IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 200 OF 2015(IMJ)

IN THER MATTER OF THE COMPANIES LAW (2016 REVISION)

IN THE MATTER OF STERLING MACRO FUND

BETWEEN

WORTHING PROPERTIES LIMITED **PETITIONER**

AND

STERLING MACRO FUND **RESPONDENT**

<u>IN OPEN COURT</u>

Appearances:	**Mr. P Jones QC, instructed by Mr. B Gowrie, Mr. P Kendall and Mr. P McConvey of Walkers on behalf of the Petitioner**
	Mr. I Croxford QC, instructed by Mr. J Harris of Higgs & Johnson on behalf of the Respondent Company
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**12, 13, 14, 15, 16, 19, 20, 21, 22 September, 21, 23 November 2016 and 21 February 2017**
Draft Judgment Circulated:	**31 March 2017**
Judgment Delivered:	**6 April 2017**

HEADNOTE

Companies Law (2016 Revision), section 92(e) - Winding Up Petition on Just and Equitable Grounds - Extant related proceedings underway in Holland as to beneficial owner of shares in Petitioner - Only asset owned by Petitioner is its interest in the Company - Whether factual basis for Petition proved - whether alleged lack of confidence in those in control of Company justified by their lack of probity, and whether lack of probity objectively justified - whether any sound evidence of dissipation of assets or risk - Unclean hands - improper purpose - abuse of process.

JUDGMENT

1. This is an Application by the Petitioner Worthing Properties Limited ("Worthing") to wind up Sterling Macro Fund ("Sterling") upon the just and equitable ground contained

in the Companies Law (2016 Revision) ("the ***Law***"); section 92 (e). The Petition was filed on or about 10 December 2015.

2. I wish to thank the Attorneys-at-Law representing both Parties for the extremely high level of preparation and invaluable assistance to the Court.

3. It is Worthing's case that the conduct of those managing and advising Sterling in relation to the "Unlawful Transfer" and "the Information Application", terms which I will discuss further below, demonstrates such a lack of probity and is so egregious that the only appropriate remedy is for Sterling to be wound up. Worthing contends that Sterling cannot be allowed to have unfettered control of its assets, the economic value of which entirely belongs to Worthing. Worthing's position is that Sterling has put forward perjured and fabricated evidence.

4. Mr. David Katz ("Mr. Katz") is not a registered shareholder in Worthing. In proceedings commenced by Mr. Katz in the Netherlands in March 2015, he is making a claim that he is the true beneficial owner of the shares in Worthing. Sterling maintains that this Petition is a dishonest attempt by Hendrik Keilman ("Mr. Keilman") to defraud Mr. Katz of his interest in Sterling. To that end, it was argued that Mr. Keilman has sworn deliberately false and dishonest evidence for the improper purpose of circumventing proceedings before the Courts of the Netherlands, which Courts are already seized of the issue of ultimate beneficial ownership. In proceedings in the Cayman Islands concerning the Information Application, it was alleged by those managing Sterling, that Mr. Keilman was not authorised to represent Worthing.

5. Worthing's position on the other hand, is that that claim in the Netherlands has not yet been determined and is a far way off. Worthing states that Sterling and its management have acted and continue to act, in what they consider to be in the best interests of Mr. Katz. The allegation is that as a practical matter, Sterling is wrongly seeking to freeze Worthing's assets so as to relieve Mr. Katz from the obligation of seeking an injunction in relation to Worthing in an appropriate jurisdiction, with the concomitant requirement

to give cross-undertakings in damages with suitable fortification. This is entirely inappropriate conduct, Worthing says, which this Court should condemn in the strongest terms.

6. It may be useful to set out a Dramatis Personae.

A. Mr. Keilman operated as a provider of fiduciary and corporate services through a number of companies and has interacted with Mr. Amnon Shiboleth ("Mr. Shiboleth") and clients of his for many years, providing such services. Mr. Keilman has been the only factual witness called to give oral evidence on behalf of Worthing. Mr. Keilman was declared a bankrupt on 8 July 2015 in the Netherlands. Mr. Keilman had filed an appeal from that determination which he subsequently withdrew.

B. A number of witnesses have given factual evidence on behalf of Sterling. Mr. Katz, a deponent for Sterling, is a businessman, resident in Portugal and Israel. As stated above, he claims to be the beneficial owner, or ultimate beneficial owner ("UBO") of the shares in Worthing.

C. Mr. Shiboleth, a deponent for Sterling, is a lawyer admitted in New York and Israel. Mr. Katz was at all material times his client. He gave evidence for Sterling. His evidence was that Mr. Katz was at all material times the beneficial owner of the shares in Worthing and was the investor in Sterling.

D. One of the companies owned by Mr. Keilman was RIG Investments NV ("RIG") and another was Holland Trust Management ("HTM").

E. Mr. Kreikamp ("Mr. Kreikamp") is RIG's trustee in bankruptcy or receiver. Since 2012 RIG has been and remains in bankruptcy in Holland.

F. Gloria Vanderbilt Trademark Investments ("GVTI") owned the trademarks associated with jeans and denim clothing carrying the Gloria Vanderbilt name.

G. Gloria Vanderbilt Apparel Corp ("GVAC") was a subsidiary of GVTI and exploited the Gloria Vanderbilt trademarks under license from GVTI.

H. Gloria Vanderbilt Trademarks BV ("GVBV") was a Dutch holding company formerly known as Plato Reserve 9 BV which had no known activity before it was used to acquire the trademarks from GVTI.

I. Mr. Isaac Dabah ("Mr. Dabah"), a deponent for Sterling, was formerly the CEO of GVAC and was the person who negotiated the sale of GVTI's trademarks to GVBV between 1995 and 1997 and the later onward sale of the trademarks by GVBV in 2002. Later in 2005 he became the principal of the investment manager of Sterling which had been run by Mr. Khafif.

J. Mr. Edgar Khafif ("Mr. Khafif") also gave evidence for Sterling. He is the brother-in-law of Mr. Dabah, and managed Sterling initially through his American Investments Holdings USA Inc. company. His evidence was that he was the Investment Manager for Sterling since its inception in 2002 until January 1, 2005.

K. Mr. Moise Khafif ("Mr. Khafif Snr.") is Mr. Dabah's father-in-law. It was Mr. Khafif Snr. who financed the acquisition of the Gloria Vanderbilt trademark assets for GVTI in the early 1990s.

L. Savlamor Investments Ltd ("Savlamor") and Telescope Investments Ltd ("Telescope") are two companies beneficially owned by Mr. Keilman.

M. Niaga Holdings Ltd ("Niaga") is a private Hong Kong Company to whom Mr. Keilman caused 49,995 out of 50,000 shares in Worthing to be issued in June 2015, said to be for the purpose of litigation funding. This issue took place after Mr. Katz had filed proceedings in the Netherlands in March 2015, making his claim to beneficial ownership of the shares in Worthing. Niaga is therefore on notice of Mr. Katz' claim.

N. Mr. Cas Renders ("Mr. Renders"), is a creditor of Mr. Keilman to whom Mr. Keilman caused 20% of the issued shares in Worthing to be issued (Sterling says "purportedly issued"), in 2012.

O. Victory Hills SA ("Victory Hills") is a Panamanian company established by Mr. Shiboleth and to which an attempt was made to transfer Worthing's shareholding in Sterling.

P. Mr. Andreas Jansen lives in the Netherlands and worked in various capacities with Mr. Keilman and his group of companies including RIG and HTM, over various periods of time. Mr. Jansen gave evidence on behalf of Sterling in these proceedings and has provided written evidence on behalf of Mr. Katz in the Dutch proceedings.

7. The Petition as well as the Points of Defence have undergone amendment. This case has been quite a complex and convoluted one. There are two completely different and contradictory stories as to how funds came to be invested in Sterling. This has meant that very different explanations as to some material events have been proffered to this Court. It must be said, that it is plain that one party is being extremely deceitful to this Court.

8. The Unlawful Transfer is a matter about which the Court heard much evidence. In sub-paragraph 6(a) of the Amended Petition, amended on 6 June 2016, "the Unlawful Transfer", was defined as follows:

> *"6.(a) At some time on or after 18 May 2012 and prior to 31 December 2012,* [Sterling] *purported to transfer the entirety of the Worthing Shares to Victory Hills S.A. ("Victory Hills"), a company wholly unrelated to* [Worthing]*, without* [Worthing's] *knowledge or authority (the "Unlawful Transfer")."*

9. At sub-paragraph 6(b) of the Amended Petition, it is alleged that Sterling then took steps to conceal the Unlawful Transfer by failing to provide the books and records at various times, and in different ways, including, as stated at sub-paragraph (iii):

> *"6.*
>
> *(b)...*
>
> *(iii) following the filing of an originating Summons in this Honourable Court on 2 June 2015 seeking a declaration that [Worthing] was entitled to the Books and records of [Sterling] .pursuant to clause 2(d) of the Subscription Agreement ("the Inspection Application")."*

10. It is Worthing's pleaded case that, Sterling further sought to conceal the Unlawful Transfer, by opposing the Inspection Application without any proper grounds and advancing a case premised on Worthing having an interest in Sterling, and in particular

alleging only that Mr. Keilman was not authorised to represent Worthing, whilst knowing full well that Worthing's interest in Sterling had been fraudulently misappropriated to Victory Hills. Worthing also alleges that the managers and advisors of Sterling prevaricated and delayed the determination of the Inspection Application in a number of ways.

11. Worthing avers that Sterling further sought to conceal the Unlawful Transfer by causing proceedings to be brought in the Commercial Court section of the Court of Amsterdam in which Mr. Katz alleges that he is beneficially entitled to all of the shares in Worthing (seeking, amongst other relief, a declaration to that effect), without disclosing the Unlawful Transfer.

12. Worthing went on to plead that the conduct of Mr. Dabah in relation to the Unlawful Transfer and its subsequent concealment constitutes a fraud on Worthing, which justifies the immediate winding up of Sterling and requires independent scrutiny or investigation of Sterling's affairs.

13. The Amended Petition also asserts that a review of the financial statements of Sterling indicate that there are apparent irregularities in respect of the management and accounting of Sterling that justify investigation by independent officers.

14. On the ex parte application of Worthing, and therefore at a time when the Petition and Supporting Affidavits only were before the Court, this Court made an Order on 16 December 2015 for the appointment of David Griffin and Andrew Morrison of FTI Consulting (Cayman) Ltd as joint provisional liquidators ("the JPLs").

15. In relation to the Unlawful Transfer, in the amended Points of Defence filed 21 June 2016, Sterling's case was put forward as follows:

> *"63A The attempt to "transfer [Worthing's] shares to Victory Hills was made in order to protect Mr. Katz, the person whom [Sterling] believed to be the sole shareholder of* [Worthing] *from a dishonest*

attempt by Mr. Keilman to use his role as [director of Worthing] *to take control of* [Worthing] *and* [Sterling].

(i) *The instruction to "transfer"* [Worthing']*s interest in* [Sterling] *to Victory Hills was recommended to Mr. Katz by Mr. Shiboleth.*
(ii) *Mr. Shiboleth had discovered that Mr. Keilman had in breach of his fiduciary duties misappropriated funds of a number of Mr. Shiboleth's clients.*
(iii) *Mr. Shiboleth feared that Mr. Keilman would use his control of* [Worthing] *to defraud Mr. Katz of his beneficial interest, as indeed was the case by no later than the end of 2011(a fact unknown to Messrs Shiboleth, Dabah or Katz).*
(iv) *Mr. Katz agreed with Mr. Shiboleth to issue the instruction to transfer* [Worthing's] *shares in* [Sterling] *to Victory Hills.*
(v) *Mr. Shiboleth agreed with Mr. Katz that nothing would be done to alter* [Sterling's] *interest in its assets or redeem Mr. Katz' investment until Mr. Shiboleth had been able to establish the extent of Mr. Keilman's dishonesty and commence recovery proceedings which he thought would be in Holland, Mr. Keilman's domicile.*

63B. [Sterling] *did not know at the time of the purported transfer to Victory Hills that there was any claim by Mr. Keilman to the shares of* [Worthing] *or that there was any dispute let alone bona fide dispute by him that Mr. Katz was the sole shareholder of* [Worthing].

63C. *What* [Sterling] *knew is that* [Worthing's] *director had dishonestly abused his position in other companies in which he was in a similar fiduciary position and misappropriated substantial sums and investments.*

63D1. [Sterling] *did not move any of its assets, which remained invested precisely as they had previously. [Sterling] did not attempt to render it impossible for the attempted transfer to Victory Hills to be reversed and indeed it was not effective. Moreover,* [Sterling] *did nothing which in law prevented* [Worthing] *from exercising its rights as shareholder.*

63D2 [Sterling] *bona fide believed at the time that it needed to protect its true economic owner from a devious and dishonest director of its registered shareholder.*

> 63E. *In the circumstances, it is denied that* [Sterling's] *conduct was reprehensible or such as would render it just and equitable to wind up* [Sterling]."

The JPLs Reports

16. The JPLs have filed two reports which show that the assets of Sterling have substantially increased in value since first invested. Importantly, the Reports show that the Investment Manager of Sterling has not moved those assets, depleted them or done anything adverse with them. The vast majority of the assets consist of assets which have remained throughout at Goldman Sachs. At paragraph 5.6 of their First Report, dated 18 January 2016, the JPLs discuss a number of matters, including the purported transfer to Victory Hills, and Sterling's Articles of Association, and state that:

> "....*In any event, as noted earlier, it appears likely that the dispute as to beneficial ownership of Worthing is likely to be determined by other legal proceedings in due course. <u>In the meantime, the JPLs consider that the assets of the Company are secure.</u>*" (my emphasis)

17. The JPLs were provided by the auditors with the following documents which they included in their First Report:

    (i) A letter dated 19th July 2012 from Mr. Shiboleth to Mr. Weinstock stating: *"Here are the instructions of Mr. David Katz which were executed some two weeks ago, in Tel Aviv,..."*

    (ii) An undated document which purports to be "an instruction to transfer" addressed to Sterling and signed by Mr. Katz stating *"I instruct you to transfer and assign all the rights of Worthing Properties Limited in the deposit with you to Victory Hills S.A. Panama. I further hereby, declare that both entities are controlled by me."*

    (iii) A copy of a document entitled "share summary" dated 31 December 2012 which showed the only participating shareholders in the Company at that date were Victory Hillsand Stillwater Market Neutral Fund Ltd. II

("Stillwater"). It is common ground that Stillwater, which was Mr. Dabah's investment, is no longer a shareholder.

18. In their Second Report dated 17 April 2016, the JPLs indicate, amongst other matters, that they have agreed a protocol, in principle, with the Investment Manager for the approval of any trading decisions and/or payments required in the ordinary course of business. This Report also indicated, that going forward from there, a significant reduction in the JPLs time costs rate was anticipated, as a result of their completion of that Report, and their review of Sterling's affairs.

The Witnesses and evidence in relation to the Unlawful Transfer

19. Worthing's leading Counsel Mr. Jones QC, in his written closing submissions has opined that it is useful to examine how Sterling's case developed in relation to the Unlawful Transfer during the different phases of the litigation. In "*the first round of evidence*" as he refers to it, Mr. Jones QC points out that neither of the Directors of Sterling, (Mr. and Mrs. Dabah), gave any evidence which dealt with the Unlawful Transfer. Mr. Dabah did file an Affidavit, but he did not seek to explain or to excuse Sterling's conduct. The only evidence filed which dealt with this issue was that of Mr. Katz and Mr. Shiboleth.

20. Mr. Katz' evidence, at paragraph 9 of his Affidavit, was in essence, that he approved the decision to transfer his investment in Worthing to another company beneficially owned by him, which was Victory Hills. He states that he did so in order to protect his investment from being stolen by Mr. Keilman, which he says in fact is what is now occurring, with the Petitioner purporting to be Worthing. Mr. Katz' evidence was that he made his decision about the transfer after learning that Mr. Keilman had stolen millions of dollars from other trust clients whose assets were under Mr. Keilman's control. Mr. Katz evidence continued as follows:

> "*I undertook to Mr. Dabah that I would not transfer my assets out of Sterling until a determination of ownership by a Dutch Court, and that no steps have been made to transfer any assets out of Sterling. I also undertook to return my assets into the name of Worthing if Mr. Dabah*

personally requested. The sole purpose of my transfer to Victory Hill was to remove my assets from the control of Keilman, an admitted embezzler."

21. Mr. Shiboleth's evidence in relation to the Unlawful Transfer at paragraph 47 of his Affidavit sworn 22 February 2016, is as follows:

"*By this stage (i.e. July 2012) I was convinced that Mr. Keilman would seek to steal from all of the clients which I had referred. I decided that I needed to take whatever steps I could to protect the assets of my clients who had dealt with Mr. Keilman from any further steps he might take to try and defraud them. Although I had no specific knowledge of how he was proposing to misappropriate Mr. Katz' investment in Sterling, I was concerned about Worthing, since he had effective control of that company through the various fiduciary businesses controlled by him. The only step I could conceive and execute quickly at the time was to transfer Worthing's shareholding in Sterling to another Company controlled by Mr. Katz. I caused Victory Hills.... to be incorporated in Panama for that purpose. It is important to note that Mr. Katz could as easily have removed the assets from Sterling completely or partially had he chosen to do so. The assets were not moved. Sterling has not depleted its balance sheet. Mr. Katz and my only concern however was to protect and preserve those assets from the depridations of Mr. Keilman. On 19 July 2012 (less than a week before Keilman's letter admission to attorney Wachtel) I sent Itzhak Weinstock, an executive of Sterling, instructions to transfer and assign all rights of Worthing in the investment in Sterling to Victory Hills S.A."*

22. The point Mr. Jones QC makes is that, at this stage, Mr. Shiboleth made no reference at all to any agreement between Mr. Katz and Mr. Dabah that Mr. Katz would not transfer his assets out of Sterling until a determination of ownership was made by Dutch Court. He emphasizes that that evidence was only given by Mr. Katz and that it was not supported by either Mr. Shiboleth or Mr. Dabah.

23. In paragraph 51 of his Affidavit Mr. Shiboleth accepted that he had no authority on behalf of Worthing to give this instruction.

24. Worthing's Leading Counsel also felt that it was worthwhile for the Court to examine what was Sterling's case when it put in the August 2016 evidence. Reference was made to the second round of evidence, in which, in his Affidavit filed 10 August 2016, at paragraphs 16-19, Mr. Shiboleth gave the following evidence:

> *"16. I would like to make it absolutely clear that when recommended to Mr. Katz and Mr. Dabah that Worthing's shares in [Sterling] should be transferred to Victory Hills that I had no idea that Mr. Keilman would assert that he was the owner of the Worthing shares. Mr. Katz still had his bearer shares in Worthing, I was simply concerned to put it outside of Mr. Keilman's power to do anything to harm Mr. Katz. After all, Mr. Keilman had set up Worthing and had been responsible for its administration and I therefore wanted to put some distance between Mr. Katz and Mr. Keilman.*
>
> *17. Unfortunately this had come too late for some of my other clients who had already been defrauded by Mr. Keilman. I expected that those other matters and Mr. Keilman's criminality might eventually come before the Courts, particularly if he did not make good his promises to repay what he had stolen. It was in that context that I said to Mr. Katz at the time that he might have to unwind the Victory Hills transaction. This was not said, as I understood to have been suggested on behalf of [Worthing] because I was somehow expecting a claim by Mr. Keilman to the shares in Worthing. As I have said that would have come as a surprise given that Mr. Katz held the two bearer shares.*
>
> *18. Since both Mr. Katz and Mr. Dabah were long time clients of mine, I had some concerns not to harm one in order to protect the other. My thinking was to protect Mr. Katz by moving assets held in Sterling from Worthing to a different entity outside the reach of Mr. Keilman. My thinking was to also protect Mr. Dabah by having Mr. Katz agree not to withdraw assets from*

Sterling in the name of Victory Hills until a final determination by a competent Court that he is the beneficial owner, as well as to allow Mr. Dabah to move the assets back to Worthing in his discretion. Therefore, a week after the transfer to Victory Hills, I prepared a letter of undertaking for Mr. Katz to send to Mr. Dabah, which Mr. Katz signed, attached hereto as tab 2 of AS2. My logic in using a Dutch Court's determination as to ownership before permitting any withdrawal of the assets from Victory Hills was because while I had some concerns as to the regularity of the hasty transaction used to protect the asset from the reach of Mr. Keilman, I believed that if it were ever contested since Mr. Katz was truly the Beneficial owner of Worthing's asset, he would prevail. Moreover, it seemed to me that the only possible logical forum for any future dispute in respect of ownership, which could only be with Mr. Keilman who had went[sic] rogue less than a year before, would be in Amsterdam.

19. The intention was to protect the Company and it was not an attempt to dissipate assets. As the joint provisional liquidators have confirmed nothing has in fact been moved out of Sterling. The accounts with Goldman were not depleted after Victory Hills took over Worthing's interest."

25. The point raised by Mr. Jones QC is that this was the first time that it had been mentioned that there was anything <u>in writing</u> relating to not doing anything until the Court in Amsterdam had pronounced on Mr. Katz' beneficial ownership of the shares. The undated letter is exhibited to Mr. Shiboleth's Second Affidavit and reads as follows:

" *Date:...*

To: Mr. Isaac Dabah

Sterling Macro

From: David Katz

Re: Transfer of assets out of Worthing

Last week, I instructed the transfer of assets out of Worthing. Following your request, I hereby authorize you to fill out the date above- as will be necessary, as well as-

1. *I agree not to take any money out of Victory Hills as long as the courts of Amsterdam will not issue a final judgment declaring me as the beneficial owner of Worthing.*
2. *You have the absolute discretion to move the assets back from Victory Hills to Worthing at any time.*

…………………."

26. Mr. Dabah gave the following evidence at paragraph 13 of his Fourth Affidavit:

> *"I understand that I have been criticized for not saying anything previously about Victory Hills. The attempted transfer of shares in [Sterling] from Worthing to Victory Hills was a recommendation of Mr.Shiboleth who was concerned that Mr. Keilman had been defrauding his clients and would next attack Worthing. One of the clients who Mr. Keilman defrauded was my sister. At the time this happened Mr. Keilman had not made any claim to shares to Worthing. I did not know that Mr. Keilman was actually going to pretend he was the true owner of those shares. I agreed to the transfer because I know Mr. Katz to be the true and only owner and what Mr. Shiboleth suggested sounded reasonable to protect Mr. Katz, as it distanced him from the Company which Mr. Keilman had incorporated."*

27. Mr. Katz gave no further evidence in the second round of affidavits.

28. Reference was made by Worthing's Leading Counsel to the cross-examination of Mr. Dabah, where he said:

> *"we know that, ultimately, if Mr. Keilman was going to assert that he is the owner of Worthing, then we would have to take him to court in Amsterdam."*

29. Worthing submits that it is clear that Sterling was aware of a claim that Mr. Keilman could make. What Worthing disputes, however, was that there was any contemporaneous

agreement that nothing would be done until the issue of ownership had been determined. Worthing's Leading Counsel submits that this was simply put forward as an attempt to lessen the seriousness of what happened and that it is perjured evidence. And further, that in an attempt to lessen the seriousness of what had happened, Sterling has recently manufactured the document referred to at paragraph 24 above. They are, it is contended, seeking to pass this off as a contemporaneous document, but it is clearly a recent creation, submits Mr. Jones QC. One of the many points Worthing makes about this document is that if there had been any written document recording the purported undertaking it would have been exhibited in the first round of affidavit evidence and the document would have been expressly referred to in the Defence.

30. Worthing goes on to submit that of equally probative force in relation to this issue is the fact that no proceedings were commenced in Amsterdam until 31 March 2015, just under three years afterwards.

31. As for how there could have been an agreement that nothing would be done until a determination by a Dutch Court when no proceedings were commenced until 31 March 2015, Mr. Jones Q.C. submits that Mr. Katz' evidence below is risible:

"Q: *I suggest to you that this-that the conclusion one should draw from the letter is that it was written at a time that there were existing proceedings taking place in the courts of Amsterdam. Do you agree or not?*

A: I don't know. I don't know. I don't know the dates.

Q: Why would you be referring to a-not taking out money until a final judgment?

A: Maybe we are intending to put deposit maybe. I don't remember if we did, or did not yet.

Q: Your evidence is that you have dictated this letter. Is it your thoughts that have gone into this? It is inconceivable that this would have been dictated if proceedings were not then on foot?

A: *I can't answer you for sure if you or not, but this is what I did to prevent my investment in Sterling Macro. I didn't want to be in the same place where the other people where they claim their accounts, you know that.*

Q: *...and I suggest that this is a letter drafted by a lawyer and put in front of you to sign. Do you agree or disagree?*

A: *No.*

Q: *I suggest this document has been created very recently in the last few months?*

A: *Oh, my God.*

Q: *Is that right?*

A. *Not so. Where you take these things? Never."*

32. Worthing also submits that Mr. Katz' explanation for why there was a three year delay in filing suit was not credible and was made up on the spur of the moment. Mr. Katz had said that they had to gather documents and prepare the case with lawyers.

33. Mr. Jones sought to highlight the fact that there was a discrepancy between the witnesses as to who had produced this document. Mr. Shiboleth in his evidence stated that he had drafted the document; he said "*Definitely, I did. I remember that clearly.*"

34. When, on the other hand, Mr. Katz was asked about the drafting of the document, he had this to say:

"Q: *Is that a document you are familiar with?*

A: *Yes.*

Q: *Did you draft that yourself?*

A: *It's not my English. I read it to someone maybe and then they typed it. It's not - I don't speak so well English to write it that way.*

Q: *So you dictated this to someone?*

A: *I stated this idea. I read it, and I signed it.*

Q: *Just so we can clarify this. You dictated this?*

> *A: Not word by word. The idea. I dictated that this* [was] *what I want to be on the paper.*
>
> *Q: So this wasn't drafted by a lawyer and put in front of you to sign?*
>
> *A: I don't think-I don't remember exactly, but I don't think so."*

35. Leading Counsel also asked Mr. Shiboleth during his cross-examination, whether he had been aware that on the summary judgment application, a criticism had been made that there was no written undertaking and that there had been no claim of there being a written undertaking. Mr. Shiboleth said he was not aware. Mr. Shiboleth insisted that the document was not created to deal with that criticism, and had been in existence long before the Cayman Proceedings were filed.

36. It was Leading Counsel's submission that this evidence was not credible. It was submitted that, in an attempt to downplay the seriousness of what they had done, there had been a conspiracy between Mr. Dabah, Mr. Katz and Mr. Shiboleth to concoct false evidence. That, it was submitted, was more than sufficient to demonstrate a lack of probity and a reason why it is just and equitable that Sterling be immediately wound up.

37. Leading Counsel also suggested that Mr. Shiboleth's evidence that he could not conceive of any step to protect what he considered to be Mr. Katz' beneficial ownership other than to procure the transfer of Worthing's shareholding to Victory Hills was incapable of belief. It was submitted, that if Mr. Katz was the holder of the only two bearer shares in Worthing, Mr. Shiboleth had only to look at the Articles of Association to see that a director of Worthing could be removed (Art. 55(a) simply by the members passing a resolution removing Mr. Keilman as a director). Article 25 of the Articles provides that a meeting of members must be convened on the written request of members holding more than 50% of the votes of the outstanding voting shares.

38. The following exchange took place with Mr. Shiboleth during cross-examination:

> *"Q: How could Mr. Keilman get his hands on Sterling's assets?*

A. *Well, since now we know this gentleman is willing to do-forge documents, as far as I'm concerned, he would forge the documents of Sterling Macro-I'm sorry-of Goldman Sachs. He will - he will - he will - might forge the signature of the administrators. I don't know what this gentleman could have done, and I was petrified.*

Q. *You're not seriously suggesting, are you, that Mr. Keilman could have gone to Goldman Sachs and pretended to be the administrator?*

A. *No, no, no. I didn't say that. Forge the signature of the administrator, and if necessary, of Goldman Sachs.*

I'll tell you something else, which you'll be surprised he forged the signature of a bank in Israel. So he could do it again.

Q. *But where would the assets go from Goldman Sachs? They would go to Sterling, wouldn't they?*

A. *No, he might forge the signature of Sterling too, and say, I hereby suggest that it will go to Mr. Keilman in an account in Hungary. I don't know.*

Q. *Mr. Shiboleth, this is ridiculous evidence, isn't it?*

A. *I agree.*

Q. *Yes.*

A. *But the activities were ridiculous, too."*

39. The following exchange also took place in cross-examination:

"Q: *Why did you not just remove Mr. Keilman?*

A: *I was afraid, if I'm noticing shareholders meeting or something, he's going to do something. And I didn't want to give him the chance. I wanted to act and did not want to spend one hour to give him a chance that $50 million will disappear, and the, Your Honour, there will be no cases here because he was bankrupt. Or not him. His major company was bankrupt, RIG. And the receiver, I don't know, will never see the money. It will be gone. This exercise, namely, to become- to any court of law in any place would be an exercise of futility. Keilman, it was* *clear, is doomed to be bankrupt, and his entire empire will be bankrupt. So I don't want to give up or take a chance that $50 million will disappear in the hands of a crook..."*

40. On behalf of Worthing, it was also submitted that Mr. Shiboleth trying to portray that the Unlawful Transfer was a move born of panic, or that they were operating under some time pressure, does not stand up to scrutiny when one examines the chronology. The promissory notes signed by Mr. Keilman are dated 'as of' March and April 2011. There was also an agreement between Mr. Keilman and Mr. Dabah to submit a dispute as to certain investments in Poland to arbitration with Mr. Shiboleth acting as arbitrator. The agreement to submit to arbitration is dated April 2012.

41. There was indeed some dispute in the evidence as to whether it was 2011 or 2012 that Mr. Keilman met with Mr. Shiboleth at a hotel in Amsterdam, where Mr. Keilman admitted to taking millions of US dollars from clients of Mr. Shiboleth who had been referred to Mr. Keilman. Mr. Jones QC submits that the exact timing is not important. What is clear, however, he submits, is that Mr. Shiboleth was aware of Mr. Keilman's financial difficulties at least prior to the arbitration agreement dated 20 April 2012 and that therefore the suggestion that the Unlawful Transfer was the result of some urgent panic is simply not sustainable.

42. It was further Worthing's submission that it is no answer to say that no assets were dissipated by Sterling and that Victory Hills did not put in any redemption notice. Mr. Jones QC submitted that this was obviously because it was considered that Mr. Shiboleth and his clients had successfully appropriated Worthing's shares and successfully transferred them to Victory Hills such that they were now beyond the reach of Worthing. Furthermore, it was argued, RIG had become bankrupt in October 2012 and Mr. Keilman had huge personal financial difficulties. Mr. Jones QC suggests that it was no doubt considered that there would be no funds to launch a claim and that Mr. Shiboleth and his clients were now safe.

43. Worthing has also argued that, contrary to the position maintained by Sterling in its skeleton argument, they did proceed as if there had been an effective transfer of Worthing's interest in Sterling. Reference was made to paragraph 61(1) of the Defence which states that Mr. Katz' Dutch lawyer Mr. Deckers informed Mr. Kreikamp, on behalf of Mr. Katz, that Worthing's interest in Sterling had been transferred.

44. Worthing's submission is that the relevant individuals did not consider the transfer ineffective, and that in fact they acted upon it. It was argued that up until shortly before the hearing on the Information Application, it was still believed by Mr. Dabah and Mr. Shiboleth that the transfer was effective. (Indeed, it was said that Mr. Weinstock still continues to believe it was effective). It was argued that this made Sterling's response to the Information Application even more startling.

The Information Application

45. At paragraphs 93-98 of the detailed Closing Submissions, Worthing sets out the train of events which it maintains led to the Information Application as follows:

> *"93. On 15 December 2014 Mr. Sperling of Covington & Burlington LLP, A New York firm of lawyers, wrote on behalf of Worthing to Sterling stating that Worthing had not received any statements of account since February 2012. Numerous documents were requested and proceedings threatened if not complied with. No response was received. A follow up letter was sent on 2 March 2015.*
>
> *94. On 9 March 20[1]5 Shiboleth LLP replied. They said that they represented "owners of 100% of the shares of Worthing and its assets", but did not say who this was. They said that an unsuccessful attempt had been made in Amsterdam the previous year by Mr. Keilman to induce Mr. Kreikamp, the trustee in bankruptcy for RIG, to make a claim for an interest in Sterling*

using a false claim of ownership by RIG of Worthing. It was said that proceedings would shortly be taken in Amsterdam to make Mr.

95. *Covington & Burlington LLP replied on 17 March 2015 asking who Shiboleth LLP represented.*

96. *Shiboleth LLP replied by letter stating that their client held all of the outstanding shares of Worthing and they enclosed copies of the certificates. They did not say who this person was. They said that bankruptcy proceedings had now been brought against Mr. Keilman in Utrecht.*

97. *On 31 March 2015 Mr. Katz commenced proceedings in Amsterdam. The statement of claim is to be found at "IW-1" pages 38ff in the Information Application. It appears that prior to the proceedings being commenced, RIG's Trustee in Bankruptcy had made various reports to the Court. These revealed that Mr. Keilman had cancelled the bearer shares in Worthing and had issued registered shares to himself. Mr. Katz was not recorded as a shareholder. It was no doubt for this reason, and in an attempt to make the requests from Covington go away or be stalled, that proceedings were brought in Amsterdam against Mr. Keilman and RIG's Trustee in Bankruptcy for a declaration that Mr. Katz was "the sole beneficiary (indirectly or otherwise) of the shares in Worthing." This was also no doubt motivated by a desire to avoid having to disclose the Unlawful Transfer.*

98. *This then led to the Information Application in this Court."*

46. The allegations in relation to the Information Application are set out in paragraphs 28-42 of the Amended Petition. In essence, the allegation is that the relevant persons prevaricated and were not forthright with the Court. In particular, that they did not tell the court about the Victory Hills Unlawful Transfer. Certain allegations that had been made in relation to Leading and Junior Counsel who then appeared for Sterling have now, (I think quite properly), not been persisted with. What is said on Worthing's behalf is that it

is remarkable that until the hearing on 18 November 2015 Mr. Dabah, Mr. Weinstock and Mr. Shiboleth believed that the only lawful participating shareholder was Victory Hills. It is Learned Counsel's submission that they obviously did not want anybody, including the Court, to find out what they had done. Thus, the allegation continues, they pretended during the course of the Information Application that Worthing was still a participating shareholder. It is Worthing's proposition that they obviously hoped to defeat the claim so as to keep secret what they had done.

47. Worthing refers to Mr. Shiboleth's evidence at paragraphs 51-53 of his Affidavit, and states that this is the only evidence that deals with the Information Application, as follows:

> *"51. I note that the Petitioner complains that in evidence filed in the Cayman Islands it was not revealed that Worthing's interest in Sterling was held by Victory Hills. In fact I am advised and believe that Victory Hills did not in law hold Worthing's interest in Sterling. I had no authority to give an instruction to transfer its interest. I have already explained why I did this.*
>
> *52. I appreciate that I made no mention of the attempted transfer in the evidence filed and that the same is true of Mr. Weinstock. I humbly and unreservedly apologise to this Honourable Court for this. I recognize that we should have at least disclosed the attempt to transfer Worthing's interest, even if it was ineffective. However, I would like to explain that this was not a deliberate attempt to conceal the existence of Victory Hills*
>
> *53. Whilst I do accept that we had no desire to disclose information to Mr. Keilman the transfer out of Worthing was not one of the matters which we withheld. It will be appreciated that I regard Mr. Keilman as a consummate liar, forger and thief...I was very concerned that he would find a way to force Sterling to hand over a very substantial portfolio of assets. However, it is not the case that I was seeking to conceal the transfer to Victory Hills in the Cayman Islands. The*

transfer was not concealed by me or Mr. Katz. In the Dutch proceedings we had already mentioned the transfer out of Worthing, and this fact was specifically addressed by Kreikamp in his Statement of Defence at 22. In fact I note that Mr. Keilman failed to disclose this fact on the ex parte application and it was repeatedly wrongly alleged that this had been concealed from Worthing."

48. In the body of the written submissions filed on behalf of Worthing, at paragraph 7, Learned Counsel puts forward the following propositions:

"*7. In the proceedings before the Grand Court, it is important to keep firmly in mind two important matters. First:*

1) There is a conceptual distinction between the issues that go to the claim that it is just and equitable to wind up Sterling and the defence that, if it is just and equitable to wind up Sterling, such relief must be refused on the basis of illegality/ abuse of process/ unclean hands.

2) The court must first determine whether it is just and equitable that Sterling should be wound up. It is only if the Court so determines that the defences of illegality/abuse of process/ unclean hands need to be considered.

3) Nevertheless, it is accepted that, in the present case, the evidence that goes to the issue of whether it is just and equitable that Sterling should be wound up cannot be entirely detached from the evidence that goes to the illegality/abuse of process/unclean hands defence because Sterling seeks to justify its actions on the basis of Mr. Keilman's dishonesty. But it is Sterling that relies on this dishonesty.

4) However, the focus of the decision as to whether to wind up a company on the just and equitable grounds in a case such as the *present is primarily the conduct of the company, its directors and advisors, whereas the focus of the illegality/abuse of process/unclean hands defence is the conduct of the party making the claim."*

49. I note however that in Derek French's well-known work "*Applications to Wind Up Companies*" Third Edition, Paragraph 8.254, " *The Just and Equitable Clause*", at page 657, the learned author refers to an Australian case and discusses this issue in an interesting way. The approach taken in that case does seem to have some merit in the instant circumstances as I think Worthing's submission at paragraph 73 quoted above, recognises. The discussion is as follows:-

"*In **Morgan v 45 Flers Avenue Pty Ltd** [(1986) 10 ACLR 692 Young J said, at p708, that rather than treat a petitioner's unclean hands as a defence to a winding-up petition (so that it is necessary to consider the petitioner's conduct after it has been decided to make a winding-up order) it would probably be better to say that the petitioner's conduct was one of the factors to be taken into consideration in deciding whether it is just and equitable to wind up a company."*

STERLING'S CASE

50. Sterling, in its Closing Submissions readily accepts that in 2012, acting on the advice of its lawyer Mr. Shiboleth, it participated in a scheme the purport of which was to transfer Worthing's shareholding to Victory Hills, which company had been set up for that purpose.

51. However, Sterling maintains that there was no power to achieve this and it was 'effected' by legally invalid accounting entries i.e. the whole process was in fact totally ineffective. Moreover, and in any event, Sterling's assets, as the JPLs have confirmed, were never moved or dealt with other than in the ordinary course of business. Sterling's balance sheet was not depleted and nothing has in fact been unlawfully transferred to any third party.

52. It is Sterling's stance that this extraordinary measure was prompted because, after the exposure of Mr. Keilman's wrongful dealings in respect of stealing millions of dollars from some clients introduced to him by Mr. Shiboleth, it was feared that Mr. Keilman would also steal from Mr. Katz and Sterling. Whilst it is now apparent, Learned Counsel Mr. Croxford QC submits, that Mr. Shiboleth did not act as promptly as he had previously thought and said, that is why, it is suggested, that Messrs. Katz, Dabah and Weinstock in fact each agreed to act as they then did in 2012. It was suggested that Mr. Keilman's denials of such wrongdoings have been weak and no positive explanation or justification of his conduct has emerged at trial. It was argued that on any view, those who acted should not now be criticized for acting from a motive of seeking to protect Sterling and the person understood to be the lawful beneficial owner of Worthing and of the investment made by it. It was submitted that it cannot be said to be just and equitable to now wind up Sterling where such protective measures only were taken, and there has been no loss or defalcation, nor risk of such.

53. Sterling accepts, Mr. Croxford QC put forward, that the information regarding the purported attempt to transfer Worthing's shares in Sterling to Victory Hills was not initially disclosed to the Court on the Information Application as it should have been. Sterling accepts that there was prevarication in that Application and there should not have been. However, Sterling does repeat that the Receiver of RIG had been told of what was believed to be the fact of that transfer out (albeit not given the name "Victory Hills"). However, it is Learned Counsel's submission that nothing of the events admitted justifies an Order to wind up Sterling.

54. In its written submissions, Sterling invites the Court to refuse to make the winding up Order, and to dismiss the Amended Petition. Mr. Croxford QC, amongst many submissions, argued that Worthing has failed to prove its pleaded factual case which underpins the claim i.e. the Amended Petition, at paragraphs 12-16 making allegations as to beneficial ownership of both the Petitioner and of the funds invested with Sterling. Further, or alternatively, it was submitted that it is neither just nor equitable for Sterling

to be wound up.

55. Sterling further argued as follows:

A. Worthing seeks equitable relief, i.e. a winding up on the 'just and equitable' basis, but it does not come with clean hands. It relies upon Mr. Keilman's deliberately false evidence, given both on affidavits at interlocutory stages in this action (and in the associated Information Application) and then persisted in when giving oral evidence during the trial. Leading Counsel argued that the giving of manifestly false evidence in connection with a case is classic conduct which would disentitle a party to relief in equity.

B. It was submitted that a further aspect of the lack of substance to the alleged basis for a "just and equitable" Order is that it is now very clear that there has been and is now no risk of dissipation of Sterling's assets. Learned Counsel opines that the pleaded case of Worthing shows that this was a fundamental element in the alleged justification of such an Order. It was submitted that a winding up would not serve any useful purpose of protecting and preserving the investment in Sterling nor thus benefit Worthing.

C. A further point made by Sterling is that, far from protecting or preserving the position so far as Worthing is concerned, such an outcome in this case is likely to positively damage the value of the investment.

D. These winding up proceedings Sterling submit, are brought in bad faith for an improper, collateral purpose, i.e. seeking to circumvent proceedings before the Courts of the Netherlands which are already seized of the issue of who is the ultimate beneficial owner of the Petitioner. Mr. Croxford QC posits that if these proceedings result in a winding up and distribution to Worthing without reference to the fraud that Sterling says is being practiced on Mr. Katz, then these proceedings will have succeeded in frustrating the Dutch proceedings.

E. In the alternative, it was submitted that, if the allegation of bad faith in the preceding paragraph is wrong and in fact Worthing launched this action in a bona fide effort legitimately to obtain relief because it is feared that there had been dissipation and there remained a reasonable belief that a risk of further dissipation existed, the evidence now available (including in particular the JPL Reports) shows that any such belief was mistaken.

F. In addition, it was submitted that, if successful in obtaining a Winding Up Order, then Mr. Keilman, and those to whom he has 'sold' Worthing's claim to the invested funds and who are now apparently funding and directing this action, will have secured access to Sterling's assets and in so doing thereby probably have:

(i) evaded any investigation into his actions by the Dutch Receiver (i.e. liquidator) Mr. Kreikamp, Mr. Keilman's Trustees, and the Dutch Court;

(ii) deprived Mr. Katz, that Receiver and those trustees of the economic benefits of the claims which each may properly have.

G. It was posited that no Court will knowingly lend itself to assist the unlawful aims of a fraudster.

56. I think that it is important to note another point of departure between Worthing and Sterling as to the issues to be resolved. According to Worthing in its submissions, the source of Worthing's money and the fact that Mr. Katz is seeking to say that he should be the only shareholder in Worthing, is at best background to the claim that Worthing is making. Sterling, on the other hand, relies upon the evidence and information in relation to what has been called "the GVBV Period" as this forms part of its case that those managing and advising Sterling, genuinely believed Mr. Katz to be the beneficial owner of Worthing. Sterling says that this must be so because the source of Worthing's money came from GVBV, a company which Sterling, and Mr. Katz, allege was beneficially owned by Mr. Katz.

57. Worthing, on the other hand, and Mr. Keilman, claim that through Mr. Keilman's ownership of RIG and of its ownership of the shares in GVBV it was intended to mean he was the indirect and true owner of the GVBV shares, rather than RIG holding those shares in a purely fiduciary capacity.

58. However, although Worthing claims that the GVBV Period was only background, at

paragraphs 12-16 of the Amended Petition, Worthing's case is pleaded as follows:

*"**Background***

The Petitioner's Investment in the Company

12. *In early 2002, R.I.G. Investments N.V's ("R.I.G.") (a company that was beneficially owned and controlled by Mr. Keilman at all material times) then subsidiary, Gloria Vanderbilt Trademark B.V.("**Gloria Vanderbilt**") (now called Sama Trademark Investments B.V. ("**Sama**"), sold certain trademark rights held by it. On 10 April 2002, a transfer of US $16,329,916.56 ("**the Sale Proceeds**") was made by Jones Apparel Group S.A. Inc.("**Jones Apparel**") (the purchaser of the trade mark rights) to Gloria Vanderbilt. The Sale Proceeds were then transferred to RIG. The transfer from Gloria Vanderbilt to RIG was initially treated as an intercompany loan, but was later formalized as the payment of a dividend in the sum of US$22,000,000.OO to RIG."*

13. *US$9,880,000 was then transferred from RIG to Savlamor Investments Ltd. ("**Savlamor**") via another company, Telescope Holdings Limited ("**Telescope**") between 11 and 18 July 2002. Savlamor was initially established as a special purpose vehicle for the purposes of the Petitioner's investment in the Company; however, it was later decided to utilize the Petitioner for this purpose instead, and US$9,800,000 (the "**Investment Amount**") was transferred from Savlamor to the Petitioner's account at Hyposwiss Private Bank Limited. ("**Hyposwiss**") on 30 October 2002.*

14. *The first tranche of the Investment Amount, in the sum of US$8,000,000 was transferred from the Petitioner to the Company on 31 October 2002. The second tranche of the Investment Amount, in the sum of US$1,800,000 was transferred from the*

Petitioner's account at Hyposwiss to the Company on 22 January 2003.

15. *The Subscription Agreement sets out the terms upon which Worthing subscribed for shares in Sterling and it is supplemental to an offering memorandum issued by Sterling and dated 17 September 2002. The Subscription Agreement was entered into by the Petitioner on 15 October 2002.*

16. *The above facts regarding the source of the Investment Amount were put in evidence by the Petitioner in the course of the Inspection Application together with a full documentary trail of the source and the transaction. The Company did not dispute any of the evidence regarding the source of the Investment Amount during the Inspection Application in either of the two Affidavits filed by the Company following the putting of these facts into evidence. However, on 23 November 2015 (after the Inspection Application), Mr. Dabah swore an affidavit in the Katz proceedings disputing that the source of the Investment Amount derived from RIG and instead claiming that the trademark rights were owned by Mr. Katz (the "**Dabah Affidavit**"). No documentary evidence is provided by Mr. Dabah to support this assertion."*

59. At paragraphs 18-38 (inclusive) of the Amended Points of Defence, Sterling deals with the subject matter of Gloria Vanderbilt and Worthing's Investment in Sterling. Sterling admits the contents of paragraphs 14 and 15 of the Amended Petition.

60. As regards paragraphs 12 and 13 of the Amended Petition, Sterling at paragraph 32, states that it had no knowledge of the alleged transfers and surrounding facts alleged, but asserts that if such transfers were made, Savlamor and Telescope acted as mere conduits. Save for that, paragraphs 12 and 13 of the Amended Petition are denied. Paragraphs 34 and 35 of the Amended Points of Defence say the following:

"34. Save that US$9,800,000 was ultimately transferred to the Petitioner the second sentence of paragraph 13 is denied. It is denied that it had been Mr. Keilman to "decide" how these funds would be invested in the Company.

35. Moreover about 40% of the net proceeds were transferred to Mr. Keilman's companies at Mr. Shiboleth's direction, as had previously been agreed with Mr. Katz.

(1) A substantial proportion was transferred to persons or entities in Uruguay that were engaged in Mr. Khafif Snr's property development in Punta del Este.
(2) Substantial sums were transferred to various parties in settlement of fees.
(3) Mr. Keilman otherwise had no reason to make such investments and did not know the recipients of the funds or the persons managing the funds once transferred as he necessarily should have done if he was interested in any of them."

61. In relation to the allegation in paragraph 16 of the Amended Petition, that the source of the investment amount and alleged surrounding facts were put in evidence by Worthing during the Inspection Application, and that Sterling did not dispute any of this evidence as to the source of the Investment Amount during the Inspection Application, Sterling, at paragraph 38 of the Amended Points of Defence responds as follows:

"VI. ASSERTION OF INTEREST IN THE PETITIONER

38. Paragraph 16 of the Petition is denied. In the course of the Inspection Application the Company explained in its evidence that it was Mr. Katz and not Mr. Keilman who was the ultimate beneficial owner of the funds invested in the Petitioner. This was well-known to the Petitioner before the Petitioner applied for the appointment of Provisional Liquidators:

(1) Mr. Katz commenced proceedings in the Netherlands against Mr. Keilman (subsequently Mr. Keilman's trustee) and against RIG's trustee Mr. Kreikamp in

> *which he asserted his beneficial ownership of the shares in the Petitioner on 31 March 2015.*
>
> (2) *In those proceedings Mr. Katz asserted a claim in tort under Dutch law and further alleged that Mr. Keilman (and the companies he owned or controlled) had been acting for him in a fiduciary capacity when funds were transferred to the Petitioner which the Petitioner invested in the Company.*
>
> (3) *Mr. Keilman caused the Inspection Application to be brought by summons issued on 2 June 2015. There has never been any dispute that the Petitioner invested US$9,800,000 in the Company or that funds moved from GVBV through accounts held by companies within Mr. Keilman's structure.*
>
> (4) *The dispute has been as to the capacity in which those funds were received and/or transferred by those companies. The Company made it clear by filing the affidavits of Itzhak Weinstock on 21 September 2015 and Mr. Shiboleth on 11 November 2015 that Mr. Keilman and his companies had been acting in a fiduciary capacity.*
>
> (5) *The affidavit filed by Mr. Dabah on 23 November 2015 in the Netherlands was a response to the 3rd Affidavit of Mr. Keilman which had been filed in the Grand Court on 12 November 2015 shortly before the hearing of the Inspection Application. <u>Mr. Keilman's 3rd affidavit was the first occasion on which he had sought to describe the origin of the funds transferred to the Petitioner."</u>* (my emphasis)

62. In Sterling's Closing Submissions, it is submitted that the assertion in paragraph 16 of the Amended Petition, that the facts set out in the earlier paragraphs regarding the source of the Investment Amount being put in evidence in the course of the Inspection Application together with a full documentary trail of the source of the transaction, was and remains wholly inaccurate.

63. Mr. Croxford QC goes on to argue that further, Worthing did not initially support its Inspection Application with any account of where the funds invested in Sterling came

from and Mr. Keilman's First Affidavit did not mention GVBV. In any event, Learned Counsel submits, the First Affidavit of Mr. Weinstock filed 24 September 2015, made it clear that it was Sterling's case that Mr. Katz was the ultimate beneficial owner of the investment made and that "*Mr. Keilman has dishonestly sought to appropriate for himself an investment which in fact belongs to Mr. Katz - namely Worthing and its interest in Sterling.*" Reference was made to paragraphs 6, 8, 11-12, and 15 of that Affidavit.

The Evidence of the Witnesses as to Beneficial Ownership

64. In terms of viva voce evidence, it is Mr. Keilman alone who says that the source of the sums invested in Sterling derived from RIG, a company which was beneficially owned and controlled by Mr. Keilman at all material times. There is a statement made by Maria Geleijn-Benner submitted in the Dutch proceedings by Worthing in support of its case. However, Ms. Geleijn-Benner did not give evidence in the instant proceedings.

65. Mr. Shiboleth gave evidence that it was Mr. Katz investment in Sterling. Mr. Katz gave evidence that it was his investment. Mr. Dabah gave evidence that it was Mr. Katz investment. Mr. Weinstock gave evidence in cross-examination by Mr. Jones QC, that it is not exclusively the correspondence which he exhibits at paragraph 12 which is the source of his belief that Mr. Katz is the beneficial owner of Worthing. He said that he also relied upon the fact that when he joined Sterling in 2005, and Worthing happened to be the only investor, he asked who Worthing was. He said that Mr. Dabah told him that Worthing was a company in which Mr. Katz was the beneficial owner and the investor in Sterling. Mr. Croxford QC says that Mr. Weinstock's evidence is instructive in telling the Court what the thinking of the relevant players was at all material times.

66. Mr. Khafif gave evidence that in or about 2002 Mr. Katz was introduced to him by Mr. Shiboleth as a prospective investor in Sterling. This witness says that he did not speak to Mr. Keilman in reference to any fund subscription or investment in Sterling. He said he never dealt with him, although he recalled meeting him in Argentina at some time.

67. Since the time of Mr. Katz' investment in Sterling, through the time that he ended his Investment Management Agreement with the Fund in 2005, Mr. Khafif says that he spoke directly with Mr. Katz from time to time with respect to his investment.

68. Mr. Khafif also exhibited to his Affidavit from his files, a letter that he wrote to Mr. Shiboleth in early September 2002 thanking him for his referral of Mr. Katz as an investor. Also in his files was correspondence with Mr. Shiboleth, the fund administrator and himself, with respect to Mr. Katz's initial funding investment of US$8 million, including the Subscription Agreement for his investment, as well as a copy of Mr. Katz' passport. Documents were also exhibited dated 2004, being correspondence from Mr. Katz giving his approval to replacement of Mr. Khafif by a company controlled by Mr. Dabah and his wife Ivette Dabah, who is Mr. Khafif's sister.

The Evidence of Mr. Jansen

69. In his Declaration given in the Netherlands, for use in Court proceedings in Amsterdam, Mr. Jansen stated that during the period 1992-1999, he was the Chief Financial Officer of a group of companies owned and/or controlled by Mr. Keilman principally held through Mr. Keilman's holding company RIG which was known as, or did business through its subsidiary company under the name of HTM. These companies, Mr. Jansen said, directly or indirectly performed trust services for various clients of HTM which included, among other things, the acquisition and/or, formation, management and operation of various nominee companies and their bank accounts. Clients frequently used these business structures to take advantage of various favourable tax regimes and treaties by domiciling their investments in the jurisdiction of formation.

70. Mr. Jansen stated that during these years, he was introduced to Mr. Shiboleth, who directed a number of his firm's clients to Mr. Keilman and HTM for Trust services. One of these clients Mr. Jansen says was the Dabah family (including Mr. Dabah, his father and father-in-law) as well as others.

71. It was Mr. Jansen's evidence that while he was employed at HTM and RIG, they operated several investment structures. Mr. Jansen declared that he knew this because he and others were in direct contact with the UBOs and local agents of these companies and/or their direct representatives to execute transactions and/or agreements and to keep these companies in good standing (tax filings, coordinate payments, financial reports, etc.).

72. It was further Mr. Jansen's evidence that he was familiar with the transactions involving the acquisition of the Gloria Vanderbilt trademarks and trademark licenses ("Gloria Vanderbilt IP") by GVBV from G.V. Trademark Investments Ltd. (a B.V.I. company) in or about August 1997. GVBV, for which Mr. Keilman acted as its legal representative, was nominally owned by Mr. Keilman or one of the companies he owned, but Mr. Jansen says that the company and Mr. Keilman were acting solely as Trustee for one of the Dabah family members. Mr. Jansen said that he believed that because GVBV was acquired as shelf company Plato Reserve 9 B.V. and later renamed for this purpose. He says that he also prepared the financial statements of GVBV. The witness' evidence continued, importantly, that the management instructions to operate GVBV company in the Netherlands came from the New York office of the Dabah family and their legal representatives - Mr. Shiboleth's firm.

73. Mr. Jansen's declaration, at paragraphs 5-9, continues as follows:

> "5. *Keilman definitely was not acting as principal for his own account in the acquisition of the Gloria Vanderbilt IP by GVBV which was ultimately sold to Jones of New York in 2002.I believe this because the whole transaction was monitored and managed from New York and the gain made from this transaction was never transferred to the Netherlands.*
>
> 6. *I know that Keilman did not pay anything out of his pocket for the Gloria Vanderbilt IP. The acquisition was financed completely by non-recourse financing that was secured by the Gloria Vanderbilt IP. I know this because I prepared the financial statements of GVBV. Basically he*

did as he was instructed, he signed whatever documents he was asked to sign in the transaction.

7. *I went into private business providing trust services on my own between 2001 and 2007. When I came back as CFO for Keilman's group of companies in 2010/2011, I learned that no financial statements were filed for RIG with the Chamber of Commerce since I left his employment in 1999/2000. According to his retiring CFO, Keilman had been paying penalties for not filing the required financial statements every year.*

8. *In 2011, I received instructions from Keilman to prepare financial statements for RIG and include Worthing Properties Ltd. ("Worthing") as if it were owned by RIG. I refused to do so and asked Keilman to prove to me that RIG, himself (Keilman), or any of his other entities owned Worthing. He failed to do so and the end result was that when RIG was declared bankrupt in 2012, it became evident that no financial statements had been filed for it.*

9. *I am prepared to repeat and confirm the contents of this Declaration under oath as a witness in court proceedings."*

74. Mr. Jansen also gave a declaration before a Notary Public on 18 April 2016 in which, in addition to the above, he commented on a statement made by Ms. Maria Geleijn-Benner of an address in the Netherlands dated 16 February 2016, which was submitted on behalf of Worthing.

75. Ms. Geleijn-Benner stated as follows:

> *"1. From 1990 to 2000 I worked for Holland Trust B.V. As from 1995 I was general manager, responsible for general operational management, account management and legal affairs. In that capacity, I worked closely with Mr. H.J. Keilman, director and major shareholder of Holland Trust and its parent company R.I.G. Investments Ltd. ("R.I.G."). I also had the authority to sign on behalf of various of Mr. Keilman's companies.*

2. *Effective from 1994 Mr. Keilman, besides Holland Trust, made several investments in other companies. Those investments, including an investment in a listed telecommunications company and an international marketing centre, were made from RIG. The acquisition of GVBV was part of Mr. Keilman's investment activities, as explained in paragraph 4 below.*

3. *In 1997 I was involved in the trademark right Gloria Vanderbilt ("GVdB"). To that end agreements were signed in August 1997, by which GVBV was bought for the amount of US$55 million, which in part was financed by a bank.*

4. *In 1999 the trust activities, accommodated in Holland Trust BV, were sold to Global Group ("GG"). Shortly afterwards, GG as a whole was sold to Amicorp, a large international trust office. At the time, the specific decision was taken by which GVdB was separated from the trust activities because this was an investment in which both the legal and the beneficial interests belonged to RIG. That was then recorded in a contract of sale dated 8 December 1999. The preamble of this agreement referred to RIG's legal and beneficial ownership of GVdB.*

5. *During the period from 1997 to 2000 I never heard the name Katz in relation to the acquisition of GVdB.*

6. *I furthermore state that it was common practice to draw up written management and trust agreements in the interest of the clients but also in the interest of the trust office.*

I hereby declare that this statement is true and based on the information I gained in my position in which I was directly involved and had knowledge of the GVdB transaction and the organizations and undertakings involved in that transaction. To confirm the accuracy of this statement I will place my signature below.

I am furthermore aware that Mr. Keilman currently has several business disputes with Mr. Ammon Shiboleth and affiliated persons, including Mr.

Isaac Dabah and Mr. Joseph Nakash. Mr. Keilman and/or his legal counsel are free to use this statement in these disputes and/or proceedings……"

76. Ms. Geleijn-Benner did not give evidence at this hearing and therefore was not cross-examined.

77. In his declaration of 18 April 2016, Mr. Jensen stated as follows, at paragraphs 9-11:

> *"9. After my declaration was submitted to the court in Amsterdam in connection with-the law suit between David Katz and Keilman (and his individual bankruptcy trustees) and the bankruptcy trustee of RIG relating to the beneficial ownership of Worthing Properties Limited, I was shown a statement of Ms. Johanna Maria Geleijn-Benner, dated sixteenth of February ..2016.. which was submitted to the court in a proceeding in the Cayman Islands relating to the beneficial ownership of Worthing's investment in Sterling Macro-Fund, Inc ("Sterling") initiated and maintained by Keilman (and his personal bankruptcy trustees) which is attached to this declaration as an exhibit. Also is attached copies of an extract from the Chamber of Commerce relating to Holland Trust-Management B.V. and some correspondence between Mr. Shiboleth (and his assistant) and Ms. Geleijn- Benner(also known as Annemeik Benner), which was-submitted as evidence in the Dutch court proceeding referred to above and shown to me. The statement of Ms. Geleijn-Benner is factually incorrect in a number of its statements, and omits to state facts which would make other statements contained in Ms. Geleijn-Benner's statement not misleading in that-*
>
> *(a) Annemeik Benner appears to have forgotten that a company whose name was changed to Gloria Vanderbilt Trademark B.V. was acquired, paid for and had-its name changed at the direction of Mr. Shiboleth.*
>
> *(b) She also seems to have forgotten that we sent invoices to New York for our services and we had an annual fee arrangement with New York with respect to this Company.*

(c) *Annemeik Benner fails to state, a fact that I know to be true, that Keilman and his companies acted as trustee for numerous clients without using formal written trust or management agreements.*

(d) *She also neglects to point out that not including GVBV in the sale of HTM to Amicorp is consistent with someone other than Mr. Keilman being the beneficial owner of the GVBV intellectual property.*

10. *All of this together with the facts I recited above is consistent with someone other than Keilman being the ultimate beneficial owner of GVBV.*

11. *I am prepared to repeat and confirm the contents of this Declaration under oath as a witness in court proceedings…"*

78. To my mind, Mr. Jansen was a very important witness. On 19 September 2016, Mr. Jansen gave evidence from Amsterdam, Holland by way of video-link. In response to questions from Mr. Croxford QC, Mr. Jansen was shown the two declarations, and he indicated that the contents of these two declarations were true. At Learned Counsel's request, I ordered the two Declarations to stand as Mr. Jansen's examination-in-chief.

79. In cross-examination by Mr. Jones QC, Mr. Jansen said that according to the structure, it was advisable to keep GVBV within the RIG structure and get instructions sideways from the ultimate beneficial owner. He said that he concluded that because the instructions, for all the preparation of transactions, including the financial statements, were supervised, monitored and managed by the Dabah family, their representatives or legal Counsel, the ultimate beneficial owners were the Dabah family, in particular, Mr. and Mrs. Dabah.

80. Although in his Declaration Mr. Jansen had said that the gain made from the sale of GVBV to Jones New York in 2002 had not been transferred to the Netherlands, when shown by Learned Counsel two payments amounting to US$22 million transferred from Gloria Vanderbilt to RIG, Mr. Jansen indicated that he had not seen this, and this was not

known to him because he left in 2002. However, he said he was knowledgeable about the transaction itself. He indicated that there were instructions given to set up this account with Hyposwiss because Mr. Shiboleth at the time had good relations with the Hyposwiss Bank. Mr. Jansen insisted that whilst RIG and HTM had accounts at Hyposwiss, this was because of the relationship between Mr. Shiboleth and that Bank and was done in relation to accounts of clients under the flag of the Shiboleth office.

81. It was suggested to Mr. Jansen that the conversation that he claimed he had with Mr. Keilman where Mr. Jansen asserted that he asked Mr. Keilman to prove that RIG or any of its other entities owned Worthing was denied by Mr. Keilman. Mr. Jansen insisted that this conversation did in fact take place.

82. He indicated that he had no access to Worthing's file which was kept in Mr. Keilman's office.

83. Mr. Jansen said that Mr. Keilman had the capability to show him documents proving that he was the beneficial owner but did not do so, and what reason Mr. Keilman had for not showing him he does not know.

84. Mr. Jansen admitted that he presently has a working relationship with Mr. Shiboleth. He is a director and minority shareholder in one of Mr. Shiboleth's structures. He also said he has his own accountancy firm and is an International Tax Advisor.

85. In re-examination, Mr. Jansen said that he recalled that he had said in cross-examination that where there was a trust, it was important to have the ultimate beneficial owner down in writing. However, he said that it was not always the case when he was working for Mr. Keilman that the ultimate beneficial owner made a document.

86. The witness further said that whilst Mr. Keilman was the registered shareholder through RIG, and therefore the legal owner, the economic owner was the Dabah family.

The Delaware Judgment

87. During the cross-examination of Mr. Keilman, the Court admitted into evidence a Judgment issued by Vice Chancellor Laster of the Court of Chancery in the State of Delaware, U.S.A. in the matter of ***Gila Dweck, Success Apparel LLC, and Premium Apparel Brands LLC, v Albert Nasser and Kids International et al***, delivered January 18 2012.

88. The facts of that case are complicated, but it involved the Dabah family, Mr. Shiboleth, and Mr. Keilman. This Court found the judgment instructive, in particular as to the nature of dealings that had occurred in the past between the Dabah family, Mr. Shiboleth and Mr. Keilman. At pages 2-5, and 7, the Judgment states as follows:

> *"I. FACTUAL BACKGROUND*
>
> *This case was tried on July 11-15, 2011. The parties introduced approximately 930 exhibits, submitted deposition testimony from twenty-three fact witnesses, and adduced live testimony from six fact witnesses and three expert witnesses. The parties joined issue over the authenticity of certain important documents, debated whether key conversations actually took place, and disputed whether critical agreements were reached. Even allowing for the frailties of human memory and subjective perception, I cannot reconcile the conflicting accounts.*
>
> *Each of the party-witnesses exhibited credibility problems under cross-examination. Dweck's testimony was particularly suspect. She repeatedly contradicted her deposition testimony, responded evasively, and suffered convenient failures of memory. On several occasions, she appeared to have invented entirely new accounts for trial. Most notably, despite overwhelming evidence to the contrary, Dweck denied having any ownership interest in cash payments made by Kids to certain foreign entities. By contrast, the most credible witness at trial was Ammon Shiboleth, a member of the New York and Tel Aviv bars who acted as corporate counsel to Kids. Having weighed the*

parties' testimony, evaluated their demeanor, and considered the evidence as a whole, I make the following factual findings.

A. The Dabah Family Business

Morris Dabah had three sons: Haim, Ezra and Isaac.(First names are used for clarity and without suggesting familiarity or intending disrespect). Morris and his sons founded the Gitano Group, a large multi-division apparel wholesaler.

Morris' fourth and youngest child was a daughter: Gila Dweck. While still in college, Dweck began working at Gitano as a receptionist. After graduating, Dweck joined the childrenswear division, known as EJ Gitano, as a salesperson. She rose rapidly through the ranks to become President of EJ Gitano.

In 1993, Haim and Isaac pleaded guilty to criminal violations of United States customs regulations and spent time under house arrest. Wal-Mart, Gitano's largest customer, refused to continue selling Gitano's lines of clothing. Gitano defaulted on its debt and teetered on the verge of bankruptcy.

In the debacle, Dweck saw an opportunity. She suggested to Haim that they purchase EJ Gitano. It was profitable, and Dweck thought the existing pipeline of orders made the purchase 'essentially risk free". Tr. 448.

But there was a problem. Because of Gitano's default, its lender had the right to veto any sale of assets, and the bank would not approve a sale of EJ Gitano to the Dabah family. Dweck needed a third party.

Enter Albert Nasser, a successful entrepreneur with numerous holdings in the apparel sector. Nasser was a cousin of Dweck's mother, and despite maintaining his primary residence in Switzerland, he moved within the same tightly-knit New York community as the Dabah family. Even before Isaac arranged a formal introduction, Dweck knew of Nasser "through family acquaintances and family functions, weddings, bar mitzvahs".Tr. 347.

B. The formation of Kids

In September 1993, Dweck, Haim and Nasser purchased the assets of EJ Gitano. The basic deal was straightforward. Nasser agreed to provide 100%

of the funding, comprising $8.2 million for acquisition financing plus $1 million in start-up capital. In return, Nasser originally would own 100% of the new company's equity. Once Nasser received payments equal to his original investment plus 10% interest, Nasser would transfer 50% of the equity to Dweck and Haim. Nasser would serve as Chairman of the Board; Dweck and Haim would be in charge of day-to-day management.

Shiboleth implemented the basic concept in a complex manner. Kids was formed under Delaware law and designated for tax purposes as a Subchapter Corporation. A corporation that qualifies under this section of the tax code is treated as a pass-through entity for tax purposes, so Kids' profits would be attributed pro rata to Kids stockholders (originally only Nasser) regardless of whether any dividends were paid. To minimize the amount of taxes that Kids stockholders would pay domestically, Shiboleth designed a structure that would allow Kids to send large amounts of money out of the United States free of tax, while at the same time generating deductible business expenses to reduce Kids' profits.

....

(Page 7)

Notably, for the tax avoidance structure to work, it was critical that Nasser, Dweck and Haim ***not*** *appear to control any of the companies receiving funds from Kids. The intermediary companies- Maubi and the Foreign Licensors- were therefore structured to avoid the indicia of control. Maubi and the Foreign Licensors are each owned and controlled by Henk Keilman, a resident of Holland and professional acquaintance of Shiboleth. As compensation for providing the intermediary entities, Keilman's firm receives 7% of all amounts that the intermediaries receive. Originally, all of the funds received by Maubi and the Foreign Licensors, net of the 7% paid to Keilman's firm, were passed on to Woodsford. Later, after the Nasser-Dweck split, Keilman refused to pay out any funds without joint instructions from both Nasser and Dweck. To circumvent Keilman, Nasser caused Kids to wire funds directly to Woodsford.*

...." (My emphasis)

89. In the instant case, the parties also joined issue over the authenticity of some important documents. Expert evidence was introduced to deal with some of the assertions.

90. Mr. Keilman relies upon a letter dated 15 November 2011 from Mr. Dabah to him. Mr. Dabah denies that he signed any such letter and he says that it is a forgery.

91. The questioned letter reads as follows:

" From: Mr. L. Dabah Sterling Macro Fund Cayman Islands
To: Worthing Properties Limited Hessenberweg, 111, 1101 BS Amsterdam The Netherlands
Att: Mr. Henk Keilman
STRICTLY CONFIDENTIAL
November 15, 2011
Dear Mr. Keilman,
In reference to your request for a partial subscription of your Shares in the Sterling Macro Fund (the "Fund") up to the amount of US$5,000,000 (five million US Dollars) I can inform you as follows. I have discussed this matter with the other Fund managers, and while it is in conflict with the investment rules of the Fund, we have agreed to this partial redemption. However, there will be a penalty which we will discuss when I meet you in Amsterdam on November 24, 2011. We will take into consideration your long term and good relationship with the Fund.
The funds will be made available to you after November 24, 2011, and we would like to request you provide us with the relevant bank information of Worthing Properties Limited.
Sincerely yours
(Signed/ or purportedly signed)
Dabah
(On behalf of the Sterling Macro Fund)"

92. Handwriting Services International ("HSI") were asked to compare two signatures attributed to Mr. Dabah. These were signature on an agreement of 4 February 2002, and the alleged signature in the above letter. HSI were instructed to work from the hypothesis that the signature in the agreement is genuine and authentic, and the signature in the letter is questioned. In its letter of Opinion dated 19 January 2016, HSI stated its Opinion, outlining three possibilities. That Opinion has been commented upon both by Mr. Deckers, Counsel to Mr. Katz, in the Amsterdam Proceedings, as well as by Mr. Aldo Verbruggen of Jones Day, Counsel to Mr. Keilman in the Amsterdam proceedings. Mr. Verbruggen stated in his Report that he believes that his experience and expertise qualify him to assess Mr. Deckers' and the parties' interpretation of the Report. Thus, although Mr. Verbruggen has no handwriting expertise himself, he prepared a Joint Memorandum with Mr. Robert Baier of HSI dated 14 September 2016. Having referred to the Case Management Order which I made on 26 May 2016, in accordance with the orders sought by the parties, the Joint Memorandum at paragraphs 2-4, and 8-10 (inclusive) reads as follows:

"2. Pursuant to this order and instruction of counsel, Mr. Robert Baier, forensic document examiner at ...HSI and Mr. Aldo Verbruggen, attorney at law at Jones Day ("JD"), contacted each other to deliver this joint memorandum.

1.In a " Document Examiner Letter of Opinion, Isaac Dabah Report, case no. 1601-1193-3, dated January 19, 2016 and addressed to Mr. Isaac Dabah ("HSI letter of opinion"), HSI provided the results of its investigations into the signature of Isaac Dabah. HSI reached the following conclusion:

"OPINION

Based on the documents submitted and after careful and complete examination, using accepted methods of document examination, the evidence supports my professional opinion that questioned documents Q1 and K1 are the same signature of Mr. Dabah. (See

Exhibit 1 attached). It is a principle of document examination that you cannot sign your name exactly the same twice. According to Albert S. Osborn in his book Questioned Documents on page...1.1[sic] *In addition to its opinion, HIS provides the following clarification for the signatures being identical:*

"FURTHER:

Since Q1 and K1 are the same signature. There are three possibilities. (1) The signature of Isaac Dabah on document Q1 is a machine-generated/cut-and-paste signature taken from document K1 and placed onto document Q1 which has been presented as authentic. (2) The signature of Isaac Dabah on document K1 which was stated by Isaac Dabah is a genuine signature of Isaac Dabah is a machine generated/cut and paste signature taken from questioned document Q1 and placed onto document KI. (3) There is a third "model" signature of Isaac Dabah as yet unknown that is a machine generated /cut-and paste signature of Isaac Dabah and placed onto both documents Q1 and K1.

In a cut-and paste document material is removed from one document, placed onto another then a photocopy is made of the new fraudulent document and presented as an original. The cut-and-paste process can be accomplished by literally cutting out with scissors a signature, a paragraph or multiple parts of a document. The other method is to use the cut-and paste tool on a word processor which is more difficult to detect on a photocopied document. In a cut-and-paste document there can be no original of the page or pages of the falsified materials. In this case questioned document Q1 has a cut-and-paste line across the page above the signature which can be seen with the naked eye,"

1. In a civil litigation court, pending before the District Court of Amsterdam ("D.C."), Counsel to Mr. Katz, Mr. Deckers, submitted the HSI report to the DC. In the accompanying email Mr. Deckers stated, inter alia:
"(...) There is no room for a margin of doubt. The signature under the letter from 2011 has been copied from the 2002 agreement.
It has thus been established that the letter is a forgery (....)"

"8. JD pointed out that the contents of the HSI letter of opinion does not justify the conclusion of forgery. JD pointed out that HSI lists three

possible explanations as to why the two signatures are identical- making reference to the above quoted paragraph of the HSI letter of opinion.

9. *From the following it pertains that JD does not disagree with the contents of the HSI letter of opinion. JD is not in a position to assess whether the contents of the HSI letter of opinion is accurate and reflects the truth, since JD did not examine the signatures itself. JD does not have the expertise to render forensic document examinations such as signature comparisons.*

10. *If, however, the conclusion reached in the HSI letter of opinion is accurate and the signatures which were compared, are identical, JD holds that there are three possible explanations for that. HSI does not disagree with JD in this respect."*

93. In my view, all of these issues will really have to be determined by the Courts in Netherlands as to whether this and other documents are forgeries.

94. I accept learned Queen's Counsel Mr. Croxford's submission that Mr. Keilman had access to Mr. Dabah's signature, having received documents signed by Mr. Dabah. In particular, Mr. Keilman received the original of the Agreement of February 2002. Mr. Dabah says that the signature on this Agreement was authentic and genuine. He also has not indicated that he has a machine generated cut and paste signature that he used generally, or on the Agreement. It also has not been said by anyone that there is a third document out there from which the signature was copied. Further, these letters were used by Mr. Keilman when dealing with/negotiating with his creditors in or about late 2011/early 2012 see Kreikamp at AS1 Tab 34 p.16 para 69-71 and the evidence of Mr. Keilman Tr/pt Day 4 p 638(7). He was thus the person who had a direct and significant interest in the existence and ability to use such letters.

95. I also take into account that at the time when these letters were allegedly written Mr. Keilman and his companies were in serious financial difficulties.

96. It does in my view seem peculiar that, instead of such correspondence, Mr. Keilman did not simply serve a Notice of Redemption redeeming the whole investment. Further, it is hard to see why, if such letters were written and the promised payment of millions of dollars did not take place, there is no evidence of Mr. Keilman complaining about the non-payment or seeking to follow up on payment.

THE EMAILS

97. There was expert evidence introduced to deal with allegations that two particular pieces of correspondence, i.e. emails, of 4/2/02 and the letter of 31/10/02, were forged. The email of 4/2/02 allegedly sent by Mr. Dabah to Mr. Keilman, and copied to Mr. Shiboleth, reads as follows:

> *"From: Isaacd<Isaacdabah@gloria-vanderbilt> on behalf of Isaacd*
> *Sent:*
> *To: Henk Keilman...*
> *Cc: Amnon Shiboleth...*
> *Subject: Sale GVBV*
> *As per our numerous discussions, you have confirmed to me that when/if we sell the total GV business, you will accept $80M for the trademark.*
> *We need to resolve any and all open issues with regard to the Notes payment schedule which I am sending to Amnon today."*

98. The alleged fax to Hyposwiss of 31/10/02 signed by Mr. Keilman, and written on RIG letterhead reads as follows:

> *"Hyposwiss ....*
> *Att: Mr. Rolf Muller*
> *31-10-02*
> *Dear Mr. Muller,*

An amount of US$9,980,000 was lend to Worthing Properties Limited by Telescope Holdings Limited, on the basis of a loan agreement. Telescope Holdings is part of the RIG Group. The above amount as such originates from the RIG Group as a result of profitable investments made, of which you are aware. Worthing Properties is going to invest the amount into an investment fund, called the Sterling Macro Fund, based in Bermuda.

Initially Savlamor Investments Limited was going to be the investment vehicle. Savlamor will be utilized however for another investment activity. For that reason Worthing Properties was set up to be the vehicle through which the investment in the Sterling Fund will take place. All investments made by me or related companies are as a matter of policy, always concluded through special purpose vehicles.

I trust this will provide you with sufficient information.

Best regards,

Henk J. Keilman"

99. A Joint Memorandum dated 6 September 2016 was prepared by the Experts on Digital evidence in addition to their individual Reports. The experts were Sean Theron of LDM Global ("ST"), Marc de Gunst of sbv Forensics ("MdG") and Alex Seigle-Morris of Transperfect Legal Solutions ("ASM").

100. In essence, in relation to the email message, the experts ST, MdG, and ASM agree that is possible to forge or "spoof" an email. All three experts also agreed that, subject to entries for the timeframe in question still being available, interrogation of email logs would prove whether the message in question was sent/received at the time that the sent/received metadata states in the MSG file.

101. Furthermore, they are all agreed that, without reviewing the server logs it will not be possible to prove or disprove the authenticity of the message.

102. It would seem that what the experts disagree on is as follows. ST's affidavit at paragraph

7, states that successfully spoofing an email can be carried out by a person with "*minimal or no special technical knowledge*". He goes on to explain that "*minimal or no special technical knowledge*" means that someone who is able to understand basic web search features (eg. Google) and follow a set of instructions. MdG and ASM on the other hand, opine that a reasonable degree of technical knowledge would be necessary to create a forged email that can withstand investigatory analysis.

103. As regards the Word-file Hyposwiss letter/fax, the experts who examined this issue, ST and MdG agree on the fact that it is possible to change the metadata of a Word file with minimal or no special technical knowledge. Therefore, that it is technically possible to create a Word-file with the content and metadata like in the file "transactions telescope 021031.doc".

104. The areas of disagreement set out in the Joint Memorandum are as follows:

> *"2. What the experts disagree on*
>
> *a. ST holds the opinion that no forensic expert is able to put forth a conclusion as to the authenticity of the specific Word-file.*
>
> *b. MdG holds the opinion that it is possible to provide a conclusion about the most probable dates of creation, modification and use of the specific Word-file.*
>
> *3. Why the experts disagree*
>
> *4. There are two reasons for the experts disagreeing:*
>
> *a. Difference in assignment.*
>
> *a. Difference in information to be used to evaluate the Word-file.*
>
> *5. Ad 1*
>
> *a. ST has been assigned to analyze the Word-file in isolation and, if possible, draw a conclusion about its authenticity. (ST-Paragraph 3). In every day computer usage, it is true that metadata will point to the most probable creation and modification dates. However, ST holds that the allegations of fraud in this matter have rendered the question of probable creation date irrelevant to the investigation and the question to be addressed is whether the fraud could plausibly have been carried out.*

b. MdG has been assigned to give an opinion on the most probable dates of creation, modification and use(MdG-Paragraph 3)

c. This leads to a difference in the opinions given: what's possible vs. what's probable.

6 . *Ad 2.*

a. As MdG on the one hand had a different assignment and on the other has personally acquired the file named "transactions telescope 021031 doc" from the Dell Optiplex 330 computer, he was able to evaluate the metadata in relation to (among other things) general computer user knowledge, information about the Dell Optiplex 330 computer and the time it was taken into service, and general objectives of a potential forger. Based on his evaluations he formed his opinion that the file named "transactions telescope 021031.doc" has most probably not been manipulated (MdG- Paragraph 36).

b. MdG's report states that the files creation date being more recent than the last modified date indicates that the file was copied from one computer system or hard drive to another in 2008, and that no modification has taken place since(Paragraph 22). However, ST holds the opinion that the document could have been forged at any time between 2002 and 2008 and copied to the machine in 2008, or that the documents metadata could have been manipulated at any time between 2002 and the present by changing the systems' time settings during the copy process. This process is essentially the same as the process described in paragraph 1 of this section; which the experts agree could be carried out by someone with minimal special technical knowledge.

c. MdG notes that while it is technically possible that the Word-file could have been manipulated at any time between 2002 and 2008 (or the present, depending on the method used), it is highly unlikely that a file that is apparently so important that it leads one to forge it; it is used only years later.

d. ST requested access to the machine (Dell Optiplex 330), that request was denied, therefore ST cannot speak to analysis of system meta data.

e. MdG notes that he has received a request to supply the Word-file named "transactions telescope 021031.doc" and has supplied an image containing that file.

....'

105. On this issue, it does seem to me that because these Experts appear to have had different assignments, and did not have uniform access to a relevant machine, their evidence does not point clearly one way or another as to the authenticity of this email and its date. However, separate and apart from those matters, which again, will be matters that the Courts in the Netherlands will have to wrestle with, I agree with Learned Counsel Mr. Croxford QC that it is odd for Mr. Keilman to be providing the Bank with such a detailed narrative about his and his companies' internal policies and maneuverings.

Evidence that Mr. Keilman took money from clients

106. It is the undisputed evidence that Mr. Keilman did take money from persons/clients in respect of whom he was in a position of trust and responsibility. The sums taken were indeed large (more than US$8.9 million in aggregate) and it does appear that this conduct was calculated conduct, and repeated upon a number of occasions. The promissory notes given by Mr. Keilman and RIG to Gila Dweck Goodman (Mr. Dabah's sister), Woodsford Business S.A., and Shelley Management Ltd during the period March – April 2011, speak for themselves (Core Chronological Bundle Volume 2). In addition, the document headed "*Confirmation*", in the same Bundle, speaks volumes. That document, written to William Wachtel Esquire, of Wachtel Masyr & Missry LLP, and to Gila Dweek Goodman dated July 23 2012, reads as follows:

*"**<u>CONFIRMATION</u>***

July 23, 2012

William Wachtel, Es

……

Gila Dweck Goodman

Dear Mr. Wachtel and Ms Goodman:

I wish to confirm to you that neither Albert Nasser nor Ammon Shiboleth had anything to do with my using approximately U.S. $7 million of the funds of Heckbert and Maubi. They did not know about it and did not authorize it.
<u>I borrowed and used the funds because I had to respond to a major financial crisis, resulting from a third party fraud, and I fully intend to repay the funds together with interest and all of the costs and expenses incurred in connection</u>

with resolving the situation as soon as I can realize my illiquid investments. I have issued a demand promissory note signed by myself personally as well as my company Rig Investments N.V. to evidence our obligation to make such payments, and I fully intend to repay the funds together with interest and all of the costs and expenses incurred in connection with resolving the situation as soon as I can realize my illiquid investments. I have issued a demand promissory note signed by myself personally as well as my company Rig Investments N.V. to evidence our obligation to make such payments.

Sincerely,

Hendrik J. Keilman"

107. Mr. Keilman in cross-examination claimed that he signed the promissory notes as part of a settlement, and that in fact Mr. Shiboleth and his clients owed Mr. Keilman a lot of money. He said there are 5 sets of litigation ongoing about the debts. At pages 831-833 of the Transcript for Day 5, the following exchange took place between Learned Queen's Counsel Mr. Croxford and Mr. Keilman after referring to the "Confirmation", the terms of which are set out above:

"Q: Were you were providing your services of trust agency and corporate management for the benefit of clients.

A: No. I was personally involved, and I had a stake in those companies. And a company like Maubi was wholly owned by me, both beneficially and legally. And I had a substantial stake in it. Moreover, several of the people involved in this group of companies, owed me a significant amount of money.

Q: You received a seven percent commission providing services as a trust agent for those companies, Heckbert and Maubi. You had no beneficial stake whatsoever, did you, Mr. Keilman?

A: No, that's not true.

.....I had a beneficial stake. And, moreover, some of the people...for instance, Mrs. Dweck... at that time, owed me already over $6 million. And there's a litigation going on right now with respect to the money

that she owes me. She was one of the persons involved in this transaction.

Q: *"My using approximately $7 million of the funds of Heckbert and Maubi." Other people's money was used by you, wasn't it?*

A: *Substantial part of the money was my own. And secondly, Mrs. Dweck...who is...this letter is, in effect addressed to, Mrs. Dweck owes me, as of today, $7 million and the litigation is going on in the United States to that effect. Moreover, the document that you were referring to yesterday, the document... the Delaware litigation, it even confirms... that some of the other stakeholders, such as Mr. Nasser, had bypassed me in order to avoid paying the money that was due to me in this structure.*

Q. *This was money owned by two companies of which you were acting as a director and a trust agent on behalf of the beneficial owners and you simply helped yourself to it, didn't you?*

A. *No, absolutely not. I also had an economic interest. And I'll just explain to you that several of the stakeholders owed me significant amount of money and litigations are going on right now in order to recover that money.*

Q. *Why didn't you put in this letter, yes, I took approximately $7 million of the funds of these two companies, but I was entitled to it for the following reasons? Why didn't you put something like that in there, Mr. Keilman, if any of that was true?*

A. *Because at that time Shiboleth asked me to do that. I trusted him, and there was a settlement that had been reached, and I thought this was over and done with. So for me, it was simply an act of assisting him in a problem that he had with some of his clients and nothing more than that....."*

THE SUBSCRIPTION AGREEMENTS

108. There is evidence that Ms. Christian, who signed her name as being Mr. Keilman's personal and legal assistant, sent out the Subscription Agreement for Sterling to the Fund Administrators in Bermuda under cover of a letter dated 15 October 2002, stating as follows:-

> *"Please find the fully executed booklet for Mr. David Katz....*
> *Please also find enclosed the original Certificate of Incorporation and the Articles of Association of Worthing Properties Limited."*

109. There is also evidence that on the 25 May 2012, Mr. Keilman sent Moore Stephens, the registered agent of Worthing, what he claimed to be a true copy of the Subscription Agreement by which he allegedly made his investment in Sterling. However, in cross-examination Mr. Keilman admitted that what he had sent was a typed over version and he claimed that he had done so because the original was "*a bit messy*" and in order to make it more legible. Mr. Keilman's explanation as to why he had not told Ms. Christian that it was no longer Mr. Katz, but himself that was investing in Sterling was that he might have been out of office travelling for a few days. Mr. Keilman also admitted that whereas the document sent by Ms. Christian on 15 October 2002 did not have his signature, the one he sent to Moore Stephens did have his signature. His explanation was that corrections not just as to the amount of the subscription, but others such as adding his signature had to be made as well.

110. Mr. Croxford QC, in his closing submissions, submitted that it was obvious that Mr. Keilman had added his signature to a copy of the real document and then put in a copy of that forgery as if it was the real document. Again, this question of forgery will be more appropriately addressed by the Dutch Court.

The undisclosed letters

111. Paragraph 27 of the Amended Petition states as follows:

"The Petitioner wrote to the Company, at its registered office, by letters dated 15th of December 2014, and 2nd of March 2015, requesting certain information in relation to the Worthing shares. No information was received pursuant to the letters; however, the Company never denied that the Petitioner had an interest in the company, and never stated, impliedly, or expressly, that the Worthing Shares had been unlawfully transferred to Victory Hills."

112. Mr. Croxford QC submitted that this was a very important false statement. Reference was made to Mr. Keilman's Second Affidavit, which exhibited these letters, and which was relied upon when the *ex parte* application was made before me in December 2015, for appointment of the JPLs. Paragraph 41 of Mr. Keilman's Affidavit, Mr. Croxford QC submitted, is almost in the same wording as paragraph 27 of the Petition. Copies of the two letters were exhibited to Mr. Keilman's Second Affidavit. At paragraph 42, Mr. Keilman stated that it was as a result of the Company's failure to provide the information requested that the Petitioner brought the Inspection Application.

113. Mr. Croxford QC submitted that Mr. Keilman was clearly the man controlling the Petitioner and was therefore the one suppressing the truth. Reference was made to page 328 of the Core Chronological Bundle, to the first of the letters. Then at 333 is the second of the letters pleaded to and attested by Mr. Keilman. Page 335 is the letter dated March 9, 2015, written by Charles B. Manuel Jr. on the Shiboleth law firm letterhead, which is patently a response to the letter of 2nd March 2015. This letter reads as follows:

> *"We refer to the letter of Jonathan M. Sperling Esq., addressed to Sterling Macro Fund ("the Fund") dated the 2nd March 2015, purportedly written on behalf of Worthing Properties Ltd ("Worthing") making certain demands upon the fund.*
>
> *You cannot properly be representing Worthing because we represent owners of a hundred percent of the shares of Worthing and its assets, and they've not engaged your firm.*
>
> *Please be advised that an unsuccessful attempt was made in Amsterdam last year by Hendrik Johannes Keilman to induce Mr. H.H. Kreikamp of Blauw*

Tekstra Uding firm in Amsterdam, the trustee/receiver in the bankruptcy of RIG Investments NV ("RIG"), to make a claim for an interest in the fund using a similar false claim of ownership by RIG of Worthing and an interest in the fund. In order to assist in preventing a recurrence of this type of claim, we request that you advise us of the true identity of the client that you represent.

Because the attempt to misappropriate an interest in the Fund through RIG failed, and in view of what we know of Mr. Keilman's misdeeds and modus operandi, we anticipate that the "claim" to an interest in the Fund by your client (which may or may not be associated with Mr. Keilman) will likely not derive from a purported ownership by RIG, but rather through a different fraudulent claim of title. The common element we expect to be used in any variation of the scheme is a claim of ownership in the Fund through a purported ownership of Worthing, which will be "evidenced" by, or derived through, some action by Keilman or an affiliate, falsely represented to be acting as a director or other authorized representative of Worthing or its "owners".

By way of explanation, we expect that a proceeding seeking a declaration of Keilman's bankruptcy will be filed shortly in Amsterdam by numerous creditors who will include, among others, Dutch tax authorities, banks, and persons who were clients or customers of Keilman and the trust companies he owned and controlled and from whom he stole millions of dollars. Worthing was a company which was at one time represented by Keilman and his trust companies. Keilman has upon a number of occasions falsely represented that he (or entities that he owned or controlled) "owned" an interest in businesses and companies that were clients or customers of Keilman and his trust companies, but that in reality are owned by others, including a false claim of ownership in Worthing. These interests, which were valued at tens of millions of dollars, have purportedly been shown on financial statements of entities represented to be owned or controlled by Keilman and/or his confederates. In most of these instances the claims were based upon specious *instruments, documents and agreements created by Keilman and often signed by him allocating shares or otherwise purporting to evidence "ownership".*

We are concerned that your client may have engaged Covington & Burling under false pretences with a view toward trading on the firm's good name in furtherance of a fraudulent scheme. Accordingly, we request that you investigate your clients, this matter and its provenance before you take any further action. A failure to do so may have unfortunate consequences for persons involved in this peculiar situation.

Because of the nature of this matter, we are sending a copy of this letter to Messrs. Hester and Breuer because we believe it merits the attention of senior management of your firm.

...."

114. This was followed by a letter from Covington & Burling LLP ("Covington") dated 17 March 2015, as follows:

> *"Dear Mr. Manuel:*
>
> *We write in response to your letter of March 9, 2015. The letter asserts that you represent "owners of 100% of the shares of Worthing and its assets", but it fails to provide any information to substantiate that assertion or even to identify the persons you claim are the owners. We would be grateful if you could provide us with that information, absent which there is no basis to credit the letter's assertions.*
>
> *............"*

115. In response, Mr. Manuel wrote to Covington, Mr. Sperling Esq, as follows by letter dated 27 March 2015:

> *"I respond to your letter dated March 17, 2015. Worthing Properties Ltd. (the "Company") issued bearer shares. Our client holds all of the outstanding shares of the Company. Copies of these certificates are enclosed. Please note the signatures of Keilman and his then assistant Riedewald-Christian on the*

Certificates. We are prepared to have the original certificates exhibited to you at a time and place convenient to our client, if necessary.

Further to our March 9, 2015 letter to you, the bankruptcy case of Mr. Keilman is now pending in Utrecht.

We have provided you with sufficient information to conduct your own inquiries as to your client's actions, this matter and its provenance. We, of course, cannot compel you to do a proper investigation or to credit the information we have provided to you. But we do now insist that you inform us of your client's true identity. It is not Worthing Properties Ltd.

..."

116. Mr. Croxford QC submitted that the reference to Kreikamp and to RIG are pertinent because of the way that the Petition has pleaded that RIG is the company beneficial owner of the investment, and RIG is now in receivership with Mr. Kreikamp as Receiver. It was submitted, that this letter should have been brought to the Court's attention if Mr. Keilman had not been lying to the Court and to his lawyers. Mr. Croxford QC submitted, that had this letter not been concealed, the Court would then have asked a series of questions: for example, is RIG in receivership? What is the liquidator's role in this amended Petition? The Court would also have said to itself, this man Mr. Keilman who has now made two affidavits before me, this firm of lawyers says he is a fraudster, and then asked Counsel, what do you have to say about that?

117. I must say that I entirely agree with Mr. Croxford QC on this point. A completely different impression was left with me by the statement that no information was provided, and by Mr. Keilman's failure to exhibit or even refer to these two letters from Mr. Shiboleth's firm in response.

118. However, I have also noted something else that is striking. In the Inspection Application, at paragraphs 22-24 of Mr. Keilman's First Affidavit, he refers to the letters dated 15 December 2014 and 2 March 2015. Then at paragraph 25, Mr. Keilman does not say no information was provided, he makes the remarkable statement that "*No response has*

been received to either letter." (my emphasis)

119. Not only is that not true, (at least in relation to the 2 March 2015 letter) but Mr. Keilman also goes on to rely upon this alleged lack of response by asking that (at paragraph 26), "*In the light of Sterling's lack of response to either letter, I humbly request that the Honourable Court make the binding declaration sought in the Originating Summons in respect of clause 2(d) of the Subscription Agreement*".

TAX TREATY EVIDENCE

120. Worthing called two witnesses, Mr. Sleurink and Mr. Bazar as tax experts to give evidence about aspects of the US/Dutch Double Taxation Treaty. Essentially, this evidence would really go towards the credibility of Sterling's case that Mr. Katz was the beneficial owner of Worthing. I accept Sterling's submission (at paragraph 82 of the Closing Submissions), that this evidence does not indicate, and indeed, could not indicate, what the persons involved in the 1997 transaction knew and believed in the period 1995-1997. In any event, I remind myself, that not only is Mr. Keilman's case that for GVBV to derive the tax benefits, he would have to be the beneficial owner of the shares, it is also his case that although the investment in Sterling was initially supposed to be an investment for Mr. Katz, via Worthing, he, Mr. Keilman took it over in 2002.

121. Each of these witnesses Sleurink and Bazar did give evidence of what they thought the Treaty meant. Both indicated that a "black letter" approach to the Treaty and its construction was necessary, at least as a starting point. However, I do agree with Mr. Croxford QC that each acknowledged that the Treaty used the term "*owner*" and "*beneficial interest*". At the end of the day, I find that their evidence did not persuade me that between 1997 - 2002, it was not possible or probable that persons could have sought to use the US-Dutch Treaty in the manner which Sterling's witnesses, Mr. Shiboleth, Mr. Katz and Mr. Dabah, say was done in respect of GVBV.

122. Mr. Barzily was also called by Worthing to give evidence in relation to Israeli tax law. This evidence really went to the credibility of Mr. Katz. However, this evidence did not

take the matter much further, since I was not asked to make, and did not make any order for disclosure by Mr. Katz of his Israeli tax affairs, and nor did he disclose those voluntarily. Tax affairs are, it is well-known, considered by many persons to be very private matters. The witness did not have any material knowledge of the actual particular tax circumstances of Mr. Katz and in particular whether at any time he was a returning Israeli who qualified for exemption.

123. On the other hand, the evidence of Mr. Katz was that he took and relied upon expert advice in Israel and had complied with his obligations.

124. I must say, that in any event, it seems to me that the way the characters in this case operated, with no written documents, within layers upon layers, and with a view to effecting tax avoidance schemes, it is very hard to conclude that all is as meets the eye, or for that matter, that there are binary choices as to what the true situation was.

EVIDENCE ABOUT BEARER SHARES AND BVI LAW

125. There was also some evidence presented in this case, albeit indirectly through the Dutch proceedings, about BVI Law and changes in relation to bearer shares. In my judgment, I do not need to go into that, nor could I resolve this issue for the purpose of these proceedings.

DISCUSSION AND ANALYSIS

126. A point that is well-made by Mr. Croxford QC is that this whole case has been bedeviled by the parties not recording clearly what they were doing. However, one of the aims of the arrangement being tax avoidance, that might conceivably lend itself to a paucity of documents. As expressly acknowledged in the Delaware judgment, the whole point of this lack of documentation was to do things in secret, and Mr. Keilman routinely loaned himself and his companies to such ventures.

127. This has been a strange and complex case. The case involves on both sides some very

clever, shrewd businessmen. It has been complicated by the fact that there are ongoing, yet to be determined proceedings in the Netherlands. In relation to the issues that are directly before me for decision on this winding up Petition, I do not intend, and have been careful not to make, any findings, as to the beneficial ownership of the shares in Worthing. Indeed, both sides were agreed that it was not for this Court to determine that issue. In that regard, it has at times, felt rather like walking through a minefield. Whilst there has been much evidence and legal argument directed at these very issues before this Court, this will no doubt be gone into in even greater detail in the Courts in the Netherlands, where that issue arises squarely for determination.

128. The power to wind up a company is discretionary, and regard must be had to all of the surrounding circumstances. Further, whether it is just and equitable that a company should be wound up is an inference of law from the facts of the situation. The equity must be founded on facts alleged in the Petition – see *French*, page 629, paragraph 8.137.

129. In my judgment, the Petitioner has not, on a balance of probabilities, proved its alleged factual case, and nor has it demonstrated that there is any proper basis for saying that it is just and equitable for Sterling to be wound up. In my judgment, if those managing Sterling, and Mr. Shiboleth did believe that the true beneficial owner was Mr. Katz, then it could not be said that the Unlawful transfer, the attempted transfer to Victory Hills, was so egregious that Sterling ought to be wound up. This is particularly so since Worthing had no assets apart from its interest in Sterling. In my written judgment in respect of the summary judgment application, delivered 26 July 2016, at paragraph 75, I accepted that Sterling did have a real prospect of arguing that the "Unlawful Transfer" is more appropriately characterized as the purported transfer. As being procedurally wrong, ineffective and unauthorized, but not unlawful. At that stage I had seen affidavits, but there had not yet been cross-examination or all of the evidence.

130. I have now seen and heard from witnesses, including Mr. Keilman, Mr. Shiboleth and Mr. Katz. I found Mr. Shiboleth and Mr. Katz shrewd businessmen; it is plain that they were accustomed to being involved in all kinds of savvy money-making deals and

arrangements, and sophisticated tax avoidance endeavours. It is plain that there is a trusting relationship between Mr. Dabah, Mr. Shiboleth and Mr. Weinstock. Indeed, it seems as if all went well and was on the same footing between Mr. Shiboleth and those managing Sterling with Mr. Keilman, until, to use Mr. Shiboleth's turn-of phrase, Mr. Keilman went "rogue" in 2011. I found Mr. Shiboleth, Mr. Dabah, Mr. Katz and Mr. Weinstock and indeed, the internal logic of the case of Sterling on a whole, to be more credible than Mr. Keilman and the case he has advanced before me. I also thought that the evidence of Mr. Jansen was powerful and convincing and I do not find that he was shaken in cross-examination. I do not find that his evidence was biased (nor do I think it was suggested that it was), or put forward in Sterling's favour for any improper motive, because of his business relationship with Mr. Shiboleth.

131. It is clear from the evidence of Mr. Shiboleth and Mr. Jansen that Mr. Keilman has in the past provided trust services for clients of Mr. Shiboleth, participating in tax avoidance structures and that part of the service offered was to have things occur in a secret fashion, with little or no documentation at all. The Dweck Delaware judgment supports Sterling's case that Mr. Keilman provided intermediary entities which were structured to "*avoid the indicia of control*" for a percentage fee. In that case, Mr. Keilman was not operating as the beneficial owner of the companies Maubi and Heckter; he was merely the legal owner and controller. This evidence and judgment do not tend to support Mr. Keilman's pleaded case. For present purposes, more importantly, it supports the case that those managing Sterling, and Mr. Shiboleth, genuinely believed that Mr. Katz was the beneficial owner of Worthing's shares.

132. I find that those managing Sterling, and Mr. Shiboleth did, and do believe that Mr. Katz is the beneficial owner of the shares in Sterling. Some of the matters that support them as credible witnesses who believed that Mr. Katz was the beneficial owner are the bearer shares which were in Mr. Katz' possession, the Subscription Agreement sent by Mr. Keilman's Assistant Ms. Christian, on the same day that Mr. Keilman claims to have taken over the investment opportunity, and the fact that Mr. Katz' passport was sent to Sterling's Investment Manager Mr. Khafif.

133. I also think that the evidence of Mr. Khafif was important. Although at times Mr. Khafif seemed to be overly painstaking in the detail and particularity with which he was giving his evidence, he was an important witness and his evidence supported Sterling's case as to management's belief. Mr. Khafif said that he dealt with Mr. Katz as the investor via Worthing in Sterling, both before and after the 15 October 2002 and had never dealt with Mr. Keilman on that basis, or at all.

134. I also note that Mr. Keilman's case depends on a number of things happening. A phone call he alleges took place, which Mr. Shiboleth denies, in which Mr. Keilman claims that it was communicated to him that Mr. Katz was not going ahead with the Sterling investment after all and no longer needed the company, Worthing, that he, Mr. Keilman had incorporated for Mr. Katz. Mr. Keilman claims that conversation took place on the same day as his secretary sent out the Subscription Agreement in relation to Mr. Katz.

135. Mr. Keilman's case also depends upon a number of coincidences. Mr. Keilman agrees that the money for the initial investment came from GVBV and he acknowledges the Khafif and Dabah families' connection with GVTI, and Mr. Dabah's connection with Sterling. He also is saying that it so happens that he was out of office when his Personal Assistant went ahead and sent out the Subscription Agreement in the name of Mr. Katz. Mr. Keilman claims to have invested the exact same sums that Mr. Shiboleth had earlier indicated that Mr. Katz had wanted to invest.

136. Further, I do accept that Messrs. Shiboleth, Katz, Dabah and others, did consider Mr. Keilman to be a liar and a thief. In those circumstances, I cannot say that the Unlawful Transfer or the alleged delay in disclosing information on the Inspection Application can show a justifiable lack of confidence. As discussed in ***Loch and John Blackwood Ltd*** [1924] AC 783 and at paragraph 643 of French's Work, in order to justify the winding up of a company on the basis of lack of confidence in those in control, the lack of confidence must be justified by their lack of probity, and that lack of probity must be objectively justified.

137. It is plain that if this Court were to wind up Sterling, and the Courts of the Netherlands were to later find that Mr. Katz was in fact the UBO of the shares in Worthing, then this Court would, by its actions, have assisted Mr. Keilman in carrying out a serious fraud.

138. As regards the undated letter from Mr. Katz to Mr. Dabah referred to at paragraph 25 above, emphasized by Worthing's Leading Counsel, I do think that there were discrepancies between the evidence of Mr. Shiboleth and Mr. Katz as to the authorship of this letter. There is also a credibility issue as to when it came into existence. However, overall, particularly having regard to the undisputed existence of the documents referred to and handed to the JPLs, and referred to at paragraph 17 above, I cannot say that I am satisfied on a balance of probabilities that the letter was manufactured, or formed part of a conspiracy between Mr. Dabah, Mr. Katz and Mr. Shiboleth to concoct false evidence in order to down-play the seriousness of what they had done regarding Victory Hills.

139. I also looked at the fact that proceedings were not filed in the Netherlands until 2015. However, it does seem that from 2012 until 2015 when the proceedings were filed, those in charge of Sterling, Mr. Shiboleth and Mr. Katz all thought the attempted transfer to Victory Hills had successfully protected Mr. Katz.

140. I am not satisfied on a balance of probabilities that there has been any lack of probity by Mr. Shiboleth or those in charge of Sterling such as to meet the requisite standard. Mr. Keilman's alleged lack of confidence has not persuaded me that Worthing has an objectively justifiable lack of confidence in the management of Sterling. This is particularly so, given that the shares were not in fact transferred to Victory Hills. Thus, whist what was done in relation to Victory Hills may have been procedurally wrong, and ineffective, I cannot say that, given the belief that was operating on the minds of management and Mr. Shiboleth, that it reaches the level of lack of probity. Indeed, based upon their beliefs, they thought they were doing a prudent thing, for the good motive of protecting the investment and the true beneficial owner of the investment in Sterling from the depredations which they thought Mr. Keilman was capable of, acting through

Worthing. The time between 2011 when Mr. Shiboleth first found out about Mr. Keilman taking money from other clients of his, and the Victory Hills purported transfer in 2012 is in my view relatively short and does not make Mr. Shiboleth's explanation of how he felt he had to act quickly incredible. It is not easy to identify a workable, effective alternative way of acting to protect what those managing Sterling considered needed protecting.

141. In relation to the Inspection Application, whilst the Victory Hills transaction should have been disclosed and there should have been no prevarication about this, this is not a ground in the circumstances that can ground winding up on a just and equitable basis. In addition, I accept that Mr. Kreikamp had been told some time ago of what was believed to be the fact of the transfer, albeit he was not given the name "Victory Hills".

142. It is also important that at the date of filing the Petition and at the date of the ex parte application before me for the appointment of the JPLs it was alleged that there are irregularities in the accounts and risk of dissipation of assets. That has now been demonstrated not to be so. The evidence and the JPLs Reports do not support a case that there is any mismanagement of Sterling's assets or affairs or dissipation or risk of dissipation. Indeed, I accept that a winding up in this case is likely to damage the value of the investment since the majority of it concerns "thinly traded stock" such that any sudden disposal would have a serious and adverse effect upon the price to be realized. If this were to occur, and Mr. Katz succeeds in his claim in the Dutch proceedings proves his beneficial ownership and succeeds in having that fact recognized in the BVI Company Register, then there would be no real scope for such damage to the value of the investment to be compensated. In any event, it would just be plainly uncalled for and unjust to take the drastic step of winding up Sterling.

143. Further, as pleaded in the Amended Petition, until February 2012 Information Packs were routinely provided to Mr. Keilman. The practice is said to have stopped when Sterling formed concerns about his honesty and intentions. There were no previous contemporaneous complaints, objections or queries made as to the financial management of Sterling during the nearly a decade when information was provided.

144. Having looked at the JPLs Reports, it is plain that taken overall the investment has been a very successful one.

145. In addition, there are serious legal questions which arise about many issues, including:

(i) The validity of the initial and subsequent resolutions purportedly passed by Mr. Keilman as "*sole director*" when he was not;

(ii) Whether Mr. Katz' bearer shares were properly cancelled and replaced by the two registered shares;

(iii) The effect of a change in BVI law "*immobilizing*" bearer shares; and

(iv) Whether the Niaga shareholdings are valid.

146. All of these are issues and questions raised that are yet to be determined in the Dutch proceedings to which Mr. Katz, and Mr. Keilman and RIG are already parties. Niaga, Mr. Renders, and Worthing have, I have been advised by Leading Counsel in this case, since been joined.

147. I therefore cannot say, as required if I am to make a winding up order, that there is "*...something in the management and conduct of the company which shows the Court that it should no longer be allowed to continue, and that the concern should be wound up*"- ***Ex Parte Spackman*** (1849) 1 Mac & G 170 at 174, 41 ER 1228 (with note) per Lord Cottenham LC.

148. It is useful to examine the depth of the considerations that the Court is required to engage in when considering whether it is just, appropriate, or necessary, to make a winding up order. In ***Re Acorn Inc.*** [Grand Court, unreported, 6 March 2015] Jones J stated at paragraph 71:

> *"I accept Ms. Newman's submission that it would be wrong to make a winding up order on the Petition because it is unnecessary and would be a*

disproportionate way in which to remedy the wrong which has been done to the Majority Shareholders. Whether or not a winding up order is an appropriate remedy must depend on the basis upon which the Court comes to the conclusion that the jurisdiction is engaged. In this case the jurisdiction is engaged because the Petitioner has justifiably lost all confidence and trust in the Company's directors who have acted in bad faith and exercised their powers for the improper purpose of disenfranchising the Majority Shareholders so as to perpetuate the Minority Shareholders' control of the board. It is not necessary to make a winding up order to remedy this wrong. This complaint is capable of being remedied by an order that a meeting of the shareholders be convened for the purpose of considering and, if thought fit, passing the resolutions which Mr. Roche has been attempting to put forward on behalf of the Majority Shareholders and I do not consider that the pursuit of this particular remedy is unreasonable in any way. "

149. On the other hand, I find a number of features to this case in relation to the conduct of Mr. Keilman troubling, or most puzzling, at the very least. The Amended Petition at paragraph 16 did plead that "*The above facts regarding the source of the Investment Amount were put in evidence in the course of the Inspection Application together with a full documentary trail of the source and the transaction.*" However, Worthing did not initially support its application with any account of where the funds invested by Worthing in Sterling came from and Mr. Keilman's First Affidavit did not mention GVBV.

150. Further, at paragraph 27 there is the pleaded allegation concerning two letters from New York Attorneys Covington in respect of which it was pleaded that "*No information was received pursuant to the Letters.*" It is true that these letters yielded no information about Accounts or Victory Hills. However, I do think that it was quite misleading and wrong, in any event, but especially when the ex parte application was made (and I have assumed that Counsel who appeared before me in December on behalf of Worthing, different Counsel from Mr. Jones QC, did not know of the other correspondence), not to reveal to the Court that Mr. Shiboleth's firm Shiboleth et all LLP had responded in detail. Firstly,

by the letter dated 9 March 2015, accusing Mr. Keilman of being a fraudster and referring Worthing's Attorneys to Mr. Kreikamp. That letter made it quite clear that the ownership of Worthing was disputed and that it was anticipated that Mr. Keilman would engage in some fraudulent scheme to make a false claim of ownership. Then followed the letter dated 27 March 2015 which provided copies of the bearer shares. This was followed by a letter dated 31 March 2015 indicating the issue that day of the Dutch Proceedings. I have already commented adversely on the position in relation to what was originally said to the Court by Mr. Keilman on the Information Application.

151. In my judgment, it is odd that all of this was not mentioned or disclosed to the Court when Worthing made its Inspection Application or indeed addressed when the Petition was filed and the ex parte application for the appointment of the JPLs made. Further, the allegation in the letter recited that Mr. Keilman had defrauded some of Mr. Shiboleth's clients of millions of dollars. It is extraordinary that that was not disclosed and some explanation, such as it was, as has been given to this Court by Mr. Keilman, offered at the outset.

152. I do find it striking that at paragraph 31 of the Petition it is alleged that Weinstock (1), amongst other matters, "*...(ii) put in issue the Katz proceedings, which had no bearing on the matters at issue in the Inspection Application; and (iii) put in issue Mr. Keilman's bankruptcy status when this was entirely irrelevant.*"

153. It is extraordinary that it could be considered that the Katz proceedings had no bearing on the Inspection Application. As Sterling points out in its written closing submissions at paragraph 26(2), paragraph 15 of Weinstock (1) gave a summary of Mr. Katz' alleged status as the shareholder in Worthing and his investment in Sterling. By the Katz proceedings Mr. Katz seeks to establish that he alone is entitled to be recognized in law as being the beneficial shareholder in Worthing. It is plain that if that is so then Worthing, in taking out the Inspection Application, would have been acting not only contrary to the wishes of its sole shareholder, but it would also amount to a furthering of the fraud allegedly being conducted on its shareholder by Mr. Keilman.

154. As regards the allegation that Mr. Keilman's bankruptcy status was irrelevant, in my judgment that plainly cannot be so. There could well be matters, as described in paragraphs 19-21 of Weinstock (1) filed in relation to the Inspection Application that could go to the credibility and bona fides of Mr. Keilman in bringing this Petition, and also to the issue of the formal status of an undischarged bankrupt as a director of a company.

155. Indeed, at paragraphs 3.3 - 3.5 of the Bankruptcy judgment, in respect of a creditor's claim that Mr. Keilman had embezzled money from it that he had managed in a trust, the Bankruptcy Judge had some very serious things to say before making the adjudication of Bankruptcy as follows:

> *"3. **The assessment of the application***
>
> ....
>
> *3.3. Nevertheless, the court finds that the debtor cannot be granted a definitive moratorium; there are good grounds to fear that the debtor will attempt to prejudice the creditors during the moratorium and, moreover, there is no prospect that he will be able to satisfy his creditors in the fullness of time.*
>
> *3.4. The aforementioned good grounds exist because the debtor, as an entrepreneur, apparently failed to maintain adequate records. After three full months of a temporary moratorium, the basis for the indebtedness alleged by the debtor is unclear, even to the –very experienced- administrator. Both in the public report and at the hearing, the administrator stated that the information provided by the debtor was defective and disjointed.*
>
> *In the information provided to the Court the debtor proved to be extraordinarily careless. In the moratorium application the debtor, who at that time was already assisted by his lawyers, claimed indebtedness of approximately €18 million, divided over seven*

creditors. The administrator has stated that on 30 June 2015, 17 creditors had registered for a total sum of approximately €30 million. On 5 July 2015 that amount was "adjusted" to no less than (approximately) €71 million, divided over 19 creditors. An "asset" described in the application is a claim or interest of €21 million, but shortly before the hearing it emerged that that asset belonged to the estate of ROG Investments; the receiver of that company claimed an almost identical amount from the debtor in the week before the hearing. Another major creditor and business partner of the creditor also registered shortly before the hearing with a claim of €22,378,204.72. In the view of the Court it is impossible to believe that the creditor and his advisors forgot this claim last April, as was essentially argued at the hearing, since the claim was purportedly part of a very sizeable transaction at the end of 2010. The court cannot verify this-there is no substantiation. The Court did not see evidence at the hearing that the debtor was taking a proactive approach to seeking a solution (also) for his creditors; the debtor made no offer to provide (further) underlying documentation about the debts and the assignment that has apparently taken place. He is therefore giving the impression of not actually wanting to work on a solution at his own risk.

In the view of the Court the argument advanced by the debtor's counsel that sometimes he is confused and gives that impression is hard to believe, given the years of experience with and involvement in major international investment of millions of US dollars alleged by the debtor.

3.5. The creditors will be satisfied, according to the debtor, from the considerable amounts that the debtor will collect from third parties in proceedings. The Court finds that there is no factual substantiation for that assertion.

It is not clear within what timeframe proceeds can be expected, approximately what amounts are involved and who will take the initiative and control in the legal proceedings. It is clear that the proceedings will not be conducted by the debtor. Even after a moratorium period of three months, the applicant has been unable to demonstrate adequately with underlying documents that he can lay claim to the many millions of US dollars as he alleges. Moreover, as also reported in the moratorium application, the applicant does not have (all of) these claims on third parties personally, but primarily indirectly through companies of which he is the sole (direct or indirect) shareholder. That these proceeds will also benefit the creditors of the applicant in a personal capacity or "will wash up indirectly with the applicant", as he puts it himself, has not been demonstrated in any way and is consequently incomprehensible argument. For the moment, the applicant's undertaking can only be preserved by means of external financing.

On the ground of the foregoing, the Court finds that there is no prospect that the applicant will be able to satisfy his creditors in the fullness of time."

156. It was to me undoubtedly material for the Court to know that Sterling and Mr. Shiboleth were alleging that Mr. Keilman was acting in furtherance of a fraudster's scheme.

157. As regards the Petition for Winding Up, the fact that these matters were not disclosed does suggest to me that the Court was not being given a full picture.

158. All told, I have not found there to be any sound reasons or factors as to why Sterling, a successfully operated, going concern, should be wound up compulsorily, particularly given the ongoing proceedings before the Courts in the Netherlands which are still to be determined in relation to Mr. Katz' claim to be the beneficial owner of the shares in Worthing and where Worthing has no other assets than its interest in Sterling. I accept

that as Mr. Jones QC has argued throughout, Worthing is a separate legal entity from Sterling. However, the congruity of beneficial interest issues as between Worthing and Sterling is not something that this Court can ignore, and is another reason why Sterling should not be wound up compulsorily.

159. In addition, Worthing has repeatedly pitched its case by saying the following, for example, at paragraph 6 of its Closing Submissions:

> *"6. The real issue for the Grand Court is whether, having regard to the fact that Mr. Katz is not a registered shareholder in either Sterling or Worthing and is merely making a claim to be the owner of the shares in Worthing, Sterling should be allowed unfettered control over what is in effect Worthing's assets or whether Sterling should be liquidated, with its assets in due course being distributed to Worthing, with the onus on Mr. Katz to apply in an appropriate forum to freeze those assets pending resolution of his dispute as to ownership with suitable cross-undertakings and fortifications."*

160. As Mr. Croxford QC argued during his closing submissions, this is really a strange position for Worthing to take. It is clearly Worthing's position that it is anticipated that even if I make a winding up order, there would be no distribution of assets or proceeds of sale of assets to Mr. Keilman, Niaga and Mr. Renders. This seems to be because Worthing is saying that Mr. Katz would then have to apply for an injunction, or some other "*holding*" course.

161. I also find it of interest to note, that in his evidence in cross-examination and in examination in chief (Day 7 of the Transcript, pages 1203 and 1241-1243) Mr. Shiboleth gave evidence that injunction proceedings launched by Mr. Katz in the Dutch proceedings were frustrated because two or three days before the injunction hearing, a change in the Directorship of Worthing was made, such that relief could not viably be proceeded with. It was not suggested to Mr. Shiboleth that this did not take place. I am not sure what the exact terms of the injunctive relief that was being sought on that

occasion were. However, if this is a consideration at all, it points away from a Court of Equity exercising its discretion in such a way as to assist Worthing with this strange procedure of having Sterling wound up, but yet anticipating an injunction application to stop the distribution of any cash.

162. In my judgment, the fact that Mr. Keilman did not disclose the matters I have discussed earlier, such as the letters referred to at paragraphs 113 and 115 above, or seems to have considered that many significant factors were not relevant to the Court's consideration, plainly indicate that the Court was not being presented with the full picture. In my judgment, I regret to say that it does seem that Mr. Keilman did not come before this Court with clean hands.

163. As a result, I have struggled somewhat in deciding whether to find that this Petition was brought for a collateral improper purpose, or amounts to an abuse of process.

164. After carefully taking account of all the circumstances, I have come to the decision that I should not hold that this Petition was brought for an improper purpose or is an abuse of process. The factors that have prevailed in my so deciding, are that this Petition was not launched until after the Inspection Application, and it was only after this that the fullness of the attempted Victory Hills transfer became known. The Victory Hills transfer would, if Mr. Keilman is the true UBO of the shares in Worthing, be a matter of serious concern. However, that issue as to beneficial ownership is, as I have said repeatedly, not for me to determine in these Winding-Up proceedings.

165. In all of the circumstances, I exercise my discretion to dismiss the Petition, with costs to Sterling to be taxed if not agreed.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT