this action. (TX 72 at 3-4). During IGF's insolvency proceedings, IGF, and CCC settled the claims in this case against one another. Consequently, IGF is no longer a party to this action. (TX 78; TX 1016; TX 153, Exs. 1, 2, and 3; Litvak Tr. at 237; JAMS Docket # 175; *see also* TX 1723).

4. IGFH is an Indiana holding company and owns 100% of the stock of IGF. (TX 153, Ex. 1).

5. Granite Re is a Barbados corporation, with headquarters in Bermuda, and is or was engaged in the reinsurance business, principally with affiliates of SIG. (TX 1016; TX 153, Ex. 1).

6. Superior is engaged in the non-standard automobile insurance business. (TX

[2] Citations to the trial transcript will be "[witness name] Tr." followed by "at [transcript page]"; citations to the trial exhibits will be "TX" followed by the exhibit number; citations to the deposition designation testimony submitted by the parties will be "[witness name] Dep." followed by "at [dep. page]."

1016). Superior is currently in rehabilitation proceedings in Florida, and there is currently a stay order in effect in this case against Superior. (Docket # 3).

7. Pafco is also engaged in the non-standard automobile insurance business. (TX 1016). Like IGF, Pafco settled its claims with CCC during IGF's insolvency proceedings. (TX 1723; JAMS Docket # 175; *see infra* Finding of Fact # 302). Thus, Pafco is no longer a party to this action.

8. SIG is a holding company and performed management of its subsidiaries, which included IGF, IGFH, Pafco, and Superior. SIG owned 100% of the stock of IGFH, Pafco, and Superior. (TX 153, Ex. 1).

9. Goran is a holding company that owns stock in various insurance and reinsurance companies and owns 73% or more of the outstanding shares of SIG and 100% of the shares of Granite Re. (*See* A. Symons Dep. at 3).

10. At all relevant times, Gordon Symons, Alan Symons, and Douglas Symons owned majority stock interests (up to 100%) in Goran, SIG, Granite Re, IGF, IGFH, Superior, Pafco, and other unnamed affiliated companies. (Litvak Tr. at 237; TX 153, Ex. 1).

11. Gordon Symons was at all relevant times the Chairman of the Board of Goran and all of its subsidiaries, including all Corporate Counterdefendants. He was also at all times the CEO and President of Granite Re and served on the Board of Directors of each Counterdefendant. (TX 153, Exs. 4, 16).

12. Alan Symons was, from 1997-2001, the President and CEO of Goran; Vice

Chairman and CEO of SIG; Vice Chairman of Granite Re; President and CEO of Superior; and the President and CEO of IGF. He also served as Vice Chairman for SIG, Pafco, Superior, IGFH, and IGF, and served on the Board of Directors of each Counterdefendant. (*Id.*, Exs. 4, 16).

13. Douglas ("Doug") Symons[3] was at various times the Executive Vice President, COO, and Secretary of Goran; President, CEO and COO of SIG; CEO and Secretary of Pafco; Vice Chairman, Executive Vice President, and Secretary of IGFH; CEO and Secretary of IGF; Vice Chairman of Granite Re; and served on the Board of Directors of each Counterdefendant. (*Id.*, Exs. 4, 16).

B. Background Regarding MPCI Crop Insurance and Reinsurance

14. This case involves crop insurance, and in particular, MPCI. MPCI is a federal government-sponsored insurance program designed to protect the interests of farmers in growing their crops, so that to the extent there is a shortfall in crop yield due to adverse weather conditions or other natural causes, the producer can be indemnified for a portion of the loss. (Driscoll Tr. at 80).

15. The Federal Crop Insurance Corporation ("FCIC"), later known as the Risk Management Agency ("RMA"), is responsible for developing and approving insurance policies and premium rates with respect to private insurance companies selling MPCI. The FCIC also provides reinsurance and subsidies to these private

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

companies selling MPCI. (*Id*. at 78-79).

16. The Standard Reinsurance Agreement ("SRA") describes the terms and conditions of the relationship between the federal government and the private insurance companies which provide MPCI. (*Id*. at 79). The SRA provides both proportional and stop loss reinsurance coverage. (*Id*. at 85-86).

17. Proportional reinsurance refers to an arrangement whereby the ceding company and the reinsurer agree to share profits and losses in defined percentages. With respect to the proportional reinsurance provided by the federal government, the SRA has different pools of money, or funds, with each carrying various degrees of risk. The insurance company may assign any particular policy to one of three funds: the assigned risk fund, whereby the ceding company only retains 20% of the risk with the remaining 80% ceded to the federal government; the developmental fund (the middle level risk), whereby the ceding company retains a minimum of 35% of the risk; and the commercial fund, whereby the ceding company retains a minimum of 50% of the risk. (*Id*. at 86-88; TX 151 at 3-4).

18. Stop loss reinsurance involves a cession by the insurer of losses as a percentage of premium written, above or within a certain range of losses (expressed as a percentage of premium written). The federal government automatically provides four tiers of stop loss protection: (1) from 100-160% (greatest insurance company participation in terms of bearing the risk); (2) from 160-220% (insurance company pays smaller percentage of losses); (3) from 220-500% (insurance company pays

much lower share of losses); and (4) above 500% (government pays all losses). (Driskoll Tr. at 89; TX 151 at 4-5).

19. Because of the SRA and the federal subsidy, the retained loss figures for a crop insurance company as a whole would necessarily be significantly lower than its gross loss ratios (total losses divided by gross premium). (Driscoll Tr. at 137-38; TX 151 at 6-7).

C. IGF's Purchase of CCC's Crop Insurance Business

20. Prior to February 1998, CCC's crop insurance consisted of: (1) crop insurance written by North American Crop Underwriters, Inc. ("NACU"); (2) crop insurance written by CNA; and (3) MPCI and Crop Hail Insurance written by Producers Lloyds Insurance Company. (Amended Complaint ¶ 15; Amended Answer and Counterclaim ¶ 15; Stipulation of Facts ¶ 12).

21. On February 28, 1998, CCC entered into the SAA and certain Ancillary Agreements with the IGF Parties. Pursuant to those agreements, CCC sold its MPCI and Crop Hail books of business to IGF in return for a future payment from the IGF Parties based upon a pre-negotiated formula – the Put Mechanism – and a share of the profits based on the actual performance of the "pooled" books of business. CCC had the option of exercising the Put Mechanism at any time after a three-year period pursuant to Section 3.8(B) of the SAA. (*See generally* TX 1554).

22. On July 7, 1998, 1911 Corp. entered into a Stock Purchase Agreement with IGFH,

pursuant to which IGFH agreed to purchase 100% of the shares of NACU in exchange for $3 million in cash payable to the NACU founders (who owned 60% of NACU's stock) and the issuance of a promissory note ("NACU Promissory Note" or "Note") in the principal amount of $1 million to 1911 Corp. (which owned the remaining 40% of NACU stock). (*See* Docket # 40, CCC Ex. 18).

23. On that same date, IGFH assigned the NACU Promissory Note to IGF. Thus, IGF "assum[ed] all of the obligations of IGFH in the [NACU Promissory] Note." (*See* Docket # 36, CCC Ex. 17).

D. IGF's Deteriorating Financial Condition and the Ensuing Litigation

24. Soon after the SAA was signed, IGF began to experience financial difficulties. (A. Symons Tr. at 449). Reasons for this decline include: (1) deteriorating market conditions in the crop insurance industry, including the low price of commodities (Daggett Dep. at 301-02); and (2) IGF's new insurance product called AgPI (agricultural interruption insurance) which turned out to be a drain on IGF's cash reserves. (A. Symons Tr. at 455-57, 715; Daggett Dep. at 72-74, 77-79; Fonville Dep. at 26-27, 153).

25. In late 2000, Kent Peterson, President of CNA Ag, informed Daggett that CCC was contemplating exercising the Put. (Daggett Dep. at 278).

26. Daggett testified that he hoped CCC would not call the Put because "financially, I didn't see how IGF would survive if they did." (Daggett Dep. at 279).

27. On January 3, 2001, CCC exercised the Put Mechanism, which became effective

on February 19, 2001. (TX 154 ¶ 18).

E. IGF Decides to Sell its Crop Insurance Business

28. In the latter part of 2000, the boards of Goran and SIG decided to pursue a sale of IGF due to flat revenue projections. (A. Symons Tr. at 460; A. Symons Dep. at 229-30).

29. Potential buyers included Acceptance, Archer Daniels Midland ("ADM"), and the Westfield Group ("Westfield"). (A. Symons Tr. at 461-62).

30. Negotiations with Acceptance began in December 2000, and were suspended when IGF began discussions with Westfield around April 2001. (TXs 665-80).

31. Negotiations with Westfield lasted until early May 2001. (TXs 644-64).

32. Negotiations with ADM occurred mainly during March, April, and May 2001. (TXs 628-43).

33. Beginning in March 2001 and continuing through early June 2001, CCC engaged in negotiations with the IGF Parties regarding payment of the debt owed to CCC. In the course of these negotiations, CCC made it clear that legal action would be instituted if the IGF Parties did not pay the debt. (TX 154 ¶ 28).

34. On April 4, 2001, the FCIC informed IGF in a written notice that: (1) on June 30, 2001, the FCIC was going to terminate IGF's 2001 SRA (discontinuance of the SRA would have required that IGF go out of business); (2) the FCIC would not provide reinsurance for any IGF-eligible crop insurance contract issued or renewed after June 30, 2001; and (3) IGF was required to immediately notify all current

policy holders that their policies were canceled. (TX 559; A. Symons Tr. at 506).

35. On May 23, 2001, facing the imminent cutoff of its ability to write or issue any new business, IGF entered into an Asset Purchase Agreement ("APA") with Acceptance, selling IGF's crop insurance business assets for $40,500,000. (TX 1711 § 2.02).

36. On June 4, 2001, IGF filed suit against CCC alleging breach of contract (with respect to the REAP Software License Agreement), fraud (relating to CCC's crop insurance book of business), and breach of fiduciary duty. As noted above, the court granted CCC's unopposed Motion for Summary Judgment with respect to these claims on March 22, 2007.

37. On June 6, 2001, CCC filed a Complaint demanding payment of IGF's obligations relating to the Put Mechanism. (Complaint at ¶ 41). The Acceptance sale closed later that day. (TX 1711 at § 2.02).

38. On September 20, 2001, the cases filed by the parties were consolidated, and on December 13, 2001, CCC filed the Amended Counterclaim. (JAMS Docket # 51).

F. CCC's Amended Counterclaim and the Court's Summary Judgment Ruling

39. On August 16, 2006, CCC and 1911 Corp. moved for summary judgment on their Amended Counterclaims.

40. On March 31, 2007, the court granted summary judgment on Counts I and II of CCC's and 1911 Corp.'s Amended Counterclaim against IGFH and SIG, and

denied summary judgment on Count III of the Amended Counterclaim. As IGFH and SIG are no longer going concerns, CCC and 1911 Corp. seek payment of that debt against the other Counterdefendants through Counts IV and V of their Amended Counterclaim – i.e., the fraudulent transfer and alter ego claims. Below is a brief synopsis of the court's summary judgment ruling.

41. Counts I and II of CCC's and 1911 Corp.'s Amended Counterclaim allege the IGF Parties failed to pay: (1) the Put Mechanism price owed to CCC pursuant to Section 3.8(B) of the SAA (Count I) and (2) CCC's share of the MPCI Underwriting Gain for the 2000 Crop Year (Count II).

42. In their Response to CCC's and 1911 Corp.'s Motion, the IGF Parties did not dispute the amount owed to CCC pursuant to Section 3.8(B) of the SAA. Instead, they argued that only IGF was liable for the debt, and not IGFH and SIG.

43. The court found, based upon the plain meaning of the SAA, that IGFH and SIG were jointly and severally liable for the amount owed on the Put. Accordingly, in the court's March 31, 2007 Summary Judgment Order, the court found that SIG and IGFH owed CCC $25,407,182, plus interest of $4,611,404 (as of June 2006), and awarded judgment in that amount in favor of CCC. (Docket # 107 at 30-31).

44. In addition, pursuant to an ancillary agreement to the SAA, the parties agreed to share profits and losses from the pooled insurance businesses (until the Put was exercised), known as the MPCI Underwriting Gain. Again, the IGF Parties did not dispute the amount owed to CCC for the MPCI Underwriting Gain for the 2000

Crop Year. Instead, they argued that only IGF was liable, and not IGFH and SIG.

45. The court found that pursuant to the SAA, IGFH and SIG were jointly and severally liable for the debt owed to CCC for the MPCI Underwriting Gain. Accordingly, in the court's March 31, 2007 Summary Judgment Order, the court found the IGF Parties owed CCC $4,239,491.69, plus interest, and entered summary judgment in that amount in favor of CCC and against SIG and IGFH. (*Id*. at 31-32).

46. Count III of the Amended Counterclaim alleges that IGFH failed to pay 1911 Corp. monies due and owing under the NACU Promissory Note ("NACU Note").

47. In the court's summary judgment ruling, the court found an issue of fact as to whether 1911 Corp. consented to IGFH's assignment of the NACU Note to IGF. (*Id*. at 32-33).

II. The Fraudulent Transfer Claim

A. The Terms of the Sale

48. The APA provided that $9 million of the payment would be split between SIG and Goran in return for covenants not to compete; $15 million would be paid to Granite Re (in present and future payments) for a reinsurance agreement; and $16.5 million of the purchase price would be paid to IGF for the purchase of its business. The foregoing amounts were paid to each of those parties, and SIG then transferred the funds it received ($4.5 million) to Pafco and Superior. (A. Symons Dep. at 286).

49. Alan Symons acted as the principal representative of IGF, IGF Holdings, SIG, Goran and Granite Re in these negotiations. (*Id*. at 348-49; D. Symons Dep. at 252; Daggett Dep. at 217; Granite Re 30(b)(6) Dep. at 65-66; *see also* McCarthy Dep. at 8 ("I was involved in the initial and subsequent conversations with Alan Symons representing the interests of a number of companies"), 87-88)).

B. The Non-Compete and Reinsurance Contracts Were Part of the Same Sale Transaction

50. The APA explicitly required execution of the Reinsurance Agreement and SIG/Goran non-compete agreements as "ancillary agreements" to the sale of IGF's assets, and specified that the obligation of Acceptance to purchase IGF's assets were "subject to the satisfaction" of certain "conditions precedent," including the execution of the non-compete and reinsurance agreements, which were attached to the APA as Schedules. (TX 1711, Art. VI, § 6.01; *see also id*. at 4 ("Ancillary Agreements"), 11 ("Granite Re Treaty, Ex. F hereto"), 13, 25 (at § 2.01), 52 (at § 5.09), 57 (at § 5.19)).

51. The structure of the sale, whereby IGF received $16.5 million of the proceeds, and Goran, SIG, and Granite Re received $24 million for non-competes and reinsurance, was initiated by Alan Symons, not Acceptance. (A. Symons Dep. at 272, 276 ("[I]t was my thought that the non-competes be $9 million"); Granite Re 30(b)(6) Dep. at 52-53, 68-69).

52. The Board of Directors' Minutes of SIG, Goran, IGF, and IGFH, dated May 23,

2001, affirm this finding:

> Whereas the Board of Directors has been advised that the payments to be made [to the IGF affiliates] by Acceptance in connection with the proposed sale of the Business to Acceptance were initially recommended among SIG, Goran, [Granite Re] and IGF by the Corporation's executive officers, not by Acceptance."

(TX 91 (IGFH's Board Minutes); *see also* TX 1378 (SIG's Minutes); TX 1532 (IGF's Minutes); TX 1256 (Goran's Minutes)).

53. Acceptance's Chairman, Michael McCarthy ("McCarthy"), testified that he was not interested in the non-competes and reinsurance agreement; rather, the $40 million purchase price was intended to be for IGF's crop insurance business. (McCarthy Dep. at 10-11 ("I initiated a conversation with Alan about acquiring the crop assets of IGF . . . [W]e had heard that IGF might be for sale, and I called him and asked him."); *id*. at 13 ("I'm not sure I had a clear understanding of who Alan Symons represented. Obviously – maybe it's not obvious – our interest was in acquiring the assets of IGF, its crop division."); *id*. at 15 ("Q: Do you recall what assets you said you were willing to acquire? A: We were interested in the IGF assets employed in the service of crop insurance customers.")). In fact, none of the payments to Goran, SIG or Granite Re were contained in the original proposal made by Acceptance. (TX 29; *see also* McCarthy Dep. at 38-44).

54. Acceptance viewed the value of the transaction to be based solely on the cash flow generated by IGF's crop business. (McCarthy Dep. at 19, 35, 120; *see also id*. at

26-27, 83, 86). Acceptance valued the business from the very start at $35-40 million, and that was the price Acceptance was willing to pay. (*Id.* at 24 ("We made a determination that if we could acquire and retain the business, a combination of the assets and the liabilities we were assuming, that if we could do that for less than I'm thinking $35 or $40 million, as best I can remember that was the range, that it would be an acceptable transaction from Acceptance's perspective."). That valuation and price never changed throughout the course of the negotiations. (*Id.* at 33, 35 ("Our valuation was done at the beginning and it didn't change.")).

55. McCarthy allowed Alan Symons to structure the deal to include the ancillary payments provided the overall purchase price did not exceed $40 million:

> Q: So if you took these three components, the note, the noncompetition payments and the reinsurance, you were willing to – you're telling Mr. Symons you were willing to make adjustments but only if the total ended up being the same viewed on a present value basis, sort of a zero sum approach?
>
> A: Yes, but the sum had to be – couldn't change, and as I say in the last paragraph, you know, within regulatory restraints and with any concerns that his board or special committee of that board might have.
>
> *   *   *
>
> Q: But you were willing to increase or decrease the . . . note if the non-compete or reinsurance payments decreased in equal amounts on a present value basis?
>
> A: Along with the other conditions in my last paragraph

[of TX 42].

(*Id*. at 84-86; *see also id*. at 24, 33, 46; TX 42 ("The note . . . can increase if the noncompetition payments or reinsurance payments decrease in an equal amount . . . We're willing to be as flexible as we can be, within regulatory constraints, in making the deal work for you and your companies."); Borghesi Tr. at 841 ("[L]ooking at the documents surrounding the negotiations of the transactions, it was reasonably clear to me that the dollar amounts were essentially dictated by the sellers. The testimony of Mr. McCarthy was essentially that he was more interested in what the total out-of-pocket cost was going to be.")).

C. Terms of the Non-Compete Agreements

1. The Non-Compete and Consulting Agreements

56. As noted above, Acceptance, a major provider of crop insurance (with a greater market share than IGF) entered into Non-Compete and Consulting[4] Agreements with SIG and Goran, non-operating holding companies, for $9 million. (A. Symons Tr. at 461 (prior to acquisition, Acceptance was # 2 in the crop insurance industry in terms of volume); TX 150 at 7-8). The Non-Compete and Consulting Agreements prevented Goran and SIG from engaging in any crop insurance business for two (2) years. (TX 1711 § 5.19).

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[4] As a side note, the Non-Competition and Consulting Agreements also allowed for the provision of up to 20 hours per month of consulting services by the principals. (TX 1019 at Ex. 10.16). Significantly, there was no evidence presented at trial that Acceptance received any of the consulting services for which it paid. (*See, e.g.,* Wechter Tr. at 710) (testifying that he was not aware of any consulting services provided by SIG to Acceptance)).

57. Neither SIG nor Goran were a competitive threat to Acceptance which would otherwise justify the Non-Competition and Consulting Agreements. (Borghesi Tr. at 847-50). Unlike IGF, neither SIG nor Goran were engaged in the crop insurance business and did not employ individuals with knowledge of the crop insurance business. (TX 72 at 3-4; TX 10; *see also* Findings of Fact ## 8-9). Moreover, IGF's crop insurance was sold and all of the operating assets and employees who ran the crop insurance business went to work for Acceptance. (Borghesi Tr. at 848-49, 855). As CCC's expert testified, "[I]f you are going to sell the business lock, stock, and barrel, there really is a presumption that there's no intent to compete." (*Id*. at 849). Even Acceptance's Chairman, Michael McCarthy, testified that it would be "highly unlikely" that IGF or any other Symons Company would be able to obtain a SRA from the FCIC given the fact that the Indiana Department of Insurance ("IDOI") was set to terminate IGF's SRA in June 2001. (*Id*. at 123-25).

58. In June 2006, the IDOI questioned the reason for the Non-Compete and Consulting Agreements with Goran and SIG. (TX 111 ("If Goran and SIG primarily function as holding companies and are not directly involved in the crop business, please explain why these entities are being compensated not to compete.")).

59. No valuation of any kind was done – by the Symons Parties, by Acceptance, by an accounting firm or by any valuation organization or consultant – to determine the amount or value of the SIG/Goran Non-Compete Agreements. (A. Symons Tr. at

558; McCarthy Dep. at 51).

2. The Non-Competition and Retention Agreements

60. Acceptance also entered into Non-Competition and Retention Agreements with each of twenty IGF employees,[5] for which Acceptance paid $1,143,000. (TX 89; TX 1711).

61. The twenty IGF employees who entered into the Non-Competition and Retention Agreements were responsible for IGF's day to day operations and included field representatives, marketing representatives, and some key adjustment staff. Acceptance believed that these IGF employees posed a competitive threat to Acceptance if they were to engage in competition with Acceptance. (TX 33; TX 36; Borghesi Tr. at 848).

62. The payments, which ranged from $34,000 to $75,000 per employee, (TX 1711), were not paid by SIG or Goran and were not part of the $40.5 million paid by Acceptance at closing, but were paid directly by Acceptance to the employees after the employees began working for Acceptance. (TX 89 ¶¶ 4, 5). The amount paid per employee represented a bonus of one year's salary over a three-year period, on the condition that they remain employed by Acceptance. (Daggett Dep. at 224; TX 89).

63. The Non-Compete and Retention Agreements were executed by IGF before

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[5] IGF employees were actually employed by IGFH. (A. Symons Dep. at 564). Alan Symons explained that the employees worked for IGF but were paid by IGFH. (*Id.*).

closing pursuant to the APA as part of the purchase agreement, and in partial consideration of the purchase of IGF assets, but were, in accordance with the APA, assigned to and paid by Acceptance. (TX 1711 §§ 5.19, 6.01; TX 89 ¶¶ 4, 5).

3. Other Non-Compete Agreements

64. In addition, Acceptance executed a non-compete agreement with each of the three individual Symons – Alan, Doug, and Gordon – for consideration of $1 each. (TX 89; TX 1711).

65. Neither Alan, Doug, nor Gordon Symons was active in the day-to-day operations of IGF and thus did not have the specialized knowledge and customer/agent relationships to be a competitive threat. (Armstrong Tr. at 670).

66. Acceptance also entered into non-compete agreements with IGF, IGFH, and IGF subsidiaries Geo Ag Plus, LLC and NACU for consideration of $1 each. (TX 1711).

4. David Borghesi's Opinion

67. David Borghesi ("Borghesi") testified for CCC as an expert on the value of the Non-Competition and Consulting Agreements between Acceptance and Goran and SIG. (TX 150).

68. Borghesi is a Certified Public Accountant and consultant. (TX 150 at 2). One of Borghesi's "areas of specialization is analyzing accounting transactions and computing economic damages in connection with civil litigation and contractual matters." *Id.* From 1970 to 2002, Borghesi worked at Arthur Anderson LLP,

during which time he was employed as an auditor and forensic accountant. (*Id*.; *see also* Borghesi Tr. at 815-16). Borghesi is currently employed as Managing Director in the Financial and Economic Consulting practice of Huron Consulting Group LLC. (TX 150 at 2; Borghesi Tr. at 817).

69. Borghesi opined that payments of $4.5 million each to Goran and SIG are substantially purchase price consideration and such consideration should have been paid directly to IGF. (TX 150 at 5; *see also* Borghesi Tr. at 864). In reaching his conclusion, Borghesi considered the value to Acceptance with the Non-Compete and Consulting Agreements and the value without such agreements, based upon the competitive threat posed by Goran and SIG. (Borghesi Tr. at 844-45). In other words, Borghesi determined whether Goran and SIG could achieve a competitive threat, such that it was more valuable to Acceptance to have the Non-Compete and Consulting Agreements than not.

70. Borghesi concluded that SIG and Goran were not competitive threats, and therefore, the $9 million payments to Goran and SIG were actually purchase price consideration. The reasons behind Borghesi's opinion are as follows. First, the individuals with specialized knowledge of IGF's crop insurance business were retained by Acceptance from IGF (by virtue of the Non-Competition and Retention Agreements) and were not part of SIG or Goran. (TX 150 at 6-7). Second, the payments from Acceptance to SIG and Goran were payments to non-operating holding companies that did not have the infrastructure or operations to conduct a

crop insurance business. (*Id*. at 7). Third, by virtue of the Non-Competition and Retention Agreements, Acceptance had access to those IGF employees with specialized knowledge of its book of business, "making any additional corporate level consultation superfluous." (*Id*. at 8). Fourth, the $9 million payments to SIG and Goran for the Non-Compete and Consulting Agreements did not bear a reasonable relationship to Acceptance's $1.4 million payment to IGF's employees and officers for the Non-Compete and Retention Agreements. (*Id*.).

71. At trial, Borghesi testified that he questioned the form over the substance of the Non-Compete and Consulting Agreements when he realized that the parties valued IGF's entire crop insurance business at $9.5 million. (Borghesi Tr. at 858).

72. Based upon the foregoing, the court finds the $9 million paid to SIG and Goran was actually purchase price consideration and did not represent the true value of the SIG and Goran Non-Compete and Consulting Agreements. Therefore, IGF did not receive reasonably equivalent value when its crop insurance assets were sold to Acceptance and $9 million was paid to Goran and SIG instead of IGF. In reality, the transaction constituted a transfer to Goran and SIG of $9 million from the proceeds IGF was entitled to receive for its assets, without any consideration paid by Goran and SIG for that transfer.

D. The Funds Transferred to Goran and SIG under the Reinsurance Agreement Were Really Purchase Price Consideration That Should Have Gone to IGF

73. As part of the sale of IGF's business to Acceptance, Acceptance entered into a

Reinsurance Agreement with Granite Re, another subsidiary of Goran, whereby Acceptance would pay Granite Re $6 million immediately, and $9 million over a three-year period, beginning on January 1, 2003. In return, Granite Re reinsured Acceptance for any losses on Acceptance's MPCI business that was in excess of 140% but not greater than 150% of the net premium received by Acceptance during the 2001-2005 MPCI crop years. The Reinsurance Agreement provided further that Granite Re's total liability over the five-year term should not exceed $40 million and, if that cap were reached, Acceptance would pay (in addition to the $3 million annual premium) a rate of 5% of net premium for each remaining crop year. (TX 19, Articles 6 and 11A).

1. Negotiation of the Reinsurance Agreement

74. A reinsurance agreement was not part of the original Acceptance offer for the purchase of IGF's assets. (TX 29).

75. Alan Symons counter-offered with a request for the Reinsurance Agreement. (TX 31 at 2; A. Symons Tr. at 530; *see also* McCarthy Dep. at 46-47).

76. At the time the parties entered into the APA, Acceptance already had reinsurance at the 140-150% level for its own business. (McCarthy Dep. at 59). Similarly, IGF also had reinsurance for the 100-150% band for the 2000-2005 crop years. (TX 1498, Tabs 3 and 4, Art. VI).

77. Although reinsurance is generally purchased with the aid of a broker in the market, no broker was used in connection with the Reinsurance Agreement. (TX 29; TX

31; TX 33; TX 36; McCarthy Dep. at 40-41; A. Symons Tr. at 499-502).

78. Alan Symons set the initial price for the reinsurance, and negotiations continued from there. (A. Symons Dep. at 273; Granite Re Dep. at 52-53; TX 29; TX 30 ¶ 8; TX 33 ¶ 6; TX 37; TX 39; TX 40; TX 91; McCarthy Dep. at 47). However, no pricing analysis was ever performed. (Granite Re 30(b)(6) Dep. at 57: "Q: Did he do any kind of analysis of what the risk might be from this type of policy? A. None that I've seen.").

79. No evidence was presented at trial as to how the $3 million annual premium was calculated or how that premium compared to other reinsurance IGF or Acceptance had purchased in the past for that range of potential loss.

2. The Granite Re/Acceptance Agreement Differed From Customary Methods of Crop Insurance

80. William Totsch ("Totsch") testified as an expert on behalf of CCC. Totsch has twenty-four years of experience as a reinsurance intermediary and broker, specializing in multi-peril and crop hail insurance. He is currently employed by Totsch Enterprises, Inc. (Totsch Tr. at 145).

81. Totsch testified that the Reinsurance Agreement contained several unique provisions that were not customary in the industry. Each of these provisions will be discussed in turn below.

82. First, the agreement provided that in the event of a major loss during the term of the Reinsurance Agreement, Acceptance would be required to pay an additional

5% premium for the remaining period of the agreement. (Totsch Tr. at 155; TX 19; TX 1709 §§ 6, 11A; TX 30 §§ 6, 11A; TX 90, §§ 3.11, 6.01). Totsch opined that, based upon his experience, such an additional premium – as much as $20 million – was not the industry norm. (TX 152 at 5; *see also* Totsch Tr. at 154-55).

83. An additional premium charge in the event of a major loss was not included in any of the other IGF, Superior, or Acceptance reinsurance treaties that Totsch reviewed or that were presented at trial. (Totsch Tr. at 157).

84. Second, the reinsurance agreement provided $9 million indemnification by Granite Re if IGF breached the APA between Acceptance and the IGF Parties. (TX 152 at 5; Totsch Tr. at 158).

85. Totsch testified that he had never previously seen an indemnification clause included in a MPCI reinsurance agreement and that it was "certainly not the industry norm." (Totsch Tr. at 158).

86. Doug Symons, Granite Re's 30(b)(6) witness, admitted that the provision was unusual. (Granite Re 30(b)(6) Dep. at 76-77 ("Most reinsurance contracts would not contain that kind of language."); TX 152 at 5).

87. Third, the Reinsurance Agreement required payment in advance of each crop year, with the first two years' premium payments (for the 2001 and 2002 crop years) due on January 1, 2001, and the remaining years due on January 1 before each succeeding crop year commenced. (TX 19, Art. 11).

88. In Totsch's experience, the deposit premium for the 2001 crop year would be paid

in July 2001, and any remaining premium would be paid in November 2001. (Totsch Tr. at 153). The same is true for each succeeding year.

89. Thus, by requiring the payment of the 2001-2002 crop years' premium ($6 million) on January 1, 2001, Granite Re was being paid between seven and twenty-two months in advance for those two years. (Totsch Tr. at 153). Similarly, payments for the final three years[6] were required to be made six to eleven months earlier than the norm. (*Id.*).

90. Other reinsurance treaties involving IGF, Superior, and Acceptance that Totsch reviewed in connection with this case called for payment of premiums in July through September or October of the current crop year, consistent with industry practice. (*Id.* at 153).

91. Totsch concluded that these payment terms "are significantly different from the industry norm for a Multi Peril stop loss treaty and extremely favorable to the reinsurer." (TX 152 at 4; Totsch Tr. at 152).

92. Fourth, the Granite Re Reinsurance Agreement had a five-year term without an early termination clause. This provision was very unusual because, given the nature of the SRA with the federal government and the fact that it could change from year to year, it is possible that the underlying risk could change without any

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[6] Acceptance never paid the remaining $9 million that was due under the Granite Re Reinsurance Contract as the company went into bankruptcy in January 2005. (A. Symons Tr. at 567).

ability to terminate the agreement. (Totsch Tr. at 154; TX 152 at 4-5).

93. The other reinsurance treaties involving Acceptance, Granite Re, or IGF had only one-year terms. (TX 19, Exs. A and Art. 3(A) (IGF-C 22608); Ex. B at Art. II (ABC 002522)).

94. Fifth, the Reinsurance Agreement was undated. Were there to be a loss, a dispute could arise as to whether coverage existed on the date of the loss. (Totsch Tr. at 158-59). The failure to have a signing date "is contrary to normal reinsurance practices." (TX 152 at 5).

95. Each of the other IGF, Granite Re, and Acceptance reinsurance treaties that Totsch reviewed had a signing date. (Totsch Tr. at 159).

96. Sixth, the Reinsurance Agreement was missing other usual and customary terms, such as the estimated subject premium income and the premium rate, from which the subject reinsurance premium income could be calculated. (TX 152 at 1-2). Instead, there was simply an annual premium total. (Totsch Tr. at 162-63).

97. It is industry standard to include a rate in the reinsurance agreement. (TX 152 at 1). In fact, all other IGF, Granite Re, and Acceptance reinsurance agreements that Totsch reviewed did contain the rate in the reinsurance treaty. (Totsch Tr. at 163).

98. Seventh, Totsch testified that ceding companies generally seek reinsurance from multiple reinsurers in order to split the risk. (*Id*. at 168).

99. The Granite Re Reinsurance Agreement placed 100% of the risk with Granite Re. This was unusual because Granite Re was a very small company which had a

surplus of only $14 million, far less than the reinsurance policy limits of $40 million. (TX 27; Totsch Tr. at 168).

100. McCarthy of Acceptance expressed concern about Granite Re's ability to pay any loss, and even sought to replace it with another reinsurer, with Granite Re retaining $2.8 million. (TX 36, Att. A at 3; *see also* TX 40, Att. A at 3; *see also infra* Findings of Fact ## 129-32).

101. Notably, other Acceptance reinsurance agreements in effect during the same time period as the Granite Re Reinsurance Agreement were reinsured by multiple reinsurers. (Totsch Tr. at 167).

3. The $3 Million Annual Premium Was Excessive and Out of Line With Industry Norm

a. It Was Extremely Unlikely That the 140% Attachment Point Would Be Hit

102. Dr. James Driscoll ("Dr. Driscoll") testified as an expert for CCC in this matter. Dr. Driscoll has a Ph.D. in Agricultural Economics. He worked for the FCIC for nineteen years as a crop insurance underwriter, eventually attaining the position of Senior Actuary. During his time with the FCIC, Dr. Driscoll was responsible for overseeing the methods the FCIC used to establish premium rates for crop insurance, and analyzed ratemaking methods proposed by private insurance companies that submitted crop insurance products for sale under the federally-subsidized program. (TX 151 at 1).

103. Dr. Driscoll was asked to determine the likelihood that a retained loss ratio (loss

divided by premium) of 140% or higher would be experienced in any crop year by a nationwide insurer like Acceptance. Dr. Driscoll determined to a reasonable degree of scientific certainty, using both IGF's and industry average retained premium data, that such a loss would occur between 4.7 and 6.5 years in every 10,000 years. (Driscoll Tr. at 99-100; TX 151 at 11).

104. Alan Symons advised his Boards of Directors that the likelihood that Granite Re would experience a loss in excess of 140% would happen approximately once in one hundred years. (TX 61; A. Symons Dep. at 293; A. Symons Tr. at 589-90).

105. Totsch similarly opined that the chances of reaching the 140% loss ratio for a nationwide company is extremely low. (Totsch Tr. at 156 ("It would be very, very unusual to hit a layer attaching at 140, in my experience in the MPCI program."); TX 152 (Totsch Report: "Based on my experience with the MPCI program, it would be extremely rare for a nationwide book of business, using the fund selection available under the SRA to minimize expected negative results, to have a loss ratio reach 140%.")). Because a crop insurance company can assign the worst business to the federal government under the assigned risk fund of the SRA, "that takes most of the – almost all of the exposure out of the insurance company's result." (Totsch Tr. at 156).

b. The Pure Premium Was Far Less Than $3 Million

106. Dr. Driscoll was also asked to determine the pure premium for the Granite Re Reinsurance Agreement. The pure premium "reflects the amount of premium that

the insurer needs to collect to pay expected losses without consideration of anything else such as expenses, operating costs, or profit and so on." (Driscoll Tr. at 104).

107. Dr. Driscoll calculated the pure premium by multiplying the maximum exposure (i.e., IGF's net retained premium x 10% range of loss) by the likelihood of the loss occurring (6.5 ÷ 10,000). (Driscoll Tr. at 103-05; TX 151 at 11). Using IGF's net retained premium ($138.5 million), IGF's maximum exposure was $13.85 million. The pure premium therefore was determined to be $9,002 annually – i.e., 13.85 x .00065. (Driscoll Tr. at 103-05; TX 151 at 11). $9,002 charged over the course of the five-year Reinsurance Agreement equals $45,010.

108. The Counterdefendants attack Dr. Driscoll's opinion by contending that the $13.85 million figure is incorrect, as the maximum exposure under the Granite Re Reinsurance Contract is $40 million. Using the $40 million figure results in a pure premium of $26,000 – well short of the $3 million annual premium charged in the Granite Re Reinsurance Agreement. (Driscoll Tr. at 128).

109. The Counterdefendants also attack Dr. Driscoll's opinion as not reflective of what a commercial reinsurance company would actually charge a crop insurance company to underwrite the risks at issue in the agreement. In other words, Dr. Driscoll's pure premium failed to take into account administrative expenses, overhead expenses, profits, and the like. Dominic Weber ("Weber"), the Counterdefendants' expert on the value of IGF's crop insurance at the time it was

sold to Acceptance, testified that the norm for expenses, overhead, and profits for crop reinsurance was 50% of the total reinsurance charged by the reinsurer to the original insurer (with the cost of assuming the risk making up the remaining 50%). (Weber Tr. at 1066-67). If this 50% were added to Dr. Driscoll's estimate of a pure premium, it would only double the $9,002 (or $26,000) pure premium for the combined Acceptance and IGF crop business – an amount far below the $3 million annual premium charged in the Reinsurance Agreement.

110. Thus, even assuming the Counterdefendants' best arguments, there is no justification for a premium anywhere close to the $3 million annual premium Granite Re received.

c. The Reinsurance Agreement Was Substantially Overpriced

111. Totsch also opined as to the value of the Reinsurance Agreement. His opinion was based on: (1) his twenty-four years of experience in brokering reinsurance contracts in the crop insurance industry; (2) his placement of similar policies around the same time; (3) his opinion as to the unusual and non-conforming nature of the Reinsurance Agreement at issue; and (4) his review of similar contracts involving Acceptance, Granite Re, and IGF around the same time frame. (Totsch Tr. at 159-167).

112. In evaluating the costs of the contract, Totsch calculated the rate-on-line for the Granite Re Reinsurance Agreement. Rate-on-line is calculated as a percentage by

dividing the premium paid to the reinsurer by the policy limit or exposure. A high rate-on-line should correspond to a greater risk of the insurance being implicated. (*Id*. at 160). Totsch calculated that the rate-on-line for the Granite Re Reinsurance Agreement, using the $15 million premium and the $40 million limit, was 37.5%. This would indicate a highly significant likelihood that the 140% attachment point would be hit. (TX 152 at 3). Totsch testified that using the entire $15 million premium in determining the rate-on-line (as opposed to the $3 million annual premium) was appropriate as the Reinsurance Agreement was for a guaranteed five-year term, with a five-year maximum of $40 million, which, if hit, would trigger the 5% additional premium charge for the balance of the five-year agreement. (Totsch Tr. at 161-62).

113. Totsch also calculated the payback period for the Reinsurance Agreement. The payback period is calculated by dividing the treaty limits by the reinsurance premium paid to the reinsurer. The payback reflects "how many years you would pay that premium to pay a total loss." (*Id*. at 159-60). A longer payback period would coincide with less exposure to the reinsurer, while a short payback period would indicate fairly significant risk to the reinsurer that a loss would occur. (*Id*. at 160).

114. Totsch determined that, taking into account the mandatory five year premium of $15 million, the payback would be 2.6 years ($40 million exposure ÷ $15 million), indicating great exposure to the insurer and a high likelihood that the 140%

attachment point would be hit. (*Id*. at 160-61).

115. The low payback period and high rate-on-line associated with the Granite Re Reinsurance Agreement are inconsistent with the low risk that the 140% attachment point would be hit. This indicates that the Reinsurance Agreement was grossly overpriced and out of line with the market norm. (TX 152 at 3; Totsch Tr. at 161).

116. The Counterdefendants argue that Totsch's opinion is unreliable because he did not know what portion of the Reinsurance Agreement was allocated to the MPCI component and what portion was allocated to the indemnity component. (Totsch Tr. at 188). However, as set forth *infra*, the indemnification agreement was added at the last minute, after the premium had been agreed upon, and thus no portion of the premium can be properly attributed to the indemnification provision. (*See infra* Finding of Fact # 134; McCarthy Dep. at 81, 111). Moreover, no risk was exchanged when the indemnification provision was added. (*See infra* Finding of Fact # 137; Borghesi Tr. at 867-68) Therefore, the court rejects the Counterdefendants' argument with respect to the reliability of Totsch's opinion.

d. The Granite Re Reinsurance Agreement Was Substantially Overpriced When Compared to Other Reinsurance Agreements

117. In addition to his own analysis and rendering his own opinion concerning the excess price of the Granite Re Reinsurance Agreement, Totsch also reviewed and analyzed two reinsurance agreements involving similar levels of coverage during

the relevant period as the Granite Re Reinsurance Agreement.

118. The first reinsurance agreement he examined, entitled "Third [Layer] MPCI Stop Loss Insurance Contract," was between IGF and various reinsurers for the years 1999 to 2001 and provided coverage for the 150% through 185% loss percent band. Totsch concluded that the payback periods were 175 years in 1999 and 114.8 years for 2000 and 2001. (TX 16 at 2 and 16, attached Treaties, Arts. 2 and 6 and Summary Page 2; Totsch Tr. at 165-66). The rate stated in the policy was 0.2%. (TX 16 at 2 and Treaty, Art. 6[7]).

119. Totsch testified that the 150% attachment point, like the 140% attachment point in the Granite Re Reinsurance Agreement, is "far removed from the norm." (Totsch Tr. at 166). In other words, one would not expect a reinsurance agreement to be "hit" at either the 140% or 150% rate.

120. Comparing the payback period of the "Third Layer" Agreement with the Granite Re Reinsurance Agreement (175 years vs. 2.6 years) and the rate (.2% vs. 37.5%) for the year 1999 in light of the band of coverage (35% vs. 10% in the Granite Re Reinsurance Agreement), for example, reflects that the Granite Re Reinsurance Agreement was far more costly than similar coverage in the IGF "Third Layer" Agreement. (*Id*. at 165-66).

121. The second reinsurance agreement Totsch reviewed, entitled "Net Excess

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[7] The calculated rate-on-line was 0.5% (i.e., $230,000 ÷ limit of $115,000,000 x 35% band).

Reinsurance Contract" between Acceptance and several reinsurers involving MPCI, Crop Hail, and Crop Revenue Coverage Plus ("CRC-Plus") crop insurance for the year 2000, had a 123% attachment point, a limit of coverage of nearly 25% (i.e., a range of coverage from 123% to 148%), and a payback period of 46.5 years. (*Id*. at 167). The 123% attachment point has a much greater possibility of being hit as compared to a 140% attachment point, yet the payback period for that policy (46.5 years) was much greater than the 2.6 years as reflected in the Reinsurance Agreement. (*Id*. at 166-67). The premium rate on the "Net Excess" contract was 0.534% – one-tenth the rate stated in the Granite Re Reinsurance Agreement and much less than the 37.5% rate-on-line for that agreement – even though the band of coverage (123% to 148%) was much broader (25% vs. 10%) than the Granite Re Reinsurance Agreement. (*Id*. at 226; TX 16, Sch. A).

122. Thus, as Totsch concluded, the Reinsurance Agreement's annual premium rate was dramatically higher (and the payback period much lower) than other reinsurance agreements obtained by Acceptance and IGF around the same time period – despite the fact that other policies covered risks that began at similar or lower attachment points, had wider ranges of exposure, and lacked a provision for a large premium add-on (5% of subject premium income) if the limit were reached. (TX 16; TX 152 at 3; Totsch Tr. at 165-67). This demonstrates that the pricing of the Granite Re Reinsurance Agreement was inconsistent with market norms.

123. On cross-examination at trial, the Counterdefendants presented Totsch with a

reinsurance agreement between Acceptance and Scandinavia Re covering the 1999 crop year (the "Scan Re Agreement"). (*See* TX 1764). The Scan Re Agreement involved coverage of CRC-Plus and MPCI crop insurance and charged a premium of $7.5 million a year. (*Id*. at 1, 7).

124. The Scan Re Agreement had a one-year term with respect to the CRC-Plus crop insurance, and a seven-year term with respect to the MPCI. However, Acceptance had the option of canceling the MPCI coverage "on any December 31 by giving the other party not less than 90 days notice." (*Id*. at 2). Totsch testified that in his opinion, the cancellation provision was a "significant difference" between the Scan Re Agreement and the Granite Re Reinsurance Agreement. (Totsch Tr. at 219).

125. CRC-Plus was not covered under the government's MPCI program and was not reinsured under or protected by the SRA. Thus, there was no "sharing of losses with the government." (*Id*. at 220).

126. The Scan Re Agreement attached when the ultimate net losses exceeded 75% of Acceptance's CRC-Plus subject to net earned premiums, not 140% as in the instant Reinsurance Agreement (which, as previously stated, provided coverage for only MPCI). (TX 1764, Art. V.A.1). Thus, the Scan Re Agreement would be implicated if virtually any loss occurred.

127. Upon expiration or termination of the Scan Re Agreement, Scan Re and Acceptance agreed to profit share "equal to 100% of the positive balance" for all premiums paid, minus the deposit premium of $550,000 and losses recovered, less

the reinsurer's expense of $2,150,000. (*Id*., Art. IX).

128. Based upon the foregoing, the court finds the Scan Re Agreement is distinguishable from the other reinsurance agreements mentioned above, and therefore, does not alter the court's opinion with respect to the pricing of the Reinsurance Agreement at issue.

e. The Parties' Negotiations Reflect That the Reinsurance Agreement Was Worth Substantially Less Than $3 Million

129. In late January 2001, Acceptance expressed concern over Granite Re's ability to pay a loss under the proposed Reinsurance Agreement. (McCarthy Tr. at 59-60). Accordingly, Acceptance requested that Granite Re retrocede its risk to another reinsurer for $200,000 per year. (TX 36, Att. A at 3 ("Seller will retrocede risk, with cut through endorsement, to reinsurer satisfactory to Buyer, or to Buyer, at cost to Seller of $200,000 per year."); *see also* TX 40, Att. A at 3).

130. McCarthy, who made the proposal, stated that the purpose of the modification was "to reflect our [Acceptance's] expectation of a net benefit to you [Granite Re] of $2.8 million per year with two years paid in advance." (TX 40 at 1). Alan Symons rejected the proposed modification because "we need to achieve the $3,000,000 net to us" and suggested a fronting arrangement instead. (TX 41 at 1).

131. Thus, Acceptance's written proposal was that a separate reinsurer would be brought in who would reinsure Granite Re's obligation for $200,000, with Granite Re keeping the remaining $2.8 million without any risk to it. McCarthy, who

made the proposal, testified that, under his proposal, "the seller would be accepting the risk for [a] three million dollar premium and then handing off the same risk for a cost of only $200,000 to itself." (McCarthy Dep. at 70). When asked, "Why didn't Acceptance just propose to pay the $200,000 per year to [Granite Re] for reinsuring the risk?," McCarthy responded, "I don't know." (*Id.*). McCarthy explained, "As I recall what I meant was that this would result in a gain of $2.8 million per year to Alan Symons' entities or Symons-related entities." (*Id.* at 74-75).

132. The foregoing reflects that Acceptance viewed the Reinsurance Agreement as having a value of roughly $200,000 – certainly nowhere close to $3 million per year.

f. The Indemnity Provision Did Not Provide An Additional Basis for the $3 Million Premium

133. Acceptance wanted indemnification for unknown claims or lawsuits that might arise after the purchase of IGF's assets. (*Id.* at 112). Initially, Acceptance was to provide a note to IGF in the amount of $9.7 million to cover such potential claims. (A. Symons Tr. at 479-80; TX 1587 at 2). During negotiations, Acceptance told Alan Symons that, if Granite Re would agree to assume this liability instead of IGF, Acceptance would be willing to pay IGF cash at closing instead of the note. (A. Symons Tr. at 478-79). The parties thus agreed to have Granite Re assume the indemnity in the reinsurance treaty. (*Id.* at 480).

134. The indemnity provision was added "at the last minute" – i.e., after the $3 million premium had been agreed upon. (Granite Re 30(b)(6) Dep. at 53; McCarthy Dep. at 112; A. Symons Tr. at 586). Accordingly, there was no additional premium charged for the indemnity provision. (Granite Re 30(b)(6) Dep. at 53).

135. McCarthy explained Acceptance's reasons for agreeing to add the indemnity provision:

> I know it was important to Acceptance that we have the ability to set off future commitments against any liabilities or damages resulting from representations and warranties that were not fulfilled, and that, you know, we had future obligations to Granite Re, and as I recall we did arrange for a set-off arrangement.

(McCarthy Dep. at 112).

136. Acceptance's and the Counterdefendants' lawyers agreed at the time that the indemnity provision was added, "the essence" of the provision "was that the purchasers should have the same rights to set off for indemnity obligations they would have had if the Note were in place, and [IGF] was not to be paid in cash." (TX 88).

137. Borghesi opined that the value of the indemnity provision was worth substantially less than $15 million. (Borghesi Tr. at 876). His opinion is based upon the following observations. First, assuming the $15 million was related to the indemnity, "it makes no sense that you would pay $15 million in premiums for $9 million of coverage." (*Id*. at 866). Second, there was no real transfer of risk

because "it was clear that Acceptance wanted the ability to set off the $9 million of future payments against the $9 million of potential loss of breaches of reps and warranties." (*Id*. at 867-68). Third, McCarthy testified that he was concerned about Granite Re's ability to pay Acceptance in the event of a loss under the policy. (*Id*. at 868, 872). Fourth, the indemnification provision was added without any change in the amount of the $15 million premium. "It was just an add-on." (*Id*. at 873). Finally, this kind of coverage was available on the open market for significantly less. (*Id*. at 875).

E. The Indiana Department of Insurance Questioned the Reason for the Non-Compete Agreements With SIG and Goran

138. On June 6, 2001 – the closing date of the sale of IGF's crop insurance business to Acceptance – the IDOI sent SIG a letter expressing its concern about the Non-Compete Agreements with SIG and Goran. (TX 111; TX 1620; A. Symons Tr. at 630-31). The letter states: "Please explain why the $9 million payment for the Consulting and Noncompetition Agreements in conjunction with the sale of the [IGF's] crop insurance business and assets is being paid to Goran and SIG and not the Company." (TX 111). In particular, the IDOI questioned why Goran and SIG were being compensated not to compete "[i]f Goran and SIG primarily function as holding companies and are not directly involved in the crop business." (*Id*.). The IDOI also asked SIG to explain "how the terms of the Consulting and Noncompetition Agreements were negotiated, and the basis for determining the

amounts paid to Goran and SIG." (*Id.*). In addition, the IDOI also questioned "how the funds paid to Goran and SIG will be used." (*Id.*). The IDOI requested that SIG respond to its requests "prior to closing on the proposed transaction with Acceptance." (*Id.*).

139. Later that same day, Alan Symons responded to the IDOI's letter. (TX 1622). The letter contains the following misstatements (which are noted in brackets below):

(a) "Symons International Group, Inc. it's [sic] subsidiary IGF Holdings and Goran Capital Inc. had all of the employees, intellectual knowledge and the relationship dealing with the business. This also included the relationships with reinsurers, the independent brokers and the Federal Government."

[The employees subject to the non-compete agreements were employees of IGFH, although they performed job duties solely for IGF. (A. Symons Dep. at 393-94; TX 1533). In addition, there is no evidence that SIG or Goran had any "intellectual property" of any kind. All of the "relationships" were maintained by IGF employees. (*See, e.g.*, Gowdy Dep. at 13-15)].

(b) "In order to determine a fair value we looked to an outside investment house to give us the comparable value for the business . . . . Total value to IGF is $28,000,000. This leaves what is a reasonable value [$9 million] "for the intellect [sic] and property, the

employees and owners."

[The City Securities Valuation is dated May 14, 2001, after the purchase price had been agreed upon, and did not opine on any value. (TX 85). IGF ultimately received $16 million, not $19 million. (TX 115). In addition, there is no evidence that the "employees" received the $9 million.]

(c) "Symons International Group, Inc., which has to deliver the employees (not IGF Insurance Company, which has no employees) is delivering approximately 350 employees with salaries totaling over $13,000,000."

[As noted above, the employees are employees of IGFH or IGF, not SIG; no evidence was presented to support the assertion regarding number of employees or their purported salaries. Moreover, SIG did not deliver the employees to Acceptance; rather, Acceptance persuaded the employees to work for it and to sign non-compete and retention agreements worth approximately $1.1 million].

(d) "[Goran] has capital and resources to be in any business . . . . Acceptance wanted and Goran agreed, that for $4,500,000 it would not re-enter the crop business . . . ."

[As noted above, Acceptance did not seek the agreement with Goran. Moreover, as shown *infra*, Goran was insolvent and was unable to

get an SRA from FCIC].

(e) "The terms for the non-compete were the same or less than those terms agreed with [ADM] and Westfield Insurance Groups." [There was no payment associated with any non-compete in the ADM deal and Westfield refused to pay anyone but IGF. (*See infra* Finding of Fact # 145)].

140. The letter does not explain how the amount paid to SIG and Goran was determined. The letter also does not explain how the terms of the Consulting and Non-Competition Agreements were determined, other than to say that the "overall transaction was reviewed by the Acceptance Board and approved" and the transaction "was reviewed by the [SIG] independent Board and found reasonable." (TX 1622). With respect to how the funds paid to Goran and SIG would be used, the letter stated that SIG "will invest the total $4,500,000 proceeds into capital of its two non-standard companies Pafco General Insurance Company and Superior Insurance Company." (*Id*.).

141. Alan Symons testified that after the IDOI received his letter, Mark Pufahl contacted him and said, "I'm satisfied. Close the transaction." (A. Symons Tr. at 632).

F. Westfield's and ADM's Offers for IGF's Assets

142. As noted in Finding of Fact # 29, in addition to Acceptance, ADM and Westfield expressed interest in purchasing IGF's crop insurance assets.

143. The ADM group was led by ADM as purchaser of the business, Munich Re as reinsurer, and CCC as broker. (TX 59 ¶¶ 5, 6). ADM offered to pay approximately $39 million to IGF for its crop insurance assets. (*Id.*). Notably, none of that amount was allocated to Goran and SIG for non-compete agreements or to Granite Re for a reinsurance agreement. Instead, the non-compete agreements were part of the overall purchase price. (*Id.*; *see also* TX 1253).

144. Similarly, Westfield was close to a deal with IGF for approximately $37.5 million. (Adornetto Dep. at 30-31; *see also id.* at 83 ("[W]e would not pay any more than 40, that was our walk away price, and we would offer 37.5 [million].").

145. During negotiations, Alan Symons insisted that Westfield allocate money for convenants not to compete and reinsurance with Goran and Granite Re in separate agreements. (TX 70; TX 75 at 6909). Jack Adornetto, Westfield's CEO, testified that Westfield would not agree to that proposal:

> Q: So again, it was Mr. Symons' idea to allocate the purchase price among these various entities?
>
> A: He's the one that brought it up to me.
>
> Q: Thank you. Did the core group of people who were involved in the transaction at Westfield discuss that idea or the, let's call it the allocation idea?
>
> A: Only to the extent that we weren't going to do it.
>
> Q: Okay. Why weren't you going to do it?
>
> A: We felt that our arrangement was with IGF and that we were not interested in getting involved in and making payments to

> various entities. It was, we're buying IGF's assets, you do what you want after you get the money, Alan. And some of that was the advice of our counsel.

(Adornetto Dep. at 34-35; *see also id*. at 42-44; D. Symons Tr. at 768-770).

146. After conducting due diligence, Westfield considered making a "significantly lower offer" of $20 million, but ultimately "decided not to offer anything." (Adornetto Dep. at 83-84, 93-94).

G. Mr. Weber's Opinion Regarding the Value of IGF's Crop Insurance Business Is Irrelevant and Unreliable

147. Weber was presented by the Counterdefendants to give an expert opinion on the value of IGF's crop insurance business at the time of the sale to Acceptance.

148. Weber is a former Vice President and Chief Actuary for Empire Fire & Marine Insurance Company. He currently is employed by Hawthorne Underwriting Group, LLC, and is a Certified Expert Reviewer for the RMA, Fellow of the Casualty Actuarial Society, and Member of the American Academy of Actuaries. (TX 1764 at 3; Weber Tr. at 983-85).

149. Weber determined that IGF's crop insurance book of business, which includes IGF's MPCI, Crop Hail, and Named Peril products, had an appraised value of negative $20,500,000 to negative $11,700,000 at or about the time of the Acceptance transaction. (TX 1764 at 12).

150. The court finds Weber's opinion is irrelevant and unreliable for the reasons set forth below.

151. First, Weber failed to take into consideration the fair market value of IGF's crop insurance book of business. Fair market value is defined as "the price at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." (IRS Revenue Ruling 59-60; Borghesi Tr. at 879). Weber's opinion did not take into consideration the actual purchase price that Acceptance paid for IGF's crop insurance business, nor the bids from ADM and Westfield. (Weber Tr. at 1035, 1042). Weber admitted this fact at trial. (*Id*. at 1015 ("Q: Did you use that definition of "fair market value in valuing IGF's crop insurance business? A: No.")).

152. Second, Weber's negative valuation ignores the economic reality that no one would ever pay another to take the business off the seller's hands; rather, the seller would simply terminate the business. (TX 161 at 2). The costs of terminating the business would likely be far less than the negative valuation ascribed to IGF by Weber. (Borghesi Tr. at 886).

153. Third, Weber relied on the numbers provided to him over the phone by IGF personnel for every input variable that he used in his calculation, including IGF's historical results, IGF's gross and net premium, IGF's loss ratios, IGF's interest and tax rate, reinsurance costs, and industry averages. (Weber Tr. at 1079-80). In addition, the discount factors he used were taken from conversations with

investment bankers. (TX 1756 at 8, 11).

154. Weber did not independently verify through source documents whether the numbers he was provided were accurate. (Weber Dep. at 80-81) ("I never verified any of the information independently. I relied totally on the IGF personnel to give me the correct information based on what I was asking them."); Weber Tr. at 1050; *see also* Weber Dep. at 79-80) ("Q: Did you always receive from IGF the report that would document the information they had given you? A: I received nothing until the very last week of my assignment, in which I received the information that I forwarded on to you. The annual statements for two years and some other crop reports. Very minimal. No explanation of how they had adjusted numbers, if they'd adjusted them. And at that point, since it was becoming obvious I was not getting paid, I did not spend any time verifying the data.").

155. Instead, Weber conducted what he called a "reasonableness" test, which meant that the number "sound[ed] like a decent number." (Weber Tr. at 1080).

156. For the foregoing reasons, the court gives Mr. Weber's opinions no weight.

III. The Alter Ego Claim

A. The Symons Family Dominated and Controlled the Corporate Counterdefendants

1. Stock Ownership

157. The Individual Counterdefendants own 100% of Symons International Group, Ltd. of Canada. (TX 78; TX 1016; TX 153, Exs. 1, 2, 3; Litvak Tr. at 237).

158. The Individual Counterdefendants also own 22.5% of Counterdefendant Goran, and Symons International Group, Ltd. of Canada owns 28.5% of Goran. As a result, the Individual Counterdefendants effectively own 51% of Goran. (TX 153, Ex. 1; Litvak Tr. at 237).

159. Goran owns 73.1% of the shares of SIG, as well as 100% of the shares of Granite Re. (TX 153, Ex. 1).

160. SIG owns 100% of IGFH, which in turn owns 100% of IGF, which was a party prior to CCC's settlement with the IDOI. (TX 153, Ex. 1).

161. SIG also indirectly owns 100% of Superior, now in rehabilitation proceedings in Florida, and Pafco, which was a Counterdefendant prior to CCC's settlement with the IDOI. (TX 153, Ex. 1; Litvak Tr. at 332; *see also supra* Findings of Fact ## 6-8).

162. As a result of the Individual Counterdefendants' majority interest in Goran, the Individual Counterdefendants own the majority interest and effectively control each of the other Corporate Counterdefendants: SIG, Granite Re, Superior, Pafco, IGF, and IGFH, as well as non-party affiliates Granite Insurance Company, Canada, and Symons International Group, Florida. (Litvak Tr. at 237; TX 153, Ex. 1).

163. Accounting valuation literature lists numerous factors that are commonly reviewed in determining whether one having an ownership interest in a company also has a controlling interest. These include the ability to (1) appoint or change board

members and/or management; (2) set operational and strategic policy; (3) determine management compensation; (4) acquire, lease, or liquidate business assets or the company; (5) negotiate transactions; (6) change the articles of incorporation or bylaws; and (7) register securities for public offerings. (TX 153 at 14; Litvak Tr. at 248-49).

164. According to Accounting Principle Board Opinion No. 18, the ability to exercise significant influence over a company "may be indicated in several ways, such as representation on the board of directors, participation in policy making decisions, material intercompany transactions, interchange of managerial personnel, or technological dependency." (TX 153 at 11; *see also* Litvak Tr. at 243-45).

2. Corporate Officers

165. According to the SEC, "[a] strong indicator of control is often who holds the CEO position. A common CEO usually is a strong indicator that the businesses are under common management." (TX 153 at 12 (citing *SEC Views on Current Accounting and Reporting Issues 2001 Topic 1*); *see also* Litvak Tr. at 245).

166. At all relevent times, Alan, Doug, and Gordon Symons held the CEO position of at least one of the Corporate Counterdefendants. (Litvak Tr. at 245-46; TX 153 at 12 and Ex. 4; TX 78; TX 1193; TX 1207; TX 1272; TX 1310; TX 1320; TX 1334; TX 1407; TX 1413; TX 1417; TX 1422; TX 1504; TX 1531).

167. At all relevant times, Gordon Symons was the CEO and President of Granite Re and the Chairman and a director of each of the Symons corporate entities. (*See,*

e.g., TX 1189; TX 1193; TX 1197; TX 1207; TX 1224; TX 1272; TX 1310; TX 1315; TX 1320; TX 1324; TX 1330A; TX 1332; TX 1334; TX 1340; TX 1343; TX 1347; TX 1354; TX 1360; TX 1369; TX 1378; TX 1388; TX 1407; TX 1413; TX 1417; TX 1422; TX 1501; TX 1531).

168. From 1997-2001, Alan Symons was the CEO of Goran, SIG, IGF, IGFH, and Superior; Vice Chairman of SIG, Pafco, Superior, IGF, and Granite Re; President of Goran, IGF, IGFH, and Superior; and also served as a director for each entity. (TX 153 at 12, Ex. 4; TX 1193; TX 1207; TX 1238; TX 1272; TX 1310; TX 1320; TX 1330A; TX 1334; TX 1356; TX 1366; TX 1369; TX 1378; TX 1388; TX 1407; TX 1413; TX 1417; TX 1422; TX 1430; TX 1501; TX 1530A; TX 1531).

169. From 1997-2001, Doug Symons was the Executive Vice President, COO, and Secretary of Goran; President, CEO and COO of SIG; CEO and Secretary of Pafco; Vice Chairman, Executive Vice President, and Secretary of IGFH; CEO, Executive Vice President, and Secretary of IGF; Vice Chairmant of Granite Re; and a director of each affiliated company. (*See, e.g.,* TX 1193; TX 1207; TX 1226; TX 1238; TX 1272; TX 1310; TX 1320; TX 1334; TX 1356; TX 1407; TX 1413; TX 1417; TX 1422; TX 1430; TX 1501; TX 1531).

170. As noted previously, Alan Symons acted as the principal representative for each of IGF, IGFH, SIG, Goran, and Granite Re during the negotiation of the Acceptance transaction. (Daggett Dep. at 217; D. Symons Dep. at 253; Granite Re 30(b)(6) Dep. at 65-66; A. Symons Tr. at 511-12).

3. Board of Directors

171. The Symons Family collectively owned and controlled over 50% of the outstanding common stock of Goran, thereby enabling them to elect the Board of Directors of Goran and "to effectively control all of [Goran's] policy decisions." (TX 1 at 5).

172. The ability to control Goran in turn enabled the Symons Family to elect SIG's Board of Directors and "otherwise to influence significantly [SIG's] business and operations." (TX 1 at 5).

173. At all relevant times, Gordon Symons was the Chairman of the Board of Goran and all of its subsidiaries, including all Corporate Counterdefendants. (TX 153 at 12 and Ex. 4; TX 22; TX 77).

174. At all relevant times, the Symons Family were named directors and officers of each company. (TX 153 at 22 and Ex. 16; Litvak Tr. at 263-64).

175. The Corporate Counterdefendants shared directors in addition to the individual members of the Symons Family. For example, John McKeating ("McKeating") was a director of Goran and SIG. Gene Yerant ("Yerant") was a director of SIG, Superior, and Pafco. Gowdy was a director of IGFH and IGF. Daggett was a director of IGF, IGFH, Superior, and Pafco. Gregg Albacete ("Albacete") was a director of Superior, Pafco, and IGF. Robert Whiting ("Whiting") was a director of SIG and IGF. (TX 22).

176. The Corporate Counterdefendants shared officers besides the individual members

of the Symons Family. For example, Fonville was the Treasurer and CFO of Goran, SIG, Pafco, and Superior. Yerant was an Executive Vice President of Goran and SIG and President and COO of Superior and Pafco. As noted previously, Daggett was the CEO of IGF and IGFH. Gowdy was the President of IGF and IGFH. Albacete was Vice President and CIO of SIG and Superior. (*Id.*).

177. Pursuant to SEC rules, employees and officers of the companies (or their affiliates) on whose board they sit are not considered independent board members. (A. Symons Tr. at 591; TX 153 at 12; Litvak Tr. at 245).

a. IGF and IGFH Boards

178. At all relevant times, the IGF and IGFH Boards each consisted of Alan, Doug, and Gordon Symons, and two of the following: Daggett, Gowdy, Albacete, or Yerant. (TX 1412; TX 1416; TX 1421; TX 1423-28; TX 1499; TX 1507; TX 1511-12; TX 1530A-32; TX 1547). As noted previously, Daggett was the CEO of both IGF and IGFH, and the President and COO of NACU. Gowdy was the President of IGF and IGFH, and the Executive Vice President of NACU. Albacete was Vice President of Superior, SIG and Goran, and a director of Superior, Pafco, and IGF. Yerant was the President of Superior and Pafco, and Executive Vice President of SIG and Goran. (Litvak Tr. at 266-67; TX 22).

179. Yerant earned a salary of $500,000, and bonuses potentially in excess of $750,000. In addition, Yerant received a minimum of six weeks paid vacation per year, a luxury motor vehicle, and payment of monthly dues for a country club and a city

club, including all membership fees. (TX 1016 at 93-95). Yerant also received a $250,000 hiring bonus. (TX 1016 at 95).

180. Thus, there were no independent board members of IGF and IGFH; moreover, the Symons Family constituted a majority of the board members.

181. In 2000, the members of the IGF Board of Directors were: Alan, Doug, and Gordon, Daggett, and Gowdy. Daggett and Gowdy, as noted numerous times, were employees of IGF. The IGFH Board of Directors had the same composition. When Daggett resigned from IGF, he was replaced on the board by Albacete, the Vice President of Superior and SIG. When Gowdy resigned, he was replaced on the board by Yerant, who was the President of Superior and Pafco and Executive Vice President of SIG and Goran. (A. Symons Tr. at 593-95; Litvak Tr. at 266-67; TX 22 at 2).

182. On May 23, 2001, when the IGFH Board of Directors approved the sale of IGF to Acceptance, the only board members present and voting were Alan, Doug, and Gordon Symons. (TX 1424).

183. Both Albacete and Yerant were placed on the IGF Board of Directors to facilitate the sale of IGF's crop insurance business. (TX 94 ("As you know, I joined the IGF Board of Directors to allow the management directors to step out in order to facilitate the sale of the crop business."); A. Symons Tr. at 595-96). Both resigned from the Board on the date of the closing of the Acceptance/IGF transaction. (TX 94). Their resignations were announced in identical letters, which were drafted by

the Symons Family's lawyers. (*Id.*; *see also* A. Symons Tr. at 595-96).

b. Pafco Board

184. The Pafco Board consisted of Alan, Doug, and Gordon Symons, and Yerant, and, at differing times, either Daggett or Albacete. (TXs 1535-40). Daggett held officer positions with IGF, IGFH, and NACU. Yerant was the President and COO of both Pafco and Superior. Yerant was also the Executive Vice President of both Goran and SIG, for which he received a base salary of $500,000 plus a bonus in an amount up to another $500,000. Albacete was a Vice President and Director of several of the operating companies. (TX 22 at 2; TX 139 at 3). Thus, there were no independent board members of Pafco, and the Symons Family constituted a majority of the Board.

c. Granite Re Board

185. The Granite Re board consisted of Alan, Doug, and Gordon Symons, Trevor Carmichael, and Whiting. (TX 118). In addition, Whiting held the position of Vice President of Granite Re, was a director of SIG, and rendered "consulting services" to SIG in 2000 for which he received $15,000. (TX 22; TX 78 at 3). Thus, there was at most one independent board member of Granite Re, and the Symons Family consistituted a majority of the Board at all relevant times.

d. Superior Board

186. The Superior Board consisted of Alan, Doug, and Gordon Symons, and, at different times, Albacete, Daggett, Mark Paul ("Paul"), Yerant, or Jeff Reynolds

("Reynolds"). As noted above, Albacete held officer positions with SIG and Superior Insurance Group, and Daggett held officer positions with IGF, IGFH, and NACU. Paul was the CFO of SIG. Yerant was the President and COO of both Pafco and Superior, as well as Executive Vice President of both Goran and SIG. Reynolds was the Vice President of Marketing of Superior Insurance Group. (Litvak Tr. at 265; TX 22 ; TX 1545). Thus, there were no independent board members on the Superior Board of Directors.

e. SIG Board

187. The SIG Board of Directors included at various times Alan, Doug, and Gordon Symons, Yerant, Wechter, Whiting, and McKeating. As noted above, Yerant held officer positions with Pafco, Superior, Goran, and SIG. (Litvak Tr. at 265-266; TX 22). Whiting held an officer position with Granite Re. (TX 118).

188. Wechter was one of the non-Symons Family board members of SIG from 1998-2002. (Wechter Tr. at 695-96).

189. Wechter was asked to join the SIG Board by his friend and neighbor, Alan Symons. (*Id*. at 695, 703-04).

190. Alan Symons was one of the original investors in Wechter's company, Monument Advisors, and he continues to be a shareholder. (*Id*. at 704).

191. Alan Symons was a board member of Monument Advisors prior to the time Wechter became a SIG board member. (*Id*. at 704).

192. Because of his friendship with Alan Symons, Wechter tried to look after Alan

Symons' interests. (*Id*. at 704).

193. For example, Whiting raised an objection to the payment of $1.175 million for a non-compete agreement with Alan, Doug, and Gordon Symons in conjunction with the Acceptance sale. Wechter blind copied Alan on the email so that Alan would know what was being said about him. (*Id*. at 704-05; *see also* TX 60; TX 61).

194. Alan Symons then sent the email to Doug and Gordon Symons in which he stated, "Bob [Whiting] is not only a liar but is trying to run our show . . . I find it hard to deal with liars and people who go behind your and my back with improper info. We need to get more Larry Wechter[s] on our board. They are [at] least looking after our interest. Larry blind copied me on Bob[']s email." (TX 60).

195. In May 2001, all of the directors except Whiting signed the consent of the SIG Board approving the Acceptance transaction. (TX 1384).

f. Goran Board

196. The Goran Board consisted of Alan, Doug, and Gordon Symons and three other members, including McKeating. (TX 22; TX 1233; TX 1234; TX 1238; TX 1245; TX 1249; TXs 1252-56). As Chairman, Gordon Symons had the ability to break any tie votes. (Litvak Tr. at 265; TX 22). Given that a Symons Family member had the tie-breaking vote and that the majority directors were not independent, the Symons Family had the power to obtain the results they wanted. (Litvak Tr. at 263).

g. Board Objections

197. Non-Symons Family directors McKeating, Whiting, and Fonville objected to Symons Family proposals on two occasions after CCC filed this lawsuit. In July 2001, McKeating, Fonville, and Whiting objected to: (a) a loan to Gordon Symons and (b) Doug Symons' request that certain payments be made to the Symons Family for non-compete agreements. (TX 120; TX 123; TX 124; *see also infra* Findings of Fact # 211, 246-47). With respect to the loan to Gordon Symons, Fonville made clear that his concern about "the appearance of preferential payments to controlling interests" was due to the pendency of this litigation: "Pending litigation is in fact questioning the validity of transactions amongst the group of companies and this [loan] raises additional concerns in the face of such litigation." (TX 124). Despite this purported opposition, Gordon Symons received the loan. (TX 1270). With respect to the non-compete agreements with Alan, Doug, and Gordon Symons, the SIG Board of Directors successfully blocked that transaction. (TXs 1260-67; D. Symons Tr. at 740-41; Wechter Tr. at 702).

4. Summary

198. As shown above, at all relevant times, the Symons Family had the ability to control the decisions of the Boards of Directors of IGF, IGFH, Granite Re, Pafco, Superior, SIG, and Goran. The Symons Family retained the chairmanship of each of their boards, with the power to break any ties, and held either a majority of the seats on the board, or a co-equal number of board seats (with the vote of the

Chairman breaking ties). In addition, the Symons Family appointed non-independent directors (frequently employees of the Corporate Counterdefendants) as the remaining board members. Further, through their control as majority or 100% owners of each entity, the Symons Family had the ability to remove any non-Symons family member from each Board at any time.

199. The court therefore finds that the Symons Family had the ability to, and did in fact, dominate and manipulate the other board members so as to ensure that all board members voted consistent with the interests of the Symons Family over the interests of the Corporate Counterdefendants on whose board they sat.

B. The Symons Family Improperly Controlled the Management and Financial Operations of Each Corporate Counterdefendant

200. While not involved in the day-to-day operations of the Corporate Counterdefendants, the Symons Family frequently acted to override the critical decisions of the management of the Corporate Counterdefendants, in particular, as they related to accounting and regulatory reporting. (TX 153 at 24; Litvak Tr. at 277).

201. Although Daggett was CEO of IGF and Michael Jones ("Jones") was IGF's CFO and a CPA, Alan Symons injected himself into the recording of accounting entries on IGF's books – despite the fact that Alan Symons was not a CPA and had no accounting education, training, or experience. (Litvak Tr. at 278; A. Symons Tr. at 613; TX 22).

202. Jones testified: "At certain points Alan would make his opinions strongly made to us and give – there were some instructions on how to book certain items, yes." (Jones Dep. at 128; TX 153 at 24; *see also* Jones Dep. at 27).

203. Alan Symons requested that Jones make a false representation to the FCIC regarding IGF's year 2000 estimated underwriting gain that was substantially higher than estimates that Jones had already prepared, which calculated the gain at $25-$26 million. When Jones expressed his concerns, Alan Symons told him, "[O]n the 12/31/2000 [sic] I want the UW gain dialed in at $31.5 [million]." (Jones Dep. at 122-23 and Ex. 7; *see also id.* at 169). The actual underwriting gain realized by IGF was closer to Jones' estimate of $25 to $26 million. (Jones Dep. at 168-69; TX 153 at 26; Litvak Tr. at 281-83).

204. SIG officers also pressured Jones to prepare false financial statements, which would be filed with the IDOI. Jones refused to sign the 2000 financial statements, and ultimately resigned as a result. Jones disagreed with the manner in which Alan Symons wanted to treat the signing bonuses, the valuation of the CNA put, and reserves for two separate products for potato revenue and business interruption. (Jones Dep. at 10-11; A. Symons Tr. at 610; D. Symons Tr. at 761).

205. Daggett and John Sheeley ("Sheeley"), General Counsel and Secretary of IGF, also refused to sign the 2000 financial statements. Daggett resigned soon thereafter for several reasons. (D. Symons Tr. at 762; D. Symons Dep. at 244-45; Jones Dep. at 194-96; Daggett Dep. at 200-01, 203-07; Litvak Tr. at 281-82).

206. Alan Symons also directed Jones on how to account for certain transactions on IGF's financial statements. In one instance, Alan Symons instructed Jones to book a payment made from IGF to SIG for an estimated premium tax, which was booked as a receivable back to IGF. This would have been appropriate if this amount was paid back but, to Jones' knowledge, it was not paid back. (Jones Dep. at 128-30).

207. Alan Symons also directed Jones to reduce the amount of a reinsurance account payable by approximately $200,000, and this amount was booked in the 2000 annual statement. Jones did not agree with this reduction because Alan Symons did not provide any evidence or documentation to support it. (*Id*. at 130-32).

208. In a March 8, 2001, email from Alan Symons to Jones, Alan Symons sought to override his CFO's views on how certain financial numbers should be recorded. "Mike [Jones], I thought you were on the same team as all of us . . . . Since it is my company and I am satisfied that we have run all the traps, them [sic] if Earl [Fonville] gives you the numbers they are going to be entered into the Yellow book. Right." (TX 47).

209. As noted above, in April 2001, SIG board member Whiting challenged the manner in which Alan Symons wanted to structure the Acceptance sale. (TX 61; *see also supra* Finding of Fact # 193). Alan Symons wrote to Doug and Gordon Symons and called Whiting a "liar," and accused him of "trying to run our show." (TX 60; *see also supra* Finding of Fact # 194).

210. In September 2001, shortly after the funds from the Acceptance sale were wired to the appropriate Corporate Counterdefendants, Goran opened an investment trading account. Only Alan and Doug Symons had authority to act on behalf of Goran in connection with such accounts. (TX 1275).

211. In a July 5, 2001 email, Doug Symons instructed Fonville, SIG's CFO, to prepare wire transfers to pay the Symons Family members $1,175,000 for their non-compete agreements (even though the stated compensation for their non-competes was $1.00) and other improper payments related to the sale – despite Fonville's stated desire to wait for Board approval. (*See supra* TX 121). As noted above, the SIG Board of Directors denied that request. (*See supra* Finding of Fact # 197).

212. As discussed more fully in Section E and G, *infra*, the Symons Family members controlled and manipulated other directors for their own personal advantage and caused the Symons' operating companies to make false representations to regulatory bodies and the general public. Each of these actions constituted improper control of the management and financial operations of the Symons' entities.

C. The Corporate Counterdefendants were Insolvent and Undercapitalized Before and at the Time of the Acceptance Transaction

213. Jeff Litvak ("Litvak") testified as an accounting and valuation expert on behalf of CCC. Litvak is a CPA, CFF, and ASA in business valuations, with 35 years of experience in public accounting, auditing, valuation, and forensic consulting, and

specializes in accounting and valuation matters, including unity of interest/separateness matters. (TX 153, App. A). Litvak has been found qualified to testify in approximately 75 matters on damages, valuation, and alter ego issues. (*Id*; Litvak Tr. at 235-36). Litvak testified with respect to the Counterdefendants' undercapitalization and insolvency, as well as other unity of interest, separateness, and alter ego issues.

214. The Counterdefendants presented no expert accounting evidence or any rebuttal to Litvak's opinions. Their only evidence regarding accounting issues came from Alan and Doug Symons, neither of whom have any formal training, education, or experience in accounting. (A. Symons Tr. at 498, 613; D. Symons Tr. at 756-57 (finding that Doug Symons' testimony regarding accounting issues was permitted only as percipient testimony)).

215. Undercapitalization refers to a situation where a business does not have enough capital to carry out its normal business function. (TX 153 at 15). To determine whether or not an entity is undercapitalized, accountants consider whether or not an entity's total liabilities exceed total assets. If so, a firm is said to be balance-sheet insolvent and is deemed to be undercapitalized by that very fact. (*Id*.). Accountants may also view whether current liabilities exceed current assets, a situation commonly termed to be a working capital deficiency, or equitable insolvency. A working capital deficiency may also render the entity to be undercapitalized. (*Id*. at 15-16).

216. Under both the Indiana Fraudulent Transfer Act and federal bankruptcy law, an entity is insolvent if it is either balance-sheet insolvent or equitably insolvent. The Indiana Fraudulent Transfer Act applies bankruptcy law principles in determining whether a person or entity is insolvent. *See, e.g., In re First Fin. Assoc., Inc.*, 371 B.R. 877, 899 n.1 (Bankr. N.D. Ind. 2007) (noting that many of the UFTA provisions were derived from Bankruptcy Code).

1. SIG, Goran, IGF, Superior, and Pafco Were Balance-Sheet Insolvent

217. Goran and SIG were balance-sheet insolvent for the years 1999, 2000, 2001, and 2002. (TX 153 at 15-16). In 1999, 2000, 2001, and 2002, Goran's total liabilities exceeded its total assets by $12.9, $72.7, $89.1, and $90.8 million, respectively. (*Id*. and Ex. 8; Litvak Tr. at 254-55). In 1999, 2000, 2001, and 2002, according to its own financial statements, SIG's total liabilities exceeded its total assets by $25.0, $112.4, $144.0, and $178.9 million, respectively. (TX 153, Ex. 8). These balance sheets were attested to by the Symons Family in their submissions to the SEC. (TX 1016; TX 1026; TX 1043; TX 1095; TX 1106; TX 1116; TX 1137).

218. In addition to the insolvency shown on Goran's and SIG's balance sheets, SIG, IGFH, and IGF each owed over $29 million plus interest to CCC as of January 2001 in connection with CCC's exercise of the Put and the Counterdefendants' resulting debt for the sale of CCC's business to IGF. (Litvak Tr. at 253-54). This debt had not been included on IGF's, SIG's, or Goran's (consolidated) books, and

rendered SIG and Goran balance-sheet insolvent by an additional $29 million. (*Id.*).

219. IGF's balance sheet, as prepared by the Symons Family and its auditors, showed a slightly positive amount from 2000, 2001, and 2002 ($8.8, $2.3, and $0.6 million, respectively). (TX 153, Ex. 8; TX 1465; TXs 1483-85; TXs 1488-89). However, when the $31 million obligation to CCC is properly reflected on IGF's balance sheet, IGF is substantially insolvent as of January 2001 and continuing thereafter to the present by at least $31 million plus interest. (Litvak Tr. at 253).

220. While the Symons Parties are now claiming that the SIG trust preferred liability should be treated as equity and disregarded in calculating the insolvency amount of SIG, SIG's financial statements properly treated the Trust Preferreds as "debt." (Litvak Tr. at 326-28). Those financial statements were prepared by SIG's own auditors and each 10-K and 10-Q was attested to by a Symons Family member and were submitted to the SEC by the Symons themselves. (TX 1016; TX 1026; TX 1043; TX 1095; TX 1106; TX 1111; TX 1137). Moreover, Fonville, SIG's CFO through July 2001, also characterized the trust preferreds as "the debt that SIG had outstanding." (Fonville Dep. at 134).

221. Litvak testified that, while trust preferreds have some characteristics of both debt and equity, these types of trust preferreds are generally treated as debt, not equity. (Litvak Tr. at 326-28). The SEC's 10-Ks reported the trust preferred securities outside and above the heading "Shareholders Equity" on the balance sheet and

described them as "mandatorily redeemable preferred securities" and as "senior subordinated notes of the company." (*See., e.g.*, TX 1106, Ex. 13 at 20, 21, 23; Litvak Tr. at 327). As such, in this instance, Litvak correctly treated the trust preferreds as debt. (*See* FASB No. 150 at 18 ("[B]ecause the trust preferred securities are mandatorily redeemable and represent obligations to transfer assets to redeem the shares, those instruments are classified as liabilities in the consolidated financial statements of the financial institution, and payments or accruals of 'dividends' and other amounts to be paid to holders are reported as interest cost"); *see also id.* at 10, 36; SEC Accounting Rule 268, issued July 27, 1979 (With respect to "preferred stock subject to mandatory redemption requirements . . . a general heading, stockholders equity, is not to be used and a combined total for equity securities, inclusive of redeemable preferred stocks, is prohibited"); *Wiley, Interpretation and Application of GAAP* at 867 ("Mandatorily redeemable instrument . . . requires the issuer to transfer assets to the holder in exchange for cancelling the instrument . . . . In accordance with FAS 150, such instruments are considered liabilities and are not classified as equity. . . ."). Here, the preferred securities, by the very description on SIG's balance sheets, were "mandatorily redeemable," required the transferor of assets to redeem them at a date certain, and the payments due thereon were reported as "interest," not dividends. (*See* TX 1106, Ex. 13 at 20, 21, 23). Thus, the Counterdefendants' assertion that the SIG trust preferreds should have been treated as equity is without

merit.

222. In any event, regardless of the treatment of the SIG trust preferreds as debt or equity, SIG was balance-sheet insolvent in 2001 and 2002 because its total liabilities exceeded its total assets without consideration of the trust preferreds. (TX 153, Att. 10). Further, again without consideration of the trust preferreds, SIG, IGFH, and IGF (and, as consolidated, Goran) were balance-sheet insolvent as of CCC's exercise of the Put in January 2001, and continuing through the Acceptance sale in June 2001 to the present. (Litvak Tr. at 252-54; *see also* TX 153 at 8). As such, SIG, Goran, and IGF were *ipso facto* undercapitalized before and after the Acceptance sale.

2. The Corporate Counterdefendants Were Equitably Insolvent

223. Equitable insolvency is indicated when a party has a working capital deficiency, i.e., it is unable to pay its current obligations as they become due. (TX 153 at 16-17).

224. Based on the information provided in the Goran 10-K, each of Goran, SIG, Pafco, Superior, and IGF suffered substantial working capital deficiencies each and every year from 1999-2002, except for 2001 in the case of Goran and SIG. (*Id.* at 17-18 and Exs. 8-13; Litvak Tr. at 253). IGF's working capital deficiency was $16.0, $21.9, $4.7, and $3.9 million in 1999-2002, and would have been even greater in 2001 (changing from a deficiency of approximately $5 million to almost $34 million) if IGF's obligation to CCC were properly considered. (TX 153 at 18).

225. As a result, each of Goran, SIG, IGF, Superior, and Pafco were equitably insolvent and undercapitalized during the years 1999-2002. (*Id*. at 17-18; Litvak Tr. at 258).

3. Each Entity Had Substantial Operating Losses Each Year

226. Goran, SIG, and Superior all showed substantial losses from continuing operations each year from 1999-2002. IGF showed a substantial loss from continuing operations each and every year from 1999-2001, and a minimal gain in the year 2002 following the Acceptance sale. (TX 153 at 30 and Exs. 6, 8; Litvak Tr. at 256-57).

227. Goran, SIG, Pafco, and Superior also showed substantial cash flow income losses from continuing operations each year from 1999-2002. IGF showed cash flow income losses from continuing operations of $21.7 and $12.9 million in 2001 and 2002, respectively. (TX 153 at 19 and Exs. 7, 8; Litvak Tr. at 257).

4. The Corporate Counterdefendants Ceased to Be Going Concerns

228. An entity that is both balance-sheet and equitably insolvent, while sustaining operating losses (and which is likely to sustain future operating losses) has essentially ceased to be a "going concern." (TX 153 at 19; Litvak Tr. at 258).

229. Per AICPA auditing standards, an auditor has a responsibility to evaluate whether there is substantial doubt about an entity's ability to continue as a going concern for the next year. Where an auditor has concerns regarding a company's ability to sustain profitable operations and exist for the next year, the auditor should issue a going concern opinion in conjunction with the annual audit. (TX 153 at 12; Litvak

Tr. at 246-47).

230. With respect to insurance company audits, factors which an auditor may identify which could indicate doubt about an entity's ability to continue as a going concern include recurring operating losses, strained liquidity, undercapitalization, failure to meet contractual requirements, concern expressed or action taken by regulatory authorities, and indication of strained relationships between management and regulatory authorities. (TX 153 at 13; Litvak Tr. at 246-47).

231. In 2001, Goran's auditors noted that Goran's financial statements were "affected by conditions and events that cast substantial doubt on the company's ability to continue as a going concern." Moreover, in 2001, SIG's auditors issued a going concern opinion which expressed doubts as to "the Company's ability to continue as a going concern given the recurring operating losses experienced by the Company over the past few years and the Company's net capital deficiency." (TX 130 at 3; TX 131 at 15; TX 145 at 1, 2).

232. A Z-score is a calculation used by financial professionals to evaluate the financial health of an entity and to determine the likelihood of an entity going into bankruptcy. (TX 153 at 20-21; Litvak Tr. at 259). A Z-score below 1.8 indicates a 95% likelihood that an entity will file for bankruptcy within one year. (TX 153 at 13; Litvak Tr. at 259-60).

233. SIG, Goran, Superior, IGF, and Pafco each had Z-scores below 1.8 in each of the years 1998-2002. Indeed, the combined 5-year average for the Z-scores was

negative 1.1. (TX 153 at 20-21; Litvak Tr. at 259-60).

234. As a result of the foregoing, the entities "were (1) balance-sheet and equitably insolvent; (2) not [] going concerns; and (3) their likelihood of going bankrupt [was] very high." (TX 153 at 21). Thus, during the 1998-2002 time period, Goran, SIG, Pafco, Superior, and IGF were "undercapitalized" and their continued existence was dependent upon their ability to obtain funding from alternative outside sources, given that their operations were unprofitable. (TX 153 at 21; Litvak Tr. at 260-61).

235. Accordingly, IGF, IGFH, SIG, Goran, Superior, and Pafco were all undercapitalized from 1999 to the present.

D. Existence of Common Officers, Directors and Employees

236. The Corporate Counterdefendants shared common officers, directors, and employees. As discussed in Section A above, the Symons Family served as controlling directors for each Symons corporate entity from 1986-2002. (TX 153 at 22-23 and Exs. 4 and 16).

237. The Symons Family held all of the highest level corporate officer positions for each entity including Chairman, President, Vice Chairman, CEO, COO, Executive Vice President, and Secretary for each of their companies. (*Id.*). Generally, each individual always held at least one officer role for each company over the entire period. (*Id.*).

238. Several entities within the Symons Family entities do not have employees,

including Corporate Counterdefendants Superior, Pafco, and IGF. (*Id.*).

E. The Counterdefendants Improperly Commingled Assets

1. Funds from the Corporate Counterdefendants Were Used to Pay the Personal Obligations of Alan, Doug and Gordon Symons

239. Alan, Doug, and Gordon Symons borrowed money – unsecured and interest-free – from the Symons-related entities.[8]

240. From 1999 to 2002, the Symons Family, on the Goran proxy date, had outstanding loans on an aggregate basis from Goran and its subsidiaries ranging from $2,261,628 to $8,556,872; the largest aggregate loan balances during the year ranged from $3,359,655 to $9,488,825. (TX 153 at 29, and Ex. 17; TX 1006; TX 1016; TX 1025; TX 1026; TX 1040; TX 1042; TX 1043; TX 1054; TX 1055; TX 12 at 3, 7; TX 129 at 4; TX 134 at 2-3). The difference in loan balances at the proxy date and at other times during the year indicates that there was an effort to pay down the outstanding balances as much as possible before the proxy date. (Litvak Tr. at 291-92).

241. As of December 31, 2001, the total amount due from directors, officers, and related parties as shown in the Goran 2001 Annual Statement was $12,616,000, with $11,486,000 reserved for bad collectibles. (TX 153 at 30; Litvak Tr. at 293).

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[8] While the Counterdefendants have given testimony that the loans were all properly approved and documented, the Goran and SIG filings with the SEC make it clear that many of the loans were unsecured, interest-free, and made without a promissory note. (*See, e.g.*, TX 121; TX 139; TX 140). The only evidence with regard to whether the loans have been paid off, since document discovery in this case ended in 2003, is the undocumented and unsupported testimony of Alan Symons.

Loans made to the Symons Family, which were not repaid and which were offered interest free, effectively increased the Symons Family's compensation, while potentially hiding reportable taxable income. (TX 153 at 30; Litvak Tr. at 293).

242. In addition to making personal loans to the Symons Family, Goran frequently guaranteed loans to the Symons Family. For example, in April 1999, Goran pledged trust preferred shares of SIG held by Goran's subsidiary Granite Re to guarantee personal loans from an unrelated third party (Huntington Bank) to Alan Symons in the amount of $1,525,000 and to Doug Symons in the amount of $980,000, for a total in excess of $2,500,000 million. (A. Symons Dep. at 217-18, 221; TX 12 at 8). The proceeds from those personal loans were intended for the repayment of personal loans previously made to Alan and Doug Symons by SIG and Goran. The key condition of Huntington Bank's willingness to make these loans was a corporate guarantee by Goran. (TX 153 at 30; Litvak Tr. at 292).

243. In November 2000, Goran loaned an additional $1,000,000 collectively to Alan and Doug Symons for the purpose of paying down their personal loans to Huntington Bank, so as to release the previously pledged trust preferred shares of SIG as collateral. (TX 153 at 30; A. Symons Tr. at 599; Litvak Tr. at 292-93). On April 19, 2001, Goran loaned an additional $750,000 collectively to Alan and Doug Symons for the purpose of paying down their personal loans to Huntington Bank. (TX 153 at 30; A. Symons Tr. at 599; Litvak Tr. at 293). By letter dated July 12, 2001, from Huntington Bank, the loans were in payment and collateral

default. (TX 153 at 30; Litvak Tr. at 293).

244. These types of financial transactions were not always approved by the respective board of directors until after the loan(s) had been made. (*See* TX 120 (J. McKeating July 4, 2001, email stating, "I, for one, do not wish to be put in the position of ratifying such actions after the fact, as we have had to do in other various situations regarding loans and advances.")).

245. In July 2001 – after this action was filed – the Symons Family requested that the Symons entities fund a short-term $1.2 million loan to Gordon Symons, to be secured by Gordon's Bermuda home, with repayment contingent on the sale of the home. On July 11, 2001, McKeating, a director of Goran and SIG, said in response to the request that "any interim loan should be refused." (TX 123; A. Symons Tr. at 600; A. Symons Dep. at 220). In that same email, McKeating expressed dismay at Alan Symons for telling him that Goran Board member Ross Schofield and SIG Board member Whiting both supported the loan, when McKeating later received an email from Schofield stating, "I'm having great difficulty in supporting this issue," and from Whiting stating, "I'm sorry I wasn't able to support your suggestion." (TX 123).

246. Despite these objections, the loan was nevertheless made and documented by "unanimous written consent," dated July 17, 2001, which authorized the loan in an amount of up to $1.2 million, although Gordon Symons only required $800,000 at this time. (TX 1270).

247. On July 19, 2001, Fonville, the CFO and Treasurer of Goran and SIG, stated his objection to the funding of the loan in an email to Alan and Doug Symons:

> Alan, as we discussed this morning, I want to again express my disapproval of the $1.2 million loan from Granite Re to Mr. Gordon Symons and the related draw on the note of $800,000. Although the Board has approved the note, I do not believe the loan to be in the best interest of Goran for the following reasons:
>
> 1. There is no stand alone business reason for the Corporation to fund the loan;
>
> 2. The loan reduces liquidity of Goran on a consolidated basis and reduces the company's ability to loan funds to SIG (it's [sic] majority owned sub) in the event the operating needs arise;
>
> 3. The loan is unsecured;
>
> 4. The loan increases the appearance of preferential payments to controlling interests, and;
>
> 5. pending litigation is in fact questioning the validity of transactions amongst the group of companies and controlling interests and this note raises additional concerns in the face of such litigation.
>
> For the above reasons, I have noted my objection to the $800,000 loan funded today at your direction.

(TX 124).

248. On July 24, 2001 – 5 days after his objection was noted – Fonville resigned, stating in his resignation letter: "As I expressed to Alan last week, my goals for the company and the goals of executive management (Alan Symons, Doug Symons, and Gene Yerant) are increasingly disparate." (Fonville Dep. at 146-47, and Ex.

19).

249. Also, as mentioned previously, board members McKeating and Whiting sent various emails regarding Alan, Doug, and Gordon Symons' recommendation that they be paid $1.175 million in non-compete agreements as a result of the Acceptance transaction. (TXs 120, 123, 124; *see also supra* Findings of Fact ## 197, 211). In the July 5, 2001, email, McKeating stated:

> I don't see a problem with a small loan, as you suggest, to carry them over. But the siblings' bad decisions are not the problems of the shareholders. Let's keep an open mind. If we can help the family and still stay within legal boundaries, I have no problem. But, I will not expose the Company nor myself to the consequences of anything improper, as the suggestions of the last two days certainly were.

(TX 1267).

250. Whiting expressed his own concerns at that time:

> If you refer to Doug's message to Gene [Yerant] yesterday, you'll see that the cash position is Goran 4.5 million, Granite 5.8 million for a total of 10.3 million. I disregard the Superior & SIG money as working capital. That's everything we have to keep the business going, answer claims and lawsuits and buy back TPs [trust preferreds]. It would be the height of bad stewardship to use any of these meag[er] resources to pay the boys for something which is not an obligation of the company. They benefit far more from a TP buyback, and I can't understand their reluctance to do so.

(*Id.*).

251. Despite these objections, Doug Symons nevertheless instructed Fonville to prepare the $1.175 million wire transfer. (TX 121). (However, as noted in Finding of Fact

197, the Board of Directors did not allow the transaction to go through).

2. Symons Family Salary and Fees

252. From 1998 through 2002, Gordon Symons collected over $2,200,000 in salary and consulting fees from Goran, SIG, and Granite Re. (*See, e.g.*, TX 139 at 2-3).

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

254. From 1998 through 2002, Doug Symons collected over $2,100,000 in salary and bonuses from Goran and SIG. (*Id.*).

255. Doug Symons' employment agreement with SIG beginning in 1999 called for a salary of not less than $375,000, with a bonus of up to an additional $375,000. The 1999 employment agreement provided for five weeks paid vacation, a country club membership (including payment by the Company of all expenses at the club), and a social club membership. (TX 1116, Ex. 10.5).

256. After Alan retired as Goran's CEO in 2002, Goran and Granite Re entered into a consulting agreement with AGS Capital Ltd. ("AGS Captital"), of which Alan Symons is the owner and President, calling for annual payments of at least $500,000 per year, plus benefits. (TX 1007, Ex. 10.29).

257. After Alan Symons retired, Doug Symons assumed his duties as CEO of Goran and SIG. Doug Symons' employment agreement called for an annual salary of not less than $500,000, plus a bonus of up to an additional $500,000. He also received not less than five weeks paid vacation, a vehicle "commensurate with Executive's

position," a "golfing membership at various country clubs, . . . including payment by the Company of all charges incurred by Executive at such club," and a "resident membership at the social club of Executive's choice." (*Id*., Ex. 10.30, Section 2).

258. According to Goran's December 31, 2002, 10-K filing, Granite Re paid $400,000 to companies owned by Gordon Symons, and there was an additional $448,672 of other compensation paid by Goran and Granite Re to Gordon Symons. In that same year, Alan Symons was paid a total of $464,119, including a consulting fee of $182,000 paid to SIG Capital Fund, Ltd. ("SIG Capital Fund"), and $282,068 paid between Goran, Granite, and AGS Capital. (*Id*. at 34-35). Both SIG Capital Fund and AGS Capital were owned by Alan Symons. (Granite Re 30(b)(6) Dep. at 97).

259. Despite the precarious financial condition of the Symons-related companies and the large debt owed to CCC, the Symonses chartered a private airplane to "facilitate the transportation on the [Acceptance] transaction." (D. Symons Tr. at 788-89; A. Symons Tr. at 609-10; TX 98). As a result, the Symons Family sought to transfer nearly $1,000,000 from IGF to pay for the airplane and "legal [fees]." (TX 98).

3. Transfers of Funds Among Symons-Owned Companies

260. Alan Symons set up a structure for the Symons Family companies whereby employees of IGF, Superior, and Pafco were on the same payroll as, and paid by, IGFH, a holding company. (Litvak Tr. at 270; TX 153 at 23; Daggett Dep. at 217-

18). The purpose of the arrangement, according to Daggett, was to facilitate the "movement of money and those kind of things. It was a structure that Alan had put together." (Daggett Dep. at 218).

261. In 2001 when the operating companies – IGF, Superior, and Pafco – were incurring multi-million dollar annual losses and were significantly undercapitalized, holding companies IGFH, SIG, and Goran received in excess of $43 million from the operating companies through management agreements and service contracts between the entities. (TX 153 at 29; Litvak Tr. at 289-90; A. Symons Tr. at 611; TX 135 at 109).

262. The fact that the Symons-related subsidiaries were incurring substantial losses and were undercapitalized during this time period demonstrates the lack of economic substance of these management agreements – *e.g.*, these agreements evidence a clear effort by the parent companies to siphon funds from their subsidiaries under the guise of management agreements. (TX 153 at 28-29; Litvak Tr. at 289-90 (the fact that $43 million was being withdrawn given the financial condition of the entities and that they were all highly leveraged or insolvent is "unusual and highly suspect")).

263. Through December 31, 2001, Granite Re and Granite Insurance Company purchased $40.46 million of trust preferred securities. In June 2001, Granite Re purchased $14,460,000 in SIG trust preferreds for $1,460,000. (TX 1261). An additional $26.5 million worth of trust preferred securities were purchased by

Granite Re for only $2.39 million in March 2002. (TX 1016; TX 153 at 27; Litvak Tr. at 284-85). These transactions show that Symons-related entities were in financial trouble and were moving cash around in order to cover obligations. (Litvak Tr. at 285).

264. On March 1, 2001, and June 5, 2001, IGF and SIG entered into separate but related agreements for the sale to SIG of certain IGF assets. Pursuant to those agreements, SIG acquired certain assets from IGF and then leased them back to IGF on the same date. SIG later resold those assets back to IGF for $1,041,637.28 and agreed to terminate the lease. In other words, the same assets were moving back and forth between the companies. (TX 105; TX 153 at 27; Litvak Tr. at 286-87).

265. In 2001, Superior, Pafco, and IGF engaged in over $1,000,000 in inter-company purchases, sales, or exchanges of loans, securities, real estate, mortgage loans, or other investments. (TX 135; TX 153 at 27).

266. During 2000, IGF and Superior ceded over $7.5 million in premiums to Granite Re. (TX 1115 at 6). Granite Re had only $7.8 million in net premiums in 2000. (TX 1289 at 13).

267. In 2001, Granite Re earned approximately 80% of its revenue from IGF, Superior, Pafco and other SIG subsidiaries. (D. Symons Tr. at 763). Five of Granite Re’s seven customers were Symons Family entities. (Goran 30(b)(6) Dep. at 17).

268. SIG charged IGF approximately $1.5 million for expenses related to the Acceptance transaction. (TX 98).

4. Inter-Company Loans

269. In addition to inter-company transactions, the Symons entities also engaged in various inter-company loans. For example, on November 28, 1998, Superior loaned IGF $5,500,000, Pafco loaned IGF an additional $1,500,000, and Granite Re loaned IGF an additional $3,000,000. (TX 35). This represented a total of nearly $12 million coming into IGF at those times. (TX 153 at 28; Litvak Tr. at 287-88).

270. While the 1998 transactions were noted as receivables and payables on the 1998 books of Superior, Pafco, and IGF, as of December 31, 1999, these line items were no longer booked on the balance sheet, suggesting that IGF repaid the intercompany loans during 1999. (Litvak Tr. at 288). Yet, it is not apparent where IGF obtained the funds to fulfill its obligations under the notes, since IGF's cash flow statements revealed the inability to generate funds from operations. (TX 153 at 28; Litvak Tr. at 288).

271. Symons International Group, Ltd. ("SIGL"), a company owned by Alan, Doug, and Gordon Symons, had an outstanding, non-interest bearing loan from Goran for $1,466,000 as of December 31, 2000. (TX 78 at 3). The following year, SIGL's indebtedness to Goran increased to $2,053,000. (TX 134 at 2). Also during 2001, Goran paid SIGL an additional $900,000 in purported consulting fees and provided an interest free loan to a wholly-owned subsidiary of SIGL in the amount of $3,340,000, which was still outstanding as of December 31, 2001. (*Id.*).

272. In late 2001, at a time when Superior was equitably insolvent, Superior obtained a line of credit from Granite Re in the total amount of $2.5 million. As of December 31, 2002, $1.3 million was outstanding under that line. (Litvak Tr. at 285-86; TX 153 at 27).

273. Thus, the Symons Family and their corporate entities commingled assets and liabilities. (TX 153 at 29).

F. The Corporate Counterdefendants Did Not Observe Corporate Formalities

1. The Corporate Counterdefendants Shared a Common Address and Business Purpose

274. Many of the Symons Family entities have similar corporate names. (*Id*. at 22 and Ex. 1).

275. At all relevant times, Goran's U.S. Headquarters shared a common business address at 4720 Kingsway Drive, Indianapolis, Indiana, 46205, with SIG, IGF, IGFH, Pafco, and Superior. (*Id*. and Ex. 15). SIG, Goran, IGF, and Pafco all listed this address as their "Statutory Home Office," "Main Administrative Office," and as the "Primary Location of Books and Records" on various financial statements submitted to state regulatory agencies and on SEC filings. (*See, e.g.*, TX 80; TX 94; TX 127; TX 128; TX 131; TX 145; TX 146). This location was also identified as the location of the "U.S. Head Office" on the Goran letterhead. (TX 81). Alan and Doug Symons maintained their offices as top officers of each Symons Company at the same Indianapolis address.

2. Various Symons Family Companies Held Simultaneous Board Meetings

276. GAAP recognizes the importance of reporting transactions and events in accordance with their substance. Accordingly, auditors are required to consider whether the substance of transactions or events differs materially from their form. (TX 153 at 13; *see also* Litvak Tr. at 247-48). Statement of Financial Accounting, Concept No. 2, states that "the quality of reliability and, in particular, of representational faithfulness leaves no room for accounting representations that subordinate substance to form." (TX 153 at 13).

277. The corporate formalities purportedly observed by the Symons-related entities were mere form as opposed to substance. (Litvak Tr. at 262-63).

278. During the period from March 1, 1997, to May 30, 2001, there were at least eighteen instances where Goran and SIG held concurrent Board of Directors meetings. (*See* TXs 1189 and 1315 (Mar. 19, 1997); TX 1197 and 1324 (Aug. 25, 1997); TXs 1200 and 1327 (Nov. 5, 1997); TXs 1203 and 1332 (Mar. 9, 1998); TXs 1216 and 1340 (Aug. 4, 1998); TXs 1217 and 1341 (Oct. 8, 1998); TXs 1220 and 1343 (Nov. 4, 1998); TXs 1224 and 1347A (Mar. 8, 1999); TXs 1226 and 1348 (Mar. 31, 1999); TXs 1227 and 1350 (Apr. 13, 1999); TXs 1230 and 1354 (Aug. 10, 1999); TXs 1234 and 1356 (Nov. 2, 1999); TXs 1239 and 1357 (Jan. 19, 2000); TXs 1240 and 1360 (Mar. 15, 2000); TXs 1243 and 1364 (May 30, 2000); TXs 1247 and 1366 (Aug. 9, 2000); TXs 1249 and 1369, 1370 (Nov. 8, 2000); TX

1252 and 1373, 1374 (Apr. 10, 2001); TXs 1256 and 1378 (May 23, 2001)). In fact, other than one concurrent Board of Directors meeting between IGFH and SIG on May 20, 1998, every SIG and Goran Board of Directors meeting was held concurrently. (*Id.*; *compare* TX 1413 (IGFH Board of Directors meeting, May 20, 1998), *with* TX 1334 (SIG Board of Directors meeting, May 20, 1998)).

279. From May 1, 1998, to May 30, 2001, there were at least three instances where IGF and Superior held concurrent Board of Directors meetings. (TX 5). On at least one of those occasions, IGFH and Superior held a concurrent Board of Directors meeting with Pafco and IGF. (*Id.*). Moreover, IGFH and IGF held at least two concurrent Board of Directors meetings between 2000 and 2001. (*Compare* TX 1422 (IGFH Board of Directors meeting, May 31, 2000), *with* TX 1501 (IGF Board of Directors meeting, May 31, 2000); *compare* TX 1430 (IGFH Board of Directors meeting, May 30, 2001), *with* TX 1531 (IGF Board of Directors meeting, May 30, 2001) and TX 1547 (same)). Additionally, on May 23, 2001, the Board of Directors meetings for Goran, SIG, IGF, and IGFH were all held at the same time and in the same location. (*See* TX 530A; TX 1256; TX 1378; TX 1424).

280. While each Symons entity may have nominally kept its own board minutes and agendas and had it own directors, in reality the directors for each entity were nearly identical, board meetings were often held concurrently, and the "separate" minutes and agendas were nearly identical copies of each other.

3. The Corporate Counterdefendants Were All in the Insurance Business

281. Pafco, IGF, and Superior and its subsidiaries were all engaged in the writing of insurance coverage for non-standard automobile and liability policies. (TX 28 at 2). Granite Re was in the reinsurance business and Symons International Group, Inc., Florida was a surplus underwriter. (TX 153 at 24).

282. As of the closing of the APA, June 6, 2001, all of the Corporate Counterdefendants were engaged in (or were holding companies for) the insurance industry. (*Id*. at 23-24; Litvak Tr. at 276-77; TX 1016).

G. The Symons Family Members Caused the Corporate Counterdefendants to Make Fraudulent Representations to the Regulatory Agencies and the General Public Concerning IGF's Financial Condition

283. Alan Symons instructed Jones "on how to book certain items [on financial statements]." The facts supporting his testimony are illustrated in Findings of Fact ## 201-08.

H. Other Evidence Affecting Alter Ego

284. Goran has been de-listed from both the NASDAQ and the Toronto stock exchanges. (TX 21; TX 1036; SIG 30(b)(6) Dep. at 130).

285. SIG has been de-listed from the NASDAQ stock exchange. (TX 20).

286. If a member of the public were to purchase shares in SIG or Goran, the stock would not be registered on the books of the corporation. (SIG 30(b)(6) Dep. at 130-31).

287. Brenda Armstrong ("Armstrong") served as the Associate General Counsel for SIG. (Armstrong Tr. at 651). Armstrong left SIG in December 2003 because she was uncomfortable working with the Florida regulators in connection with the rehabilitation of Superior. (*Id*. at 669).

288. Since leaving SIG for private law practice, the Individual and Corporate Counterdefendants remain Armstrong's clients. (*Id*. at 669-70).

289. As Associate General Counsel of SIG, Armstrong does not recall Doug or Alan Symons consulting with her about the propriety of the personal loans they took from Goran and SIG. (*Id*. at 676-77).

290. Wechter ultimately resigned from the SIG Board in 2002 because he felt SIG was insolvent and requested that the company be put into insolvency proceedings, but Doug Symons refused to do so. (Wechter Tr. at 707).

I. The Symons Family's Misuse of the Corporate Forms of the Corporate Counterdefendants Constituted a Fraud and Promoted Injustice Against CCC

291. IGF, IGFH, and SIG defaulted on an over $30 million debt to CCC. (*See* Docket # 107 at 30-31; *see also supra* Finding of Fact # 43).

292. As a result of the Acceptance sale, IGF no longer had sufficient funds or assets to pay the debt owed to CCC. However, had the entire $40.5 million purchase price proceeds been paid to IGF, sufficient funds would have been available to pay CCC.

293. The structure of the sale of IGF's assets to Acceptance, together with the $9

million payment to SIG and Goran and the $15 million payment and obligation to Granite Re, was not in the best interest of IGF as a stand-alone entity, but rather was to benefit the combined interests of the Symons Family and its corporate entities. (TX 153 at 32).

294. The structure of the sale was designed to improve the financial condition of the Corporate Counterdefendants as a whole by buying back trust preferreds and funding the nonstandard auto operations. (*See* TX 120 (McKeating: "The Board was assured several times by Chairman G. Gordon Symons that these funds would be used primarily to buy back SIG trust preferred securities and to fund Superior auto reserves. We were further assured that no non-compete payments would be made to Symons family members"); TX 1261 (Whiting: "I was happy to vote for the sale and for payment of some of the IGF proceeds to Goran on the understanding that such funds would be used to buy back Trust Preferreds and to contribute capital to the Non-Standard operations, both of which would inure to the benefit of SIG shareholders."). The "Trust Preferreds" however, were not the obligation of IGF, and the nonstandard auto operations were not part of IGF's business. IGF, as a sole entity, would not have gained from such a transfer of funds, and its policyholders and creditors were hurt by the transfer of funds.

295. In connection with the Board approval of the Acceptance transaction, there was no discussion of the fairness of the Acceptance transaction to creditors of IGF or IGFH. (Wechter Tr. at 711).

296. In connection with the approval of the Acceptance sale, there was no discussion at the Board level regarding the debt owed to CCC or how it would be paid. (*Id*. at 711).

297. In addition to the fraud in conjunction with the Acceptance transaction, the Symons Family utilized their control over the Corporate Counterdefendants to engage in other fraudulent transactions and misrepresentations to the regulatory agencies and the general public. These have been noted above in Findings of Fact ## 200-08.

298. The Symons Family also directed their corporations to pay millions of dollars for unearned and unsubstantiated non-compete agreements and expenses, and for personal loans – all contrary to Board members' wishes. (*See supra* Findings of Fact, Section III. E).

299. The corporate entities were misused to commit fraud and promote injustice.

300. Because of the actions of the Symons Family and its corporate entities, CCC suffered damages, including the diversion of approximately $24 million from IGF. By their control of each of the Corporate Counterdefendants, the Symons Family has left SIG, IGFH, and IGF unable to pay the amount they owe CCC, namely $34 million, plus interest.

IV. IGF's Insolvency Proceedings and Settlement Agreement With CCC

301. On October 23, 2003, Sally B. McCarty, as Insurance Commissioner of the State of Indiana, filed a Verified Complaint for Rehabilitation against IGF in the Marion

Circuit Court, Cause No. 49 C01-0310-PL-002942, and on the same day the Circuit Court entered an Order of Rehabilitation. (TX 1715).

302. On January 28, 2005, CCC reached a settlement with IGF, and entered into a Settlement Agreement and Release. The Settlement Agreement provided that it would "fully and finally release and forever discharge IGF and Pafco from any and all liabilities, claims, demands, causes of action and suits that CCC has of whatever kind and nature . . . in the Federal Litigation or the Insolvency Proceedings . . . ." (TX 1723 at ¶¶ 4, 6).

303. The Settlement Agreement also provided, "The Parties do not intend to, and the Settlement Agreement shall not, release, waive, or discharge any claim, of any kind whatsoever, that CCC has, had or may in the future have against the other parties to the Federal Litigation, namely IGF Holding, Inc. ("IGFH"), Symons International Group, Inc. ("SIG"), Goran Capital, Inc. ("Goran"), Granite Reinsurance Co., Ltd. (Barbados) ("Granite Re"), Superior Insurance Company ("Superior"), Gordon Symons, Alan Symons, and/or Douglas Symons, whether such claim is direct, indirect or derivative in nature." (*Id.* at ¶ 2.5).

304. The Settlement Agreement further provided, "In consideration of the terms, conditions and mutual releases contained in this Settlement Agreement, the Parties agree . . . to permit CCC to prosecute fully the Federal Litigation against Holdings, SIG, Goran, Granite Re, Superior, Gordon Symons, Alan Symons, and Douglas Symons . . . ." (*Id.* at ¶ 4.4). The Settlement Agreement continued:

"Notwithstanding anything in this Settlement Agreement to the contrary, (a) the foregoing release does not apply to any person or entity other than IGF or Pafco, or to any claim other than a claim against IGF or Pafco, and (b) it is the intent of the Parties that this Release shall not operate to effect a Release of any claim of CCC against Holdings, SIG, Goran, Granite Re, Superior, Gordon Symons, Alan Symons, or Douglas Symons, whether such claim is direct, indirect, derivative, or based on any liability of or obligation owing by IGF or Pafco." (*Id.* at ¶ 4.6).

305. A condition of the Settlement Agreement was that an Order would be entered in the Marion County Proceedings "so that CCC may continue to prosecute against all parties other than IGF and Pafco." (*Id.* at ¶ V).

306. In a contemporaneous Stipulation executed on March 15, 2005, the Liquidator and CCC agreed that CCC would be allowed to prosecute this litigation against the Counterdefendants. (TX 147).

307. On March 17, 2005, the Marion Circuit Court entered an Order Modifying Order of Liquidation, which permitted CCC to "prosecut[e] and obtain[] a final judgment with respect to their claims against IGF Holdings, Inc., Symons International Group, Inc., Alan G. Symons, Douglas H. Symons, G. Gordon Symons, Goran Capital, Inc., Granite Reinsurance Company, Ltd. (Barbados) and Superior Insurance Company, in the actions currently pending in the United States District Court for the Southern District of Indiana . . . No. IP 01-0799." (TX 148).

308. On March 31, 2007, this court entered its summary judgment opinion in which it

held that there remained an issue of fact regarding "whether the Liquidator intended to abandon its right to pursue CCC and 1911 Corp.'s fraudulent transfer and alter ego claims and allow CCC and 1911 Corp. to prosecute those claims against the Counterdefendants herein." (Docket # 107 at 44).

309. On July 2, 2007, CCC filed in the Marion Circuit Court its Motion to Clarify and Confirm its Settlement Agreement and Release with Commissioner. On August 8, 2007, the Marion Circuit Court held a hearing at which the Liquidator, by and through counsel, represented that the Liquidator had no objection to the Motion and concurred in the proposed order stating it was the Liquidator's intent to relinquish to CCC the fraudulent transfer and alter ego claims. (*See* Docket # 152, Ex. E at 3-4; *see also* Lovette Tr. at 540-41).

310. At the conclusion of the August 8, 2007, hearing, the Marion Circuit Court issued an Order granting CCC's Motion to Clarify in its entirety, and further providing as follows:

> It is further ORDERED, ADJUDGED AND DECREED that in the Settlement Agreement and Release between and among CCC and the Commissioner, as Liquidator of IGF and Rehabilitator of Pafco ("Commissioner"), the Commissioner, acting pursuant to the power conferred on the Commissioner by Ind. Code §§ 27-9-3-9(b), 6(B) and (12), in exchange for and as a condition to CCC's release of its pending claims in excess of $35 million against IGF and Pafco, intended to and did grant, assign and release back to CCC any right or interest the Commissioner had to pursue CCC's alter ego and fraudulent transfer claims against the affiliates and owners of IGF and Pafco, agreed not to prosecute such claims, and consented to CCC's and 1911 Corp.'s prosecution of the

same.

(Docket # 152, Ex. A at 2; *see also* Lovette Tr. at 541-42).

311. On September 5, 2007, SIG, Goran, Granite Re, Gordon Symons, and Alan Symons filed a Motion to Reconsider and Vacate the Marion Circuit Court's August 8, 2007 Order. Following a hearing on November 13, 2007, the Marion Circuit Court denied the Motion by Order dated November 15, 2007. (Docket # 152, Ex. B).

312. Elizabeth Lovette ("Lovette") is the Executive Director and President of Indiana Insolvency, Inc., which contracted with the Indiana Department of Insurance to administer Indiana-domiciled insurance receiverships, such as IGF. (Lovette Tr. at 537-38). Lovette recalls entering into a settlement agreement with CCC to resolve certain claims against IGF, which claims involved more than $30 million in connection with the sale of the business of CCC to IGF. (*Id*. at 538).

313. Lovette also considered claims that the Liquidator may have based upon claims CCC had against certain affiliates and shareholders of IGF with respect to alter ego and fraudulent transfer, as well as the likely high cost of pursuing those claims and concerns regarding collectibility relating to those claims. (*Id*. at 538-39).

314. In connection with the settlement agreement between the Liquidator of IGF and CCC, Lovette confirmed that it was her intent on behalf of the Liquidator to transfer to CCC, as part of the settlement agreement, any rights the Liquidator might have had to pursue alter ego claims or fraudulent transfer claims against the

affiliates and owners of IGF. (*Id*. at 539-40; *see also id*. at 542-43).

315. Further, the Liquidator of IGF executed a formal assignment, thereby transferring to CCC any and all alter ego and fraudulent transfer claims that the Liquidator had the right to pursue. (TX 162; Lovette Tr. at 543-46).

CONCLUSIONS OF LAW

1. To the extent that any of the foregoing findings of fact is a conclusion of law, it is hereby adopted as a conclusion of law. To the extent that any of the conclusions of law set forth below is a finding of fact, it is hereby adopted as a finding of fact.

2. The court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332. Thus, the court must apply the substantive law of the forum state. *Allen v. Cedar Real Estate Group, LLP*, 236 F.3d 374, 380 (7th Cir. 2001) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). The forum state in this case is Indiana; thus, Indiana state substantive law is controlling. *Id.*

3. Counts IV and V of the Amended Counterclaim are based upon IGF's sale of its crop insurance business to Acceptance. In Count IV, CCC and 1911 Corp. allege that the Individual Counterdefendants fraudulently transferred the majority of the proceeds from that sale to Counterdefendants SIG, Goran, and Granite Re, solely to divert IGF's assets from IGF, rendering it unable to pay its creditors, CCC and 1911 Corp. In Count V of the Amended Counterclaim, CCC and 1911 Corp. allege that the Individual and Corporate Counterdefendants were alter egos of one another, left IGF in a state where it was not sufficiently capitalized to meet its

obligations to CCC and 1911 Corp., and should therefore be liable for the debt owed to CCC and 1911 Corp.

I. NACU Promissory Note

4. In Count III of CCC's and 1911 Corp.'s Amended Counterclaim, 1911 Corp. alleges that IGFH failed to pay 1911 Corp. $1,000,000 under the NACU Note.

5. At trial, 1911 Corp. failed to present evidence that IGFH never paid 1911 Corp. any of the $1,000,000 owed under the NACU Note. Moreover, 1911 Corp. failed to prove that the assignment to IGF took place without its knowledge or consent.

6. Accordingly, the court concludes that IGFH is not liable to 1911 Corp. under the NACU Note.

7. The court further concludes that 1911 Corp. may not recover under a fraudulent transfer or alter ego theory, as these claims were brought as an alternative means of recovery for money allegedly owed under Count III of the Amended Counterclaim.

II. Standing to Bring Counts IV (Fraudulent Transfer) and V (Alter Ego)

8. The court now turns to the issue of whether CCC has standing to bring the present fraudulent transfer and alter ego claims. As noted in Finding of Fact # 301-02, in October 2003, IGF entered into Rehabilitation Proceedings, and eventually settled its claims with CCC in January 2005. As part of the Settlement Agreement, CCC released IGF "from any and all liabilities, claims, demands, causes of action and suits that CCC has of whatever kind and nature . . . in the Federal Litigation or the

Insolvency Proceedings . . . ." (TX 1723 ¶¶ 4, 6).

9. The issue raised is whether the Liquidator effectively abandoned or assigned its interest in the fraudulent transfer and alter ego claims to CCC, thereby giving CCC standing to pursue those claims. *See Koch Refining v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1346 (7th Cir. 1987) ("The trustee may abandon an action to a third party, and that party may then pursue it."); *Klingman v. Levinson*, 158 B.R. 109, 113 (N.D. Ill. 1993) ("The trustee's exclusive right to maintain a fraudulent conveyance cause of action expires and creditors may step in (or resume actions) when the trustee no longer has a viable cause of action.").

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

11. The court finds that there exists a multitude of documentary and testimonial evidence which expressly and unequivocally shows that the Liquidator abandoned its right to pursue CCC's fraudulent transfer and alter ego claims and to release those claims back to CCC to prosecute those claims against the remaining Counterdefendants. This evidence includes: the Settlement Agreement dated

January 28, 2005; the Stipulation dated March 15, 2005; the Order Modifying Order of Liquidation dated March 17, 2005; the Marion Circuit Court's Order granting CCC's Motion to Clarify dated August 8, 2007; and Lovette's deposition and trial testimony. (*See supra* Findings of Fact, Section IV). Accordingly, the court finds that CCC has standing to pursue Counts IV and V of its Amended Counterclaim in this litigation.

III. Fraudulent Transfer Claim

12. CCC brings its claim under two sections of the Indiana Uniform Fraudulent Transfer Act ("IUFTA"), Ind. Code §§ 32-18-2-14, 15 (hereinafter "Section 14" or "Section 15" claims).

13. The IUFTA defines a transfer as fraudulent regardless of when the claim arose if the debtor made the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor" or, alternatively, if the debtor did not "receiv[e] a reasonably equivalent value in exchange for the transfer" and the business or transaction was left in an unreasonably small state or such that the debtor would incur debts beyond the debtor's ability to pay the debts as they became due. Ind. Code § 32-2-18-14.[9]

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[9] Section 32-18-2-14 provides:
A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably

14. Moreover, where, as here, a creditor's claim arose before the transfer, a transfer is fraudulent if the debtor did not receive reasonably equivalent value in exchange for the transfer, and the debtor was insolvent at the time or became insolvent as a result of the transfer. Ind. Code § 32-18-2-15.[10]

15. The IUFTA does not define the phrase "reasonably equivalent value." In the absence of a statutory definition, the court may look to decisions construing other states' fraudulent transfer acts, as well as decisions construing the fraudulent transfer provisions of the Bankruptcy Code. *See In re Image Worldwide, Ltd.*, 139 F.3d 574, 577 (7th Cir. 1998); *In re First Fin. Assoc.*, 371 B.R. 877, 899-900 (Bankr. N.D. Ind. 2000).

16. When determining whether a debtor received reasonably equivalent value for the assets it transferred, the court must determine the value of the assets transferred and compare that value to the amount received by the debtor. *Barber v. Golden See Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997).

17. "[T]he formula for determining reasonably equivalent value is not a fixed

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small in relation to the business or transaction; or (B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.

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

mathematical formula; rather, the standard for reasonable equivalence should depend on all of the facts of the case, an important element of which is fair market value." *Id*. (internal quotation omitted). "This inquiry must be performed from the vantage point of creditors rather than that of a debtor." *Peltz v. Hatten*, 279 B.R. 710, 736 (D. Del. 2002) (citing *Mellon Bank, N.S. v. Metro Commc'n., Inc.*, 945 F.2d 635, 646 (3d Cir. 1991) (noting that the fraudulent conveyance laws are intended to protect the debtor's creditors and thus, "the question whether the debtor received reasonable value must be determined from the standpoint of the creditors.")).

18. In determining the totality of the circumstances, the court may consider factors such as "the good faith of the parties, the difference between the amount paid and the fair market value, and whether the transaction was at arms-length." *Id*. at 736-37; *see also Barber*, 129 B.R. at 387. "For purposes of considering reasonable equivalence, the critical date is the date of the transfer at issue." *Peltz*, 279 B.R. at 737.

19. Fraudulent intent, like reasonable equivalence, is a question of fact. *Greenfield v. Arden Seven Penn Partners, L.P.*, 757 N.E.2d 699, 703 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*, 774 N.E.2d 515 (Ind. 2002).

20. Fraudulent intent may be inferred from various factors or "badges of fraud" present in a transaction. *Id*. These factors include:

(1) transfer of property by a debtor during the pendency of a

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

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

21. A creditor who seeks to have a transfer set aside as fraudulent bears the burden of proving that such transfer was made with fraudulent intent. *Id*. at 703. Lack of consideration, standing alone, is insufficient to support a charge of fraud. *Id*. Rather, fraudulent intent is inferred from the various badges of fraud present in a given transaction. *Id*. (citing *Diss v. Agri Bus. Intern., Inc.*, 670 N.E.2d 97, 99-100 (Ind. Ct. App. 1996)).

22. CCC has the burden of proving its IUFTA claim under Section 14(1) by clear and convincing evidence. *See In re Martin*, 145 B.R. 933, 946 (Bankr. N.D. Ill. 1992) (applying Illinois law) (citing *Hofmann v. Hofmann*, 446 N.E.2d 499, 506 (1983)). CCC has the burden of proving its IUFTA claims under Section 14(2) and 15 by a preponderance of the evidence. *Id*.

A. Section 15 Liability

23. The sale of IGF's assets to Acceptance, with $24 million of the proceeds going to affiliates of IGF, constitutes a fraudulent transfer under Section 15 of the IUFTA because IGF did not receive reasonably equivalent value for the sale of its crop insurance business to Acceptance and IGF was insolvent at the time of the transfer and unable to pay its debts to CCC.

1. IGF Did Not Receive Reasonably Equivalent Value

24. From March 2001 through early June 2001, CCC negotiated with the Counterdefendants in an attempt to collect the $29 million debt that IGF, IGFH, and SIG owed CCC. (*See supra* Finding of Fact # 33). Thus, CCC's claim arose before the APA was executed.

25. The debtors, IGF, IGFH, and SIG, were either equitably or balance sheet insolvent at the time and unable to pay the debt to CCC. (*See supra* Findings of Fact, Section III. C).

26. On May 23, 2001, IGF entered into the APA with Acceptance, selling IGF's crop insurance business for $40.5 million. The purchase price for the IGF assets consisted of $31,489,237 paid at closing, and $9 million in deferred payments for the final three years of the Granite Re Reinsurance Agreement.

27. Under the terms of the APA, IGF received only $16.5 million of the $40.5 million purchase price, while Goran, SIG, and Granite Re received $24 million for non-compete agreements and reinsurance. Specifically, Acceptance transferred $15

million (in present and future payments) to Granite Re for the Reinsurance Agreement, as well as $9 million split between Goran and SIG for non-compete agreements. SIG then transferred the $4.5 million it received to Pafco and Superior, two other Symons-controlled entities.

28. Fair market value is defined as "the price at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." (IRS Revenue Ruling 59-60; Borghesi Tr. at 879). The court finds that IGF did not receive the fair market value for its crop insurance business because Acceptance was willing to pay $40.5 million for that business. (*See supra* Findings of Fact ## 53-55).

29. Weber's opinion estimating a negative value for IGF is irrelevant to the fraudulent transfer issues, as it fails to consider the amount Acceptance actually paid for IGF's assets. (*See supra* Finding of Fact # 151). At issue is the actual amount paid for IGF's assets and whether certain of those proceeds were wrongfully diverted to the Counterdefendants. In other words, whether Acceptance overpaid, underpaid, or paid the "right" amount is not before the court. Moreover, Weber's opinion is unreliable as he relied solely on the data provided to him by IGF, with no knowledge or verification that any of the data was correct. *See Loeffel Steel Prod. v. Delta Brands, Inc.*, 387 F.Supp.2d 794, 807 (N.D. Ill. 2005) (precluding damages expert who "uncritically relied" upon the data supplied to him by his

client); *see also supra* Findings of Fact ## 153-54).

30. The structure of the transaction was proposed and driven by Alan Symons, the sole negotiator on behalf of the Counterdefendants. (*See supra* Finding of Fact # 49).

31. By contrast, McCarthy, Acceptance's Chairman, testified that the sole purpose of the transaction was for Acceptance to acquire "the crop assets of IGF." As a result, Acceptance viewed the value of the transaction to be based solely on the cash flow generated by IGF's crop insurance business and was willing to pay $35-$40 million to acquire the business. Acceptance allowed Alan Symons to structure the deal to include payments for non-compete and reinsurance agreements provided the overall purchase price did not exceed $40 million. Therefore, as McCarthy testified, the amounts paid for the non-compete and reinsurance agreements could go up or down, so long as the total price paid by Acceptance remained the same. (*See supra* Finding of Fact # 55).

32. As explained in greater detail below, the Non-Competition and Consulting Agreements with SIG and Goran and the Granite Re Reinsurance Agreement were ancillary agreements to the sale of IGF's crop insurance business, not separate transactions, and were not exchanged for reasonably equivalent value.

a. The Non-Competition Agreements with SIG and Goran Were Not Exchanged for Reasonably Equivalent Value

33. Generally, non-competition agreements ancillary to the sale of a business are legitimate and valid only to the extent necessary to preserve a business' goodwill

for the buyer. *See Kladis v. Nick's Patio, Inc.*, 735 N.E.2d 1216, 1220 (Ind. Ct. App. 2000); *Fogle v. Shah*, 539 N.E.2d 500, 502 (Ind. Ct. App. 1989). "Goodwill" is an intangible asset that ensures that established customers will continue to patronize the business when transferred to a new owner. *See Kladis*, 735 N.E.2d at 1220. A critical factor in determining whether an entity possesses goodwill is whether it has a previously-established customer base and a reputation in the particular industry which draws repeat business. *See Baker v. Comm'r of Internal Revenue*, 338 F.3d 789, 793 (7th Cir. 2003) (describing goodwill as "the expectation of continued patronage").

34. Moreover, courts have previously recognized that non-competition agreements cannot be used to divert proceeds from the sale of a company to a holding company that is not actively operating the business sold. In *Hollinger Int'l, Inc. v. Hollinger Inc.*, the plaintiffs alleged a scheme in which the individual defendants used their positions as officers, directors and controlling shareholders to cause Hollinger International, Inc. to receive non-compete payments in connection with the sale of several of its newspapers. *See* 2005 WL 589000 at * 1-2, 16 (N.D. Ill. Mar. 11, 2005) (relying in part on *Hollinger Int'l, Inc. v. Black, et. al.*, 844 A.2d 1022 (Del Ch. 2004)). The individual defendants owned several non-operating holding companies that controlled Hollinger International, Inc., and they caused Hollinger International, Inc. to make non-compete payments to these holding companies. *Id*. at *2. In denying various motions to dismiss, the court held, in

separate entries, that Hollinger International, Inc., had sufficiently alleged that these non-compete payments to "holding companies, without the ability to compete" constituted a breach of fiduciary duty and "various torts," (*id*. at *16), and that payment of large sums for non-competes from a parent that "does not actually publish newspapers and thus [is] not a threat to compete" is actionable as securities fraud. *Hollinger Int'l, Inc. v. Hollinger, Inc.*, 2004 WL 2278545, at *9-10 (N.D. Ill. Oct. 8, 2004).

35. In a separate but related case, *SEC v. Black*, 2005 WL 1498893, at *5 (N.D. Ill. June 17, 2005), the court ruled that the receipt of non-compete payments by a "company with no operations" and where "no purchaser ever requested a noncompetition provision," established fraudulent scienter. *See also Skinner v. Comm'r of Internal Revenue*, 1968 WL 1241 (Tax Ct. 1968) (recognizing that petitioner would never compete with buyer and was in no position to do so, and therefore, the consideration allocated to the non-compete agreement was a sham).

36. In the related criminal case to *Hollinger* and *Black*, the majority owner (Conrad Black) of the newspaper holding company, who, with others, received "a total of $5.5 million in exchange for their promising not to compete with [the newspaper-operating subsidiary] for three years," was convicted of mail and wire fraud. The Seventh Circuit affirmed his conviction, as well as the conviction of the lawyer "who prepared the agreement that purported to grant covenants not to compete in exchange for $5.5. million" because the lawyer "knew that the covenants made no

sense, since [the subsidiary] was on the way out of the newspaper business and the other grantors of the covenants not to compete were not about . . . to start a newspaper." *United States v. Black*, 530 F.3d 599, 605-06 (7th Cir. 2008).

37. The court finds the cases cited above stand for the proposition that non-competition agreements must be justified by the actual threat of competition.

38. Here, there is no evidence that justifies the $9 million payment from Acceptance to Goran and SIG for the non-compete agreements. To begin, IGF was the only Corporate Counterdefendant that was engaged in the crop insurance business, and thus, was the only Corporate Counterdefendant with goodwill in that business. As McCarthy of Acceptance recognized, and as Alan Symons conceded, it was the persons who had the relationships with the agents that posed the competitive threat to Acceptance. Thus, Acceptance entered into the Non-Competition and Retention Agreements with twenty IGF officers and employees who possessed the specialized knowledge of the crop insurance business. Under those agreements, each of the employees agreed to work for Acceptance for three years, and, in exchange, received the equivalent of one year's salary as a bonus. The payments to each of the twenty IGF employees were not part of the $40.5 million paid to Acceptance at the closing of the sale. Rather, Acceptance paid these individuals their due after the sale was completed. (*See supra* Findings of Fact, Section II. A. 2).

39. The payments for the Non-Competition and Retention Agreements with the IGF

employees who possessed the specialized knowledge of IGF's crop insurance business were sufficient to protect Acceptance from any threat of competition by the seller of the business, IGF.

40. SIG and Goran, on the other hand, did not pose a competitive threat to Acceptance. Both entities lacked the infrastructure and crop insurance goodwill – including employees with knowledge of the crop insurance business and special relationships with customers and agents – necessary to compete in the crop insurance business. In addition, both entities lacked the ability to compete as both were insolvent and unlikely to obtain a SRA from the FCIC. (*See supra* Finding of Fact # 57). Similarly, neither Pafco nor Superior – who received $4.5 million in non-compete proceeds from SIG – were engaged in the crop insurance business and had no specialized knowledge or relationships in that business. (*See supra* Findings of Fact # 6-7). Morever, none of the individual Symons – each of whom were paid $1 not to compete – was active in the day-to-day operations of IGF and thus did not have the specialized knowledge and customer/agent relationships to be a competitive threat. (*See supra* Finding of Fact # 65). In sum, IGF (and its employees) was the only company among the Counterdefendants that was engaged in the crop insurance business or possessed any goodwill in that area, making the non-compete agreements between Acceptance and Goran and SIG valueless.

41. As noted above, the $9 million in payments for the non-compete agreements with SIG and Goran were requested and driven by Alan Symons. Acceptance agreed to

make adjustments in the amounts it paid for the non-compete agreements so long as the overall purchase price did not exceed $40 million on a present value basis. Accordingly, the dollar amounts paid for the non-compete agreements were set by the seller, not by the buyer or through any actual negotiations related to the value of the non-compete agreements. Indeed, no valuation of any kind was done by the Counterdefendants or any accounting or valuation firm acting on their behalf, to determine the value of the agreements from Goran and SIG. (*See supra* Findings of Fact ## 53-55, 59).

42. For all of these reasons, and the additional reasons set forth in the Findings of Fact, the $9 million paid to Goran and SIG for non-compete agreements was purchase price consideration and did not represent the true value of the SIG and Goran non-compete agreements. IGF – not Goran or SIG – was entitled to receive the entire $9 million for its assets that were otherwise fraudulently allocated by the Corporate Counterdefendants to a non-compete agreement that added no value to the transaction. Accordingly, IGF did not receive reasonably equivalent value when its crop insurance business was sold to Acceptance and $9 million was paid to Goran and SIG instead of IGF.

b. The Reinsurance Agreement Was Not Exchanged for Reasonably Equivalent Value

43. Similar to the payments to Goran and SIG for the non-compete agreements, Alan Symons requested that Acceptance allocate Granite Re $15 million for a

reinsurance policy that covered retained loss in excess of 140%, but less than 150% of Acceptance's net premium income. The likelihood that a retained loss ratio of 140% or higher would be experienced by Acceptance was extraordinarily remote. Indeed, Dr. Driscoll, an actuarial expert, determined that the likelihood of that loss percentage being hit in any crop year is between 4.5 and 6.5 years in every 10,000-year period. Alan Symons even advised his Boards of Directors that, at most, the Reinsurance Agreement would be implicated once every hundred years. (*See supra* Findings of Fact ## 103-04).

44. The low probability of loss, coupled with a maximum cap on exposure and the payment of a substantial additional premium if the cap were ever reached, warranted a price that is a small fraction of $15 million. Dr. Driscoll, who also has substantial crop insurance pricing experience, opined that the pure premium should have been $9,000 to $26,000 annually for the level of risk underwritten. (*See supra* Findings of Fact # 107-08). An administrative, overhead, and profit charge might double that amount, according to Weber. (*See supra* Findings of Fact # 109). Totsch, a crop reinsurance brokerage expert, testified that, based on his 26 years of MPCI reinsurance experience and his placing of that type of coverage at the time, as well as his review of similar coverage by the same parties, the Reinsurance Agreement was greatly overpriced. (*See* supra Findings of Fact # 115).

45. In addition, other Acceptance and IGF reinsurance contracts for the same or higher

risk MPCI stop-loss coverage, entered into around the same time period, provided for much lower premium rates and higher payback periods, indicating again that the Granite Re Reinsurance Agreement was greatly overpriced. (*See supra* Findings of Fact, Section II. D. 3. d).

46. During the course of their negotiations, the Counterdefendants and Acceptance acknowledged that the real maximum value of the reinsurance was at most $200,000. Acceptance requested that Granite Re "retrocede risk" of the treaty "to reinsurer satisfactory to Buyer . . . at a cost to [Granite Re] of $200,000." (*See supra* Findings of Fact # 129). This demonstrates that Acceptance thought the market value of the reinsurance was worth approximately $200,000. (*See supra* Findings of Fact # 132). Thus, under this proposal, Granite Re would gain $2.8 million without bearing any risk of loss under the contract.

47. Further, the Reinsurance Agreement was highly unusual and differed from customary methods in many respects, including the following: (1) it required the payment of an additional premium of 5% of the total net premium income in the unlikely event that the $40 million maximum was hit prior to the five-year term expiring; (2) it did not contain a date for either party's signature; (3) it contained a five-year term without an early termination clause; (4) it required payment in advance of each crop year; and (5) it did not include many usual and customary terms, such as an estimate of anticipated net premium income and statement of the premium rate. (*See supra* Findings of Fact ## 82-96).

48. The Reinsurance Agreement also contained a highly unusual $9 million indemnification provision that related not to reinsurance, but to indemnifying Acceptance if IGF breached the APA. (*See supra* Findings of Fact ## 84-85). That provision was added to the Reinsurance Agreement at Alan Symons's request after the full premium for the reinsurance was agreed upon. (*See supra* Finding of Fact # 134). Accordingly, no portion of the premium can be attributed to the indemnification provision. Also, the indemnification provision added nothing in the way of risk transfer for Acceptance, as the indemnification liability is equal to the future premium payments owed by Acceptance under the Reinsurance Agreement and future payments could be withheld for any breach of the APA. (*See supra* Finding of Fact # 137). The stated purpose of the indemnification provision was simply to provide Acceptance with an offset potential when it was determined that the payment to IGF would be in cash instead of a promissory note.

49. Another unusual aspect of the Reinsurance Agreement is that it placed 100% of the risk with Granite Re, a small reinsurance company with insufficient reserves. Indeed, Granite Re only had a surplus of $14 million, far less than the reinsurance policy limits of $40 million. Acceptance acknowledged its concern over Granite Re's ability to pay a loss under the policy. (*See supra* Findings of Fact ## 99-100).

50. Moreover, reinsurance is typically purchased with the aid of a broker in the market; yet, no broker was used in connection with the Granite Re Reinsurance Agreement. (*See supra* Finding of Fact # 77).

51. Furthermore, the Counterdefendants presented no evidence regarding how the $3 million annual premium was determined or how the premium compared to other reinsurance IGF or Acceptance had purchased for that range of potential loss. (*See supra* Finding of Fact # 79). Indeed, evidence presented by CCC demonstrated that the premiums for other reinsurance agreements were far less than the $15 million premium for the Granite Re Reinsurance Agreement. (*See supra* Findings of Fact ## 118-22).

52. That the payment to Granite Re for the Reinsurance Agreement constituted purchase price consideration belonging to IGF is further evidenced by the statements of McCarthy of Acceptance that the amount paid for the note, reinsurance agreement, and non-compete agreements could increase or decrease, so long as the purchase price for IGF's crop insurance business did not exceed $40 million on a present value basis. (*See supra* Findings of Fact # 55).

53. For all of these reasons, and the additional reasons set forth in the court's Findings of Fact, the $15 million paid to Granite Re for the Reinsurance Agreement was purchase price consideration and did not represent the true value of the Granite Re Reinsurance Agreement. Nor does the Granite Re Reinsurance Agreement reflect an arm's length transaction between a cedent and a reinsurer. IGF – not Granite Re – was entitled to receive the $15 million for its assets without any consideration being paid to Granite Re for that transfer. Accordingly, IGF did not receive reasonably equivalent value when it sold its crop insurance business to Acceptance

and $15 million was paid to Granite Re, rather than IGF.

2. IGF and SIG were Insolvent at the Time of the Transfer

54. In addition to the Non-Compete and Reinsurance Agreement not being exchanged for reasonably equivalent value, IGF and SIG were insolvent at the time of the transfer.

55. While IGF's books showed a net worth or surplus of approximately $8.8 million on December 31, 2000, and approximately $4.7 million on June 30, 2001, neither figure includes the approximately $31 million that IGF owed CCC as of the date of the sale to Acceptance. (*See supra* Findings of Fact ## 219, 224).

56. The Counterdefendants asserted at trial that they believed the debt owed to CCC as a result of the Put was worth approximately $1.6 million, and that they rightly reported that amount on their 2000 financial statements as a "contingent liability" under FASB and GAAP standards. (D. Symons Tr. at 757; TX 1440 at 14.4-14.6; TX 1488 at 34). In other words, the Counterdefendants contend that IGF was solvent at the time of the sale of its crop insurance business to Acceptance.

57. "A contingent liability is 'one that depends on a future event that may not even occur[] to fix either its existence or its amount.'" *Freeland v. Enodis Corp.*, 540 F.3d 721, 730 (7th Cir. 2008) (quoting *In re Knight*, 55 F.3d 231, 236 (7th Cir. 1995)).

58. The court finds the value of the Put was not a contingent liability, as the amount owed "did not depend on the occurrence of an extrinsic future event." *Id.* Indeed,

the value of the Put was fixed by the terms of the SAA. Moreover, on a more practical level, the Counterdefendants did not argue the value of the Put in their Response to CCC's motion for summary judgment. They conceded that fact, and argued that only IGF was liable, and not IGFH and SIG. Accordingly, the court credits the testimony of CCC's expert, Litvak, who opined that when the $31 million obligation to CCC is properly reflected on IGF's balance sheet, IGF was insolvent by more than $25 million prior to and after the sale. (TX 125; *see also supra* Finding of Fact # 219).

59. Even if IGF was balance-sheet solvent, the evidence reflects that it was equitably insolvent – i.e., it had a working capital deficiency. (*See supra* Findings of Fact ## 224-25).

60. Because IGF did not receive reasonably equivalent value for the sale of its crop insurance business and because it was insolvent at the time of the transfer, the transfer of proceeds to Goran, SIG, and Granite Re was fraudulent under Section 15 of the IUFTA.

61. Similarly, SIG was insolvent at the time it transferred $4.5 million of the Acceptance proceeds to Superior and Pafco. (*See supra* Findings of Fact ## 217, 225).

62. Consequently, the court finds that CCC has proven, by a preponderance of the evidence, that the Counterdefendants fraudulently transferred the majority of the proceeds from that sale to Counterdefendants SIG, Goran, and Granite Re solely to

divert IGF's assets from IGF, rendering it unable to pay its creditor. The Counterdefendants are therefore liable under Section 15 of the IUFTA for the amount of the diverted proceeds or $24 million.

B. Section 14 Liability

1. The Transfer Was Not for Reasonably Equivalent Value and/or Was Made with Actual Intent to Hinder, Delay or Defraud Creditors

63. For the same reasons set forth above under Section 15, CCC's claim arose before the APA was executed, the transfer of IGF's assets to Acceptance was not for "reasonably equivalent value," and the remaining assets were inadequate or the debtor was unable to pay its debts when due, one of the two alternatives under Section 14(2) of the IUFTA. Ind. Code § 32-18-2-14(2).

64. In the alternative, the transfer is fraudulent if the debtor made the transfer with "actual intent to hinder, delay, or defraud any creditor of the debtor." Ind. Code § 32-18-2-14(1).

65. Fraudulent intent may be inferred from various factors or badges of fraud present in the transaction. *Greenfield*, 757 N.E.2d at 703-04. Here, the Counterdefendants made the transfer with the requisite intent as evidenced by the presence of at least seven of the eight badges of fraud.

a. Legal Action Was Pending

66. Beginning in March 2001 and continuing through early June 2001, CCC and the IGF Parties engaged in negotiations regarding the debt owed CCC, and CCC made

it clear that legal action would be instituted if IGF did not pay. (*See supra* Findings of Fact # 33). Indeed, based upon the strained negotiations between the parties in the months prior to the transfer and CCC's statement of its intent to file suit, it was clear that IGF knew that its failure to pay the debt was an "invitation to legal action" by CCC. *See United States v. Smith*, 950 F.Supp. 1394, 1404-05 (N.D. Ind. 1996).

67. On June 6, 2001 – prior to the close of the transaction between IGF and Acceptance – CCC filed its Complaint demanding payment of IGF's obligations relating to the Put Mechanism. (*See supra* Findings of Fact 37). Thus, litigation was not merely probable at the time of the transaction, it had already commenced. *See Commercial Credit Counseling Servs., Inc. v. W.W. Grainger, Inc.*, 840 N.E.2d 843, 852 (Ind. Ct. App. 2006) (finding fraudulent intent in part because the transfer was made just prior to and during litigation).

68. The Counterdefendants knew or reasonably should have known at the time of the transaction that its failure to pay its debt to CCC would result in imminent legal action. *See Smith*, 950 F.Supp. at 1404-05 (finding fraudulent intent in part because defendant "reasonably should have known that his [acts] would be an invitation to legal action") (internal quotation and citation omitted).

b. IGF Was Insolvent

69. As set forth above, at and prior to the sale of IGF's crop insurance business to Acceptance, IGF was insolvent. SIG was also insolvent.

c. Transaction Differed from Customary Methods

70. As set forth above, the manner in which the Counterdefendants structured the payment for the transaction differed from customary methods. Specifically, Acceptance's payments to Goran and SIG for the non-compete payments were essentially purchase price consideration. Accordingly, the non-compete agreements with Goran and SIG were not exchanged for reasonably equivalent value. Similarly, Acceptance's payments to Granite Re for the Reinsurance Agreement were essentially purchase price consideration. Accordingly, the reinsurance agreement with Granite Re was not exchanged for reasonably equivalent value. Thus, Acceptance's payments to Goran, SIG, and Granite Re should have been paid directly to IGF.

d. The Transfer Greatly Reduced IGF's Assets Available for Execution

71. IGF only received $16,500,00 for the sale to Acceptance – less than half (approximately 40%) of the total amount that Acceptance paid to obtain IGF's crop insurance business. (TX 1711 at 19-25). That amount barely covered amounts due to policyholders. (*See* TX 1466; TX 1475; TX 1476; TX 1477). Thus, the transfer greatly reduced IGF's assets and prevented it from being able to pay its debt to CCC. *See Rose v. Mercantile Nat'l Bank of Hammond, J.R.*, 844 N.E.2d 1035, 1056 (Ind. Ct. App. 2006), *rev'd on other grounds*, 868 N.E.2d 772 (Ind. 2007) (affirming decision that a transfer was fraudulent in part because it left

the debtor without the assets needed to pay a known debt); *see also Commercial Credit Counseling Servs.*, 840 N.E.2d at 852.

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

72. As set forth above, IGF only received approximately 40% of the consideration to which it was entitled in exchange for the sale of its crop insurance business. *See Smith*, 950 F.Supp. at 1405 (finding fraudulent intent, in part, because debtor received inadequate consideration for transfer of property). IGF should have received, and, absent the fraudulent transfer, would have received, $40,500,000.

73. ADM and Westfield offered nearly the same amount for IGF's assets – with all payments to IGF. (*See supra* Findings of Fact ## 143-46).

74. Thus, IGF received inadequate consideration in return for the sale of its crop insurance business.

f. The Transaction Was Between Family Members

75. Although the officers and directors of the Corporate Counterdefendants were technically distinct, their composition was made up of many of the same individuals. For example, Alan, Doug, and/or Gordon were named directors and officers of each Corporate Counterdefendant during all relevant times. (TX 153 at 22 and Ex. 16; Litvak Tr. at 263-64). Similarly, at all times, the Symons Family retained chairmanship of the Boards of Directors of each of their companies, including Granite Re. (TX 153 at 23 and Ex. 4; TX 22; TX 77).

76. The payment structure for the sale of IGF's crop insurance business allowed the Symons Family to retain access to the funds, since the proceeds of the sale of IGF's crop insurance business were distributed among IGF, SIG, Goran, Granite Re, Pafco, and Superior. This is particularly true as Alan Symons negotiated the IGF sale to Acceptance on behalf of each of the corporate entities ensuring that funds would be kept in the family. This included the structure of the sale and the allocation of the proceeds from the sale among IGF, Goran, SIG, and Granite Re.

77. The fact that the transaction was between family members demonstrates fraudulent intent. *See Greenfield*, 757 N.E.2d at 702, 705 (affirming decision that transfer was fraudulent as a matter of law, in part, because the transfer was between family members); *Smith*, 950 F.Supp. at 1405 (finding fraudulent intent in part because the debtor and his family were the sole beneficiaries of the Trust, and therefore, the transfer could be characterized as one between family members).

78. Indeed, the correspondence among the Symons Family company board members and board minutes demonstrate that the stated purpose of the sale of IGF's crop insurance assets and the distribution of the sale proceeds was, in addition to the Symons Family obtaining improper reimbursements, to benefit the interests of the combined Corporate Counterdefendants by buying back preferred shares of SIG and funding Superior and Pafco, and not IGF, its policyholders and creditors. (TX 120; *see also* Finding of Fact # 294).

79. The trust preferred shares were not the obligation of IGF, nor did IGF's business

include nonstandard auto insurance. (Litvak Tr. at 300). IGF did not gain from the use of the Acceptance sale proceeds for these purposes. (TX 153 at 33).

80. The evidence demonstrates that Alan, Doug, and Gordon Symons gained substantially from diverting the funds from IGF and the hands of the creditors. As set forth above, Alan, Doug, and Gordon Symons collected millions of dollars in salaries and purported "consulting fees" from 2001-2002. (*See supra* Findings of Fact, Section III. E.).

g. No Evidence by the Counterdefendants to Justify the Transfers

81. The Counderdefendants have presented no evidence as to a reasonable price or value for the Goran and SIG non-compete agreements and the Granite Re Reinsurance Agreement. No valuation or pricing analysis was performed at the time of the sale or before or at trial, and no expert, or even layman's opinion, has been presented in support of the $24,000,000 price. CCC's evidence – both expert and contemporaneous Symons and Acceptance documents – is essentially uncontroverted.

82. For all of the reasons set forth above, the Counterdefendants structured the Acceptance deal with the actual intent to funnel assets away from its creditor, CCC. The court therefore finds that CCC has proven, by clear and convincing evidence, that the transfer was made "with actual intent to hinder, delay, or defraud any creditor" – namely, CCC. The court also finds that CCC has proven, by a

preponderance of the evidence, that the transfer was not made for "reasonably equivalent value." Accordingly, the Counterdefendants are also liable for fraudulent transfer under Section 14(1) and (2) of the IUFTA.

C. The Individual Counterdefendants Are Liable for Fraudulent Transfer

83. The Individual Counterdefendants maintain that they cannot be held liable under Indiana's Uniform Fraudulent Transfer Act ("IUFTA") because they do not qualify as "transferees" of the purported assets, or persons for whose benefit the transfer was made. *See* Ind. Code § 32-18-2-18(b). The IUFTA does not define the term "transferee." Black's Law Dictionary defines a "transferee" as "[h]e to whom a transfer [of property] is made." BLACK'S LAW DICTIONARY 1497 (6th ed. 1990).

84. It is undisputed that the Individual Counterdefendants were not direct beneficiaries of the Acceptance transaction. In order to prevail, then, CCC must show that the transfer of assets was made for the Symons Family's personal benefit under the theory that they personally participated in the fraud.

85. As the court noted in its summary judgment ruling, the issue of whether an officer or director of a "first transferee" who is found to have personally participated in the fraud can be held personally liable under the IUFTA is an issue of first impression in Indiana. In *DFS Sec. Healthcare Receivables Trust v. Caregivers Great Lakes, Inc.*, the Seventh Circuit had occasion to analyze the issue, and indicated that "there is good reason to believe [the Indiana common law rule holding that an officer or shareholder of a corporation can be held personally liable

if he personally participates in the fraud] would apply." 384 F.3d 338, 347 (7th Cir. 2004). The Court reasoned:

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

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

86. In the court's summary judgment order, the court analyzed another Seventh Circuit case and concluded that it did not preclude the assertion of a claim that "the Individual Counterdefendants personally participated in the allegedly fraudulent transaction at issue in this case." (Docket # 107 at 46).

87. The Counterdefendants cite *Rose v. Mercantile Nat'l Bank of Hammond* for the proposition that claims for fraudulent transfer are debt recovery remedies, not

causes of action for fraud, and thus, the reasoning of the *DFS* case is not on point. 868 N.E.2d 772 (Ind. 2007).

88. *Rose* involved a judgment creditor who moved for proceedings supplemental and also filed fraudulent transfer claims against the judgment debtor. The Indiana Supreme Court held that the evidence supported the trial court's finding that the judgment debtors fraudulently transferred assets to avoid the judgment. *Id*. at 776-77. In so finding, the Indiana Supreme Court quoted a 1937 Indiana Supreme Court case which described a fraudulent transfer claim as follows:

> [Fraudulent transfer claims] have for their sole purpose the removal of obstacles which prevent the enforcement of the judgment by the executive officers of the state through the levy of execution . . . . While the action may involve a conveyance said to be fraudulent, the recovery is not for the wrong or tort. It is not in damages.

Id. (quoting *Beavens v. Groff*, 5 N.E.2d 514, 516-17 (1937)); *see also Rice v. Comm'r, Indiana Dep't of Envtl. Mgmt.*, 782 N.E.2d 1000, 1004 (Ind. Ct. App. 2003) ("An action to set aside a fraudulent conveyance, like proceedings supplemental, sounds in equity, not in tort.").

89. The court finds its initial summary judgment ruling should stand notwithstanding the *Rose* and *Rice* decisions. First, *Rose* and *Rice* involved a post-judgment proceedings supplemental. "A proceedings supplemental . . . is merely a procedure designed to procure payment of a judgment when execution against the property of a judgment debtor is returned unsatisfied, in whole or in part." *Rice*,

782 N.E.2d at 1004. In contrast, this case involves a cause of action for legal, as opposed to equitable, relief. Second, in further support of its opinion that officers and directors can be held liable under the IUFTA for personally participating in the fraud, the *DFS* Court stated:

> [W]e are aware of no case suggesting that 'veil piercing' is impermissible under the UFTA [Uniform Fraudulent Transfer Act]. Liability for officers or shareholders of a 'first transferee' who personally participated in the fraud is a substitute for 'veil piercing,' not an extension of who can be a 'transferee' under the UFTA. Moreover, the reasoning behind the general rule that courts should avoid extending the parties who can be a 'transferee' under the UFTA appears to be based, at least in part, on the difficulty of proving damages. We do not believe that there would be any such difficulty here, where joint and several liability would clearly be appropriate.

DFS, 384 F.3d at 348 (internal citations omitted). The court can find no reason why veil piercing principles should not apply equally to the IUFTA as they do under the UFTA. Moreover, proving damages in this case is not difficult, as the damages are fixed by contract and the parties are jointly and severally liable. Accordingly, the court finds that the *DFS* case controls. The court now turns to the issue of whether CCC has proven that the Individual Counterdefendants personally participated in the fraudulent transfer.

1. Alan, Doug, and Gordon Personally Participated in the Fraudulent Transfer

90. As the principal officers, majority directors, and majority shareholders of the Symons Family entities, Alan, Doug, and Gordon Symons legally and factually

controlled Goran, SIG, Granite Re, Pafco, and Superior.

91. As a result, Alan, Doug, and Gordon Symons personally participated in the fraudulent transfers.

92. Alan Symons suggested, structured, and negotiated the sale of IGF to Acceptance, including the demands that funds be transferred upon closing to Goran and SIG for the non-compete agreements and to Granite Re for the Reinsurance Agreement. The evidence reflects that IGF did not receive reasonably equivalent value for these transactions.

93. Further, Gordon Symons was the Chairman of the Board and headed all of the Board meetings of IGF, SIG, and Goran during which the fraudulent transfers were approved. As such, he directed or approved as head of each company the corporate actions in question.

94. As Board members of each of the corporate entities which received funds diverted from IGF, which transactions were approved by the Boards of Directors, Alan, Gordon and Doug Symons personally participated in the fraud.

2. The Acceptance Transaction Financially Benefited the Symons Family

95. Although Alan, Doug, and Gordon Symons did not directly and immediately receive all of the proceeds of the IGF sale, as majority shareholders – as well as principal officers and directors – of each of the entities that received the improperly diverted funds (Goran, SIG, Pafco, Superior, and Granite Re), the

Individual Counterdefendants derived personal financial benefits from these fraudulent transactions.

96. Alan, Doug, and Gordon Symons collectively received millions of dollars in salaries and loans from Goran, SIG, and Granite Re. For example, as of April 21, 2003, (after the IGF sale and relevant transfers), Alan, Doug, and Gordon Symons had nearly $3 million in outstanding debt to Goran. (TX 1007, at Part III, Items 11 and 13).

97. Shortly after the Acceptance transaction, Granite Re loaned Gordon Symons approximately $800,000 to fund a personal real estate transaction. (*See supra* Findings of Fact # 246).

98. Shortly after the Acceptance transaction, the Symons Family caused over $2,000,000 to be paid to them and to other affiliates in which they were shareholders, for non-compete agreements, reimbursement of expenses that were never rendered by the affiliates, airplane charges, and other extraordinary expenses. (*See*, *e.g., supra* Findings of Fact, Section III. E).

99. At the same time, the Symons Family continued to receive large compensation and bonus packages, in excess of $1.5 million per year, from the transferee entities. (*See*, *e.g., supra* Findings of Fact, Section III. E. 2).

100. As the majority or 100% shareholders of all the transferees, the Symons Family has directly and personally benefited from their companies having been enriched at the detriment of CCC as a creditor.

101. Thus, the Symons Family members personally participated in the fraudulent transaction at issue in this case, and directly and personally benefitted financially from the fraudulent transaction.

IV. The Alter Ego Claim

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

103. As a general rule, Indiana courts are reluctant to disregard a corporate entity and extend the liabilities of one corporation and its affiliates, shareholders and/or officers; however, they may do so to prevent fraud or injustice to a third party. *See Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1232 (Ind. 1994); *see also Greater Hammond Comm. Servs., Inc. v. Mutka*, 735 N.E.2d 780, 784 (Ind. 2000); *Smith v. McLeod Dist., Inc*., 744 N.E.2d 459, 462 (Ind. Ct. App. 2000); *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1995).

104. "When a court exercises its equitable power to pierce the corporate veil, it engages

in a highly fact-sensitive inquiry." *Winkler*, 638 N.E.2d at 1232. The legal fiction of a corporate entity "may be disregarded where one corporation is organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation." *Smith*, 744 N.E.2d at 462. Indiana courts also refuse to recognize corporations as separate entities where the facts show that several corporations are acting as the same entity. *Id.*

105. The plaintiff bears the burden of proving, by a preponderance of the evidence, that the corporate form should be disregarded. *Escobedo v. BHM Health Assoc., Inc.*, 818 N.E.2d 930, 933 (Ind. 2004). In considering whether the plaintiff has met that burden, the court considers whether the plaintiff has presented evidence showing:

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

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

106. *Aronson* involved piercing the corporate veil in order to hold a shareholder personally liable. However, in a case such as this, where a plaintiff also seeks to pierce the corporate veil in order to hold one corporation liable for another corporation's debt, the eight *Aronson* factors are not exhaustive. *Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1192 (Ind. Ct. App. 2002); *Fairfield Dev.,*

Inc. v. Georgetown Woods, 768 N.E.2d 463, 469 (Ind. Ct. App. 2002). Rather, in addition to the *Aronson* factors, Indiana courts may also consider whether the two corporations have (1) similar corporate names; (2) common principal corporate officers, directors, and employees; (3) similar business purposes; and (4) the same offices, telephone numbers, and business cards. *Id.* (citing *Smith*, 744 N.E.2d at 463); *see also Eden United, Inc. v. Short*, 573 N.E.2d 920, 932 (Ind. Ct. App. 1991) ("[T]he key factor in any decision to disregard the corporate status of a tortfeasor is the element of control or influence exercised by the entity sought to be held liable for the corporation's affairs."). The court addresses the applicable factors below.

A. The Symons Family's Relationship with the Companies

107. The Symons Family collectively owned or controlled over 50% of the outstanding common stock of Goran, which, in turn, owned 73% of the outstanding shares of SIG and 100% of the shares of Granite Re. SIG, in turn, owned 100% of the stock of IGFH, Pafco, and Superior. And IGFH owned 100% of the stock of IGF. (*See supra* Finding of Fact, Section III. A. 1).

108. In addition, Gordon Symons was at all relevant times the Chairman of the Board of Goran and all of its subsidiaries, including all the Counterdefendants. Gordon Symons as Chairman thus had the ability to break any tie votes. (*See supra* Findings of Fact ## 167, 196).

109. Alan and Doug Symons were directors of each of the Corporate

Counterdefendants. As such, the Symons Family had a strong influence on the boards of directors, particularly the five- and six-member boardships of the Corporate Counterdefendants. (*See* Finding of Fact, Section III. A. 3).

110. The Symons Family was also involved in the operations of the Symons Family Companies and occupied the most senior officer positions at each corporation. (*See supra* Findings of Fact, Section III. A. 2). At various times throughout the period of January 1, 2000, until September 18, 2001, the Symons Family occupied the President, CEO, COO, Executive Vice President, and Secretary positions at Goran; the President, CEO, COO, and Vice Chairman positions at SIG; the President, CEO, and Vice President positions at Granite Re; the President, CEO, Executive Vice President, Vice Chairman, and Secretary positions at IGFH; the CEO, COO, Vice Chairman, and Secretary positions at Pafco; the President, CEO, COO, Executive Vice President, Vice Chairman, and Secretary positions at Superior; and the President, Executive Vice President, CEO, Secretary, and Vice Chairman positions at IGF.

111. Pursuant to NASDAQ Rule 4200(15), an "independent director" is a "person other than an executive officer or employee of the company or any other individual having a relationship which, in the opinion of the issuer's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of the director." The Rule expressly states that a director who "is, or at any time during the past three years was employed by the company or by any

parent or subsidiary of the company" shall not be considered independent. NASDAQ Rule 4200(15)(A).

112. For these reasons, Daggett and Gowdy were not independent directors since they were officers of multiple Symons-related companies. Thus, the IGF and IGFH Boards each consisted of Alan, Doug, and Gordon Symons, and two non-independent directors. (*See supra* Findings of Fact, Section III. A. 3. a.).

113. Similarly, Daggett and Yerant were not independent directors since they were officers of multiple Symons-related companies. Thus, the Pafco Board consisted of Alan, Doug, and Gordon Symons, and two non-independent directors. (*See supra* Findings of Fact, Section III. A. 3. b.).

114. Wechter is not considered independent because of his close personal relationship with Alan Symons. Thus, the SIG Board of Directors consisted of Alan, Doug, and Gordon Symons, two non-independent directors, and one other director. (*See supra* Findings of Fact, Section III. A. 3. e.).

115. Albacete and Reynolds are not considered independent directors because they were officers of various Symons-related companies. Thus, the Superior Board consisted of Alan, Doug, and Gordon Symons, and four non-independent directors. (*See supra* Findings of Fact, Section III. A. 3. d.).

116. Further, the Symons Family controlled the Goran Board, which had six members, three of which were Alan, Doug, and Gordon Symons (who, as noted above, had the ability to break tie votes), and two others who were not independent. (*See*

supra Findings of Fact, Section III. A. 3. f.).

117. Thus, Alan, Doug and Gordon Symons ignored, controlled, and manipulated the corporate forms of IGF, IGFH, SIG, Granite Re, Superior, Pafco, and Goran and operated the corporations as a single business enterprise such that these entities were mere instrumentalities of the Symons Family.

118. Further, and as shown below, the Symons Family improperly controlled the management and financial operations of each Corporate Counterdefendant.

B. Undercapitalization

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

120. Although the subject Companies were not undercapitalized at their inception, the fact that these Companies became undercapitalized and financially distressed by 1999, if not earlier, is relevant with respect to the issue of the Counterdefendants' commingling of assets and affairs and thus, cannot be ignored.

C. Fraudulent Representations

121. The Symons Family, and at their direction the Corporate Counterdefendants, made fraudulent representations to the regulatory agencies and the general public concerning IGF's financial condition. For example, Alan Symons instructed the CFO of IGF, Jones, to make misrepresentations to the FCIC regarding IGF's estimated underwriting gains that were substantially contrary to estimates that Jones had already prepared. In addition, SIG officers pressured Jones to prepare financial statements in conjunction with IGF's statutory filings in such a manner as to make him uncomfortable enough to resign. (*See supra* Findings of Fact ## 201-08).

D. Corporate Formalities

122. The corporate formalities maintained by the Corporate Counterdefendants, such as holding annual shareholder meetings, holding annual Board of Directors meetings, keeping minutes of those meetings, and occasionally issuing board resolutions of those meetings, are entirely "cosmetic." For example, Goran's and SIG's Boards met at the same time and in the same place on eighteen separate occasions between March 1997 and May 2001. (*See supra* Findings of Fact # 278). During the same period, IGF and Superior had Board meetings at the same time and in the same place on three separate occasions, and on at least one of those occasions, IGFH and Superior held board meetings with Pafco and IGF. (*See supra* Findings of Fact # 279). Further, Alan Symons acted as the principal representative for each of IGF,

IGFH, SIG, Goran, and Granite Re during the negotiation of the Asset Purchase Agreement with Acceptance. (*See supra* Findings of Fact # 49).

E. Commingling of Assets and Affairs

123. The Symons Family commingled its assets and affairs with those of IGF, IGFH, SIG, Granite Re, Superior, Pafco, and Goran. (*See, e.g.*, *supra* Section III. E.). For example, IGF had no employees on its payroll; rather, it utilized IGFH's payroll in exchange for a management fee, and employees of Superior and Pafco were on the payroll of, and paid by, IGFH or Superior Management. The Companies also engaged in inter-company loans. For example, in 2001, IGF, Superior, and Pafco engaged in over $1,000,000 in inter-company purchases, sales, or exchange of loans, securities, real estate, mortgages, or other investments. Also in 2001, at a time when IGF, Superior, and Pafco were incurring substantial operating losses and were significantly undercapitalized, their holding companies received in excess of $43,000,000 from the operating companies through management agreements and service contracts between entities for that single year alone. (*See* Finding of Fact # 261).

124. The individual members of the Symons Family also took out personal loans with the Companies, and received millions in salary, bonus, and/or consulting fees from Goran, SIG, and Granite Re. (*See supra* Findings of Fact, Section E. 1, 2).

F. Common Address and Business Purpose

125. Goran's U.S. Headquarters shared a common business address in Indianapolis with

SIG, IGF, IGFH, Pafco, and Superior. Moreover, these corporations were either in the insurance business or were holding companies of the same.

G. Conclusion

126. Based upon the foregoing, the court finds that Alan, Gordon, and Doug Symons used their control over the Corporate Counterdefendants to avoid satisfying the outstanding debt to CCC. This constitutes a fraud which justifies piercing the corporate veil. *Lambert v. Farmers Bank, Frankfurt, Ind.*, 519 N.E.2d 745, 748-49 (Ind. Ct. App. 1988).

127. As the controlling shareholders of the Corporate Counterdefendants, and the recipients of improper post-transaction benefits, Alan, Doug, and Gordon Symons were the beneficiaries of the gains in avoiding the large debt to CCC.

128. Based upon the foregoing, the court finds that CCC has proven, by a preponderance of the evidence, that Alan Symons, Doug Symons, Gordon Symons, SIG, Goran, Granite Re, IGF, IGFH, Pafco, and Superior were all alter egos of one another, and that it is therefore appropriate to pierce the corporate veil and hold Alan Symons, Doug Symons, Gordon Symons, SIG, Goran, and Granite Re liable for the debts owed by IGF, IGFH, and SIG to CCC.

V. Summary of Conclusions

129. The court finds that CCC has proven, by a preponderance of the evidence, that the Counterdefendants are liable under Section 14(2) and Section 15 of the Indiana Fraudulent Transfer Act, as alleged in Count IV of the Amended Counterclaim.

The court further finds that CCC has proven, by clear and convincing evidence, that the Counterdefendants are liable under Section 14(1) of the Indiana Fraudulent Transfer Act, as alleged in Count IV of the Amended Counterclaim. The Counterdefendants are therefore jointly and severally liable to CCC in the amount of $24,000,000 plus interest as of June 1, 2006.

130. The court finds that the CCC has proven, by a preponderance of the evidence, that the Counterdefendants were alter egos of one another, and thus, the court finds the corporate veil should be pierced to prevent fraud and injustice, as alleged in Count V of the Amended Counterclaim. The Counterdefendants are therefore jointly and severally liable to CCC in the amount of $34,258,078 plus interest as of June 1, 2006. (*See* Findings of Fact ## 40, 43, 45).

131. As Doug Symons' bankruptcy proceeding is still pending, the court's findings and conclusions regarding his liability are stayed.

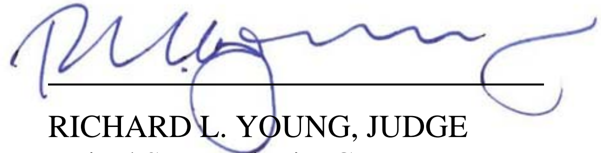
132. Finally, failed to present evidence that IGFH never paid 1911 Corp. any of the $1,000,000 owed under the NACU Note. Moreover, 1911 Corp. failed to prove that the assignment to IGF took place without its knowledge or consent.

133. Accordingly, the court concludes that IGFH is not liable to 1911 Corp. under the NACU Note.

134. Because there is no debt that may be satisfied by the Counterdefendants, 1911 Corp. may not recover under Counts IV and V of the Amended Counterclaim.

135. A separate Judgment is forthcoming.

SO ORDERED this 19th day of October 2009.



RICHARD L. YOUNG, JUDGE
United States District Court
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