IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jes Solar Company Limited, et al.,

Plaintiffs,

v.

Matinee Energy Incorporated, et al.,

Defendants.

No. CV-12-00626-TUC-DCB

ORDER

On November 17 and 18, 2015, this case was tried before the Court, sitting without a jury. Liability having been established by default against the Defendants,[1] the sole issue before the Court was the amount of damages owed to the Plaintiffs. The Court has heard the testimony and has examined the proofs offered by the parties, and has heard the arguments of counsel. Being, therefore, fully advised, the Court now finds generally in favor of Plaintiffs and against the Defendants. The Court makes the following special Findings of Fact and Conclusions of Law pursuant to the Federal Rules of Civil Procedure, Rule 52(a) and (c) which constitutes the decision of the Court herein:

[1] On July 25, 2013, default was set aside for Defendant Chun Rae Kim. (Order (Docs. 69), *see also* (Amended Order (Doc. 71)). Defendant Chun Rae Kim was dismissed without prejudice from the action on November 12, 2015. (Docs. 339, 340.) The Court relies on the facts as alleged in the First Amended Complaint (FAC) (Doc. 25) because the Second Amended Complaint (SAC) was an amendment only as to Chun Rae Kim to add facts to conform to the evidence and better state the claim of conspiracy against him; as against the defaulted Defendants, the FAC and SAC are identical, except for the paragraph numbers. (Order (Doc. 195) at 17.)

FINDINGS OF FACT

1. To the extent these Findings of Fact are also deemed to be Conclusions of Law, they are hereby incorporated into the Conclusions of Law that follow.

2. On August 20, 2012, Plaintiff Jes Solar Co. Ltd. (Jes Solar) filed this law suit claiming breach of contract, unjust enrichment, conspiracy, fraudulent inducement, conversion and piercing the corporate veil. (Complaint (Doc. 1)).

3. On November 19, 2012, the First Amended Complaint (FAC)[2] was filed to join Plaintiff Airpark Co., Ltd. (Airpark) with Jes Solar, nominally[3] named the JES/Airpark Consortium (J&A Consortium), as joint Plaintiffs jointly seeking relief, and added claims by Hankook Technology, Inc. (Hankook), formerly K&Company. (FAC (Doc. 25)). The causes of action remained the same.

4. The Defendants were properly served, *see* (Orders (Docs. 69, 71, 110, 169, 230, 269, 324) (discussing service)), and on December 11, 2012, the Clerk of the Court entered default against the Defendants[4] for failing to appear or defend the action pursuant to Fed. R. Civ. P. 55(a). (Order of Default (Doc. 40)).

5. By default, Defendants are liable for damages which flow naturally from Plaintiffs' legal injuries alleged in the FAC.

6. Hankook's compensatory damages total $825,753.62,[5] including $500,000 in advance fees; $146,284.88 for travel and related extra wages; $142,995 for fees and costs associated with K& Company Solar USA, and $36,473.74 in attorney fees paid to Lim, Ruger & Kim, L.L.P, but does not include investment losses in Il Yang. *See* (Plaintiffs'

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[2] See n. 1.

[3] J&A Consortium did not exist as a separate formal corporate entity, (Ps' Motion to Amend (Doc. 21) at 7), but Jes Solar and Airpark acted jointly pursuant to an agreement executed August 12, 2011. Exhibit 51: Joint Solar Project Agreement.

[4] See n. 1.

[5] The Court assesses damages in U.S. dollars.

Amended Proposed Findings of Fact and Conclusions of Law (Ps' Amend. Prop. FoF and CoL) (Doc. 357) at 11: 1/11/13 KRW conversion rate of 1,056.)

7. The J&A Consortium's damages total $1,826,232.08, including $996,287.88 in advance fees paid to Samsun and construction design fees paid to Samsun's subcontractor New EnerTec; an unauthorized transfer of $670,000 from J&A Solar USA to Matinee; $89,391.34 in prejudgment interest on bonds; $5,475.85 in travel expenses incurred by Jes Solar; $8,293.56 in travel expenses incurred by Airpark, and $56,783.45 in wages incurred by Airpark, but not losses incurred by Jes Solar's purchase of solar wafers from Wintec Holdings Co. or Airpark's purchase of consulting services from Semico Technology, Standard Partners, or SunCarrier. (Ps' Amend. Prop. FoF and CoL (Doc. 357) at 24: 1/11/13 KRW conversion rate of 1,056.)

Hankook

8. Hankook had face-to-face meetings with Matinee on July 21, 2010 and August 1, 2010, in Las Vegas, whereat Matinee fraudulently misrepresented that it had secured funding for the Matinee Project from JP Morgan Chase and demanded that in order for Hankook to participate in the Matinee Project, it should form a consortium with a company of substantial size and credible financial ability and make an advance fee payment in the amount of $500,000 to Defendant Samsun. (FAC ¶27.)

9. As a result of its July 21, 2010, meeting with Matinee, Hankook entered into a partnership agreement with Defendant Samsun, (FAC ¶ 28), whereby Hankook paid advance fees to Samsun, upon demand by Defendants Matinee and Samsun, in the total amount of $500,000.00, by wiring the following: $100,000.00 on July 26, 2010; $100,000.00 on August 13, 2010; $75,000.00 on September 17, 2010; $75,000.00 on October 1, 2010, and $150,000.00 on November 5, 2010. (FAC ¶ 28); Exhibit 23: cert. money transfers.

10. The Hankook-Samsun Partnership Agreement provided for Defendant Samsun to provide Hankook with various services, such as: basic geotechnical investigations, inter-connection impact studies, the management of public relations with *The Wall Street*

Journal, *The New York Times* and other major newspapers and publications, and the maintenance of the relationship with JP Morgan Chase. (FAC ¶ 28.)

11. There was not performance and consideration related to the Hankook-Samsun agreement by Matinee's execution of the Pre-Master Agreement on July 30, 2010, or the Hankook-Matinee Definitive Agreement on October 22, 2010. (Transcript of Record (TR) Day 2 (Doc. 355): Bong Ki Lee at 33) (testifying that Hankook agreed to contract with Samsun for the various pre-construction services in order to be in the running for the EPC Matinee Project contract).

12. Hankook did not receive the contracted services or compensation (FAC ¶ 90), and the Engineering Procurement Construction (EPC) Agreement was never signed by Matinee. (FAC ¶ 39.)

13. Defendants acted together knowing at the time they entered into the contracts that they could not perform because in fact they had not secured and could not secure funding from JP Morgan Chase, (FAC ¶ 112), and acted with the intent to defraud the Plaintiffs, (FAC ¶ 101), and undermine fulfillment of the Agreements, (FAC ¶ 105).

14. On September 9, 2010, as demanded by Matinee, Hankook formed a consortium with LS Industrial Systems Co., Ltd. (LSIS), a South Korean company of prominence and fiscal credibility, to proceed with the Matinee Project. (FAC ¶ 30.)

15. On or about November 23, 2010, in preparation for the commencement of construction, Hankook established its U.S. subsidiary, K& Company Solar USA, Inc. (FAC ¶ 34.)

16. Hankook is the real party in interest for losses incurred by K& Company Solar USA, its United States subsidiary.

17. Based on Defendant Chung's recommendation, Hankook retained Lim, Ruger & Kim, L.L.P. ("Lim, Ruger & Kim"), a California based law firm, to review certain legal aspects of the Matinee Project. (FAC ¶36); Exhibit 26: Retainer Agreement 12/22/2010. Pursuant to the legal service agreement, Hankook made payments of legal fees to the law firm in the total amount of $36,473.74. Exhibit 27:cert. money transfers.

18. While proceeding with the Matinee Project, Hankook was required to make numerous trips to the United States to have meetings with Defendants, to attend signing ceremonies and to attempt meeting with JP Morgan Chase. (FAC ¶¶ 27, 29, 31-33, 35, 37-38).

19. Hankook's business records include its financial report for 2010, wherein its auditor required Hankook to treat as expenses and correspondingly as losses in its accounting books and records the travel expenses and extra wages associated with the Matinee Project in the total amounts of KRW 139,788,833/$132,375.79 for travel and KRW 16,800,000/$15,909.09 for extra wages associated with the Matinee Project. Exhibit 28: accounting record; TR Day 2 (Doc. 355); Bong Ki Lee at 20, *see also* (Ps' Amend. Prop. FoF CoL) (Doc. 357) at 11: 1/11/2013 KRW conversion rate of 1,056.)

20. Defendants did not line-item object to Hankook's travel expenses as requested by the Court, (TR Day 2 (Doc. 355) at 48), because Defendants submit Exhibit 29 was not admitted into evidence, but Exhibit 29 was admitted as supporting evidence for Exhibit 28, (TR Day 2 (Doc. 355) at 28).

21. Hankook withdraws claims for travel expenses as follows: Timberland KRW 63,243, Calvin Klein KRW 125,950, Brooks Brothers KRW 324,359 (Doc. 44-11, p.102), Goody Sporting Goods KRW 94,176 (id., p.106), Sports America KRW 111,810, Dirty Harry Gun Club KRW 306,722, Pacific Island Club KRW 47,188, Macy's KRW 488,903 (id., p.107), Beach Health Spa KRW 344,844 (id., p.109), Brooks Brothers KRW 362,724 (id., p.112). The total sum is KRW 2,269,919 (equivalent roughly to $2,000). (Reply (Doc. 360) at 13-14 (citing Exhibit 29: documents submitted to external auditor; Doc. 44-11 at 8—120).

22. The total loss for travel ($132,375.79) is reduced by $2,000 for a total loss of $130,375.79 for travel related to the Matinee Project in the year 2010. (Ps' Amend. Prop. FoF CoL) (Doc. 357) at 11: 1/11/2013 KRW conversion rate of 1,056.)

23. Defendants never scheduled a meeting as requested by Hankook with JP Morgan Chase to confirm financing for the Matinee Project. (FAC ¶¶ 32-33, 35.)

24. By the end of December, 2010, Hankook ceased involvement with the Matinee Project. (FAC ¶¶ 38-39.)

25. Hankook's business records reflect a loss in its accounting books and records for its accounting year 2011 (January through October), fees, costs and expenses in an amount of $142,995.00, which were incurred in establishing and maintaining its wholly owned U.S. subsidiary, K& Company Solar USA, Inc., in preparation for the commencement of the Matinee Project. Exhibit 25: financial statements.

26. Expenses incurred after Hankook ceased involvement with the Matinee Project are not recoverable.

27. Expenses incurred before Hankook met with Defendants are not recoverable. *See* (FAC ¶ 26 (alleging on April 15, 2010, relying on negotiations with Il Yang, Hankook purchased a 50% interest in Il Yang "to pave the way for a joint venture agreement."), *see also* (FAC ¶ 25), Exhibit 17 (Il Yang-Hankook Share Transfer Agreement, related to Il Yang's contract with Matinee to construct the first stage of the Matinee Project in California and Nevada.) Hankook may not recover for losses due to its investment in Il Yang because Hankook invested in Il Yang, effective April 15, 2010, prior to meeting with Matinee on July 21, 2010 and August 1, 2010, whereat the fraudulent misrepresentations made by Matinee to Hankook from which flow Defendants' liability for damages.

J&A Consortium

28. Early in 2011, LSIS withdrew from the consortium with Hankook and introduced Samsun to Jes Solar, a solar cell manufacturer and supplier company for LSIS. (FAC ¶ 41); TR Day 1 (Doc. 354): Jae Kyung Choi at 19.

29. On March 12, 2011, Defendant Samsun, as the agent company for Matinee, met with Jes Solar and made false representations similar to those made to Hankook, including that Matinee was developing $5 billion worth of solar projects in the United State, with funding secured from JP Morgan Chase and government funding, and had already developed 15 solar plants in California and Arizona. (FAC ¶¶ 43, 45.)

30. Jes Solar met with Matinee on April 11, 2011 and June 31, 2011, in Las Vegas, (FAC ¶ 47), and met with Matinee in New York on July 16, 2011, (FAC ¶¶ 47-48).

31. Jes Solar refused to make an advance fee payment until it received a Letter of Credit (LC) from JP Morgan Chase reflecting that financing was secured, (FAC ¶¶ 50-51), but began making advance payments to Samsun after the July 16, 2011, meeting in New York where Defendant Chin agreed to personally secure Jes Solar's advance payments and Jes Solar entered into the Jes Solar-Samsun Partnership Agreement and the Jes Solar-Matinee Master Agreement. (FAC ¶¶ 48, 52-53); Exhibit 3: Samsun-Jes Solar Agreement, July 16, 2011; Exhibit 33: Matinee-Jes Solar Master Agreement, July 14, 2011.

32. The Matinee Master Agreement provided Jes Solar with the right to be compensated by Matinee in exchange for the timely construction and output and/or performance of the solar plant. (FAC ¶¶ 52-53.)

33. The Samsun Partnership Agreement provided for Jes Solar to pay Samsun a 1% consulting fee to provide support for Jes Solar's contract execution, including support for cooperation with Matinee and for selection and management of subcontractors, and provided for Samsun to be the project management company. Jes Solar was required to establish a Special Purpose Company (SPC) in the United States for construction work, with Samsun dispatching its employees to the SPC to support the smooth execution of work by the SPC. Exhibit 3: Samsun Partnership Agreement at § B.

34. During this time, Jes Solar formed a consortium with another South Korean corporation, Airpark, the JES/Airpark Consortium (J&A Consortium) to prepare for undertaking the construction of the Matinee Project. (FAC ¶ 54.)

35. J&A Consortium was a nominal entity, with Jes Solar and Airpark entering into a Joint Solar Plant Project Agreement on August 12, 2011, to work together in executing the Matinee Project, with Airpark generally providing financial backing and Jes Solar being primarily responsible for providing technical expertise. Exhibit 51: Jes Solar and Airpark Partnership Agreement.

36. They agreed to establish the SPC, with Jes Solar and Airpark to each own 50 percent of the SPC; with Airpark investing one billion won in the Matinee Project to be spent on consulting fees, the SPC establishment and its operation, with expenses to be spent through Jes Solar and later processed through the SPC. Exhibit 51: Jes Solar and Airpark Partnership Agreement.

37. Pursuant to the demands of Defendant John S. Lee and Defendant S. Chin Kim, on August 17, 2011, and September 21, 2011, with financial assistance from Plaintiff Airpark, Plaintiff Jes Solar made advance payments to Samsun in the amounts of $250,000.00 and $350,000.00, respectively. (FAC ¶ 55.); Exhibit 42: receipt of funds from Samsun.

38. On or about August 22, 2011, Defendant Chun[6] formed J&A Solar, Inc. (J&A Solar USA), a solar energy consulting company on behalf of the J&A Consortium, incorporated in Arizona. (FAC 56.) J&A Solar USA was the SPC entity referred to in the Jes Solar-Samsun Partnership Agreement, Exhibit 3, and the Jes Solar-Airpark Joint Solar Plant Project Agreement, Exhibit 51.

39. J&A Consortium (Jes Solar and Airpark) are the real parties in interest for J&A Solar USA.

40. On September 19, 2011, Jes Solar paid a construction design fee of $66,287.88 to New EnerTec, a subcontractor designated by Samsun for payment. (FAC ¶ 55); Exhibit 44: receipt by New EnerTec, *see also* (Ps' Amend. Prop. FoF CoL (Doc. 357) at 24-25: 1/11/2013 KRW conversion rate of 1,056.)

41. On October 27, 2011, Matinee and J&A Consortium signed the EPC Contract which set the Matinee Project budget at $160 million dollars, with J&A Consortium to make a 5%, $8 million, equity investment and to be paid cost plus fees for construction of the Matinee Project. It included Addendum One, which required a trust account be established at JPMorgan Chase Bank for the project. Exhibit 10: EPC Agreement.

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[6] See n.1.

42. On November 1, 2011, Jes Solar wired $1 million dollars to the J&A Solar USA account at Wells Fargo Bank in San Francisco, California, (FAC ¶ 66); Exhibit 43: cert. money transfer, from which J&A Solar USA paid Samsun an advance fee of $200,000 on November 2, 2011, *id.*, and on November 8, 2011, J&A Solar USA transferred $130,000 to New EnerTec as a construction design fee, (FAC ¶ 66); Exhibit 44: receipt by New EnerTec.

43. "Pursuant to agreement by the parties, the remaining $670,000 [in the J&A Solar USA account] was to be transferred to a trust account for the solar plant project. However, the remaining $670,000 was unilaterally transferred by Defendant Matinee, and/or their agents, and/or any other person instructed by Defendant Matinee, to Defendant Matinee's business account (the "Unauthorized Transfer")." (FAC ¶ 66.)

44. The testimony at trial reflected that Jeong Dong Song, an employee of Jes Solar and President of J&A Solar USA transferred the money, without the knowledge of Jes Solar. The unauthorized transfer was not discovered until December 20, 2011. Thereafter, Jeong Dong Song was fired, stopped serving as President to J&A Solar USA, was criminally charged with making an illegal transfer, and found not guilty in a South Korean court. (TR Day 2 (Doc. 355): Song at 71, 80.)

45. The J&A Consortium did not receive the contracted services or compensation, (FAC ¶ 90); the EPC agreement was not fully executed by Matinee because Matinee failed to comply with the provision in Memorandum One of the EPC, which required it to secure the JP Morgan Chase funding, (FAC ¶¶ 67, 68-69, 72-75); Exhibit 4: Memorandum One.

46. Defendants acted together knowing at the time they entered into the contracts that they could not perform because in fact they had not secured and could not secure funding from JP Morgan Chase, (FAC ¶ 112), and acted with the intent to defraud the Plaintiffs, (FAC ¶ 101), and undermine fulfillment of the Agreements, (FAC ¶ 105).

47. By October, 2011, J&A Consortium had paid Defendants over half a million dollars in advance fees and for construction design fees, all as demanded by Defendants,

and at the groundbreaking ceremony held on October 28, 2011 in Benson, Arizona, Defendant S. Chin Kim demanded an additional $1 million advance payment from the J&A Consortium to be used as a deposit towards the solar plant project and said that if the Consortium agreed to advance the $1 million, the LC would be promptly issued by JP Morgan Chase. (FAC ¶¶ 58, 64.)

48. The FAC did not allege that Airpark's issuance of bonds for the Matinee Project naturally flowed from the tortious misrepresentations made by the Defendants, but it was a foreseeable response to Defendants' demands for money from the J&A Consortium that Airpark, as the financer of the J&A Consortium, would need to raise money and that issuing bonds would be a possible source of financing.

49. On October 18, 2011, Airpark issued bonds (with warrants) for and amount of KRW 1,000,000,000 ($946,969.70), (Reply (Doc. 360) at 29 (using the 1,056 1/11/2013 KRW conversion rate), at an interest rate of 8% per annum to Golden Bridge Savings Bank ("Golden Bridge"). Exhibit 55: Airpark public disclosure Golden Bridge bonds.

50. It was through the Golden Bridge bonds that Airpark obtained the funds for J&A Consortium, (TR Day 1 (Doc. 354): Hong at 90), including the $1 million wired to J&A Solar USA on November 1, 2011, which was paid as an advance fee to Samsun, a construction design fee to New EnerTec, and from which Song made the $650,000 unauthorized transfer to Matinee.

51. From the date of issuance of the bonds to Golden Bridge (October 18, 2011) until the end of Airpark's accounting period 2012, Airpark incurred interest costs by way of quarterly interest payments on the Golden Bridge bonds and loss from early redemption of the bonds in the total amount of KRW 94,397,258 ($89,391.34). Exhibit 57: cert. money transfer.

52. Jes Solar incurred costs relating to travel by Mr. Du Bin Lim and Mr. Choi to Arizona for the Matinee Project in the total amount of KRW 5,782,500 ($5,475.85). (FAC ¶ 77); Exhibit 45: airline ticket invoices.

53. Airpark incurred damages for travel expenses related to the Matinee Project totaling $8,293.56. Exhibit 58: cert. money transfer.

54. "On or about December 9, 2011, Plaintiff Jes Solar contacted JP Morgan Chase with regard to the issuance of the LC. . . . Upon conferring with representatives from JP Morgan Chase, the [J&A] Consortium discovered the JP Morgan Chase could not process the issuance of the LC because Defendant Matinee had failed to provide or disclose its assets as collateral, which is a requirement by JP Morgan Chase to issue the LC." (FAC ¶ 72.)

55. On December 20, 2011, the J&A Consortium demanded that Defendants return the total amount of money, $1.6 million, they had paid and deposit $1 million into an escrow account as partial indemnification for J&A Consortium.

56. Airpark cannot recover wages for three full time employees allegedly working on the Matinee Project after December 2011.

57. Airpark cannot recover attorney fees related to this litigation as wages after December 2011.

58. Airpark's business records reflect it incurred wages related to the Matinee Project as follows: Jeong Seong Gyo 17,951,910 won; Kim Wan Jung 25,277,170 won; and Jun U. Seok 15,805,800 won for a total of 59,034,880 won. Exhibit 58: Arizona Project Team.

59. It is a red hearing argument by Defendants that these employees were working on other Jes Solar-Airpark projects. (Ds' Objection (Doc. 359) at 29 (citing TR Day 1: Hong at 114) (admitting on cross-examination that the bulk of Airpark's claimed wages related to Airpark's efforts to expand into a new field), *but see* (TR Day 1: Hong at 99,106-107, 116-118 (explaining that all of Jes Solar's work was the Matinee Project so the $1 million raised by Airpark for Jes Solar was for the Matinee Project). The same would be true for work done by Airpark with Jes Solar. It would be for the Matinee Project.

60. During the Bench Trial, Plaintiffs Jes Solar and Airpark withdrew their claim of wage losses for Jes Solar. (Minute Entry (Doc. 344) at 2.)

61. During the Bench Trial, Plaintiffs Jes Solar and Airpark withdrew their claim for punitive damages. (Minute Entry (Doc. 343) at 1.)

62. Approximately 30 days after first meeting with Matinee and Samsun in April 2011, Jes Solar ordered approximately 350,000 solar wafers from Wintec Holdings Co., Ltd. (Wintec), a South Korean silicon wafer manufacturing company for silicon wafers. Jes Solar made this purchase "relying on the representation made by Matinee and Samsun during meetings in South Korea and the United States in April of 2011 that Matinee would purchase solar modules needed for the Matinee Project," (Ps' Amend. Prop. SoF CoL (Doc. 357) ¶ 33), and Jes Solar decided to manufacture and supply to LSIS solar cells which LSIS would use to make solar modules for the Matinee Project, *id.*; TR Day 1 (Doc. 354) at 48-49, 66, 68, 77-78. The FAC did not allege any tortious acts by Defendants that were the "but for" cause of Jes Solar's silicon wafer purchase from Wintec. Defendants were not defaulted on liability related to the Wintec losses nor did the Wintec investment naturally flow from any tortious conduct alleged in the FAC. Jes Solar may not recover for losses due to its purchase of solar chips from Wintec.

63. June 24, 2011, prior to teaming up with Jes Solar and prior to Jes Solar entering into the Samsun or Matinee contracts, Airpark was introduced to the Matinee Project by Semico Technology Co. (Semico), and Airpark and Semico entered into a partnership agreement to supply inverters to EPC companies participating in the Matinee Project with Semico to share its technology and experience with Airpark. As a result of the Semico-Airpark partnership agreement, Airpark paid a consulting fee of approximately $190,000 to Semico, which Airpark lost "[since] the Matinee Project was a fraudulent venture which failed." (Ps' Amend. Prop. SoF CoL (Doc. 357) ¶ 40.) The FAC did not allege any tortious acts by Defendants that were the "but for" cause of Airpark's decision to team with Semico to manufacture and sell inverters. Defendants were not defaulted on liability related to the Semico losses nor did the Airpark-Semico partnership naturally

flow from any tortious conduct alleged in the FAC. Airpark may not recover for losses due to its Semico partnership agreement.

64. On September 8, 2011, Airpark entered into a consulting service agreement with Standard Partners Co., Ltd., for Standard Partners' services regarding Airpark's effort to attract investment for the Matinee Project and for new project procurement. (Exhibit 52.) The contract speaks for itself. The scope of consulting services was not limited to the Matinee Project. *See* Exhibit 52: Agreement at ¶¶ 1-4 (general improvement of Airpark's financial structure); ¶¶ 5-7 (matters needed with regard to the Matinee Project; ¶¶ 8-11, (other needs related to new photovoltaic projects). In the FAC, Plaintiffs did not allege Airpark was fraudulently induced to enter into this consulting agreement. The FAC did not allege that the tortious misrepresentations regarding the JPMorgan Chase financing for the Matinee Project were the "but for" cause of its need for Standard Partners' consulting services." Defendants were not defaulted on liability related to Standard Partners' consulting services, and the broad generalized nature of the Standard Partners contract did not naturally flow from any tortious conduct alleged in the FAC. Even if it was foreseeable that Airpark, as the financer of the J&A Consortium, would need Standard Partners' consulting services to fulfill its financial responsibilities relevant to the Matinee Project, Airpark failed to present evidence which would enable the Court to apportion these damages and the Standard Partners' consulting services were not limited to the Matinee Project. Airpark may not recover for losses due to Standard Partners' financial consulting services.

65. On November 11, 2011, Airpark engaged SunCarrier Korea Co., Ltd. to assist it in developing expertise in the solar industry. The Airpark-SunCarrier agreement does not reference the Matinee Project and is not related to Airpark's role as Jes Solar's financial partner. Exhibit 53: Airpark-SunCarrier Agreement. The FAC did not allege any tortious acts by Defendants that were the "but for" cause of Airpark's decision to expand into the solar industry. The Defendants were not defaulted on liability related to Airpark's contract with SunCarrier nor did Airpark's decision to expand into the solar

industry naturally flowing from any tortious conduct alleged in the FAC. Airpark may not recover for losses due to its agreement with SunCarrier.

CONCLUSIONS OF LAW

1. To the extent any of the Findings of Fact contain or include any Conclusions of Law, said Findings of Fact are incorporated herein by reference.

2. This is a civil action by Plaintiffs, South Korean corporations, for breach of contract, unjust enrichment, conspiracy, fraudulent inducement, conversion and piercing the corporate veil.

3. Jurisdiction lies in this Court pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000 and there is complete diversity between the Plaintiffs and the Defendants, who reside in Nevada (Matinee Energy, Inc.); Virginia (Samsun LLC and John S. Lee); New Jersey (S. Chin Kim); California (Paul Jeoung), and Maryland (Tong Soo Chung).

4. Federal courts sitting in diversity cases apply state substantive law and federal procedural law. *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003).

5. Personal jurisdiction exists because Defendants were properly served with process, *see* (Orders (Docs. 69, 71, 110, 169, 230, 269, 324) (discussing service)), and have minimum contacts with the State of Arizona so that exercising jurisdiction in Arizona does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

6. Venue is proper in this Court pursuant to 28 U.S.C. 1391 because the lawsuit relates to contracts entered into and conduct or acts which occurred in the District of Arizona, in the City of Benson.

7. By virtue of Defendants' default (Doc. 40), Defendants were deemed to have admitted the well-pled facts in the FAC. *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). Pursuant to the default, the Court deems all factual allegations in the FAC as true except for those relating to damages. *TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987)).

8. Granting default judgment is within the Court's sound discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). (Amended Order (Doc. 71) (describing Court's discretion as broad to set aside a default).

9. If the facts necessary to determine damages are not contained in the complaint or are legally insufficient, they will not be established by default. *Cripps v. Life Insur. Co. of N. America*, 980 F2d 1261, 1267 (9th Cir. 1992). With regard to liability, the Court has found that the FAC establishes the "but for" legal nexus between the act and the well pleaded injuries of breach of contract, unjust enrichment, fraudulent inducement, conversion and related conspiracy. *See* (Order (Doc. 324) at 12- 17 (finding remainder of pretrial motions essentially argue the Plaintiffs fail to allege facts sufficient to support the claims and reaffirming findings of sufficiency made in prior Orders (Doc. 71) at 10, (Doc. 247) at 3; (Doc. 280) at 3.)

10. The Court is not required to issue findings of fact as to liability, but must do so as to damages. *Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990).

11. For damages, the concept of proximate cause sets the limits of recovery for the injuries conceded by default. For damages, the inquiry is one of foreseeability with probable cause setting the outer bounds of recovery allowable. The default judgment did not give [Plaintiffs] a blank check to recover from [Defendants] any losses [] ever suffered from whatever source." *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 70 (2nd Cir. 1971). Plaintiffs can only recover those damages arising from the acts and injuries pleaded, and the burden is on the Plaintiffs to show the extent of the damages naturally flowing from them. *Id.*

12. For common law fraud, foreseeability sounds in tort and is a broader and hypothetical construct of what a reasonable person in the tortfeasor's position should have realized about the potential consequences of the tortious acts. Pecuniary losses that could not reasonably be expected to result from the misrepresentation are, generally, beyond the scope of the maker's liability. In other words, the matter misrepresented must

be considered in the light of its tendency to cause those losses and the likelihood that they will follow. *Cf.*, Restatement (Second) of Torts § 548A (1977).

13. Tort damages extend to all damages legally caused by the tort of fraudulent inducement, which encompasses both the misrepresentations and breach of contract claims. *Thompson v. Better–Bilt Aluminum Prods. Co*., 832 P.2d 203, 207 (1992), aff'd on other grounds, 927 P.2d 781 (Ariz. 1996), s*ee also* Order (Doc. (324) at 4, 7-8 (denying Defendants' Motion to Dismiss Tort Claims as Barred by the Economic Loss Rule because Second Amended Complaint (SAC)[7] alleged Defendants intended from inception of agreements to never perform any of them).

14. To legally cause damage, "the tort must be a substantial factor in bringing about the harm." *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 343 (Ariz. App. 1996).

15. Notions of fundamental fairness required by due process of law limit the scope of relief. Schwarzer, California Practice Guide: Federal Civil Procedure Before Trial § 6:131 (2003), *see also* Fed. R. Civ. P. 54(c) and 55(d). In the FAC, Plaintiff Hankook sought the principal sum of $1,000,000 and the J&A Consortium sought the principal sum of $4,000,000. (FAC ¶¶ 101, 110, 122, 128, 132.)

16. Under Arizona law, Plaintiffs have a cause of action against Defendants, which is limited only by real party in interest concerns. *Toy v. Katz*, 961 P.2d 1021, 1035 (Ariz. App. 1997). Plaintiffs are the real parties in interest because they are the entities that directly suffered the injury. Hankook is the real party in interest for any losses realized by K& Company USA. Jes Solar and Airpark are the real parties in interest for any losses realized by J&A Solar USA. Defendants waived any challenge related to real party in interest concerns by not raising it prior to the time of trial. *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. 1992) (relying on Fed. R. Civ. P. 17(a)(3)).

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[7] See n. 1.

17. For the reasons stated in the Court's Order (Doc. 324), joint and several liability exists as to damages flowing from Defendants' fraudulent inducement. By default, Defendants are liable for damages flowing from the conspiracy count and the corporate veils of both Matinee and Samsun are pierced on grounds of alter ego. (Order (Doc. 324) at 12-17.)

18. Defendants, Chin and Tong, were not simply victims of another man's fraud. Both men held especially responsible positions at Matinee and it is not unfair to apply knowledge and intent by Matinee to them. Both Chin and Tong knew or should have known the corporate structure whereby Samsun served as Matinee's agent. Both undertook overt acts and made statements upon which Plaintiffs relied when making advance payments to Matinee and Samsun. *Id.* at 15-16.

19. Because Defendants are jointly and severally liable for damages flowing from Defendants' fraudulent inducement and related conspiracy, including conversion and unjust enrichment, and because Matinee served as the alter ego for Defendants Chin and Tong, the Court awards damages jointly and severally against all Defendants.

20. The full amount of compensatory damages suffered by Plaintiff Hankook is $825,753.62.

21. The full amount of compensatory damages suffered by Plaintiffs Jes Solar and Airpark, jointly, is $1,826,232.08.

22. "[M]oney has a time value, and prejudgment interest is therefore necessary in the ordinary case to compensate a plaintiff fully for a loss suffered at the time and not compensated until [later]." *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 922 (9th Cir. 1995).

23. "'Whether interest will be awarded is a question of fairness, lying within the [trial] court's sound discretion, to be answered by balancing the equities.'" *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1441 (9th Cir. 1996) (quoting *Wessel v. Buhler*, 437 F.2d 279, 284 (9th Cir.1971)); *see also, Blau v. Lehman*, 368 U.S. 403, 414 (1962),

24. The court considers "'a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal

wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental conditions of fairness.'" *Knapp*, 90 F.3d at 1441 (quoting *Osterneck v. Ernst & Whitney*, 489 U.S. 169, 176 (1989) (in a federal securities action listing factors which suggest fairness issues are intertwined to significant extent with the merits of the underlying controversy).

25. Plaintiffs seek prejudgment interest in the statutory amount of 4.25%, pursuant to A.R.S. 44-1201(B), for the advance fees lost, including the $670,000 unauthorized transfer of funds from J&A Solar USA to Matinee.

26. Because Defendants Chin and Tong were not simply victims of another man's fraud, the Court finds it is fair to award prejudgment on Plaintiffs' damages, which like damages the Court calculates in United States currency,[8] as follows:

> Hankook prejudgment interest loss totaling $110,779.45 for advance fees, as follows: $250,000 for loss on 7/26/2010; $100,000 for loss on 8/13/2010; $75,000 for loss on 9/17/2010; $75,000 for loss on 10/1/2010, and $150,000 for loss on 11/5/2010.
>
> J&A Consortium prejudgment interest loss totaling $89,391.34, for actual interest at the rate of 8% and loss from early redemption of Golden Bridge Bonds until 12/31/2012.
>
> J&A Consortium prejudgment interest loss totaling $208,404.97 calculated at 4.25%, as follows: $117,272.02 for losses from 1/1/2013 on the $946,969.70 in Golden Bridge bond money and $90,863.98[9] for losses from 11/1/2011 on $523,030.30, the remaining balance of the unauthorized transfer of $670,000 to Matinee.

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[8] The Court rejects the Plaintiffs' use of varying WON conversion rates depending on the date of loss. *See* (Ps' Pro. FoF and CoL (Doc. 353), Exhibit B(1)). The Court uses U.S. currency amounts for damages based on the 1/11/2013 conversion date as follows: $946,969.70 Golden Bridge bond money and $800,000 in J&A Consortium advance fees. *See also* (Ps' Prop. FoF and CoL (Doc. 353), Exhibit B(1)). Using these dollar figures, the Court subtracts $146,969.70, which is the difference between the Golden Bridge bond money and the advance fees, from the $670,000 unauthorized transfer to get $523.030.30 as the remaining balance in Unauthorized Transfer which is not subject to the 8% actual interest award but is subject to 4.25%. *Compare* (Ps' Prop. FoF and CoL (Doc. 353), Exhibit 1(B) $571,428.57.

[9] See n. 8, *compare* (Ps' Prop. FoF and CoL (Doc. 353), Exhibit 1(B) $99,272.02.

27. Arizona law provides for fee-shifting. This Court has discretion under A.R.S. § 12-341.01 to award fees to the "successful party" in any "contested action arising out of a contract." In deciding whether to award fees under A.R.S. § 12-341.01, the Court considers: 1) the merits of the unsuccessful defenses, 2) whether the litigation could have been avoided, 3) whether plaintiffs completely prevailed, the novelty of the legal issues, and 6) whether an award would discourage parties with tenable claims from litigating. *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985).

28. The Arizona Court of Appeals in *Morrison v. Shanwick*, 804 P.2d 768, 775 (Ariz. App. 1990) defined a "contested action" as "one in which the defendant appeared and generally defends against the claims and demands made by the plaintiff. Conversely, an action is not contested, or 'uncontested,' simply because the defendant admits in his answer the true facts of the case. The mere admission of the facts does not establish a case as uncontested.

29. Subsequently to being defaulted for failing to appear and defend, the Defendants appeared and defended vigorously the merits of Plaintiffs' claims by charging that Plaintiffs failed to state a claim and challenging multiple aspects of this Court's jurisdiction. Plaintiffs prevailed on all arguments. *See e.g.*, Orders (Docs. 69, 71) (denying Defendants Motion to Set Aside Defaults, except as to Defendant Chun Rae Kim considering service issue and argument that FAC failed to state a claim); Order (Doc. 169) (denying reconsideration of refusal to set aside default re: service issue and Tong's subject matter jurisdictional challenge); Order (Doc. 195) (denying summary judgment for forum non conveniens and challenge to this Court's reliance on facts deemed admitted by default because Plaintiffs failed to state a claim); Order (Doc. 230) (denying reconsideration and renewal of motion to set aside default); Order (Doc. 247) (denying leave to file motion for judgment on the pleadings re: failure to state a claim); Order (Doc. 269) (striking late filed Answers due to previous rulings re: failure to state a claim for relief arguments and denying leave to reurge deficiency of service); Order

(Doc. 324) (denying reconsideration of service issue and failure to state a claim, and denying motion to dismiss tort claims as barred by the economic loss rule).

30. The Court awards Plaintiff Hankook its attorney fees, pursuant to the Pre-Master Agreement between it and Matinee § 13.12. Exhibit 11: Pre-Master Agreement.

31. The Court awards Plaintiff J&A Consortium attorney fees pursuant to the Matinee Master Agreement § 6, Exhibit 33, and the EPC Contract § 6, Exhibits 10: EPC Agreement.

Accordingly,

IT IS ORDERED that Judgment shall be entered for Plaintiff Hankook in the full amount of $936,533.07 and for Plaintiffs Jes Solar and Airpark, jointly, in the amount of $2,124,028.39, with Defendants to be jointly and severally liable in the total amount of: $3,068,561.46.

IT IS FURTHER ORDERED that the Plaintiffs are entitled to post-judgment interest at the federal rate pursuant to 28 U.S.C. §1961, to be calculated by the Clerk of the Court from the date of the entry of judgment.

IT IS FURTHER ORDERED that the Plaintiffs may proceed, pursuant to LRCiv 54.2, to seek reasonable attorney fees.

Dated this 16th day of February, 2016.

David C. Bury
United States District Judge