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**FRU-CON CONSTRUCTION CORPORATION, a Missouri corporation, Plaintiff,
v. SACRAMENTO MUNICIPAL UTILITY DISTRICT, a municipal utility district;
UTILITY ENGINEERING CORPORATION, a Texas corporation, Defendants.**

NO. CIV. S-05-583 LKK/GGH

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

2007 U.S. Dist. LEXIS 64017

August 17, 2007, Decided

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by *Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist.*, 2008 U.S. Dist. LEXIS 25592 (E.D. Cal., Mar. 28, 2008)

PRIOR HISTORY: *Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist.*, 2007 U.S. Dist. LEXIS 47555 (E.D. Cal., June 15, 2007)

COUNSEL: [*1] Fru-Con Construction Corporation, a Missouri corporation, Plaintiff: Charlie C.H. Lee-PRO HAC VICE, Heidi Brown - PRO HAC VICE, Jonathan A. Beldon-PRO HAC VICE, Nicole Neuman-PRO HAC VICE, Robert M. Moore, Robert D. Windus, Shoshana Rothman-PRO HAC VICE, LEAD ATTORNEYS, Moore and Lee, LLP, McLean, VA; Eileen M. Diepenbrock, LEAD ATTORNEY, The Diepenbrock Law Firm, Sacramento, CA; Gene K. Cheever, LEAD ATTORNEY, Jennifer L. Dauer, Diepenbrock Harrison, Sacramento, CA; John Benjamin Patrick, LEAD ATTORNEY, Watt Tieder Hoffar and Fitzgerald, San Francisco, CA; Robert C. Niesley, LEAD ATTORNEY, Michael R. Gandee, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., Irvine, CA; Bennett Jinchul Lee, Watt Tieder Hoffar & Fitzgerald, LLP, San Francisco, CA.

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For Utility Engineering Corporation, a Texas corporation, Defendant: Daniel D McMillan, LEAD ATTORNEY, Erich Rolf Luschei, Jones Day, Los Angeles, CA.

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For Fru-Con Holding Corporation, Counter Defendant: Kenneth C Mennemeier, Jr, LEAD ATTORNEY, Mennemeier Glassman and Stroud, Sacramento, CA.

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For A. Teichert & Son, Inc., a California corporation, Fru-Con Construction Corporation, a Missouri corporation, Counter Defendants: Jennifer L. Dauer, Diepenbrock Harrison, Sacramento, CA.

JUDGES: LAWRENCE K. KARLTON, SENIOR JUDGE.

OPINION BY: LAWRENCE K. KARLTON

OPINION

ORDER

Pending before the court in this matter are three motions. The first two are motions to dismiss for lack of personal jurisdiction filed by counter-defendants Bilfinger Berger AG ("Bilfinger") and Fru-Con Holding Corporation ("FCHC"). The third motion, filed by the Sacramento Municipal Utility District ("SMUD"), seeks

jurisdictional discovery and a stay of the pending motions to dismiss. The crux of the present dispute is whether the court may exert personal jurisdiction over these counter-defendants based on an alter ego theory. The court resolves the matter on the parties' papers and after oral argument. For the reasons set forth below, the court grants the motions to dismiss and denies the motion seeking jurisdictional discovery.

I. Background

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1 The court dispenses with any recitation of the general [*5] background of this case, as it has been discussed in previous orders.

On December 15, 2006, the court granted Fru-Con's motion to file an amended counterclaim adding Bilfinger and FCHC as counter-defendants in this action. Fru-Con is owned by FCHC, which in turn is owned by Bilfinger. The first amended counterclaim alleges that Bilfinger and FCHC are directly liable to SMUD "because there exists a unity and identity of interest between Bilfinger Berger, Fru-Con Holding and Fru-Con such that adherence to the fiction of separate existences of these entities would sanction fraud and promote injustice." Counterclaim P 6. The counterclaim further alleges that Bilfinger and/or FCHC completely controlled Fru-Con, that Fru-Con was inadequately capitalized, that Bilfinger and/or FCHC made loans to Fru-Con and guaranteed certain aspects of Fru-Con's business obligations, and that employees of the corporations were freely interchanged. *Id.*

In support of these allegations and in response to the pending motions to dismiss, Fru-Con has set forth two sets of facts (detailed in the analysis section of this order) that fall under the two prongs of the alter ego test. See *Sonora Diamond Corp. v. Super. Ct.*, 83 Cal. App. 4th 523, 538, 99 Cal. Rptr. 2d 824 (2000). [*6] One pertains to the alleged unity and identity of interest shared by Bilfinger, FCHC, and Fru-Con (collectively, "the parties"). The other pertains to the alleged injustice that would result if Bilfinger and FCHC were not made parties to this action. With regard to the first set of facts, SMUD maintains it can prove that (1) Bilfinger and FCHC exerted control over Fru-Con's day-to-day activities (2) the parties shared employees, (3) the parties shared legal services, (4) Fru-Con relied upon Bilfinger's experience and financial wherewithal, and (5) Fru-Con was inadequately capitalized.

II. Standard

Motion to Dismiss for Lack of Personal Jurisdiction

When a defendant challenges the sufficiency of personal jurisdiction, the plaintiff bears the burden of establishing that the exercise of jurisdiction is proper. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1,194 (9th Cir. 1988).

Analysis of the appropriateness of the court's personal jurisdiction over a defendant in a case in which the court exercises diversity jurisdiction begins with California's long arm statute. *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974). California's long arm statute authorizes the court [*7] to exercise personal jurisdiction on any basis consistent with the *due process clause of the United States Constitution*. *Cal. Code Civ. Proc. § 410.10*; *Rocke v. Canadian Auto Sport Club*, 660 F.2d 395, 398 (9th Cir. 1981).

Consistent with the *due process clause*, the court may exercise personal jurisdiction over a defendant when the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). If the defendant is domiciled in the forum state, or if the defendant's activities there are "substantial, continuous and systematic," a federal court can exercise general personal jurisdiction as to any cause of action involving the defendant, even if unrelated to the defendant's activities within the state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 *Ohio Law Abs.* 146 (1952); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977).

If a non-resident defendant's contacts with California are not sufficiently continuous or systematic to give rise to general personal jurisdiction, the defendant may still be subject [*8] to specific personal jurisdiction on claims arising out of defendant's contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986).

The court employs a three-part test to determine whether the exercise of specific jurisdiction comports

with constitutional principles of due process. See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). First, specific jurisdiction requires a showing that the out-of-state defendant purposefully directed its activities toward residents of the forum state or purposefully availed itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws. *Burger King*, 471 U.S. at 474-75. Second, the controversy must be related to or arise out of defendant's contact with the forum. *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). Third, the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. *Haisten*, 784 F.2d at 1397.

III. Analysis

Here, SMUD argues that the court may exercise personal jurisdiction [*9] under an alter ego or agency theory, or directly. As explained below, none of these avenues is availing, and the motions to dismiss must be granted.

A. Alter Ego & Agency Theory

First, SMUD asserts that the court may exercise personal jurisdiction over Bilfinger and FCHC because they are alter egos of Fru-Con. Under California law, two conditions must both be met in order to invoke the alter ego theory: (1) a unity of interest and ownership must exist between two corporate entities such that there does not exist a separateness between them; and (2) injustice would result if the acts in question were treated as those of only one of the corporate entities. *Sonora Diamond*, 83 *Cal. App. 4th* at 538. "[B]oth of these requirements must be found to exist before the corporate existence will be disregarded." *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 *Cal. App. 2d* 825, 837, 26 *Cal. Rptr.* 806 (1962). SMUD bears the burden in presenting evidence that satisfies both prongs of the test. *Mid-Century Ins. Co. v. Gardener*, 9 *Cal. App. 4th* 1205, 1212, 11 *Cal. Rptr. 2d* 918 (1992).

The agency theory of jurisdiction is closely related but distinct. In the case of agency, "the question is not whether there exists justification to disregard [*10] the subsidiary's corporate identity, the point of the alter ego analysis, but instead whether the degree of control exerted over the subsidiary by the parent is enough to reasonably deem the subsidiary an agent of the parent under traditional agency principles." ² *Sonora Diamond*,

83 Cal. App. 4th 523, 541, 99 Cal. Rptr. 2d 824. Nevertheless, in the case at bar, one of the principal arguments marshaled by SMUD in support of its claim that a unity of interest exists (under the first prong of the alter ego test) is that FCHC and Bilfinger exerted day-to-day control over Fru-Con. Accordingly, the court addresses both the alter ego and agency theories simultaneously, because they both rely on a similar body of evidence.

2 A "variant" of the agency theory is the "representatives services" doctrine, which permits jurisdiction where the subsidiary "performs a function that is compatible with, and assists the parent in the pursuit of, the parents' own business." *Sonora Diamond*, 83 Cal. App. 4th at 543. This doctrine is inapplicable to the facts here, because Fru-Con operated its business for over 100 years prior to its relationship with Bilfinger, just as Bilfinger has likewise conducted its business operations for [*11] a century prior to affiliating with Fru-Con.

1. Injustice

Here, in reverse order, the motions can be resolved on the second prong of the test, because SMUD has not put forward (and cannot put forward) enough evidence to prove that injustice would result if Bilfinger and FCHC were not made parties to this action.

SMUD initially maintains that "inequity would result because . . . Bilfinger, FCHC, and Fru-Con failed in key instances to draw any division between themselves as allegedly separate entities." Opp. at 28. If this were sufficient, however, the injustice prong of the test would collapse into the unity prong and become superfluous. Acknowledging as much, SMUD then goes on to argue that Fru-Con would not be able to pay a judgment if one is obtained in the District's favor, or that there is at least a risk of such a result. In the vast majority of cases, courts have only pierced a corporation that was bankrupt, insolvent, or otherwise incapable of paying judgment.³

3 See, e.g., *Norins Realty Co. v. Consol. Abstract & Title Guar. Co.*, 80 Cal. App. 2d 879, 883, 182 P.2d 593 (1947); *M.O.D. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992) ; *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1070 (C.D. Cal. 2002); [*12] *Haskell v. Time,*

Inc., 857 F. Supp. 1392, 1403 (E.D. Cal. 1994). Nevertheless, there have also been cases in which the courts were silent on the ability of a defendant to satisfy a judgment. See, e.g., *Elliott v. Occidental Life Ins. Co. of Cal.*, 272 Cal. App. 2d 373, 377, 77 Cal. Rptr. 453 (1969); *Mathes v. Nat'l Utility Helicopters Ltd.*, 68 Cal. App. 3d 182, 190, 137 Cal. Rptr. 104 (1977).

There appears to be no dispute that at all times relevant to this matter, that Fru-Con was covered by a bond that had a minimum capacity of \$ 750 million dollars, and its present uncommitted capacity is in excess of \$ 500 million dollars -- which would almost certainly cover any judgment that SMUD might obtain in this action. Decl. of James Scott, P 8. This fact alone is sufficient to negate the imposition of alter ego liability.⁴ [*13] In addition, Fru-Con has provided evidence that it is presently involved in ongoing projects throughout the United States totaling approximately \$ 600 million. Scott Decl., P 8. Of course, this figure represents the gross total value of its current construction contracts -- not necessarily its ability to pay a judgment of a particular size --but it is at least suggestive of Fru-Con's current financial health.

4 The fact that the bonding company, Travelers, has filed its own suit and disputes its obligation to pay does not change this conclusion. SMUD has the burden of showing that injustice would result, and the chance that Travelers might be able to avoid liability is not enough to satisfy SMUD's burden under the alter ego test. Furthermore, this is an obstacle that no amount of discovery pertaining to the unity of interest prong can cure.

SMUD makes several arguments, none of which are responsive to the fact that a bond covers the project. For example, SMUD asserts that Fru-Con may be unable to pay because it was allegedly undercapitalized for the project. The alleged undercapitalization stems from the fact that the project's performance bond, which SMUD required, was obtained by Bilfinger, [*14] rather than independently by Fru-Con. Nevertheless, the counterclaim states that "[a]s part of the Contract, Fru-Con was obligated to obtain and provide to the District a performance bond in a form acceptable to the District, which Fru-Con did" -- suggesting that SMUD found the bond itself to be acceptable, even if it was unhappy to discover the ultimate source supporting the

bond. Counterclaim P 2.

SMUD also points out that there have been frequent infusions of money into Fru-Con by Bilfinger. Decl. of John Poulos, Ex. P (discussing cash infusions from Bilfinger). There is also evidence, however, indicating that Fru-Con has never failed to have cash available to meet its obligations as they became due. Poulos Decl., Ex. P. See *Platt v. Billingsley*, 234 Cal. App. 2d 577, 583, 44 Cal. Rptr. 476 (1965) (focusing on whether company had assets to meet its debts "as they came due"). To the extent that this cash was infused by Bilfinger, there is no guarantee that such an infusion would be forthcoming in the event of a judgment against Fru-Con, but Fru-Con's historical payment history is nevertheless probative of its future payment ability.⁵

5 Although SMUD has presented (hearsay) evidence that Bilfinger is [*15] contemplating getting out of the U.S. construction business, this does not prove that Fru-Con or Bilfinger is in financial trouble. Poulos Decl., Ex. YY (news article reporting Bilfinger is considering pulling out of the U.S. construction business). It is also worth noting that Fru-Con has been in existence for over 130 years and is the 10th oldest contracting firm in the U.S.

Furthermore, while it is unclear if the presence of bad faith is a requirement for alter ego liability or merely a factor, compare *Sonora Diamond*, 83 Cal. App. 4th at 539 with *Elliott*, 272 Cal. App. 2d at 377, there is also insufficient evidence from which to conclude that Fru-Con acted in bad faith. SMUD claims that it was misled because Fru-Con described itself in its Statement of Qualifications as "a major international constructor" and that it had a \$ 750 million bonding capacity -- which SMUD maintains would be true only if the statements encompassed both Fru-Con and Bilfinger, rather than only Fru-Con. This is far from clear, however, and SMUD has not discharged its heavy burden in piercing the corporate veil.⁶

6 With regard to the quibble over whether Fru-Con was an "international" constructor, there is evidence [*16] that the company had, at the time of its application, conducted "start-up work" in non-U.S. countries such as Mexico and Indonesia, Poulos Decl., P 17, Ex. M, but it is unclear if this could reasonably refer to "construction" work, and if not, whether this

would rise to the level of bad faith conduct.

With regard to the bonding issue, there is simply no dispute that Fru-Con was in fact covered by a \$ 750 million bond. The only point of contention is that SMUD was unaware of the parental guarantee that supported the bond. The ability to secure a bond may have been valuable to SMUD for, primarily, its existence and, incidentally, what it signaled (i.e., Fru-Con's wherewithal to secure a bond), but it is doubtful that the non-disclosure of Bilfinger's role rose to the level of bad faith.

In any event, because the bond is sufficient to cover any judgment, the court finds that it is not apparent that injustice would result if Bilfinger and FCHC were not party to this action.

2. Unity and Identity of Interest

Even if Fru-Con could meet the hurdle presented by the injustice prong of the alter ego analysis, it would nevertheless falter under the unity prong. The factors relevant to whether there [*17] is a unity and identity of interest between corporations were set forth in *Associated Vendors*. 210 Cal. App. 2d at 837-40. They include, as SMUD maintains is present here, the control of the subsidiary's day-to-day operations, commingling of funds, shared employees, shared legal services, disregard of corporate formalities, and inadequate capitalization. *Id.* There is no required magic number of factors that must be met in order for alter ego liability to be imposed. See *Mesler v. Bragg Mgmt. Co.*, 39 Cal. 3d 290, 300, 216 Cal. Rptr. 443, 702 P.2d 601 (1985) ("There is no litmus test to determine when the corporate veil will be pierced"). A corporate veil, however, ought to be pierced only in "rare" and "exceptional" circumstances. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003).

Some of the factors alleged in the counterclaim, such as commingling of funds and the diversion of assets, lack any-evidentiary support whatsoever. See Decl. of Joerg Mrosek P 11-12 (adherence to corporate formalities and no shared bank accounts); Scott Decl. P 5-6 (same). Accordingly, the court only focuses on the factors supported by evidence.

a. Day-to-Day Control

Where a parent dictates every facet of a subsidiary's business from policy [*18] to day-to-day operations, courts have found the alter ego test satisfied. See *Rollins Burdick Hunter of S. Cal., Inc. v. Alexander & Alexander Servs., Inc.*, 206 Cal. App. 3d 1, 11, 253 Cal. Rptr. 338 (1988) (finding alter ego where "every facet" of the subsidiary's business seemed to be dictated by the parent, including budget approval, hiring, compensation, and certain real estate purchases and leases); *Mathes v. Nat'l Utility Helicopters Ltd.*, 68 Cal. App. 3d 182, 190-91, 137 Cal. Rptr. 104 (1977) (finding alter ego where parent exercised control over subsidiary's budget, replaced the subsidiary's general manager, and sent employees to subsidiary to investigate problems and report back).

Nevertheless, a "parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is 'consistent with the parent's investor status.' Appropriate parental involvement includes: 'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures.'" *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996); see also *Calvert v. Huckins*, 875 F. Supp. 674, 679 (E.D. Cal. 1995) [*19] (holding that plaintiffs "must present evidence showing that [the parent companies] do more than exercise the broad oversight indicated by common ownership and common directorship").

Here, SMUD identifies two examples of Bilfinger's and (to a lesser extent) FCHC's alleged day-to-day control over Fru-Con. First, SMUD points to a "Letter of Direction" issued by Bilfinger to Fru-Con setting forth the overall limits of Fru-Con's management authority. Poulos Decl., PP 7, Ex. C. The Letter required Fru-Con to seek the written approval of the FCHC Board for what SMUD terms "routine" activities, such as "buying or selling real estate; leasing real estate for more than five years; opening or closing branch offices; entering into contracts outside of Fru-Con's traditional business activities; initiating litigation estimated to cost more than \$ 200,000; setting an annual salary budget for employees; and appointing officers." Opp. at 11-12.

These activities may reasonably be characterized, as counter-defendants term them, "macro-management" decisions. They show that only FCHC was entitled to make decisions regarding significant contracts and major personnel decisions. They do not evidence day-to-day

[*20] control over Fru-Con. See *Wady*, 216 F. Supp. 2d at 1068-69 (finding appropriate parental involvement where parent monitored subsidiary's performance, supervised the subsidiary's finance and capital budget decisions, and articulated general policies and procedures); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459-60 (2d Cir. 1995) (no alter ego liability where parental approval was required for leases, major capital expenditures, and the sale of its subsidiary's assets). The fact that some of the required approvals were obtained via telephone with a group of three board members, Poulos Decl. P 8, Ex. D, rather than through the formality of a full board meeting, gives the court pause, but this does not justify alter ego liability.

The second example cited by SMUD of alleged day-to-day control stems from the involvement of Peter Ophoven, a Bilfinger executive, at the project site. Ophoven testified that he was present at the site for a maximum of approximately 36 days spread out over the course of several months. Poulos Decl., Ex. T (4 days in March; 5 days in September; 2 days in December; 18 days in January; 7 days in February); *Id.* (stating that "[m]ost of the guys knew me."). He was at [*21] the site long enough that he was listed as a "monthly employee" (at least for accounting purposes). Poulos Decl. P 21, Ex. Q. He also had his own telephone extension at the site. Poulos Decl. P 22, Ex. R. During his visits, Ophoven discussed the project schedule, cost forecasts, possible improvements regarding cost and time, and interviewed various project executives. Poulos Decl. P 25, Ex. U.

Again, these activities are not enough to show that Bilfinger overstepped its bounds. Permissible parental conduct includes monitoring and oversight of the subsidiary. See *Wady*, 216 F. Supp. 2d at 1068-69; *AT&T*, 94 F.3d 586 at 591. Interviewing project executives, keeping abreast of project developments, and discussing potential improvements do not rise to the level of day-to-day control. Unlike the cases in which courts pierced the corporate veil, see, e.g., *Rollins*, 206 Cal. App. 3d at 11; *Mathes*, 68 Cal. App. 3d at 182, Fru-Con and Bilfinger each adhered to their own set of corporate formalities from accounting and tax standpoints through annual meetings, had separate bank accounts and payrolls, and separately maintained corporate minutes. Jrosek Decl. P 11; Scott Decl. P 5.

b. [*22] Shared Employees

Next, SMUD points out that Bilfinger, FCHC, and

Fru-Con have shared some of the same employees.⁷ Courts have noted the existence of shared employees in imposing alter ego liability. See, e.g., *Rollins*, 206 Cal. App. 3d at 11; *Mathes*, 68 Cal. App. 3d at 191. At the same time, however, other courts have observed that "[i]t is considered a normal attribute of ownership that officers and directors of the parent serve as officers and directors of the subsidiary." *Sonora Diamond*, 83 Cal. App. 4th at 548-49; see also *Doe v. Unocal*, 248 F.3d 915, 925-26 (9th Cir. 2001) (noting that it is appropriate for directors of a parent to serve as directors of the subsidiary without exposing the parent to liability for the subsidiary's act). Accordingly, while this factor carries some weight, the court will not impose alter ego liability without a more substantial showing.

7 For example, Fru-Con Vice President and General Counsel Len Ruzicka testified that he was an officer of Fru-Con, FCHC, and other Fru-Con related entities. Poulos Decl. P 38, Ex. HH. Fru-Con controller Martin Schaper and Vice President of Audit Tanya Gale testified about various positions that they alternately filled [*23] for Bilfinger and Fru-Con over the years. Poulos Decl. P 12, Ex. H; P 59, Ex. CCC. Fru-Con Operations Manager Earle Hardgrave also came from Bilfinger and went back to Bilfinger. Poulos Decl. P 35, Ex. EE.

c. Legal Services

SMUD also argues that Len Ruzicka, Fru-Con's general counsel, provided legal services for both Fru-Con and FCHC, and was an officer of both. Poulos Decl. P 38, Ex. HH. The use of the same lawyers is another relevant factor in the alter ego analysis. See *Slottow v. Am. Cas. Co.*, 10 F.3d 1355, 1360 (9th Cir. 1993) (use of same lawyer a "relevant factor[]"); *Marr v. Postal Union Life Ins. Co.*, 40 Cal. App. 2d 673, 683, 105 P.2d 649 (1940) (use of same lawyer "a fact entitled to consideration"); *Calvert*, 875 F. Supp. at 679 (use of same lawyer "carries plaintiffs' [alter ego] argument the furthest" but nevertheless finding no alter ego liability). At the same time, "common characteristics [such] as shared professional services" may be normal and appropriate. See *Sonora Diamond*, 83 Cal. App. 4th at 540-41.

Here, Ruzicka did not testify that he provided legal advice to both Fru-Con and FCHC in his capacity as an officer of each corporation; rather, he stated that it was his role in such [*24] capacities to complete the meeting

minutes and oversee certain activities from a corporate legal standpoint. Poulos Decl. P 38, Ex. HH ("My primary function as a secretary of each of those corporations is to do the corporate minutes, [] be involved in overseeing what was done from a legal corporate point of view. So it would have been more of . . . corporate legal services."). That Ruzicka "change[d] hats," *Sonora Diamond*, 83 Cal. App. 4th at 548-49, like the other employees who have worked for Fru-Con in addition to FCHC and/or Bilfinger, is still not enough to establish alter ego liability.

Ruzicka's contact with Bilfinger was even less direct than the contact with FCHC. He testified that he would call Bilfinger's general counsel and "keep him informed." Poulos Decl. P 38, Ex. HH. As a subsidiary, Fru-Con had a duty to report significant legal issues to its parent. *Sonora Diamond*, 83 Cal. App. 4th at 548-49. There is no indication that Bilfinger or its general counsel directed Fru-Con's day-to-day litigation.

d. Experience and Financial Wherewithal

SMUD also maintains that Fru-Con misrepresented its experience, relying on Bilfinger's track record for its representation that it was a [*25] "major international constructor," (a point addressed above) and also misrepresented its financial wherewithal by not disclosing Bilfinger's backing in obtaining the bond. "[T]he concealment and misrepresentation of the identity of responsible ownership, management and financial interest, or concealment of personal business activities" is a factor in the alter ego analysis. *Associated Vendors*, 210 Cal. App. 2d at 840-41; *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP*, 69 Cal. App. 4th 223, 251, 81 Cal. Rptr. 2d 425 (1999) (describing "financial misrepresentation" as an "important" factor).

Fru-Con's conduct, however, does not rise to the level of a "financial misrepresentation." The fact that Bilfinger used its financial weight to secure Fru-Con's bond is insufficient to establish alter ego liability. See *Akzona, Inc. v. E.I. Du Pont De Nemours and Co.*, 607 F. Supp. 227, 238 (D. Del. 1984) (parental guaranty of third party loans insufficient); *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil*, 456 F. Supp. 831, 841-43 (D. Del. 1978) (surety on bank loans insufficient); *Calvert*, 875 F. Supp. at 679 (parental guarantees appropriate feature of parent-subsidiary relationship). As noted above, from [*26] all that appears, what was most valuable to SMUD (and what SMUD inquired about) was the existence of

the bond, not its source.

e. Undercapitalization

SMUD argues that Fru-Con was undercapitalized, another factor in the alter ego analysis. See *Associated Vendors*, 210 Cal. App. 2d at 839. To be adequately capitalized, a subsidiary must have "capital reasonably regarded as adequate to enable the corporation to operate its business and pay its debts as they mature." *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984).

SMUD bases its argument on Bilfinger's role in securing the bond (addressed above) and on the cash infusions that Fru-Con received from Bilfinger. Poulos Decl. P 20, Ex. P (testimony of Fru-Con's cash manager, who stated that "if there was ever a need for cash that Bilfinger would -- there would be a cash infusion."). This latter practice, however, is a common feature of parent-subsidiary relationships, and the fact that a subsidiary receives cash infusions from time to time does not necessarily mean that it has been inadequately capitalized. See *Sonora Diamond*, 83 Cal. App. 4th at 546 (finding corporation "was adequately [*27] capitalized at the outset and regularly funded, by intercompany loans, when operational losses made cash infusions necessary"); Poulos Decl. P 20, Ex. H (Fru-Con controller testifying that when Fru-Con "had some longer-term cash flow problems" in the 1980s, Bilfinger would send cash).

In sum, SMUD has not tendered sufficient evidence to show that there was a unity of interest and identity between Fru-Con, on the one hand, and Bilfinger or FCHC, on the other. With regard to FCHC, the only evidence presented in support of an alter ego theory is that (1) Fru-Con was required to obtain FCHC board approval with respect to certain "macro-management" decisions contained in the Letter of Direction, (2) Fru-Con and FCHC shared certain employees, and (3) Fru-Con's general counsel also performed certain tasks as an officer of FCHC from a legal standpoint. This falls far short of the required showing for alter ego liability.

With regard to Bilfinger, the evidence at issue consists of (1) Ophoven's periodic visits to the site over a span of several months, (2) shared employees, (3) the description of Fru-Con as a major international constructor and the alleged reliance on Bilfinger's experience in [*28] making that statement, (4) Bilfinger's

role in obtaining the bond, and (5) Bilfinger's cash infusions to Fru-Con. While perhaps a closer issue than that presented by FCHC, SMUD has also not introduced sufficient evidence to prove that alter ego liability is warranted.

B. Direct Contacts

Alternately, SMUD asserts that the court may exert jurisdiction over Bilfinger and FCHC based on their direct contacts with California. As detailed below, this argument is even less availing than jurisdiction under an alter ego or agency theory.

1. General Jurisdiction

General jurisdiction can exist where a foreign corporation's contacts with the forum are "continuous and systematic general business contacts." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). The standard for establishing general jurisdiction is "fairly high and requires that the defendant's contact be of the sort that approximate physical presence." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (internal citations and quotations omitted).

With regard to Bilfinger, the only alleged direct contact with California consists of two general engineering licenses, the most recent [*29] of which expired in 1992, a decade before Fru-Con's contract with SMUD was negotiated. Poulos Decl. PP 17, 19, Ex. O. These licenses are simply too stale to permit the exercise of general jurisdiction. Courts reach back no more than five to seven years in examining jurisdictional facts. See *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996) (noting that other courts have found three to seven years to be reasonable); *Slurry Sys. v. Birmingham Found. Equip.*, 2005 U.S. Dist. LEXIS 20238, *12-13 (N.D. Ind. 2005) (declining to examine contacts beyond seven years).

With regard to FCHC, there are two alleged contacts: (1) a lease for three cars associated with the project and (2) an insurance policy endorsement that covered some project-related equipment. Poulos Decl. P 27, Ex. W (lease agreements); P 28, Ex. X (insurance policy). These two contacts are not the sort that "approximate physical presence." *Bancroft & Masters*, 223 F.3d at 1086.

2. Specific Jurisdiction

Alternately, a court may exert specific jurisdiction where (1) the defendant has purposefully availed itself of a forum benefit, (2) the controversy is related to or arises out of the defendant's [*30] contacts, and (3) the exercise of jurisdiction would comport with fair play and substantial justice. *Burger King*, 471 U.S. at 475-78.

With regard to Bilfinger, all of SMUD's jurisdictional claims are derivative. Accordingly, because SMUD cannot establish jurisdiction under an alter ego or agency theory, there is no specific jurisdiction over Bilfinger. With regard to FCHC, the evidence shows that FCHC received the lease agreements, but there is no indication that FCHC was the contracting party or in control of the cars in question. Moreover, although there is evidence that an insurance policy obtained by FCHC was amended to include certain Fru-Con equipment used on the project, this contact, like the lease agreement, is simply too peripheral to be said to give rise to the present controversy. Relatedly, it would not comport with fair play and substantial justice to hail international defendants into California on such an attenuated basis.

C. Discovery

The final matter before the court is SMUD's motion, which seeks jurisdictional discovery and requests that the court stay any decision on the pending motions to dismiss.

There is no definitive standard for whether to permit jurisdictional [*31] discovery. Some courts have held that before allowing such discovery, the plaintiff must first make a "colorable or prima facie showing of personal jurisdiction." See *Central States v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000); see also *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625 (1st Cir. 2001) ("[A] diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of in personam jurisdiction may well be entitled to a modicum of jurisdictional discovery if the corporation interposes a jurisdictional defense."); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 186 (2d Cir. 1998) (denying discovery where plaintiffs "did not establish a prima facie case that the district court had jurisdiction").

Other courts, however, have rejected the requirement of a prima facie case. See *Orchid Biosciences Inc. v. St.*

Louis Univ., 198 F.R.D. 670, 673 (S.D. Cal. 2001) ("It would [] be counterintuitive to require a plaintiff, prior to conducting discovery, to meet the same burden that would be required in order to defeat a motion to dismiss. Moreover, the authorities from our circuit . . . indicate that our Federal Rules envision a [*32] broader scope of even preliminary discovery."). The Ninth Circuit has also held that while "[a]n appellate court will not interfere with the trial court's refusal to grant discovery except upon the clearest showing that the dismissal resulted in actual and substantial prejudice to the litigant," discovery "should be granted where pertinent facts bearing on the question are controverted . . . or where a more satisfactory showing of the facts is necessary." *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (internal quotation marks omitted).

Here, most of the facts themselves are not seriously in dispute; the issue is whether they rise to a level warranting application of the alter ego theory. Furthermore, there is no reasonable likelihood that additional discovery would help SMUD to prove that injustice would result if Bilfinger and FCHC were not made party to this action.⁸ Without proof of this necessary element, any other discovery would be futile. The simple fact remains that a bond exists (with an uncommitted capacity almost assuredly large enough to satisfy any judgment). In addition, Fru-Con has ongoing projects worth hundreds of millions of dollars and has a track [*33] record of timely payment of debts. Against this background, it would be unfair to permit SMUD to conduct jurisdictional discovery.

⁸ As noted earlier, although SMUD maintains that Travelers' legal obligation to pay is in doubt, this doubt is not enough to satisfy its burden of showing that injustice will result. Furthermore, additional discovery would not help SMUD with regard to this issue.

IV. Conclusion

For the reasons set forth above, the court GRANTS Bilfinger and Fru-Con Holding Corporation's motions to dismiss for lack of personal jurisdiction (Doc. Nos. 410 & 412) and DENIES SMUD's motion for jurisdictional discovery (Doc. No. 419).

IT IS SO ORDERED.

DATED: August 17, 2007.

LAWRENCE K. KARLTON
SENIOR JUDGE

UNITED STATES DISTRICT COURT