S H
M&R

SALLEY, HITE, MERCER & RESOR, LLC
Attorneys at Law

JOHN W. HITE III
Direct Dial Number: (504)566-8802
E-mail address: jhite@shmrlaw.com

365 Canal Street
One Canal Place, Ste. 1710
New Orleans, LA 70130
Phone: (504) 566-8800
Fax: (504) 566-8828

www.shmrlaw.com

June 12, 2017

Gladstone Jones, Esq.
Jones, Swanson, Huddell & Garrison, LLC
Pan American Life Center
601 Poydras St., Suite 2655
New Orleans, LA 70130-6004

Robert J. Daigre, Esq.
Burgos & Associates LLC
3535 Canal Street
New Orleans, LA 70119

Catherine E. Lasky, Esq.
Lasky Murphy LLC
715 Girod Street, Suite 250
New Orleans, LA 70130

RE: Ecetra N. Ames v. John B. Ohle, III, et al
Our File: 295-20976

Dear Counsel:

Enclosed please find a copy of JPMorgan Chase Bank's Opposition to Application for Supervisory Writ of Certiorari and Review that we have filed with the Supreme Court today.

With best regards,

Sincerely,

John W. Hite III

JWH/ds
Enclosure

SUPREME COURT OF LOUISIANA

No. 2017-C-0892

ECETRA N. AMES,

Plaintiff-Applicant,

versus

JOHN B. OHLE, III, J.P. MORGAN CHASE & CO. f/k/a BANK ONE CORPORATION, et al.,

Defendants-Respondents.

CIVIL PROCEEDING

On Application for Writ of Certiorari or Review to the Court of Appeal, Fourth Circuit, Parish of New Orleans

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DEFENDANT-RESPONDENT JPMORGAN CHASE & CO. f/k/a/ BANK ONE CORPORATION'S OPPOSITION TO APPLICATION FOR SUPERVISORY WRIT OF CERTIORARI AND REVIEW

J. Gregory Deis
Stephen J. Kane
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
Telephone: 312/782-0600
Facsimile: 312/701-7711

John W. Hite III (T.A. 17611) (A.C.)
SALLEY, HITE, RIVERA & MERCER, LLC
One Canal Place
365 Canal Street, Suite 1710
New Orleans, LA 70130
Telephone: 504/566-8800
Facsimile: 504/566-8828

Attorneys for JPMorgan Chase & Co. f/k/a Bank One Corporation

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RESPONSE TO STATEMENT OF WRIT GRANT CONSIDERATIONS

Plaintiff-applicant 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-respondent 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"), an indirect subsidiary of Bank One, 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 Fourth Circuit affirmed summary judgment for Bank One on Uhalt's claims for fraud and fraud-based conspiracy. The court rejected Uhalt's attempt to hold Bank One liable for Ohle's conduct for two independent reasons: (1) Ohle was employed by BOIA, not Bank One; and (2) Ohle worked on the Trust in his personal capacity, not as part of his job at BOIA. The court rejected Uhalt's theory that Bank One itself committed fraud for four independent reasons: (1) Bank One owed no duty to Ames; (2) there is no evidence of intent to defraud; and Ames's inability to testify left no evidence of (3) material omissions or (4) reliance. Uhalt thus must demonstrate ***multiple*** errors to justify review of either his direct- or indirect-fraud theory.

Uhalt principally asks the Court (at 1) to grant the writ because the Fourth Circuit allegedly misapplied La. C.C.P. art. 966 "by making credibility and factual determinations," supposedly causing "material injustice." Uhalt does not identify any "credibility" determinations, however, and the facts relied on by the Fourth Circuit are beyond genuine dispute—as article 966 expressly permits. Uhalt's real complaint is that the Fourth Circuit erred. But as Uhalt himself argued in successfully opposing Bank One's application for certiorari at the pleading stage, "error-correction analysis" is "an improper exercise of this Court's discretionary jurisdiction."[1]

That is particularly true here, where Uhalt asks the Court to scour a massive record to determine whether there is a genuine dispute as to any material fact. Uhalt identifies no legal question of import beyond the narrow interests of the parties, instead claiming only a misapplication of article 966—a claim that every summary-judgment loser could make. Nor does Uhalt offer any basis for his assertion of injustice beyond the "injustice" felt by every disappointed litigant. In fact, Ames was compensated for her alleged injuries by the actual

[1] Brief in Opp. to App. for Writ of Certiorari and Review at 1-2, *Ames v. Ohle*, No. 2012-C-1832 (La.) (citing *Boudreaux v. State Dep't of Transp. & Dev.*, 2001-1329 (La. 2/26/02), 815 So.2d 7).

wrongdoer—Ohle—more than a decade ago. There is no injustice in precluding Uhalt from seeking another recovery from what he apparently views as a "deep pocket."

In all events, for reasons that we describe in detail below, the Fourth Circuit correctly affirmed the district court's grant of summary judgment on multiple independent grounds. There was thus no misapplication of law, and there would be no material injustice in denying review.

Uhalt also asks the Court (at 1) to grant certiorari on the ground that the Fourth Circuit's decision conflicts with six cases addressing four separate issues. That implausible assertion is wrong for reasons that we explain below. In short, some of the cases that Uhalt cites actually support Bank One, and the others are easily reconcilable with the decision below.

STATEMENT OF THE CASE

A. Ohle's Work for Ames and the Trust

Ecetra Ames is an heiress to the Procter & Gamble fortune, owning some $50 million in assets.[2] Ames first met Ohle in 1997, when he was an accountant at KPMG working on tax and accounting issues for Ames's mother's estate.[3] 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."[4] For this work, Ames wrote checks directly to Ohle and Ohle's wife, not to KPMG.[5]

While at KPMG, Ohle approached Ames about creating what became the Trust.[6] Ohle later left KPMG for a job at BOIA, starting on December 13, 1999.[7]

Ames executed the instrument creating the Trust on December 17, 1999.[8] The Trust instrument does not mention BOIA or Bank One. It designates Ohle as trustee, listing Ohle's home address.[9] It requires the trustee to make quarterly payments to Ames and her husband and, upon their deaths, distribute the remaining funds to charities.[10] And it provides "maximum powers grantable to trustees under applicable law," including "the power to invest ... the

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[2] 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.
[3] SR: Affidavit of Kathleen M. Przywara ("Przywara Aff.") (Dec. 11, 2015), Ex. 1 at PLFF004737-38; SR: SUMF, Ex. 1 at 49-50.
[4] SR: SUMF, Ex. 1 at 70-77; SR: Przywara Aff., Ex. 2.
[5] SR: Przywara Aff., Ex. 2; SR: SUMF, Ex. 1 at 70-77.
[6] SR: Przywara Aff., Ex. 1 at PLFF004738, Ex. 3.
[7] 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.
[8] SR: Przywara Aff., Ex. 4 at PLFF000045, PLFF000053.
[9] *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).
[10] SR: Przywara Aff., Ex. 4 at PLFF000046-47.

principal of the Trust in such assets as the Trustee may determine to be appropriate."[11]

The Trust instrument entitles the trustee to compensation.[12] Ohle received a fee from the Trust each year that he was trustee.[13] The Trust instrument also allows the trustee to retain an investment advisor.[14] Ohle allegedly retained Jonathan Freedman, who was not affiliated with BOIA or Bank One, as the Trust's investment advisor.[15] Neither BOIA nor Bank One received any fees from Ohle's work as trustee.[16]

In 1999 and 2000, Ames funded the Trust with about $7.8 million in Procter & Gamble stock.[17] Ames's bankers at PNC or Whitney Bank sold the stock and transferred the proceeds to the Trust's account at Charles Schwab.[18] No BOIA or Bank One accounts were involved.

In 2001, Ames invested in Carpe Diem, a hedge fund managed by affiliates of Société Générale.[19] Carpe Diem had no affiliation with BOIA or Bank One.[20] Ames's husband testified that Ohle recommended Carpe Diem but was not "pushy" about it.[21] 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).[22] Following these discussions, Ames executed instructions directing Whitney National Bank to transfer $5 million for a personal investment in Carpe Diem.[23] Acting as trustee, Ohle withdrew $2 million from the Trust's Charles Schwab account for a second investment in Carpe Diem.[24] Ohle received part of a 5% "commission" on these investments,[25] none of which went to BOIA or Bank One.

Beginning in 2000, Ohle misappropriated funds from the Trust, before returning most of the money in 2003.[26] Ohle used this money to buy sports memorabilia and pay his credit-card

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[11] *Id.* at PLFF000051.
[12] *Id.* at PLFF000050.
[13] SR: Przywara Aff., Ex. 5 at PLFF00187.
[14] SR: Przywara Aff., Ex. 4 at PLFF000049.
[15] R.I:6; SR: SUMF, Ex. 6 at 232.
[16] SR: SUMF, Ex. 1 at 169-70.
[17] SR: Przywara Aff., Ex. 4 at PLFF45, Ex. 6 at WNB-692, Ex. 7 at WNB-794.
[18] SR: Przywara Aff., Ex. 7 at WNB-794, Ex. 8 at PLFF270, Ex. 9 at PLFF4950.
[19] SR: Przywara Aff., Ex. 1 at PLFF004739, Ex. 11 at PLFF001108.
[20] SR: SUMF, Ex. 6 at 49-50; Przywara Aff., Ex. 11.
[21] SR: SUMF, Ex. 1 at 146-47.
[22] SR: SUMF, Ex. 1 at 147-52, 161-64, Ex. 7 at 62; Przywara Aff., Ex. 1 at 4739.
[23] SR: Przywara Aff., Ex. 12, Ex. 6 at WNB-000693.
[24] SR: Przywara Aff., Ex. 13, Ex. 14 at PLFF002434, Ex. 15.
[25] SR: SUMF, Ex. 8 at 1-2.
[26] *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.

bills, among other things.[27] No misappropriated funds went to BOIA or Bank One.

In early 2003, Ames directed her attorney, John Wogan, to investigate Ohle.[28] Following that investigation, Wogan recommended that Ames settle her dispute with Ohle.[29] 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."[30] 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."[31] 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.[32] "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."[33] 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."[34]

Following Wogan's advice, Ames executed a settlement agreement with Ohle in September 2003.[35] The agreement recounted many of the same allegations asserted in the Petition here.[36] It required Ohle to pay over $67,000 to Ames and resign as trustee.[37] 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.[38]

Ames "agree[d]" that the settlement was "fair and reasonable," "preferring" settlement "over the expenses, delays and contingencies of litigation."[39] 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."[40] In January 2004, an Orleans

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[27] SR: Przywara Aff., Exs. 25-29.
[28] SR: Przywara Aff., Ex. 1 at PLFF004736, Ex. 16.
[29] SR: Przywara Aff., Ex. 17.
[30] *Id.* at PLFF004882.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at PLFF004881.
[35] SR: Przywara Aff., Ex. 5.
[36] *Id.* at PLFF001158-67.
[37] *Id.* at PLFF001168.
[38] *Id.* at PLFF001168-69.
[39] *Id.* at PLFF01168, PLFF01170.
[40] SR: SUMF, Ex. 15 at 42-43, 53-55.

Parish court signed a consent judgment approving an accounting of the Trust prepared by Ohle.[41]

The Trust still exists.[42] It has generated, and continues to generate, substantial income for Ames and her husband through quarterly payments. Ames received about $1.39 million from the Trust as of June 2015, after taxes.[43] Mr. Ames received about the same amount.[44]

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.7.[45] During the hiring process, Ohle did not disclose that he was trustee of the Trust.[46]

Ohle reported to Harry "Trey" Dye in what became known as the Innovative Strategies Group ("ISG"), a department of BOIA.[47] In the ordinary course of their jobs, ISG employees neither offered investment advice nor provided trustee services.[48] A separate Bank One subsidiary provided trust services, and BOIA employees outside of ISG provided investment advice.[49] 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.[50] 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.[51]

Ohle always maintained that his work for Ames was "unrelated to his position at Bank One."[52] 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."[53] 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."[54]

In January 2002, Trey Dye learned that Ohle had promoted Carpe Diem to a third-party

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[41] SR: Przywara Aff., Ex. 18 at PLFF000185.
[42] SR: Przywara Aff., Ex. 7 at 24-31.
[43] SR: Przywara Aff., Ex. 10 at pp. 10-11 (Attachment 4 at 2-3).
[44] *Id.*; SR: Przywara Aff., Ex. 4 at PLFF0046.
[45] 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)
[46] SR: SUMF, Ex. 6 at 221-23, Ex. 9 at 51; SR: McCabe Aff., Exs. 1-3.
[47] SR: SUMF, Ex. 6 at 19-25, 118, Ex. 3 at 64.
[48] SR: SUMF, Ex. 6 at 220.
[49] *Id.*; SUMF, Ex. 3 at 161-63, Ex. 9 at 231, Ex. 10 at 118-20, 124-25, 130, 196-97.
[50] SR: SUMF, Ex. 6 at 223-24, Ex. 9 at 55-56, 64, Ex. 3 at 86, 88-89.
[51] SR: McCabe Aff., Ex. 5 at JPM AMES 007610, JPM AMES 007614.
[52] SR: Przywara Aff., Ex. 1 at PLFF004738.
[53] *Id.*
[54] SR: SUMF, Ex. 1 at 165-67.

BOIA client (not Ames), violating Dye's prior directive not to do so.[55] BOIA promptly suspended Ohle's employment and began an investigation.[56] 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 Ohle authority "to reveal this information to you."[57] Ohle's counsel noted that "the Trust itself has never been a Bank One customer."[58]

After being suspended, Ohle sent a draft complaint against BOIA and BOIA executives to BOIA and demanded bonus payments relating to his employment at BOIA.[59] BOIA and Ohle entered into a settlement agreement under which BOIA paid Ohle some of the money that he demanded.[60] Subject to 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."[61] BOIA excluded from these provisions claims "related to Ohle's service as trustee for the Ames Family Trust or any investment in Carpe Diem."[62] Ohle resigned from BOIA on February 21, 2002.[63]

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.[64] Ohle recruited his friend Ken Brown—who was not affiliated with any Bank One entity—to play a role in the HOMER transactions.[65] 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.[66] Ohle was convicted of wire fraud and tax evasion, sentenced to five-years imprisonment, and ordered to pay restitution to Bank One and Ames.[67]

In June 2009, Ames signed a power of attorney giving Uhalt authority to file this lawsuit.[68] Ames later sued Bank One, Ohle, Steger, Brown, and Brown's wife in federal court.

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[55] SR: SUMF, Ex. 6 at 45-50, 225-26; SR: Rogoff Aff., Ex. 5 at JPM AMES 1107.
[56] SR: SUMF, Ex. 6 at 56-58.
[57] SR: Rogoff Aff., Ex. 2 at JPM AMES 001165.
[58] SR: Rogoff Aff., Ex. 3 at JPM AMES 001109.
[59] SR: Rogoff Aff., Ex. 4.
[60] SR: Rogoff Aff., Ex. 1.
[61] *Id.* at JPM AMES 000046-47.
[62] *Id.*
[63] *Id.* at JPM AMES 000044, JPM AMES 000046.
[64] SR: SUMF, Ex. 8 at 1.
[65] *Id.* at 1-2.
[66] SR: SUMF, Ex. 8 at 1-2.
[67] SR: Przywara Aff., Ex. 19.
[68] SR: Przywara Aff., Ex. 20.

(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.*) 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) The court dismissed Ames's state-law claims without prejudice. (*Id.*)

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) The Fourth Circuit 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 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. This Court denied Bank One's application for a writ of certiorari and/or review. (R.V:1051)

On remand, Bank One asserted exceptions left unresolved by the Fourth Circuit, arguing that the Petition was perempted and failed to state a claim. 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 liability"—"respondeat superior and apparent authority." (R.V:1066-67) The district court dismissed Ames's apparent-authority claim but upheld the respondeat-superior claim and denied Bank One's exception of peremption. (R.V:1079)

Following the district court'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) The district court therefore substituted Uhalt for Ames as the plaintiff. (R.X:2152)

Following discovery, Bank One and Ohle separately moved for summary judgment. The district court 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) The district court later granted summary judgment for Bank One in full.

First, the district court 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, the court found no evidence that Bank One itself committed fraud by purportedly not telling Ames that BOIA barred Ohle from marketing Carpe Diem. The court 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." (*Id.*) The court 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 about any "problems with investment vehicles that did not come through the bank." (*Id.*)

The Fourth Circuit affirmed. The court cited two alternate reasons in rejecting Uhalt's attempt to hold Bank One liable for Ohle's conduct. First, "Ohle was never an employee of Bank One, but of BOIA." Opinion at 12. Ohle's "direct supervisor at BOIA, Harry Dye, III, testified to this fact, as well as Peter Atwater, the CEO of BOIA." *Id.* A hiring letter to Ohle likewise stated: "'John, we look forward to you playing an important role within Banc One Investment Advisors.'" *Id.* at 13. "Lastly and most conclusive, BOIA's name appears on Ohle's W-2s." *Id.*

The Fourth Circuit rejected Uhalt's argument that BOIA's status as Ohle's employer could be ignored on the ground that BOIA and Bank One were a single-business enterprise. The court noted that "BOIA is a subsidiary of Bank One." *Id.* at 12. It cited witness testimony and documentation showing that "BOIA is a separate corporation, such as" Articles of Incorporation

that BOIA filed with the Ohio Secretary of State. *Id.* at 12-13. And the court found "no evidence" that Bank One and BOIA "act[ed] as a single business enterprise." *Id.* at 15.

Second, the Fourth Circuit held as a matter of law that Bank One is not liable for Ohle's conduct under the respondeat-superior doctrine. The court noted that "Ames retained Ohle's services outside of his employment, with both KPMG … and BOIA." *Id.* Mr. Ames testified that "he and his wife paid Ohle directly by check for his investment advising services even while he was employed by KPMG because the services Ohle provided were outside the scope of his KPMG employment." *Id.* "Similarly, as Mr. Ames further testified, when Ohle transitioned to BOIA, he received annual payments directly from the Trust … ." *Id.* Moreover, Ohle's work for Ames centered around the Trust, but "Ohle's BOIA employment was not trust-related." *Id.* To the contrary, as Ohle's boss testified, "[t]rust services were not provided by ISG." *Id.*

The Fourth Circuit also rejected Uhalt's theory that Bank One fraudulently concealed Ohle's conduct from Ames, citing multiple independent reasons. First, Bank One and Ames lacked the "fiduciary" relationship necessary to impose a duty to speak. *Id.* at 18. The court explained that Ohle worked for Ames "in a personal capacity, never as an employee of BOIA." *Id.* There thus could be no fiduciary relationship between Ames and BOIA, much less between Ames and Bank One. *Id.* at 18-19. Second, Uhalt offered no evidence of "intent to defraud." *Id.* at 19. Third, because Ames was not deposed, there was no evidence about "what representations or omissions were made to her by Bank One and/or its employees upon which she relied." *Id.*

Because the Fourth Circuit affirmed based on the district court's reasoning, it did not address the four alternative arguments that Bank One made in support of the judgment. *Id.* Two judges dissented. The dissent's reasoning is addressed below.

The Fourth Circuit also affirmed the district court's judgment dismissing Uhalt's claims against Ohle. *Id.* at 5-10. Uhalt does not seek review of that judgment.

SUMMARY OF ARGUMENT

Uhalt's application should be denied because the Fourth Circuit neither misapplied article 966 nor created a conflict with any other decision. As for Uhalt's direct-fraud claim, the Fourth Circuit affirmed summary judgment for two independent reasons. Uhalt must show that ***both*** reasons merit this Court's review, but he fails on both counts.

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. 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 uniformly testified that BOIA employed Ohle. This evidence permits no genuine dispute.

Uhalt alternatively seeks to pierce BOIA's corporate veil under the single-business theory. No court has ever done that. 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 the single-business 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 introduced evidence 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. The Fourth Circuit thus correctly applied article 966 in rejecting Uhalt's single-business theory.

For the first time in this eight-year old litigation, Uhalt now argues that Bank One undertook BOIA's alleged duty to protect Ames. This Court does not consider arguments that were not raised below. Regardless, we explain below that Uhalt's new theory is meritless.

Second, the Fourth Circuit correctly held that Uhalt's respondeat-superior theory fails as a matter of law. 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. 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 a Bank One subsidiary. And a federal judge found that Ohle used the Trust 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.

The Fourth Circuit also correctly applied article 966 in rejecting Uhalt's direct-fraud theory. Uhalt asserts that Bank One should have told Ames that BOIA barred Ohle from promoting Carpe Diem. Uhalt neither pled that theory nor produced 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.

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, even if the Fourth Circuit's reasoning were incorrect, there are numerous alternative grounds for affirmance—making this Court's review even more unnecessary.

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).[69] Summary judgment "shall be granted" if "there is no genuine issue as to material fact" and "the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3).

I. The Fourth Circuit's Indirect-Fraud Ruling Does Not Merit Further Review.

The Fourth Circuit cited two independent reasons in affirming summary judgment on Uhalt's indirect-fraud claims, seeking to hold Bank One liable for Ohle's conduct. First, Bank One did not employ Ohle, so it is not the proper party. Second, Ohle's work on the Trust was outside the scope of his job at BOIA, so Uhalt's respondeat-superior theory fails. Uhalt must show that both of these issues merit the Court's review, but neither do.

A. The Fourth Circuit Correctly Ruled That Bank One Is Not The Proper Party.

During the federal-court proceedings, Bank One repeatedly told Uhalt that he had sued the wrong defendant.[70] Bank One did the same after Uhalt re-filed this case in state court, explaining in its Answer and discovery responses that BOIA employed Ohle and thus was the proper defendant. *Supra* at 7. The district court thus 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, the Fourth Circuit correctly rejected Uhalt's arguments.

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

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 the Fourth Circuit held, the record shows beyond

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[69] Citations to article 966 are to the current version. Amendments to article 966 since Bank One filed its summary-judgment motion do not materially change the provisions cited herein.

[70] 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.)).

genuine dispute that "Ohle was never an employee of Bank One, but of BOIA." Opinion at 12.

Most important, Ohle's W-2s identify BOIA as the payor. (R.VI:1290-92) As the Court knows, the IRS requires employers to report salary information about their employees on W-2s. That Ohle's W-2s are from BOIA should therefore be dispositive.

Beyond the W-2s, all relevant parties—Bank One, BOIA, Ohle, and even Uhalt for a period of time—agree that Ohle was a BOIA employee. Bank One's article 1442 witness testified that Ohle was a BOIA employee.[71] Ohle's supervisors all testified that Ohle was a BOIA employee.[72] Employment and other forms completed shortly after Ohle's hiring identified Ohle as a BOIA employee.[73] A form that BOIA sent to regulators after Ohle's resignation identified Ohle as a BOIA employee. (R.VI:1277-78) And Ohle's draft complaint suing BOIA and several of its executives—but not Bank One—stated that he was an "employee of BOIA."[74]

Uhalt himself expressly conceded—in both his summary-judgment opposition and his response to Bank One's statement of undisputed facts—that Ohle was a BOIA employee. To take just a few examples, Uhalt admitted:

- "Ohle was hired by BOIA on November 23, 1999." (R.VIII:1663)
- "While employed by BOIA, Ohle" advised Ames to invest in Carpe Diem. (R.VIII:1666)
- "Ohle was a W-2 employee of Banc One Investment Advisors."[75]

In the Fourth Circuit, Uhalt tried to explain away some of his concessions. With respect to his concession that "Ohle was hired by BOIA on November 23, 1999," for example, Uhalt claimed that it addressed only "the *timing* of Ohle's hiring."[76] But Uhalt admitted that "Ohle was hired by BOIA," and his other concessions do not tie that admission to timing. Uhalt called his concession that "Ohle was a W-2 employee of [BOIA]" an "unremarkable fact."[77] But nothing could be more important: as the Fourth Circuit said, Ohle's W-2s were "most conclusive" in identifying BOIA as the employer. Opinion at 13.

Further refuting Uhalt's explanation, Uhalt's summary-judgment opposition did not defend his claims on the ground that Bank One employed Ohle. Uhalt instead argued that Bank

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[71] SR: SUMF, Ex. 4 at 89.
[72] SR: SUMF, Ex. 3 at 65, Ex. 6 at 73, 220-23.
[73] SR: McCabe Aff., Ex. 2 at JPM AMES 001557-58, Ex. 3; R.VI:1293-96.
[74] Rogoff Aff., Ex. 4 at 3704-06.
[75] SR: Uhalt's SUMF ¶ 42E; *see also id.* ¶¶ 8, 42, 45, 48A.
[76] Reply Brief of Plaintiff-Appellant Hugh Uhalt at 2, *Ames v. Ohle*, No. 2016-C-0612 (4 Cir.).
[77] *Id.* at 3.

One was judicially estopped from maintaining that BOIA employed Ohle (an argument that Uhalt dropped on appeal after the district court rejected it), and that Bank One is liable for BOIA under the alter-ego or single-business doctrines. (R.VIII:1676-78) At the summary-judgment stage, Uhalt did not defend his claims on the ground that Bank One employed Ohle until ***after*** Bank One filed its reply—by which time Uhalt had already conceded that BOIA employed Ohle.

Uhalt's theory does not even make sense. Bank One was a holding company.[78] Holding companies exist to hold operating subsidiaries. They do not employ people like Ohle, who provide services to clients. That is what operating subsidiaries like BOIA do.

To demonstrate a "genuine issue of material fact" as to Ohle's employer, Uhalt needed to "produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial." *Reynolds v. Bordelon*, 2014-2371, p. 3 (La. 6/30/15), 172 So.3d 607, 610-11. Given Uhalt's admissions, Ohle's W-2s, and Bank One's other evidence, the evidence cited by Uhalt (at 14) and the dissent (at 1-2) could not possibly satisfy his burden. For example:

- Uhalt cites statements generically referring to Ohle as a Bank One employee (e.g., in a November 1999 form 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 form letter made this clear when it was specific to Ohle: "John, we look forward to you playing an important role within Banc One Investment Advisors." (R.IX:1865)
- Uhalt cites Bank One witness Michael Reed's testimony, but it does not support Uhalt's theory at all. To the contrary, Reed testified that "Ohle was a ... W-2 employee of Banc One Investment Advisors." (R.VIII:1716) Indeed, Uhalt himself cited Reed's testimony in asserting that "Ohle was hired by BOIA on November 23, 1999." (R.VIII:1663)
- 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 employees of Bank One ***and its subsidiaries***."[79] 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.

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[78] SR: SUMF, Ex. 6 at 14.
[79] SR: McCabe Aff., Ex. 4 at JPM AMES 000178 (emphasis added).

But that agreement defined "Bank One" to include BOIA, Bank One, "and all of their subsidiaries and affiliates."[80] 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 14-15) that BOIA was a division of Bank One rather than a subsidiary. Uhalt waived that argument by failing to raise it in his summary-judgment opposition. In fact, Uhalt's opposition suggested that BOIA was a Bank One subsidiary by stating: "Bank One concedes that BOIA was a subsidiary of Bank One." (R.VIII:1677)

Beyond waiver, there can be no ***genuine*** dispute in light of the affidavit submitted by JPMorgan Chase Executive Director Richard Rogoff, averring that BOIA was a Bank One subsidiary.[81] Confirming this, the BOIA-Ohle settlement agreement identified Bank One as BOIA's "parent."[82] Documents filed with the SEC and Ohio Secretary of State show that Bank One and BOIA were separately incorporated. (R.X:2115-49) Bank One's 10-Ks identified Bank One as the parent of its subsidiary, Bank One, N.A. (Ohio), which in turn was the parent of its subsidiary, BOIA—making BOIA an indirect subsidiary of Bank One. (R.X:2100-13) 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 (at 14) that Trey Dye testified that BOIA was a Bank One division. In fact, Dye testified that BOIA "was a subsidiary of the holding company [Bank One]."[83]

Finally, Uhalt asserts that the Fourth Circuit's decision conflicts with *Marshall v. West Baton Rouge Fire Protection District No. 1*, 2008-1576 (La. 1/9/09), 998 So.2d 85. It does not. In *Marshall*, unlike this case, the lower courts did not resolve who "actually employed plaintiff," as a matter of law or otherwise. *Id.*; *see Marshall v. W. Baton Rouge Fire Prot. Dist. No. 1*, 2007-1065 (La. App. 1 Cir. 5/2/08), 991 So.2d 492. *Marshall* did not, as Uhalt suggests, hold that disputes about an employer's identity are exempt from summary judgment. Uhalt's suggestion is irreconcilable with article 966, which contains no such exemption. In fact, the First Circuit distinguished *Marshall* in a summary proceeding because the defendant was "undisputably" plaintiff's employer, "***as is clearly reflected on [plaintiff's] Form W-2.***" *Ballard*

[80] SR: Rogoff Aff., Ex. 1 at JPM AMES 000044.
[81] SR: Rogoff Aff. ¶ 4.
[82] SR: Rogoff Aff., Ex. 1 at JPM AMES 000044.
[83] SR: SUMF, Ex. 6 at 14.

v. Livingston Parish Fire Prot. Dist. 5, 2011-1053, p. 6 n.2 (La. App. 1 Cir. 1/11/12), 91 So.3d 311, 314 n.2 (emphasis added). *Ballard* refutes Uhalt's theory.

2. Uhalt's single-business theory fails as a matter of law.

In addition to arguing that Ohle was a Bank One employee, Uhalt asserts (at 18) that Bank One failed to sustain its purported "burden" to disprove that Bank One and BOIA acted as a "single business enterprise." The Fourth Circuit correctly ruled that Uhalt's theory is meritless.

To begin with, Uhalt has the burden of proof backwards. When a summary-judgment movant "will not bear the burden of proof at trial," it need only "point out" the lack of evidence for an element "essential to the adverse party's claim." La. C.C.P. art. 966(D)(1). "The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law." *Id.*

Settled law holds that plaintiffs seeking to pierce the corporate veil bear the "burden" of proof at trial. *F.G. Bruschweiler (Antiques) Ltd. v. GBA Great British Antiques*, 03-792, p. 9 (La. App. 5 Cir. 11/25/03), 860 So.2d 644, 651; *see also Riggins v. Dixie Shoring Co.*, 590 So.2d 1164, 1168 (La. 1991) (unless parent formed subsidiary to defraud creditors—which Uhalt does not and cannot argue here—plaintiffs "bear a ***heavy*** burden of proving" that parent "disregarded the corporate entity") (emphasis added). Thus, if a summary-judgment motion establishes a separate corporation's "existence," article 966 places "the burden of showing that th[e] corporate entity should be disregarded ... on the plaintiffs." *Hodge v. Strong Built Int'l*, 2014-1086, p. 5 (La. App. 3 Cir. 3/4/15), 159 So.3d 1159, 1164; *accord Fina Oil & Chem. Co. v. Amoco Prod. Co.*, 95-1877 (La. App. 1 Cir. 5/10/96), 673 So.2d 668, 673-74.

The same rule governs the single-business theory because, like the "similar" alter-ego doctrine, it is "an exception to the general rule that a corporation ... has a separate and distinct existence apart from its shareholders." *In re New Orleans Train Car Leakage Fire Litig.*, 96-1677, pp. 4, 6 (La. App. 4 Cir. 3/5/97), 690 So.2d 255, 257, 259. Therefore, a defendant moving for summary judgment on the single-business theory need only demonstrate "the existence of separate corporate entities." *Id.* at 259. "The burden then shift[s] to the plaintiffs to show that exceptional circumstances and/or factors exist which establish a single enterprise ... ." *Id.*

Here, as we explain above (at 14), Bank One demonstrated that it was a separate corporation from BOIA. The burden therefore shifted to Uhalt to produce evidence that he could

show the exceptional circumstances necessary to disregard BOIA's separate existence.

Uhalt argues that Bank One bore the burden to disprove his theory solely because Bank One asserted an affirmative defense that it "is not the proper party in interest and is not liable for the actions of any separate juridical entities." (R.V:1102)[84] That argument is frivolous. Just as an affirmative defense denying liability does not shift the burden to the defendant to disprove liability, so too Bank One did not assume a burden that courts have placed squarely on plaintiffs.

Uhalt's burden argument is particularly perverse because the Petition did not give Bank One notice that Uhalt invoked the single-business theory. A "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." *Robertson v. W. Carroll Ambulance Serv. Dist.*, 39,331, p. 9 (La. App. 2 Cir. 1/26/05), 892 So.2d 772, 777. Uhalt's Petition did not mention the single-business theory. It did not allege facts supporting that theory. It did not even mention BOIA. A petition cannot seek to disregard BOIA's separate existence without mentioning BOIA. Uhalt instead first raised the single-business theory in his summary-judgment opposition. If Uhalt had pled this theory, Bank One would have used the discovery process to refute every one of the single-business factors. It is fundamentally unfair for Uhalt to assert a new theory after discovery is complete and after Bank One filed its summary-judgment motion.

Uhalt argued below that his single-business theory is "subsumed" within the Petition's vicarious-liability claim.[85] In fact, the Petition based vicarious liability on allegations that Ohle's work for Ames was within the scope of his job. (R.I:31-32) That is an entirely different question than whether BOIA and Bank One were a single business. Uhalt also argued below that Bank One's affirmative defense that it is the wrong party demonstrated notice of his theory.[86] But that defense simply responded to the Petition's allegation that Bank One employed Ohle. Plus, Bank One was not required to disprove every theory used to hold a parent company liable for the conduct of a subsidiary's employee; it was Uhalt's burden to identify his theory.

Uhalt's single-business theory also fails on the merits. The "strong policy of Louisiana ... favor[s] the recognition of the corporation's separate existence, so that veil-piercing is an extraordinary remedy, to be granted only rarely." *Bujol v. Entergy Servs., Inc.*, 2003-492, p. 14

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[84] Reply Brief of Plaintiff-Appellant Hugh Uhalt at 3, *Ames v. Ohle*, No. 2016-C-0612 (4 Cir.).
[85] *Id.* at 3 n.7.
[86] *Id.*

(La. 5/25/04), 922 So.2d 1113, 1128. Here, Uhalt did not produce evidence showing that he can demonstrate the "exceptional circumstances" needed to support his single-business theory. *Gaddy v. Universal Cable Sys., Inc.*, 47,088, p. 20 (La. App. 2 Cir. 9/7/12), 131 So.3d 875, 887 (affirming summary judgment for defendants on plaintiffs' single-business theory).

Uhalt does not even try to address the vast majority of the 18 factors that courts consider under the single-business theory. *See New Orleans Train Car*, 690 So.2d at 257. For example, there is no evidence that BOIA was inadequately capitalized or violated corporate formalities. Instead, Uhalt primarily bases his theory on evidence that BOIA employees sometimes worked with employees of other Bank One subsidiaries to develop business and received compensation when they succeeded. That is far from enough to defeat summary judgment.

First, Uhalt asserts only that Bank One ***subsidiaries*** worked together to generate business. Evidence of subsidiary cooperation is irrelevant to Uhalt's argument that BOIA and ***Bank One***—a mere holding company—were a single business. Second, subsidiary cooperation is the norm in large corporate families. If it were enough to disregard corporate separateness, veil piercing would be commonplace. Third, courts 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. The same holds true for the single-enterprise theory because it is an "equitable doctrine" employed "to satisfy liabilities or claims of creditors." *Hopkins v. Howard*, 2005-732, p. 14 (La. App. 4 Cir. 4/5/06), 930 So.2d 999, 1008; *see Town of Haynesville v. Entergy Corp.*, 42,019, p. 11 (La. App. 2 Cir. 5/2/07), 956 So.2d 192, 199 (rejecting single-business theory where there was no evidence that parent "misappropriated resources thereby making [subsidiary] unable to meets its obligations" to plaintiff). Uhalt did not and could not introduce evidence showing that BOIA's successor is unable to satisfy a judgment.[87]

Moreover, Uhalt incorrectly assumes that Louisiana law governs his single-business theory. In fact, "'Louisiana courts ... apply the law of the place of incorporation to determine fundamental issues of corporate structure' in a single business enterprise case." *Energy Coal v. CITGO Petroleum Corp.*, 836 F.3d 457, 463 (5th Cir. 2016). Bank One was, and its successor is, incorporated in Delaware. (R.X:2101-29; R.I:1; *see also* R.X:2131-49 (BOIA was, and its

[87] Uhalt also cites (at 18) the BOIA-Ohle settlement agreement's provision defining Bank One to include BOIA and all of their subsidiaries and affiliates. Including all related entities so as to obtain a broad release of any claims against them, as most settlement agreements do, does not suggest that those entities were a single business. It simply shows intent to preclude Ohle from evading a release of BOIA alone.

successor is, incorporated in Ohio)) Delaware has not adopted the single-business theory. *Energy Coal*, 836 F.3d at 461-63. The theory therefore could not apply in the first place. And this Court does not grant writs to examine other states' laws.[88]

Uhalt also errs in asserting (at 18) a conflict with *Sarpy v. ESAD, Inc.*, 2007-347 (La. App. 4 Cir. 9/19/07), 968 So.2d 736, *Lee v. Clinical Research Center*, 2004-428 (La. App. 4 Cir. 11/17/04), 889 So.2d 317, and *Hamilton v. AAI Ventures*, 1999-1849 (La. App. 1 Cir. 9/22/00), 768 So.2d 298. *Lee* supports Bank One. It affirmed summary judgment for the defendants despite evidence of some single-business factors because, "based on the totality of the evidence in the record, there clearly were not enough factors present to create a genuine issue of material fact as to whether the defendant entities constituted a single business." 889 So.2d at 328. *Sarpy* held only that the single-business theory ***can*** apply to breach-of-contract claims, remanding "for reconsideration of the motion for summary judgment." 968 So.2d at 739. And unlike this case, *Hamilton* involved a "'shell corporation with no employees nor capital.'" 768 So.2d at 302.

To be sure, the dissent disagreed with the majority's conclusion that there is insufficient evidence supporting the single-business theory. The dissent did not, however, cite any supporting evidence. It instead cited *Lee* in asserting (at 2) that the single-business theory generally presents a "factual" question "for the trier of fact to resolve." But *Lee* affirmed summary judgment for the defendants because plaintiffs offered insufficient evidence supporting the single-business theory. *Lee* was correct: article 966 does not exempt the single-business theory from its scope.

3. Uhalt's "positive-undertaking" theory fails.

In another attempt to excuse his failure to name the right defendant, Uhalt argues (at 16-17) that Bank One undertook a duty "to monitor the outside activities and conduct of all Bank employees, including Ohle." That expansive theory is meritless for many reasons. First, Uhalt never raised the theory until now—not in the Petition, not on summary judgment, and not in the Fourth Circuit. This Court generally "cannot consider contentions raised for the first time in this Court." *Boudreaux*, 815 So.2d at 9.

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[88] This Court "has never adopted the single business enterprise theory." *Energy*, 836 F.3d at 460. Because Uhalt neither pled nor produced evidence supporting the single-business theory—and because Louisiana law does not govern the theory here anyway—this case is not the proper vehicle for the Court to decide whether to adopt the theory. But we note that other states have overwhelmingly rejected the theory. *E.g.*, *SSP Partners v. Gladstrong Invs. (USA)*, 275 S.W.3d 444, 455 (Tex. 2008). The theory is particularly improper in the context of "vertical" parent-subsidiary relationships like the one between Bank One and BOIA, where it is duplicative of the alter-ego doctrine—a doctrine that Uhalt has abandoned.

Second, Uhalt's theory derives from the Restatement (Second) of Torts § 324A, which is entitled in part: "***Negligent*** Performance of [an] Undertaking." (Emphasis added). In 2012, the Fourth Circuit dismissed Uhalt's negligence claims as prescribed. *Ames*, 97 So.3d at 392. That judgment became final long ago, so Uhalt cannot resuscitate a negligence claim.

Third, section 324A by its terms applies only to conduct resulting in "physical harm." Uhalt does not contend that the conduct at issue here caused Ames any physical harm.

Fourth, in resolving the "question of law ... whether a parent corporation affirmatively undertook the duty of safety owed by its subsidiary, courts have looked to the scope of the parent's involvement, the extent of the parent's authority, and the underlying intent of the parent." *Bujol*, 922 So.2d at 1130-31. To begin with, BOIA did not owe a duty to Ames because it lacked any relationship with her. Bank One thus could not have undertaken a duty. Even if it could have, there is no evidence that it did. Uhalt asserts (at 16) that Bank One undertook a duty to protect Ames by "enforcing a Code of Conduct." Liability would be limitless if a parent company's ethics policy meant that the parent undertook a duty to protect every person who comes into contact with every employee of every subsidiary. That is not the law. Uhalt also notes (at 16) that BOIA's compliance department required Ohle to send it the Trust's account statements. But it is undisputed that BOIA's compliance department reviewed statements for non-BOIA accounts solely to detect insider trading, not to protect accountholders, much less to protect people like Ames who did not even have an account with BOIA.[89]

Uhalt errs in asserting (at 1) a conflict with *Bujol*. That case—like the other cases cited by Uhalt (at 16)—involved claims that a parent company negligently breached a duty that it undertook to protect its subsidiary's employees from physical harm. None addressed claims like the one that Uhalt asserts now, alleging that a parent company ***fraudulently*** breached a duty that it supposedly undertook to protect a ***client*** of a subsidiary's employee from ***economic*** harm.

B. The Fourth Circuit Correctly Rejected Uhalt's Respondeat-Superior Theory.

Because Uhalt failed to name Ohle's employer as the defendant, respondeat-superior liability is by definition inapplicable. Beyond this, 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*, 1999-2633 (La. App.

[89] SR: SUMF, Ex. 4 at 53-54; McCabe Aff., Ex. 5 at 1172-73.

1 Cir. 12/22/00), 785 So.2d 842, 844. This rule may be avoided "'only if'" (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, pp. 3-4 (La. 5/21/96), 673 So.2d 994, 996.

There is no evidence satisfying either respondeat-superior requirement, much less both. First, as we explain above (at 2-6), 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 2-6), Ohle's work on the Trust and Carpe Diem was not in furtherance of BOIA's objective. 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 failed to disclose to anyone at BOIA that he received compensation in serving as trustee, thereby competing with a Bank One subsidiary that offered paid trustee services. 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.[90] In short, Ohle worked on the Trust and Carpe Diem to line his own pockets, not to help BOIA.

Uhalt principally complains (at 17) that the Fourth Circuit made "erroneous factual conclusions" in rejecting his respondeat-superior theory. This Court does not grant certiorari to determine the accuracy of factual conclusions. Regardless, the few secondary conclusions that Uhalt challenges are correct. For example, Uhalt finds fault with the Fourth Circuit's observation that Ohle "did not disclose his trustee position on the documentation he submitted to BOIA as a new employee." Opinion at 16. That is plainly true.[91] Uhalt focuses on Ohle's later disclosure to BOIA's compliance department, but that does not contradict the Fourth Circuit's finding. More important, Uhalt ignores that Ohle's disclosure dooms his respondeat-superior claim: BOIA

[90] SR: Mem. in Support of Bank One's Motion for Summary Judgment at 14-15.
[91] SR: McCabe Aff., Exs. 1-3.

required employees to disclose a trusteeship ***only if it was outside the employee's job.***[92]

Uhalt next notes (at 4-6, 17) 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). 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, as we have explained.

Uhalt also cites (at 6-7) instances where Ohle used BOIA resources (e.g., his office phone) to work on the Trust, thereby violating BOIA rules.[93] 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. But even when "'the master habitually allows the servant to use the instrumentality"—which did not happen here—"'[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.'" *Oliphant v. Town of Lake Providence*, 192 So.95, 103 (La. 1939). For the reasons stated above, Ohle's work on the Trust or Carpe Diem was not done to benefit BOIA.

Uhalt finds (at 17) a contradiction between the Fourth Circuit's supposed rulings that (a) Bank One did not undertake BOIA's purported duty to protect Ames from harm, and (b) BOIA is not liable to Uhalt under respondeat-superior principles. But Uhalt did not argue below that Bank One undertook BOIA's purported duty to Ames, so the Fourth Circuit did not address that issue. More important, there is no contradiction. Bank One did not have a duty to Ames because they lacked any relationship whatsoever, and Uhalt's respondeat-superior theory fails because Ohle's work on the Trust was outside the scope of his job at BOIA. And while Ohle disclosed his trusteeship to "BOIA's compliance department"—a fact that the Fourth Circuit noted (at 16

[92] SR: McCabe Aff., Ex. 5 at JPM AMES 007610, JPM AMES 007614.
[93] SR: McCabe Aff., Ex. 4 at JPM AMES 00189, JPM AMES 00194.

n.10)—that does not demonstrate Bank One knowledge, much less that Ohle's work on the Trust was within the scope of his job and for the benefit of BOIA.

In finding (at 3) an issue of fact on the question whether Ohle's conduct benefited BOIA, the dissent stated that "Bank One" (actually a non-BOIA Bank One subsidiary) "had a trust department" and questioned whether "Bank One" (actually BOIA) was "motivated to hire Ohle because he was trustee of the Ames' Trust." Tellingly, Uhalt's application cites no evidence supporting that speculation—because there is none. And even if BOIA had hired Ohle in an attempt to bring the Trust to a Bank One entity, Ohle did not do so. Thus, even if the dissent's speculation were true, that would not show that Ohle's work on the Trust benefited BOIA.

II. The Fourth Circuit's Direct-Fraud Ruling Does Not Merit Further Review.

In addition to his vicarious-liability theory, Uhalt argues (at 18-19) that Bank One committed fraud by not telling Ames that BOIA prohibited Ohle from promoting Carpe Diem. The first problem with this theory is that it is nowhere to be found in the Petition. We have noted this problem throughout the litigation, but Uhalt has yet to cite any allegation in the Petition making this claim, much less with the particularity required by La. C.C.P. art. 856. If Uhalt does not do so in his reply, there would be no point in this Court reviewing the direct-fraud ruling. *See Webster v. Wal-Mart Stores*, 92-1005 (La. App. 5 Cir. 5/14/93), 617 So.2d 626, 629 ("the recovery granted under any legal theory [must] be justified by the facts pled in the petition").

Moreover, the Fourth Circuit correctly rejected Uhalt's direct-fraud claim on the merits. Fraud 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, p. 13 (La. App. 4 Cir. 6/4/14), 144 So.3d 75, 86. A failure-to-disclose claim, like the one asserted by Uhalt, also requires "a duty to speak." *Greene v. Gulf Coast Bank*, 593 So.2d 630, 632 (La. 1992). Uhalt failed to produce evidence satisfying any of these elements, much less all.

First, Ames's inability to testify leaves no evidence about what was disclosed to her, what was material to her, and whether she relied on any omissions. Because "fraud is never presumed" (*Sanders v. Sanders*, 62 So.2d 284, 286 (La. 1952)), Uhalt's direct-fraud claim fails. *See Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171-72 (5th Cir. 1996). Echoing the dissent (at 3), Uhalt responds (at 19) that the Fourth Circuit's ruling conflicts with precedent holding that fraud "may be established by circumstantial evidence." *Lomont v. Myer-Bennett*, 2014-2483, p. 12 (La.

6/30/2015), 172 So.3d 620, 629. There is no conflict. The Fourth Circuit acknowledged (at 17) that fraud "may be established by circumstantial evidence," but this does not help Uhalt. For example, there is no circumstantial evidence suggesting 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.[94]

Second, there is no evidence that Bank One intended to defraud Ames. Uhalt notes (at 19) that the BOIA-Ohle settlement agreement made its terms confidential. But nearly all settlement agreements—including the Ames-Ohle settlement agreement—have confidentiality provisions.[95] The BOIA-Ohle agreement's confidentiality provision does not 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 also notes (at 19 n.91) that following Ohle's resignation, BOIA submitted a "Form U-5" to regulators that did not identify BOIA's investigation into Ohle's conduct. To begin with, Uhalt cannot hold ***Bank One*** liable for an omission in a form that ***BOIA*** completed. (R.VI:1277-79) Moreover, the Form U-5 does not suggest that BOIA intended to defraud Ames because (a) there is no evidence that Ames even saw the Form, and (b) federal regulations bar disclosure of information in Form U-5s regarding internal investigations into employee conduct.[96]

Third, Bank One lacked a legal duty to Ames. A duty arises only if there are "special circumstances, such as a fiduciary relationship." *Greene*, 593 So.2d at 632. Ames and Bank One had no relationship at all. Bank One was a mere holding company.[97] Ames held a different trust account (not the Trust) with a 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.

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[94] SR: SUMF, Ex. 6 at 49-50. In noting that Ames's inability to testify leaves no evidence of fraud, 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.

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

[96] FINRA Manual Rule 8312(d) (available at http://www.finra.org/); SR: Reply Mem. in Support of Bank One's Motion *in Limine* To Exclude Expert Testimony ("Expert Motion *in Limine* Reply"), Ex. C at 17.

[97] SR: SUMF, Ex. 6 at 14.

Uhalt nevertheless asserts (at 19) 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.

The dissent offered (at 4) a different rationale for finding an issue of fact, asserting that the district court's ruling that Bank One lacked a duty to tell Ames about "potential problems with investment vehicles that did not come through the bank" was "intertwined" with the court's respondeat-superior ruling. But even if Ohle had been acting within the scope of his job at ***BOIA***, that would not impose a duty on ***Bank One*** to disclose information to Ames.

Finally, Uhalt's assertion that Bank One failed to disclose information is at most a delictual claim for negligence. But the Fourth Circuit affirmed dismissal of Uhalt's delictual claims as prescribed, and that judgment became final long ago. (R.III:525) Uhalt may not resuscitate his delictual claims under the guise of a fraud count.

III. The Writ Should Be Denied Because Alternative Grounds Support The Judgment.

Even if the Fourth Circuit's reasoning were flawed—and it is not—the judgment should be affirmed for four additional reasons described in greater detail in the briefing below. *See* La. C.C.P. art. 2133(B). First, assuming that Ohle's work on the Trust was within the scope of his job at BOIA, the Trust Code's three-year peremptive period applies to preclude Uhalt from challenging Ohle's conduct as trustee from 1999-2003. *See* La. R.S. § 9:2234.

Second, if the Trust Code does not apply, then Uhalt's claims are barred by a one-year prescriptive period under La. C.C. art. 3492. Although the Fourth Circuit held at the pleading stage that Uhalt's claims are subject to a 10-year prescriptive period because the Petition alleged "fraudulent conduct of a fiduciary" (R.III:517), the summary-judgment record shows no evidence that Bank One was a fiduciary of Ames under La. R.S. § 6:1124. Moreover, it is undisputed that a one-year prescriptive period governs both fraud claims against non-fiduciaries and fiduciary-duty claims against banks. *E.g.*, *Simmons v. Templeton*, 98-43, p. 5 (La. App. 4 Cir. 11/10/98), 723 So.2d 1009, 1012; La. R.S. § 6:1124. Given this, it does not make sense to subject a fraud claim against an alleged fiduciary-bank to a 10-year prescriptive period.

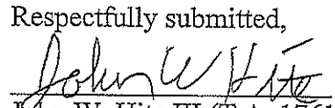
Third, as with Uhalt's direct-fraud claim, Ames's inability to testify leaves Uhalt with no evidence of materiality or reliance to support a fraud claim based on Ohle's conduct.

Fourth, under La. C.C. art. 1803, Uhalt cannot hold Bank One vicariously liable for the very same conduct that Ames already released under her settlement agreement with Ohle.

CONCLUSION

Uhalt's application should be denied.

Respectfully submitted,

By: 

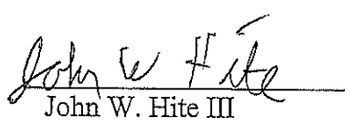
John W. Hite III (T.A. 17611)
SALLEY, HITE, RIVERA & MERCER, LLC
One Canal Place
365 Canal Street, Suite 1710
New Orleans, LA 70130
Telephone: 504/566-8800

J. Gregory Deis
Stephen J. Kane
MAYER BROWN LLP
71 South Wacker Drive
Chicago IL 60606
Telephone: 312/782-0600

Attorneys for JPMorgan Chase & Co. f/k/a Bank One Corporation

VERIFICATION

I certify that the above information and all of the information in this opposition is true and correct to the best of my knowledge. I further certify that a copy of this opposition has been mailed or delivered to the appropriate court of appeal, to the respondent judge, and to all other counsel and unrepresented parties identified on the application's "List of Counsel, etc."



John W. Hite III