FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

NO. 2016-CA-0612

ECETRA N. AMES,

Plaintiff-Appellant,

versus

JOHN B. OHLE, III, J.P. MORGAN CHASE & CO. f/k/a BANK ONE CORPORATION, DOUGLAS STEGER, AND KENNETH A. BROWN,

Defendants-Appellees.

CIVIL PROCEEDING

Appeal from the Civil District Court,
Parish of New Orleans, State of Louisiana
Docket No. 2011-440
The Hon. Ethel S. Julien, Judge

ORIGINAL BRIEF OF DEFENDANT-APPELLEE JPMORGAN CHASE & CO. f/k/a/ BANK ONE CORPORATION

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STATEMENT OF THE CASE

Plaintiff-appellant Hugh Uhalt alleges that John Ohle committed fraud while serving as trustee of a charitable remainder unitrust ("Trust") created by Uhalt's mother, Ecetra Ames. Uhalt argues that defendant-appellee JPMorgan Chase & Co. f/k/a/ Bank One Corp. ("Bank One") is liable for Ohle's conduct under a respondeat-superior theory because Ohle was employed by Banc One Investment Advisors Corporation ("BOIA"), a Bank One subsidiary, during part of the time that Ohle served as trustee. Uhalt also argues that Bank One itself committed fraud by purportedly failing to tell Ames about Ohle's conduct.

The district court granted summary judgment for Bank One on Uhalt's claims for fraud and fraud-based conspiracy. The court held that Bank One is not liable under either of Uhalt's theories because BOIA, not Bank One, employed Ohle. The court also rejected Uhalt's theories on the merits. Uhalt's respondeat-superior theory fails because Ohle's work on the Trust was not part of his job at BOIA. Uhalt's direct-fraud theory fails because Bank One owed no duty to Ames, and because Uhalt failed to establish the basic elements of a fraud claim.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly granted summary judgment on all of Uhalt's claims because Bank One was not the proper defendant.

2. Whether the district court correctly granted summary judgment on Uhalt's respondeat-superior theory.

3. Whether the district court correctly granted summary judgment on Uhalt's direct-fraud theory.

4. Whether the judgment should be affirmed on the ground that Uhalt's claims are (a) perempted or (b) prescribed.

5. Whether the judgment on Uhalt's respondeat-superior theory should be affirmed because (a) Uhalt failed to produce evidence supporting all elements of

a claim that Ohle committed fraud or (b) a settlement agreement between Ames and Ohle bars a claim seeking to hold Bank One liable for Ohle's conduct.

STATEMENT OF FACTS

A. Ohle's Work for Ames and the Trust

Ecetra Ames is an heiress to the Procter & Gamble fortune, owning assets worth some $50 million.[1] Ames first met Ohle in or about 1997, when he was an accountant at KPMG working on tax and accounting issues for Ames's mother's estate.[2] Ames's husband testified that in mid-1999, his wife began paying Ohle for advice "personally" rather than "in his capacity as a KPMG employee."[3] For this work, Ames wrote checks directly to Ohle and Ohle's wife, not to KPMG.[4]

While at KPMG, Ohle approached Ames about creating what became the Trust.[5] Ohle later left KPMG for a job at BOIA, starting on December 13, 1999.[6]

Ames executed the instrument creating the Trust on December 17, 1999.[7] The Trust instrument does not mention BOIA or Bank One. It designates Ohle as trustee, listing Ohle's home address.[8] It requires the trustee to make quarterly payments to Ames and her husband and, upon their deaths, distribute the remaining funds to charities.[9] And it provides "maximum powers grantable to trustees under applicable law," including "the power to invest ... the principal of the Trust in such

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[1] SR: JPMorgan Chase & Co. f/k/a Bank One Corporation's Statement of Uncontested Material Facts ("SUMF"), Ex. 1 at 60, Ex. 2 at 32. "SR" refers to documents in the record lodged under seal. "R" refers to documents lodged in the public record and is followed by the volume and page numbers.
[2] SR: Affidavit of Kathleen M. Przywara ("Przywara Aff.") (Dec. 11, 2015), Ex. 1 at PLFF004737-38; SR: SUMF, Ex. 1 at 49-50.
[3] SR: SUMF, Ex. 1 at 70-77; SR: Przywara Aff., Ex. 2.
[4] SR: Przywara Aff., Ex. 2; SR: SUMF, Ex. 1 at 70-77.
[5] SR: Przywara Aff., Ex. 1 at PLFF004738, Ex. 3.
[6] SR: Affidavit of Richard A. Rogoff ("Rogoff Aff.") (Dec. 11, 2015), Ex. 1 at JPM AMES 44, Ex. 4 at JPM AMES 3707; SR: SUMF, Ex. 3 at 65, Ex. 4 at 89.
[7] SR: Przywara Aff., Ex. 4 at PLFF000045, PLFF000053.
[8] *Id.* at PLFF45, PLFF52; SR: Affidavit of Joni S. McCabe ("McCabe Aff.") (Dec. 11, 2015), Ex. 2 at JPM AMES 001558 (identifying Ohle's home address).
[9] SR: Przywara Aff., Ex. 4 at PLFF000046-47.

assets as the Trustee may determine to be appropriate."[10]

The Trust instrument entitles the trustee to compensation.[11] Ohle received a fee from the Trust each year that he was trustee.[12] The Trust instrument also allows the trustee to retain an investment advisor.[13] Ohle allegedly retained Jonathan Freedman, who was not affiliated with BOIA, as the Trust's investment advisor.[14] Neither BOIA nor Bank One received any fees from Ohle's work as trustee.[15]

In 1999 and 2000, Ames funded the Trust with about $7.8 million in Procter & Gamble stock.[16] Ames's bankers at PNC Bank or Whitney Bank sold the Procter & Gamble stock and transferred the proceeds to the Trust's account at Charles Schwab.[17] No BOIA or Bank One accounts were involved.

In 2001, Ames invested in Carpe Diem, a hedge fund managed by affiliates of Société Générale.[18] Carpe Diem had no affiliation with BOIA or Bank One.[19] Ames's husband testified that Ohle recommended Carpe Diem, but was not "pushy" about it.[20] Ames's husband explained that before investing, he and his wife "independently" discussed Carpe Diem with Blair Ferguson (one of Ames's bankers), John Wogan (one of Ames's lawyers), and Uhalt (a stockbroker).[21]

Following these discussions, Ames executed instructions directing Whitney National Bank to transfer $5 million for a personal investment in Carpe Diem.[22] Acting as trustee, Ohle withdrew $2 million from the Trust's Charles Schwab

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[10] *Id.* at PLFF000051.
[11] *Id.* at PLFF000050.
[12] SR: Przywara Aff., Ex. 5 at PLFF00187.
[13] SR: Przywara Aff., Ex. 4 at PLFF000049.
[14] R.I:6; SR: SUMF, Ex. 6 at 232.
[15] SR: SUMF, Ex. 1 at 169-70.
[16] SR: Przywara Aff., Ex. 4 at PLFF45, Ex. 6 at WNB-692, Ex. 7 at WNB-794.
[17] SR: Przywara Aff., Ex. 7 at WNB-794, Ex. 8 at PLFF270, Ex. 9 at PLFF4950.
[18] SR: Przywara Aff., Ex. 1 at PLFF004739, Ex. 11 at PLFF001108.
[19] SR: SUMF, Ex. 6 at 49-50; Przywara Aff., Ex. 11.
[20] SR: SUMF, Ex. 1 at 146-47.
[21] SR: SUMF, Ex. 1 at 147-52, 161-64, Ex. 7 at 62; Przywara Aff., Ex. 1 at 4739.
[22] SR: Przywara Aff., Ex. 12, Ex. 6 at WNB-000693.

account for a second investment in Carpe Diem.[23] Ohle received part of a 5% "commission" on these investments,[24] none of which went to BOIA or Bank One.

Beginning in 2000, Ohle misappropriated substantial funds from the Trust, before returning most of the money in 2003.[25] Ohle used this money to buy sports memorabilia and pay his credit-card bills, among other things.[26] No misappropriated funds went to BOIA or Bank One.

In early 2003, Ames directed her attorney, John Wogan, to investigate Ohle's work.[27] Following that investigation, Wogan recommended that Ames settle her dispute with Ohle.[28] In a letter to Ames, Wogan stated that "the written instructions signed by [Ames] at every step of the way would be a difficult item to overcome."[29] Wogan also cited several factors that limited Ames's damages. Although the assets managed by Ohle declined in value, "the stock market declined sharply during the same time period."[30] Ames's "damages would be limited to the difference between the performance of the trust's portfolio" and "a portfolio that was properly managed" at the time.[31] "In addition, your interest in the assets of the trust is limited to the [quarterly Trust distribution]. At least some part of the damages would accrue to the charitable remainder beneficiaries."[32] Wogan concluded by cautioning Ames: "[w]hen the settlement is completed, ... it will be final and you will not have any further right to pursue John Ohle for damages."[33]

Following Wogan's advice, Ames executed a settlement agreement with

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[23] SR: Przywara Aff., Ex. 13, Ex. 14 at PLFF002434, Ex. 15.
[24] SR: SUMF, Ex. 8 at 1-2.
[25] *Id.* at 2; SR: Przywara Aff., Ex. 5 at PLFF001181, 1195; Plaintiff Hugh Uhalt's Statement of Contested and Uncontested Material Facts ("Uhalt's SUMF") ¶ 25.
[26] SR: Przywara Aff., Exs. 25-29.
[27] SR: Przywara Aff., Ex. 1 at PLFF004736, Ex. 16.
[28] SR: Przywara Aff., Ex. 17.
[29] *Id.* at PLFF004882.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at PLFF004881.

Ohle in September 2003.[34] The agreement recounted many of the same allegations asserted in the Petition here.[35] It required Ohle to pay over $67,000 to Ames and resign as trustee.[36] In exchange, Ames released Ohle from "all claims and demands of any nature, ... whether or not now known," specifically including claims arising out of Ohle's trusteeship and other "services" that he provided to Ames.[37]

Ames "agree[d]" that the settlement was "fair and reasonable," "preferring" settlement "over the expenses, delays and contingencies of litigation."[38] Wogan testified that Ames waived all "potential" claims against Ohle even though Wogan believed that much of the evidence supplied by Ohle in negotiating the agreement was "fabricated."[39] In January 2004, an Orleans Parish district court signed a consent judgment approving an accounting of the Trust prepared by Ohle.[40]

The Trust still exists.[41] It has generated, and continues to generate, substantial income for Ames and her husband through quarterly payments. According to Uhalt's expert, Ames received about $1.39 million from the Trust as of June 2015, after taxes.[42] Mr. Ames received about the same amount.[43]

B. Ohle's Employment With BOIA

On December 13, 1999, BOIA hired Ohle to prepare financial and wealth-transfer plans for high net-worth clients. *See supra* at 2 & n.6.[44] During the hiring

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[34] SR: Przywara Aff., Ex. 5.
[35] *Id.* at PLFF001158-67.
[36] *Id.* at PLFF001168.
[37] *Id.* at PLFF001168-69.
[38] *Id.* at PLFF01168, PLFF01170.
[39] SR: SUMF, Ex. 15 at 42-43, 53-55.
[40] SR: Przywara Aff., Ex. 18 at PLFF000185.
[41] SR: Przywara Aff., Ex. 7 at 24-31.
[42] SR: Przywara Aff., Ex. 10 at pp. 10-11 (Attachment 4 at 2-3).
[43] *Id.*; SR: Przywara Aff., Ex. 4 at PLFF0046.
[44] Uhalt cites (at 3) Bank One witness Michael Reed's testimony in asserting that Ohle was hired on November 23, 1999. In fact, Reed was testifying about a November 23, 1999 letter that stated: "We look forward to you joining us on ... December 13, 1999." (R.IX:1864-65)

process, Ohle did not disclose that he was trustee of the Trust.[45]

Ohle reported to Harry "Trey" Dye in what became known as the Innovative Strategies Group ("ISG"), a department of BOIA.[46] In the ordinary course of their jobs, ISG employees neither offered investment advice nor provided trustee services.[47] A separate Bank One subsidiary provided trust services, and BOIA employees outside of ISG provided investment advice.[48] During his employment at BOIA, Ohle did not tell his supervisors that he was providing trustee services or that he was offering investment advice to Ames or the Trust.[49] Although Ohle disclosed the trusteeship to BOIA's compliance department, BOIA required its employees to disclose a trusteeship only if it was outside the employee's job.[50]

Ohle has always maintained that his work for Ames was "unrelated to his position at Bank One."[51] Ohle told one of Ames's lawyers that his "services for [Ames], and the compensation he receives for it, are separate and apart from the work he had done for KPMG [or] Bank One."[52] Ames's husband testified consistently, stating that Ohle was essentially "working two jobs," one for KPMG or Bank One and the other "providing ... services to Miss Ames personally."[53]

In January 2002, Trey Dye learned that Ohle had promoted Carpe Diem to a third-party BOIA client (not Ames), violating Dye's prior directive not to do so.[54] BOIA promptly suspended Ohle's employment and began an investigation.[55] As part of that investigation, BOIA requested information from Ohle regarding his relationship with Ames. Ohle's counsel refused, stating that Ames had not given

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[45] SR: SUMF, Ex. 6 at 221-23, Ex. 9 at 51; SR: McCabe Aff., Exs. 1-3.
[46] SR: SUMF, Ex. 6 at 19-25, 118, Ex. 3 at 64.
[47] SR: SUMF, Ex. 6 at 220.
[48] *Id.*; SUMF, Ex. 3 at 161-63, Ex. 9 at 231, Ex. 10 at 118-20, 124-25, 130, 196-97.
[49] SR: SUMF, Ex. 6 at 223-24, Ex. 9 at 55-56, 64, Ex. 3 at 86, 88-89.
[50] SR: McCabe Aff., Ex. 5 at JPM AMES 007610, JPM AMES 007614.
[51] SR: Przywara Aff., Ex. 1 at PLFF004738.
[52] *Id.*
[53] SR: SUMF, Ex. 1 at 165-67.
[54] SR: SUMF, Ex. 6 at 45-50, 225-26; SR: Rogoff Aff., Ex. 5 at JPM AMES 1107.
[55] SR: SUMF, Ex. 6 at 56-58.

Ohle authority "to reveal this information to you."[56] Ohle's counsel noted that "the Trust itself has never been a Bank One customer."[57]

After being suspended, Ohle sent a draft complaint against BOIA and others to BOIA and demanded bonus payments relating to his employment at BOIA.[58] BOIA and Ohle entered into a settlement agreement under which BOIA paid Ohle some, but not all, of the money that Ohle demanded.[59] Subject to various representations made by Ohle that proved to be false, BOIA agreed to indemnify Ohle for and release him from claims "arising out of his employment."[60] BOIA excluded from these indemnity and release provisions any claims "related to Ohle's service as trustee for the Ames Family Trust or any investment in Carpe Diem."[61] Ohle resigned from BOIA on February 21, 2002.[62]

C. Procedural History

In 2008, the federal government indicted Ohle. At trial, the government showed (among other things) that Ohle marketed a tax strategy called "HOMER" while at BOIA.[63] Ohle recruited his friend Ken Brown—who was not affiliated with any Bank One entity—to play a role in the HOMER transactions.[64] Ohle then defrauded BOIA by conspiring with Doug Steger—who also was not affiliated with any Bank One entity (R.I:100)—to submit invoices falsely claiming expenses incurred in recruiting HOMER clients, reducing HOMER-related fees paid to BOIA.[65] Ohle was convicted of wire fraud and tax evasion, sentenced to five-years

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[56] SR: Rogoff Aff., Ex. 2 at JPM AMES 001165.
[57] SR: Rogoff Aff., Ex. 3 at JPM AMES 001109.
[58] SR: Rogoff Aff., Ex. 4.
[59] SR: Rogoff Aff., Ex. 1.
[60] *Id.* at JPM AMES 000046-47.
[61] *Id.*
[62] *Id.* at JPM AMES 000044, JPM AMES 000046.
[63] SR: SUMF, Ex. 8 at 1.
[64] *Id.* at 1-2.
[65] SR: SUMF, Ex. 8 at 1-2.

imprisonment, and ordered to pay restitution to Bank One and Ames.[66]

In June 2009, Ames signed a power of attorney giving Uhalt authority to file this lawsuit.[67] Four months later, Ames sued Bank One, Ohle, Steger, Brown, and Brown's wife in federal court. (R.II:315-49) The complaint asserted a RICO claim as well as claims for unjust enrichment, breach of fiduciary duty, fraud, detrimental reliance, negligent misrepresentation, breach of contract, and conspiracy. (*Id.*)

In December 2010, the federal district court dismissed Ames's RICO claim as untimely. The court found that Ames "obviously" could have uncovered Ohle's fraud in 2003 "with minimal effort," but she instead "agreed to settle all known and unknown claims she had with Ohle." (R.III:440)

In 2011, Ames (through Uhalt) filed the Petition in this case, asserting the same state-law claims pled in the federal suit as well as a claim under the Louisiana RICO statute. (R.I:1-34) Judge Ethel S. Julien granted Bank One's exception of prescription. (R.III:489) This Court affirmed dismissal of six of Ames's eight claims. *Ames v. Ohle*, 2011-1540 (La. App. 4 Cir. 5/23/12), 97 So. 3d 386. The Court held that these claims were subject to prescriptive periods of one or five years, making them untimely because Ames was on "notice" of the claims in 2003 (when she signed the settlement agreement with Ohle) but did not sue until 2009. *Id.* at 391-95. The Court reversed, however, as to Ames's claims for fraud and fraud-based conspiracy. The Court found those claims to be subject to a ten-year prescriptive period, making them timely. *Id.* at 392, 397.

On remand, Bank One asserted exceptions left unresolved by this Court, arguing that the Petition was perempted and failed to state a cause of action. Ames did not defend the Petition on the ground that it asserted a claim that Bank One itself committed fraud. Ames instead identified two "bases for Bank One's

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[66] SR: Przywara Aff., Ex. 19.
[67] SR: Przywara Aff., Ex. 20.

liability"—"respondeat superior and apparent authority." (R.V:1066-67) Judge Julien dismissed Uhalt's apparent-authority claim but upheld the respondeat-superior claim and denied Bank One's exception of peremption. (R.V:1079)

Following Judge Julien's ruling, Bank One answered the petition. The answer repeatedly stated: "Ohle was employed by Banc One Investment Advisors Corporation." (R.V:1083-84, 1088, 1092, 1097, 1100) It explained: "Plaintiff's claims are barred because [Bank One] is not the proper party in interest and is not liable for the actions of any separate juridical entities." (R.V:1102) Bank One's discovery responses made the same point, objecting because "Ohle ... was employed by Banc One Investment Advisors," but neither BOIA nor its successor were "named as defendants." (R.VI:1113; *see also* R.VI:1103)

In 2014, before being deposed, Ames was interdicted due to serious medical problems. (R.X:2153) Judge Julien substituted Uhalt in as plaintiff. (R.X:2152)

Following extensive discovery, Bank One and Ohle separately moved for summary judgment. Judge Julien granted Ohle's peremptory exception on the ground that the Ames-Ohle settlement agreement released Uhalt's claims, entered partial summary judgment for Bank One on the respondeat-superior claim, and took Bank One's remaining arguments under advisement. (R.X:2157, 2086-87) Judge Julien later granted summary judgment for Bank One in full.

First, Judge Julien held that "Bank One is not the proper defendant as Bank One was not [Ohle's] employer." (R.X:2152) Rather, the "uncontroverted evidence" showed that BOIA employed Ohle. (R.X:2152-53) The "uncontroverted evidence" further showed that "BOIA was a subsidiary of Bank One" and, in 2004, became a subsidiary of JPMorgan Chase Bank as part of Bank One's merger into JPMorgan Chase & Co. (R.X:2153) Because "[a] parent corporation is not liable for the acts of its subsidiaries," Bank One could not be held liable for BOIA. (*Id.*)

Second, Judge Julien found no evidence that Bank One itself committed

fraud by purportedly not telling Ames that BOIA prohibited Ohle from marketing Carpe Diem. Judge Julien explained that Ames "is the only person who would have been able to testify as to what she was told and what she relied upon," but she "has never been deposed." (R.X:2153) Judge Julien also noted that "Ames invested in Carpe Diem" before BOIA learned that Ohle had marketed Carpe Diem to her, and Uhalt offered only "speculation" that "Ames' alleged losses could have been prevented had the bank taken a different course of action." (R.X:2155) In any event, "the bank [lacked] a duty to notify ... Ames of potential problems with investment vehicles that did not come through the bank." (*Id.*)

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment for two independent reasons. First, Bank One is not the proper defendant because it did not employ Ohle. Uhalt disputes this. But Uhalt conceded below that BOIA employed Ohle and may not change course now. Beyond his concessions, Uhalt's attempt to sow confusion about a black-and-white issue fails. Ohle's W-2 forms identify BOIA as the payor; company forms name BOIA as Ohle's employer; and Ohle's supervisors testified that BOIA employed Ohle. This evidence permits no genuine dispute.

Uhalt also seeks to pierce BOIA's corporate veil. No court has ever found Bank One liable for BOIA's actions. Uhalt asks this Court to be the first, arguing that Bank One bore the burden to disprove his theory. But settled law places the burden on Uhalt. Moreover, the Petition did not plead a veil-piercing theory, which Uhalt first raised in opposing summary judgment. Bank One was not required to disprove a theory that Uhalt had not raised. Bank One nevertheless submitted an affidavit averring that BOIA was a Bank One subsidiary. In contrast, Uhalt did not (and could not) develop evidence that would justify disregarding BOIA's separate existence. Uhalt instead relies on evidence that Bank One subsidiaries tried to develop business for one another. That is true of all large corporate families.

Uhalt's expansive position thus contradicts this Court's description of veil piercing as a radical remedy requiring exceptional circumstances.

Second, Uhalt's theories fail on the merits. As for respondeat superior, Ohle's trusteeship was outside the scope of his job at BOIA. BOIA employees did not serve as trustees; a different Bank One subsidiary did that. The instrument creating the Trust did not mention BOIA, listing only Ohle at his personal address. And BOIA did not pay Ohle to work on the Trust. Moreover, Ohle used his work on the Trust solely to enrich himself and defraud BOIA. Ohle opened the Trust's account at Charles Schwab, not BOIA. He took for himself trustee fees and "commissions" on the Carpe Diem investments, none of which went to BOIA. He violated his supervisor's orders by promoting Carpe Diem, which competed with funds offered by Bank One entities. And a federal judge found that Ohle used the Trust in a scheme to defraud BOIA out of fees that it was owed. The notion that Ohle's work on the Trust was part of his job at BOIA is absurd.

Uhalt principally responds that Ohle tried to generate non-Trust business for Bank One entities from Ames and her family. But even the worst employees sometimes work to benefit their employer. The Supreme Court has been clear: in intentional-tort cases like this, what matters is whether the ***misconduct itself*** was within the scope of the employee's job. That Ohle engaged in ***other conduct*** that may have benefited BOIA does not change his purpose in working for Ames. Because Ohle's work for Ames was outside the scope of his job at BOIA, Uhalt's respondeat-superior theory fails.

Uhalt's direct-fraud theory also fails. Uhalt asserts that Bank One should have told Ames that BOIA barred Ohle from promoting Carpe Diem. Uhalt waived this theory by not pleading it in the Petition. In any event, Uhalt failed to produce evidence satisfying the basic elements of a fraud claim. Most significantly, Ames did not testify, and Uhalt offers no other evidence that BOIA's order barring Ohle

from promoting Carpe Diem was material to Ames or that she relied on BOIA. Nor is there any reason why BOIA's order should have been material to Ames: BOIA barred Ohle from promoting Carpe Diem because it competed with funds offered by Bank One entities, not because Carpe Diem was a poor investment.

Finally, the judgment can be affirmed on other grounds. The Trust Code's three-year peremptive period precludes Uhalt from challenging Ohle's conduct as trustee from 1999-2003. Alternatively, Uhalt's claims are barred by the one-year prescriptive period applied to fraud claims. Even if his claims were timely, Uhalt's respondeat-superior theory fails for two more reasons. First, as with Uhalt's direct-fraud claim, Ames's inability to testify leaves Uhalt with no evidence of materiality or reliance to support a fraud claim based on Ohle's conduct. Second, Uhalt cannot hold Bank One vicariously liable for the very same conduct that Ames already released under her settlement agreement with Ohle.

ARGUMENT

The summary judgment procedure is "favored" and "is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).[68] "Appellate courts review summary judgments *de novo*, using the same criteria that govern the district court's" decision. *Greemon v. City of Bossier City*, 2010-2828 (La. 7/1/11), 65 So. 3d 1263, 1267.

Summary judgment "shall be rendered" if "there is no genuine issue as to material fact" and the movant "is entitled to judgment as a matter of law." La. C.C.P. art. 966(B)(2). Where, as here, "the movant will not bear the burden of proof at trial," the movant need not "negate all essential elements of the adverse party's claim." La. C.C.P. art. 966(C)(2). Rather, the movant need only "point out to the court that there is an absence of factual support for one or more elements

[68] Citations to article 966 are to the version in effect when Bank One filed its motion for summary judgment.

essential to the adverse party's claim." *Id.* If "the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact." *Id.*

I. Judge Julien Correctly Granted Summary Judgment For Bank One.

The district court granted summary judgment for two independent reasons. First, Bank One is not the proper defendant because it did not employ Ohle. Second, Uhalt's respondeat-superior and direct-fraud theories fail on the merits. If the Court agrees with either reason, the judgment should be affirmed.

A. Bank One Is Not Liable For BOIA's Conduct.

During the federal-court proceedings, Bank One repeatedly told Uhalt that he had sued the wrong defendant.[69] Bank One did the same after Uhalt re-filed in state court, explaining in its Answer and discovery responses that BOIA employed Ohle and thus was the proper defendant. *Supra* at 9. Accordingly, Judge Julien observed that when free from pleading rules, Bank One "has always asserted" that it is "'not the proper party.'" (R.X:2153) Uhalt nevertheless persisted in pursuing Bank One. After Bank One moved for summary judgment, Uhalt responded with a host of arguments to excuse his failure to name BOIA as the defendant. For reasons stated below, Judge Julien correctly rejected each argument.

1. Ohle was employed by BOIA, not Bank One.

Under both his respondeat-superior and direct-fraud theories, Uhalt seeks to hold Bank One liable for Ohle's conduct based on Ohle's alleged "employment with Bank One." (R.I:31) But as Judge Julien found, "Ohle was an employee of BOIA," not Bank One. (R.X:2153) "BOIA was a subsidiary of Bank One" and is now an indirect subsidiary of JPMorgan Chase & Co. (*Id.*) A "'parent corporation'" generally "'is not liable for the acts of its subsidiaries.'" *Andry v. Murphy Oil, U.S.A.*, 2005-126 (La. App. 4 Cir. 6/14/06), 935 So.2d 239, 250.

[69] SR: Reply i/s/o Bank One's Motion for Summary Judgment at 3 (citing *Ames v. Ohle*, No. 09-7058, ECF 113 at 1, 113-1 at 4, 126-2 at 2, 129-1 ¶ 4 (E.D. La.)).

Because Uhalt neither pled nor produced evidence supporting an exception to this rule, Bank One is not liable for Ohle's conduct as a matter of law.

Uhalt offers three responses. First, Uhalt asserts (at 21) that there is a dispute about whether "it was actually Bank One that employed Ohle." But in his Statement of Contested and Uncontested Material Facts, Uhalt conceded that:

- "Ohle began his employment with Bank One Investment Advisors" in 1999.
- "Ohle was a W-2 employee of Banc One Investment Advisors."[70]

Having conceded that Ohle was a BOIA employee, Uhalt may not now assert that Ohle was employed by Bank One. The Court need go no further to affirm.

Beyond Uhalt's concessions, the record indisputably establishes that Ohle was a BOIA employee. Ohle's W-2 statements identified BOIA as the payor. (R.VI:1290-92) Bank One's article 1442 witness and Ohle's supervisors all testified that Ohle was a BOIA employee.[71] Employment and other forms completed shortly after Ohle's hiring identified Ohle as a BOIA employee.[72] And a form that BOIA sent to Illinois regulators after Ohle's resignation identified Ohle as a BOIA employee. (R.VI:1277-78)

Uhalt's evidence (at 4-5) does not create a ***genuine*** dispute in light of his admissions, Ohle's W-2s, and Bank One's other evidence. For example:

- Uhalt cites statements generically referring to Ohle as a Bank One employee (e.g., in a November 1999 letter to Ohle). Those statements use the Bank One name to refer to all companies within the Bank One structure, just as any large company sometimes uses the parent's name to refer to subsidiary conduct. The November 1999 letter makes this clear, stating that "we look forward to you playing an important role within Banc One Investment Advisors." (R.IX:1865)
- Uhalt selectively cites testimony by Bank One witness Michael Reed, ignoring the only relevant Reed testimony: "Ohle was a ... W-2 employee of Banc One Investment Advisors." (R.VIII:1716)
- Uhalt cites Bank One witness Joni McCabe's testimony that Bank One's Code of Conduct applied to Ohle. But Bank One's Code of Conduct applied to "all

[70] SR: Uhalt's SUMF ¶¶ 8, 42E; *see also id.* ¶¶ 42, 45.
[71] SR: SUMF, Ex. 3 at 65, Ex. 4 at 89, Ex. 6 at 73, 220-23.
[72] SR: McCabe Aff., Ex. 2 at JPM AMES 001557-58, Ex. 3; R.VI:1293-96.

employees of Bank One ***and its subsidiaries***."[73] The mere fact that a corporate parent's rules apply to its subsidiary's employees does not convert them into employees of the parent.

- Uhalt notes that the BOIA-Ohle settlement agreement stated that Bank One employed Ohle. But that agreement defined "Bank One" to include BOIA, Bank One, "and all of their subsidiaries and affiliates."[74] It thus does not suggest that Bank One employed Ohle any more than it suggests that he was employed by Bank One's many other "subsidiaries and affiliates."

Uhalt alternatively suggests (at 4) that BOIA was a division of Bank One rather than a subsidiary. Uhalt waived that argument by failing to raise it in his opposition to Bank One's motion for summary judgment. In fact, Uhalt's opposition suggested that BOIA was a Bank One subsidiary. Uhalt stated: "Bank One concedes that BOIA was a subsidiary of Bank One." (R.VIII:1677)

Beyond waiver, there can be no ***genuine*** issue of material fact in light of the affidavit submitted by JPMorgan Chase Executive Director Richard Rogoff, averring that BOIA was a Bank One subsidiary.[75] Confirming Rogoff's affidavit, the BOIA-Ohle settlement agreement identified Bank One as BOIA's "parent."[76] Publicly filed documents show that BOIA was separately incorporated, and that Bank One identified BOIA as one of its subsidiaries. (R.X:2100-49) And multiple witnesses testified that BOIA was a Bank One subsidiary. (R.X:2094, 2097). The evidence that Uhalt cites only confirms this. For example, Uhalt suggests that Trey Dye (Ohle's supervisor) testified that BOIA was a Bank One division. In fact, Dye testified that BOIA "was a subsidiary of the holding company [Bank One]."[77]

2. Uhalt cannot disregard BOIA's corporate separateness.

In addition to arguing that Ohle was a Bank One employee, Uhalt asserts (at 18, 22-24) that Bank One failed to sustain its purported "burden" to disprove that Bank One and BOIA acted as a "single business enterprise" or had an "alter ego

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[73] SR: McCabe Aff., Ex. 4 at JPM AMES 000178 (emphasis added).
[74] SR: Rogoff Aff., Ex. 1 at JPM AMES 000044.
[75] SR: Rogoff Aff. ¶ 4.
[76] SR: Rogoff Aff., Ex. 1 at JPM AMES 000044.
[77] SR: SUMF, Ex. 6 at 14.

relationship." The Petition did not allege these theories, which Uhalt first mentioned in opposing summary judgment. Uhalt thus failed to give Bank One the notice needed to sustain any burden that it supposedly had to produce evidence disproving Uhalt's theories. *See Robertson v. W. Carroll Ambulance Serv. Dist.*, 39,331 (La. App. 2 Cir. 1/26/05), 892 So. 2d 772, 777 ("The petition must set forth the facts upon which recovery is based; otherwise the defendant would have neither adequate notice of the allegation nor an opportunity to counter the claim.").

In any event, Uhalt has the burden of proof backwards. "It is the Plaintiff's burden to prove that the corporate limitation on liability should be disregarded in favor of shareholder personal liability." *F.G. Bruschweiler (Antiques) Ltd. v. GBA Great British Antiques*, 03-792 (La. App. 5 Cir. 11/25/03), 860 So. 2d 644, 651. Cases cited by Uhalt confirm that if there is evidence of a separate corporation's "existence," "the burden is shifted to [plaintiff] to show the exceptional circumstances that must exist to warrant disregard of the corporation's separate identity." *Amoco Prod. Co. v. Texaco, Inc.*, 02-240 (La. App. 3 Cir. 1/29/03), 838 So. 2d 821, 833-34. Thus, on summary judgment, "the burden of showing that th[e] corporate entity should be disregarded lies on the plaintiffs." *Hodge v. Strong Built Int'l*, 14-1086 (La. App. 3 Cir. 3/4/15), 159 So. 3d 1159, 1164; *accord In re New Orleans Train Car Leakage Fire Litig.*, 96-1677 (La. App. 4 Cir. 3/5/97), 690 So. 2d 255, 259 (applying same rule to single-business enterprise theory).

As noted above, the Rogoff affidavit that Bank One submitted with its motion for summary judgment averred that BOIA was a subsidiary of Bank One and is now an indirect subsidiary of JPMorgan Chase & Co.[78] Bank One and BOIA's Articles of Incorporation provide further confirmation that the two entities were separate corporations. (R.X:2114-49) The burden was thus on Uhalt to show that BOIA's corporate separateness should be disregarded.

[78] SR: Rogoff Aff. ¶¶ 4-6.

"Louisiana has a strong policy of favoring the recognition of the corporation's separate existence, such that '[p]iercing the corporate veil is considered a radical remedy only employed in exceptional circumstances.'" *New Orleans Jazz & Heritage Found. v. Kirksey*, 2009-1433 (La. App. 4 Cir. 5/26/10), 40 So. 3d 394, 407. Uhalt "bear[s] a heavy burden of proving" that Bank One "disregarded" BOIA's corporate separateness "to such an extent that [BOIA] ceased to become distinguishable from [Bank One]." *Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164, 1168 (La. 1991). Courts consider five principal factors in making this determination: "1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to [maintain] separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings." *Id.* Courts consider 18 "similar" factors in analyzing the single-business enterprise doctrine. *New Orleans Train Car*, 690 So. 2d at 257 (listing factors).

The evidence cited by Uhalt (at 23) does not satisfy any of these factors, let alone enough to justify disregarding BOIA's separate existence. *See Town of Haynesville v. Entergy Corp.*, 42,019 (La. App. 2 Cir. 5/2/07), 956 So. 2d 192, 197-98 (rejecting single-business enterprise theory despite existence of several factors). Uhalt primarily notes that BOIA employees sometimes worked with employees of other Bank One subsidiaries to develop business and received compensation when they succeeded. But all large corporate families work in this way. If this were enough to disregard BOIA's corporate separateness, veil piercing would be commonplace, not exceptional—flatly contrary to Louisiana law.

Courts typically pierce the veil to prevent use of "the corporate form to perpetrate fraud"—e.g., by creating a subsidiary that lacks assets needed to pay plaintiffs. *Riggins*, 590 So. 2d at 1169; *see Am. Bank v. Smith Aviation, Inc.*, 433 So. 2d 750, 755 n.1 (La. App. 3 Cir. 1983) (rejecting veil piercing where "there

was no evidence to indicate that [shareholders] were using the corporation as a tool to protect themselves from liability"). Thus, "it behooves the claimant to show that piercing the veil will prevent [the] corporate form from being used to defraud creditors." *Bergman v. Nicholson Mgmt. & Consultants*, 594 So. 2d 491, 500 (La. App. 4 Cir. 1992). The same holds true for the single-enterprise doctrine because it is an "equitable doctrine" employed "to satisfy liabilities or claims of creditors." *Hopkins v. Howard*, 2005-732 (La. App. 4 Cir. 4/5/06), 930 So. 2d 999, 1008; *see Haynesville*, 956 So. 2d at 199 (rejecting single-business enterprise theory where there was no evidence that parent "misappropriated resources thereby making [subsidiary] unable to meets its obligations" to plaintiff). Uhalt did not and cannot introduce evidence showing that BOIA's successor is unable to satisfy a judgment, making it completely inappropriate to disregard BOIA's corporate separateness.

The cases cited by Uhalt are easily distinguishable. Each involved gross violations of basic corporate formalities. *E.g.*, *Amoco*, 838 So. 2d at 832-33 (parent engaged in "almost daily practice" of taking subsidiary's funds); *Hamilton v. AAI Ventures*, 1999-1849 (La. App. 1 Cir. 9/22/00), 768 So. 2d 298, 302 (piercing veil of "'shell corporation with no employees nor capital'"). And in those cases, the parent made the subsidiary judgment-proof. Nothing like that exists here.

B. Uhalt's Claims Fail On The Merits.

1. The record does not support respondeat-superior liability.

Because Uhalt failed to name Ohle's employer as the defendant, respondeat-superior liability is by definition inapplicable. But even beyond that fatal flaw, the record does not support vicarious liability.

The "general rule of law in Louisiana is that employers are not vicariously liable for the intentional torts of their employees." *Dickerson v. Piccadilly Restaurants, Inc.*, 1999-2633 (La. App. 1 Cir. 12/22/00), 785 So. 2d 842, 844. This rule may be avoided "'only if'" two requirements are satisfied: (1) "'the employee

is acting within the ambit of his assigned duties'" and (2) "'also in furtherance of his employer's objective.'" *Baumeister v. Plunkett*, 95-2270 (La. 5/21/96), 673 So. 2d 994, 996. Courts "strictly construe" respondeat superior because "[l]iability should not be broadly imposed on an employer for the torts of his employee where the employer is not himself at fault." *Woolard v. Atkinson*, 43,322 (La. App. 2 Cir. 7/16/08), 988 So. 2d 836, 840-41.

There is no evidence satisfying either respondeat-superior requirement, much less both. First, as we explain above (at 6-7), Ohle's work on the Trust and Carpe Diem was outside his assigned duties at BOIA. Mr. Ames and Ohle agree that Ohle's work for Ames was not part of his job at BOIA. Ohle began working for Ames years before he was hired by BOIA and continued to work with Ames after leaving BOIA. The Trust instrument did not even mention BOIA, listing only Ohle's name and personal address. BOIA did not pay Ohle to work on the Trust or promote Carpe Diem. And employees in Ohle's department neither provided trustee services nor offered investment advice in the ordinary course of their jobs.

Second, as we explain above (at 6-7), Ohle's work on the Trust and Carpe Diem was not in furtherance of BOIA's objective. Ohle used his work for Ames to enrich himself and defraud BOIA. Ohle opened the Trust's account at Charles Schwab, even though the Trust instrument gave Ohle discretion to open the account at a Bank One entity. He took for himself trustee fees from the Trust and "commissions" on the Carpe Diem investments, none of which went to BOIA. He invested Ames's and the Trust's funds in Carpe Diem, despite Ohle's boss prohibiting promotion of Carpe Diem because it competed with products offered by Bank One entities. And Ohle's conduct violated BOIA rules in many respects.[79] In short, Ohle's work on the Trust and Carpe Diem had everything to do with lining his own pockets and nothing to do with helping BOIA.

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[79] SR: Mem. in Support of Bank One's Motion for Summary Judgment at 14-15.

Uhalt does not dispute that Ohle's work on the Trust and Carpe Diem was outside his duties at BOIA, arguing only that Ohle's work was in furtherance of Bank One's objectives. Although the two respondeat-superior requirements overlap, *Baumeister* holds that both must be satisfied. And although Judge Julien mentioned the "in furtherance" requirement at argument, the judgment dismissing Uhalt's respondeat-superior claim controls. Uhalt thus waived any objection by ignoring whether the challenged conduct was part of Ohle's job at BOIA.

Regardless, Ohle's work on the Trust and Carpe Diem was not in furtherance of BOIA's objective either. Uhalt responds with a host of assertions, apparently hoping that the Court will throw up its hands and assume that there must be an issue of fact somewhere. Judge Julien—who presided over this case for five years and thus is well-versed in its facts—was not fooled.

Uhalt principally cites evidence (at 5-9) that Ohle furthered BOIA's objectives in performing acts separate from his work on the Trust and Carpe Diem. For example, Uhalt points out that Ohle tried to generate business from Ames as part of his job at BOIA, that other Bank One subsidiaries benefited from work that Ohle generated from Ames's family members, and that BOIA paid Ohle for that work. No one disputes that Ohle sometimes furthered BOIA's objectives. If respondeat-superior liability were imposed for torts committed outside the scope of employment simply because the employee at other times acted to benefit the employer, then vicarious liability would be automatic. In "intentional tort cases," however, "it must be determined whether ***the tortious act itself*** was within the scope of the servant's employment," rather than merely "whether the servant's general activities at the time of the tort were within the scope of his employment." *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 478 (La. 1990) (emphasis added).

Uhalt's only remaining claims assert fraud, an intentional tort. Uhalt thus must show that the "tortious act itself"—Ohle's work on the Trust and Carpe

Diem—was part of Ohle's job at BOIA and furthered BOIA's objectives. It was not, for reasons that we have explained. Accordingly, even apart from the fact that trustee services and investment advice were outside the scope of Ohle's job at BOIA, Uhalt's respondeat-superior theory must fail.

Uhalt cites three additional pieces of evidence. First, Uhalt asserts (at 25) that Bank One benefited from Ohle's work for Ames because Ohle used the Trust to fund Ken Brown's role in the HOMER tax strategy. But Uhalt's fraud claim does not even mention HOMER, which instead formed a principal basis for Uhalt's dismissed RICO claim. (R.I:13-14, 17) In any event, even if BOIA benefited from Ohle's use of the Trust as part of his HOMER scheme, that would not show that Ohle's work on the Trust was part of his job at BOIA. On the contrary, as the federal court found, Ohle funded Brown as the third-party investor so they could split the profits as part of a scheme to defraud BOIA out of fees it was owed.[80]

Second, Uhalt says (at 9) that Bank One knew that Ohle was trustee for the Trust, that Bank One received Trust account statements, and that Ohle's trusteeship complied with Bank One rules. Again, even if that were true, it would not support respondeat-superior liability. And in fact, Uhalt's evidence refutes his theory: BOIA rules required its employees to disclose trusteeships and send account statements to BOIA only if the trusteeship was ***outside*** the employee's job.[81]

Third, Uhalt says (at 9-10) that Ohle used Bank One resources to

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[80] SR: SUMF, Ex. 8 at 1-2.

[81] SR: McCabe Aff., Ex. 5 at 7610, 7614. Uhalt's assertions are also misleading. Uhalt cites ***Ohle's*** assertion that he told Trey Dye about his trusteeship before starting at BOIA. Dye refuted that assertion in his deposition. (SR: SUMF, Ex. 6 at 223-24) Confirming Dye's testimony, Ohle did not disclose his trusteeship in initial employment forms. (SR: McCabe Aff., Ex. 1) As for Uhalt's claim that Bank One monitored Trust account statements, BOIA reviewed non-BOIA accounts only to detect signs of insider trading. (SR: McCabe Aff., Ex. 5 at 1172-73; SUMF, Ex. 4 at 53-54) Uhalt's suggestion that Ohle's trusteeship complied with BOIA rules is simply wrong: the trusteeship created a conflict of interest with Ohle's job because Ohle was paid for his services—competing with Bank One subsidiaries that performed the same services. (SR: McCabe Aff., Ex. 4 at 184)

communicate with Ames. Most of the cited evidence concerns Ohle's attempts to generate non-Trust business from Ames or her family. That is irrelevant for the reasons noted above. The remaining evidence consists of a letter that Ohle faxed using BOIA resources and two letters that Ohle sent on Bank One letterhead—none of which went to Ames—as well as phone messages that Ames or her advisers left at Ohle's BOIA office. Ohle's occasional use of BOIA resources to conduct Trust work violated BOIA rules.[82] And if an employer were vicariously liable whenever an employee impermissibly used company phones, every employer in the U.S. would be subject to vicarious liability. That, of course, is not the law. *See Oliphant v. Town of Lake Providence*, 192 So. 95, 103 (La. 1939) (even if "'the master habitually allows the servant to use the instrumentality,'" "'[t]he master is liable only when the instrumentality is being used by the servant for the purpose of advancing the employer's business or interests'").

2. The record does not support a direct-fraud claim.

In addition to his vicarious-liability theory, Uhalt argues (at 29 & n.100) that Bank One committed fraud by not stating, either to Ames or to Illinois regulators in a "Form U-5" submitted following Ohle's resignation, that Ohle's promotion of Carpe Diem violated his supervisor's orders. The first problem with this theory is that it is not in the Petition. To be sure, this Court suggested in the prior appeal that the Petition asserts a direct-fraud claim against Bank One. 97 So. 3d at 397. But the Petition does not plead the theory that Uhalt asserts now, much less with the particularity required by La. C.C.P. art. 856. For example, the Petition does not even mention a Form U-5. Uhalt should be required to identify allegations in the Petition making the claim that he asserts here. If he cannot, then the Court need go no further to affirm the direct-fraud judgment. *See Webster v. Wal-Mart Stores*, 92-1005 (La. App. 5 Cir. 5/14/93), 617 So. 2d 626, 629 ("the recovery granted under

[82] SR: McCabe Aff., Ex. 4 at JPM AMES 00189, JPM AMES 00194.

any legal theory [must] be justified by the facts pled in the petition").

In any event, a fraud claim requires "(1) a misrepresentation of material fact, (2) made with the intent to deceive, (3) causing justifiable reliance with resultant injury." *Chapital v. Harry Kelleher & Co.*, 2013-1606 (La. App. 4 Cir. 6/4/14), 144 So. 3d 75, 86. Uhalt failed to produce evidence satisfying these elements.

First, Ames's inability to testify leaves no evidence that Bank One's views about Carpe Diem were material to Ames. Nor is there any reason why Bank One's views should have been material to Ames: BOIA prohibited Ohle from promoting Carpe Diem because it competed with products that other Bank One subsidiaries offered, not because of any flaws with Carpe Diem.[83]

Second, Ames's inability to testify also leaves no evidence that she relied on Bank One's alleged omission.[84] In fact, Ames could not have relied on any omission in deciding to invest in Carpe Diem. The Carpe Diem purchases occurred in November 2001.[85] Even Uhalt does not argue that Bank One knew that Ohle promoted Carpe Diem to Ames before 2002. Bank One could not have intentionally concealed facts in 2001 that it first learned in 2002.

Third, there is no evidence that Bank One intended to defraud Ames. In his only apparent attempt to demonstrate intent, Uhalt notes (at 29) that the BOIA-Ohle settlement agreement made its terms confidential. But nearly all settlement agreements—including the Ames-Ohle settlement agreement—have confidentiality provisions.[86] The BOIA-Ohle agreement's confidentiality provision does not

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[83] SR: SUMF, Ex. 6 at 49-50.

[84] In noting that Ames's inability to testify leaves no evidence of materiality or reliance, we do not—as Uhalt has previously asserted (R.VIII:1674)—seek to "take advantage" of Ames's incapacitation. Far from it. If this case had to be litigated, Bank One wishes that it had been litigated long ago, when memories were fresh and evidence (including Ames's testimony) was readily available. But Uhalt cannot use the consequences of his own delay in suing to excuse his failure to produce evidence establishing the basic elements of a fraud claim.

[85] SR: Przywara Aff., Exs. 11, 15.

[86] SR: Przywara Aff., Ex. 5 at PLFF001170.

demonstrate Bank One's supposed intent to defraud Ames any more than the Ames-Ohle agreement's confidentiality provision demonstrates an intent on the part of Ames to defraud some third party.

Uhalt's Form U-5 theory suffers from additional problems. To begin with, BOIA completed the Form U-5. (R.VI:1277-79) Uhalt thus cannot hold Bank One liable for any omission in the form. Moreover, there is no evidence that Ames saw, much less relied on, the Form U-5. And even if Ames had seen it, federal regulations prohibit the disclosure of information in Form U-5s regarding internal investigations into employee conduct. *See* FINRA Manual Rule 8312(d) (available at http://www.finra.org/). Thus, the Form U-5 would not have informed Ames that BOIA prohibited Ohle from promoting Carpe Diem.[87]

Finally, a failure-to-disclose claim requires "a duty to speak." *Greene v. Gulf Coast Bank*, 593 So. 2d 630, 632 (La. 1992). A duty to speak arises only if there are "special circumstances, such as a fiduciary relationship." *Id.* Ames and Bank One had no relationship at all. Bank One was a mere holding company.[88] Ames held a different trust account (not the Trust) with a different Bank One subsidiary (not BOIA), but she had no business with Bank One. In any event, a bank does not owe fiduciary duties "unless there is a written agency or trust agreement under which the financial institution specifically agrees to act and perform in the capacity of a fiduciary." La. R.S. § 6:1124; *see* R.III:517. No such agreement exists here.

Uhalt nevertheless asserts (at 28) that "special circumstances" justify imposing a duty on Bank One because Ohle gave Ames investment advice. That assertion fails for the reasons described above. Ohle was employed by BOIA, not Bank One. And Ohle's advice to Ames regarding Carpe Diem was outside the scope of Ohle's employment with BOIA.

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[87] SR: Reply Memorandum in Support of Bank One's Motion *in Limine* To Exclude Expert Testimony ("Expert Motion *in Limine* Reply"), Ex. C at 17.
[88] SR: SUMF, Ex. 6 at 14.

Uhalt also tries (at 28-29) to impose a duty on Bank One by asserting that BOIA had duties under the federal Investment Advisers Act. Uhalt cannot mix and match separate entities in this way. BOIA is not a party to this case, so its supposed duties are irrelevant. And Uhalt's purported expert admitted that "Bank One ... was not subject to the Advisers Act."[89] Beyond this, the Petition does not even mention the Advisers Act. For good reason: private plaintiffs may not enforce it. *See Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11 (1979). Uhalt cannot evade the lack of a private right of action under the Advisers Act in an attempt to invent a common-law duty. Even if he could, BOIA did not have duties to Ames under the Advisers Act because she was not a BOIA client.[90]

At most, Uhalt's assertion that Bank One failed to disclose information is a delictual claim for negligence. But as this Court held, Uhalt's negligence and other delictual claims are prescribed. (R.III:525) Uhalt may not evade this Court's ruling by attempting to convert a delictual claim into a claim for fraud.

II. Alternatively, The Judgment Should Be Affirmed On Other Grounds.

Even if the Court disagrees with Judge Julien's reasoning, the Court can and should affirm for the reasons explained below. *See* La. C.C.P. art. 2133.

A. Uhalt's Claims Are Perempted.

The Trust Code provides that claims "by a beneficiary against a trustee ... shall ... be filed within three years of the date that the trustee renders an accounting"—regardless of whether the accounting "disclos[ed]" wrongdoing. La. R.S. § 9:2234(A). Section 9:2234 governs here. Ames was a "beneficiary" under the Trust. Uhalt bases his claims against Bank One on its supposed employment of Ohle, who was trustee. Uhalt may not evade section 9:2234 simply by suing the trustee's employer. *See Griffin v. JPMorgan Chase & Co.*, 2009 WL 935954, at *4 (W.D. La. Apr. 7, 2009) (section 9:2234 applied to claim against trustee's

[89] SR: Expert Motion *in Limine* Reply, Ex. A at 141.
[90] SR: Expert Motion *in Limine* Reply, Ex. C at 14-16, 19.

employees). Uhalt does not dispute this point, waiving any objection.

The Trust Code's peremptive period starts when "the trustee renders an accounting." La. R.S. § 9:2234(A). Ames "accept[ed]" Ohle's accounting in 2003,[91] but did not sue until 2009. Uhalt's claims are thus perempted. *See* La. R.S. § 9:2234(C) (Trust Code's peremptive period "may not be … suspended").

Uhalt responds (at 30) that Ames's $5 million investment in Carpe Diem did not come from the Trust. But Ohle transferred the proceeds from the sale of that investment to the Trust. (R.II:235) More importantly, the Trust Code governs "all actions" "by a beneficiary against a trustee." La. R.S. § 9:2234(A), (D). Ames was at all relevant times the beneficiary of the Trust, and Ohle was the trustee.

Uhalt also suggests (at 30-31) that the Trust Code's peremptive period exempts fraud claims. In fact, the Trust Code states: "Notwithstanding any other provision of law," the "peremptive period shall be governed ***exclusively*** by this Section" in "***all*** actions brought in the state against any trustee." La. R.S. § 9:2234(D) (emphases added). "All" means "all"—including fraud claims. Indeed, the legislature knows how to exclude fraud claims from a peremptive period when it so chooses. In establishing peremptive periods for actions alleging accounting, legal, and insurance malpractice, the legislature exempted fraud claims. La. R.S. §§ 5604(E), 5605(E), 5606(C). There is no such carve-out under the Trust Code.

Southern v. Bank One, 32,105 (La. App. 2 Cir. 8/18/99), 740 So. 2d 775, cited by Uhalt, is distinguishable. First, in *Southern*, two plaintiffs' funds "were not in trusts." *Id.* at 779. Those plaintiffs, unlike Ames and Ohle, lacked a beneficiary-trustee relationship. Second, unlike *Southern*, the money at issue here all went into the Trust at one point or another. Third, plaintiffs in *Southern* argued against application of the Trust Code in opposing Bank One's motion to transfer venue only to argue on appeal that the Trust Code governed. *Id.* There is no such

[91] SR: Przywara Aff., Ex. 5 at PLFF001169.

gamesmanship here: Bank One has always maintained that the Trust Code governs.

Refuting Uhalt's interpretation of *Southern*, the Second Circuit later applied section 9:2234 to a case alleging "fraud." *Wright v. Larson*, 42,101 (La. App. 2 Cir. 5/2/07), 956 So. 2d 202, 204-06. And in applying section 9:2234 to a claim for breach of fiduciary duty against a trustee, this Court emphasized 1999 amendments to the Trust Code clarifying that "'***all*** actions brought in the state against any trustee ... shall be governed ***exclusively*** by this Section.'" *Cook v. Cook*, 2004-422 (La. App. 4 Cir. 11/10/04), 888 So. 2d 1061, 1063 (emphasis altered).

B. Uhalt's Claims Are Prescribed.

If the Trust Code does not apply, Uhalt's claims are barred by a one-year prescriptive period under La. C.C. art. 3492. To be sure, this Court held in the prior appeal ("*Ames I*") that Uhalt's claims are subject to a 10-year prescriptive period under La. C.C. art. 3499 because the Petition alleged "fraudulent conduct of a fiduciary." (R.III:517) And as Uhalt notes (at 30), the Court's ruling is subject to the law-of-the-case doctrine. But *Ames I* was decided on the pleadings and thus was required to assume as true the premise of its ruling—that Bank One was Ames's fiduciary. "No financial institution," however, "shall be deemed" to "have a fiduciary obligation ... unless there is a written agency or trust agreement under which the financial institution specifically agrees to act and perform in the capacity of a fiduciary." La. R.S. § 6:1124. Because the summary-judgment record reveals no such agreement, Uhalt's "claims for fraud" are barred "by the one-year prescriptive period under Civil Code article 3492." *Simmons v. Templeton*, 98-43 (La. App. 4 Cir. 11/10/98), 723 So. 2d 1009, 1012.

Beyond this, Bank One respectfully submits that *Ames I* erred in finding Uhalt's fraud and fraud-based conspiracy claims to be timely. *See Arceneaux v. Amstar Corp.*, 2010-2329 (La. 7/1/11), 66 So. 3d 438, 448. As *Simmons* shows, this Court subjects fraud claims to a one-year prescriptive period under article

3492. "Any claim for breach of a fiduciary responsibility of a financial institution" is likewise subject to a "one year" prescriptive period. La. R.S. § 6:1124. Because fraud claims against non-fiduciaries and fiduciary-duty claims against banks are both subject to one-year prescriptive periods, it does not make sense to subject a fraud claim against an alleged fiduciary-bank to a prescriptive period of 10 years. It also violates precedent: this Court has repeatedly applied article 3492's one-year prescriptive period to claims for fraud by a fiduciary. *Brown v. Schreiner*, 2010-1436 (La. App. 4 Cir. 11/9/11), 81 So. 3d 705, 708; *Simmons*, 723 So. 2d at 1012.

Ames I relied on cases that determined the prescriptive period governing claims for breach of fiduciary duty by distinguishing true fiduciary-duty claims (which require proof of fraud or similar misconduct) from negligence claims that are mislabeled in an attempt to invoke the longer prescriptive period governing fiduciary-duty claims. *E.g.*, *Young v. Adolph*, 02-67 (La. App. 5 Cir. 5/15/02), 821 So. 2d 101, 106. No case before or after *Ames I* has applied this distinction to determine the timeliness of a fraud claim. In fact, one of the very cases that *Ames I* cited in support of its holding applied article 3492 to a fraud claim against alleged fiduciaries. *Young*, 821 So. 2d at 105, 108. A decision applying a one-year prescriptive period to a fraud claim against alleged fiduciaries cannot support the application of a 10-year prescriptive period to a fraud claim against Bank One.

C. Uhalt Failed To Establish A Claim That Ohle Defrauded Ames.

Given the district court's respondeat-superior ruling, the court did not consider whether Uhalt produced sufficient evidence establishing the elements of a claim that Ohle committed fraud. He did not, for reasons discussed below.

Uhalt argues (at 26-27) that Ohle defrauded Ames before and after she created the Trust. Uhalt's pre-Trust fraud theory fails because the Petition does not allege it. Uhalt cites this Court's statement that the Petition alleges fraud "in the management of Ames's investments." (R.III:517) Ohle could not have committed

pre-Trust fraud in managing Ames's investments, however, because Ohle did not manage Ames's investments until after the Trust was created.

Nor is there evidence that Ohle committed pre-Trust fraud in the four days between when Ohle started at BOIA and when Ames created the Trust. Neither Mrs. Ames nor Ohle testified. Mr. Ames—the only other person present for pre-Trust conversations with Ohle—offered the following dispositive testimony:

> Q: As you sit here today, can you point to any false statements that Mr. Ohle made with respect to the [Trust] prior to its creation?
>
> A: No.[92]

In support of his pre-Trust fraud theory, Uhalt cites testimony that Mrs. Ames was financially unsophisticated as well as Mr. Ames's testimony from Ohle's criminal trial. The latter testimony is inadmissible hearsay: Bank One was not a party to Ohle's criminal case, and Mr. Ames was available to (and did) testify in this case. *See Travelers Ins. Co. v. Harkins*, 458 So. 2d 632, 633 (La. App. 3 Cir. 1984). Regardless, none of the cited testimony identifies a pre-Trust representation of any sort, much less one that Mrs. Ames heard and relied on.

Uhalt's post-Trust fraud theory also fails. Uhalt cites three pieces of evidence in asserting that Ohle made misrepresentations in advising Ames to invest in Carpe Diem. First, Mr. Ames recalled Ohle saying that he made money investing in Carpe Diem. (R.VIII:1690) This testimony does not support a fraud claim because there is no evidence that Ohle's representation was false or that Mrs. Ames even heard it, much less relied on it in deciding to make her own investment.

Second, Mr. Ames speculated that his wife would not have invested in Carpe Diem but for Ohle's advice. (R.VIII:1691-92) This testimony does not identify a misrepresentation. After all, there is nothing inherently fraudulent about advising someone to invest in a hedge fund managed by affiliates of a major bank.

Third, one of Ames's lawyers stated that "there were all kinds of

[92] SR: SUMF, Ex. 7 at 22.

representations made to [Ames] about this Carpe Diem that turned out not to be true." (R.VIII:1706-07) This testimony neither identifies Ohle as the speaker nor the alleged misrepresentations, let alone suggests that Ames relied on them.

Beyond Carpe Diem, Uhalt asserts (at 27) that Ohle concealed his temporary withdrawal of Trust funds. But "fraud is never presumed." *Sanders v. Sanders*, 62 So. 2d 284, 286 (La. 1952). Ames's failure to testify leaves no evidence that Ohle failed to disclose these withdrawals or that Ames relied on any such omission. *See Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171-72 (5th Cir. 1996).

In a last-ditch effort to salvage his claim, Uhalt suggests that reliance cannot be resolved on summary judgment. But in Uhalt's cases, plaintiffs were available to offer evidence of reliance. Plus, those cases were decided before Louisiana "'adopt[ed] the federal courts' more liberal standard for summary judgment.'" *Hardy v. Bowie*, 98-2821 (La. 9/8/99), 744 So. 2d 606, 610. Since then, courts have granted summary judgment where there was no evidence of reliance. *E.g.*, *Wilson v. Davis*, 2007-1929 (La. App. 1 Cir. 5/28/08), 991 So. 2d 1052, 1062.

D. The Ames-Ohle Settlement Bars Respondeat-Superior Liability.

"Remission of debt by the obligee in favor of one obligor ... benefits the other solidary obligors in the amount of the portion of that obligor." La. C.C. art. 1803. Respondeat superior holds employers liable "without regard" to their "fault" (*Gettys v. Wong*, 2013-1138 (La. App. 4 Cir. 5/7/14), 145 So. 3d 460, 464), so the employee's "portion" of fault is by definition 100 percent. Uhalt thus cannot use a respondeat-superior claim to impose additional liability on Bank One for the same conduct for which Ohle already paid under the Ames-Ohle settlement agreement.

Uhalt first responds (at 20) that the consent judgment approving Ohle's accounting precluded only claims about matters disclosed in the accounting. But we rely on the Ames-Ohle settlement agreement, not the consent judgment. And

the settlement agreement released all claims, "whether or not now known."[93]

Uhalt next asserts (at 20) that Ohle fraudulently induced the settlement agreement. For "a settlement agreement to be set aside for fraud," a misrepresentation "must have induced reliance." *Allen v. Noble Drilling (U.S.) Inc.*, 93-2383 (La. App. 4 Cir. 5/26/94), 637 So. 2d 1298, 1301. Uhalt cites no evidence that Ames relied on Ohle in signing the settlement agreement. On the contrary, Ames's lawyer advised Ames to sign the agreement even though he believed that evidence provided by Ohle was "fabricated."[94] And again, Ames cannot testify regarding whether she relied on Ohle.

Finally, Uhalt notes (at 21) that the Ames-Ohle settlement agreement does not release Bank One. But we are not arguing that the agreement bars any claim that Bank One itself committed fraud. We argue only that because the settlement agreement bars Uhalt from holding Ohle liable for his conduct, Bank One cannot be held vicariously liable for Ohle's conduct under a respondeat-superior theory.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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[93] Przywara Aff., Ex. 5 at PLFF001168.
[94] SUMF, Ex. 15 at 54.

CERTIFICATE OF SERVICE

I certify that on November 22, 2016, I served a copy of the foregoing on the district court and the following counsel of record and parties by U.S. mail:

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