

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

**ALFRED LEWIS, MATTHEW LOVELL, RICARDO
LECKY, HERMAN ANTLEY and MAKANDA
FORRESTER, individually and behalf of all other
similarly situated persons,**

Plaintiffs,

v.

**ALERT AMBULETTE SERVICE CORP. , MARK
HANUKOV, and JACOB HANUKOV BUS SERVICE
CORP.**

Defendants.

**1:11-cv-00442-
JBW -JMA**

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
FOR AN ORDER OF ATTACHMENT**

Respectfully submitted on April 3, 2012,

By: /s/ Dan C. Getman

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INTRODUCTION

This is a wage and hour case that raises claims under federal and state labor law. Plaintiffs bring this case as a collective action under the Fair Labor Standards Act (FLSA) and as a class action under Fed. R. Civ. P. 23 and New York Labor Law on behalf of a class of ambulette drivers who transport Defendants' customers to and from medical appointments throughout the five boroughs of New York City. At a deposition, Defendant Mark Hanukov did not deny that Defendants did not pay Plaintiffs time and one half for hours worked over 40 and often did not pay Plaintiffs minimum wage for all hours worked in a week. Instead Defendant Hanukov asserted his Fifth Amendment privilege against self-incrimination, allowing this Court to presume a violation. Similarly, Defendant Hanukov did not deny that Defendants withheld Plaintiffs' wages as a performance guarantee and deducted wages for impermissible reasons, including employer expenses such as uniforms and traffic tickets. Again, he instead asserted his Fifth Amendment privilege. Finally, Defendant Hanukov did not deny that Plaintiffs generally worked twelve-hour shifts, but Defendants failed to pay an additional hour of pay under New York's spread of hours requirement. Again, he instead asserted his Fifth Amendment privilege.

Plaintiffs seek an order of prejudgment attachment pursuant to Fed. R. Civ. P. 64 and N.Y. Civil Practice Law and Rules (C.P.L.R.) §§ 6201, 6211(a) and 6212(a), as Defendants, with intent to defraud their creditors or frustrate the enforcement of a judgment that might be rendered in Plaintiff's favor, have assigned, disposed of, encumbered or secreted property, or removed it from the state or are about to do any of these acts.

STATEMENT OF FACTS

Defendant Alert Ambulette Service Corp. ("Alert Ambulette") is a privately owned company, headquartered in Brooklyn, New York that is solely owned and operated by Defendant

Mark Hanukov. Alert Ambulette transports customers to and from medical appointments throughout the five boroughs of New York City. Defendant Hanukov is personally involved in Plaintiffs' hiring, firing, scheduling, and pay. Defendant Jacob Hanukov Bus Service Corp. ("Hanukov Bus Co.") is also a privately owned company, headquartered in Brooklyn, New York that is solely owned and operated by Defendant Hanukov. Plaintiffs brought this proceeding against Defendants on January 8, 2011. *See* Doc. No. 1.

On August 15, 2011, during the pendency of this action, Defendant Hanukov sold his interest in real property located at 150 Oceana Drive West, Penthouse 6, Brooklyn, NY, which he co-owned with his mother, Mara Hanukov, to his mother. The property was transferred for \$495,000, even though Defendant Hanukov and his mother had purchased it for \$738,500. *See* Exhibit A. The property is currently valued at approximately \$831,600. *See* Exhibit B.

In response to Plaintiffs' discovery requests, Defendants provided payroll and time records and bank statements for Alert Ambulette. *See* Exhibits C-G. The payroll and time records show that Alert Ambulette did not pay Plaintiffs minimum wage, overtime or spread-of-hours pay. *See* the Declaration of Tara Tayyabkhan in Support of Plaintiffs' Motion for an Order of Attachment (hereinafter "Tayyabkhan Declaration") at ¶¶ 4-8, 13, 14; *see also* Exhibits C-G. The payroll records further show that Alert Ambulette maintains two sets of pay records – reporting falsely lower wages to the Internal Revenue Services and New York state. *See* Tayyabkhan Declaration at ¶¶ 4, 6, 10-12; *see also* Exhibits C-G. By underreporting wages, Defendants avoid payroll taxes, as well as mandatory payments for unemployment and workers' compensation. This practice also cheats Plaintiffs out of unemployment insurance benefits and workers compensation benefits should they require them. The reporting of lower wages by Alert Ambulette to the Internal Revenue Services is corroborated by the W-2 forms Plaintiffs received

from Alert Ambulette, which state lower wages than Plaintiffs were actually paid. *See* Tayyabkhan Declaration at ¶ 11; *see also* Exhibit H.

Alert Ambulette's bank statements undisputedly show that Defendant Hanukov issued and cashed multiple checks on Alert Ambulette's bank account made payable to "Cash", with several in the amounts of \$9,900 or \$9,950 (*see* Exhibit I), just below the \$10,000 amount at which a bank must file a form with the Internal Revenue Service (Currency Transaction Report) to document the transaction. The bank statements also show that while Defendant Hanukov was issuing and cashing checks on Alert Ambulette's bank account, he was simultaneously maintaining several large lines of credit from various banks. *See* Exhibit J.

The bank statements further show that Defendant Hanukov used Alert Ambulette funds for his own personal use, charging many thousands of dollars on the company credit card for things like liquor, cigars, nightclubs, hotels, skydiving excursions and trips to Costa Rica, *see* Exhibit K, which could not reasonably have occurred in the ordinary course of Alert Ambulette's business.

Finally, the bank statements show that Defendant Hanukov issued multiple checks on Alert Ambulette's bank account made payable to his mother, Mara Hanukov, for "rent" in the amount of \$1,500. *See* Exhibit L.

At a deposition on March 15, 2012, Defendant Hanukov repeatedly asserted his Fifth Amendment privilege against self-incrimination in response to questions about Defendants' liability regarding Plaintiffs' claims in this case. Specifically, Defendant Hanukov testified:

- 9 Q. Does Alert Ambulette pay its
10 drivers overtime?
11 A. Fifth Amendment.
12 Q. Does Alert Ambulette pay minimum
13 wage?

14 A. Fifth Amendment.
15 Q. Does Alert Ambulette pay spread of
16 hours paid to drivers?
17 A. Fifth Amendment.
18 Q. Do you understand when I say
19 “spread of hours” I mean an additional hour of pay
20 to employees at the minimum wage rate when the
21 driver works from the start of the shift to the
22 end of the shift of work is over ten hours?
23 A. Fifth Amendment.

Exhibit M, p.15. Defendant Hanukov also refused to answer questions about unlawful deductions from Plaintiff drivers’ wages.

5 Q. So, turning to the fourth page of
6 Exhibit 4, do you see deductions of 115 for
7 parking. Those indicate that you deducted from
8 individuals’ wages for parking violations.
9 Isn’t that true?
10 A. Fifth Amendment.
11 Q. And on the next page, page 5 Alert
12 675, you see deductions for shirts of \$33. That
13 represents the deduction from pay for uniforms.
14 Isn’t that correct?
15 A. Fifth Amendment.
16 Q. And do you see below that in the
17 same entry for Ford, it says deposit minus \$100.
18 That entry refers to your collection of a
19 performance guarantee or a performance deposit
20 taken out of the first few week’s wages of new
21 employees. Isn’t that true?
22 A. Fifth Amendment.
23 Q. And to the right, where you have
24 deposit 100, that represents the tally of the
25 deposit to generally between 100 and \$300.
2 Correct?
3 A. Fifth Amendment.
4 Q. And you withdrew, generally
5 speaking, \$300 deposit from the wages of each
6 employee as a new driver as a performance
7 guarantee. Correct?
8 A. Fifth Amendment.
9 Q. And you held on to that money until
10 you repaid it at the end of employment. Correct?

11 A. Fifth Amendment.

Exhibit M, pp. 48-49. Additionally, Defendant Hanukov asserted his Fifth Amendment privilege when asked about the business practices of Alert Ambulette and Hanukov Bus Co.

2 Q. Do you take funds from the bus
3 company to pay the Alert Ambulette drivers?

4 A. Fifth Amendment.

5 Q. Do you take funds at will from the
6 Hanukov Bus Company for your personal use?

7 A. Fifth Amendment.

8 Q. Do you take funds from Alert
9 Ambulette at will to use for your personal
10 purposes?

11 A. Fifth Amendment

...

18 Q. Do you have two sets of books for
19 Alert Ambulette?

20 A. Fifth Amendment.

21 Q. Do you have two sets of books for
22 Hanukov Bus Company?

23 A. Fifth Amendment.

Exhibit M, p. 18.

17 Q. Okay. Showing you Exhibit 1, these
18 are quarterly pay records kept by Alert, are they
19 not, for the individuals that are asserted at the
20 bottom left?

21 A. Fifth Amendment.

22 Q. And where it states \$286 gross
23 wages, that's the amount that was reported to the
24 IRS as gross wages, and reported to the individual
25 as his gross wages on a W-2. Correct?

2 A. Fifth Amendment.

3 Q. And, in fact, each of these
4 individuals was paid more than this gross amount
5 in cash wages. Isn't that right?

6 A. Fifth Amendment.

Exhibit M, pp. 43-44

6 Q. I'm showing you Exhibit 14. These
7 checks represent cash payments that you made from
8 Alert Ambulette to yourself. Correct?

9 MR. NARDO: Objection.
10 A. Fifth Amendment.
11 Q. And any time you paid yourself --
12 withdrawn.
13 Any time you took cash out of Alert
14 Ambulette Service Corp. in the form of a check,
15 you did it in amounts less than \$10,000.
16 Isn't that right?
17 A. Fifth Amendment.
18 Q. And you did that in amounts less
19 than \$10,000 so that it wouldn't be reported to
20 the IRS that you were taking that money out of
21 Alert Ambulette Service Corp.
22 Isn't that right?
23 A. Fifth Amendment.
...
19 Q. They're payable to cash, and you
20 cashed those checks. Isn't that right?
21 A. Fifth Amendment.
22 Q. And you took those monies for your
23 own personal purposes out of the corporation.
24 Isn't that right?
25 A. Fifth Amendment.

Exhibit M, p. 57-58

22 Q. While you've been making cash
23 withdrawals from Alert for your own personal
24 purposes, you have been running up credit lines to
25 Indus American Bank and Bank of America.
2 Isn't that true?
3 A. Fifth Amendment.
4 Q. You had a credit line of 500,000
5 with one of those entities. Isn't that right?
6 A. Fifth Amendment.
7 Q. Do you still have a line of credit
8 in that amount with these companies?
9 A. Fifth Amendment.
10 Q. I should say do you have a line of
11 credit balance of 500,000 with Indus American Bank
12 at this time?
13 A. Fifth Amendment.
14 Q. And you have a 100,000 outstanding
15 balance with respect to the Bank of America as
16 well. Is that true?
17 A. Fifth Amendment.

- 18 Q. And you have outstanding credit
19 card debt. Is that true?
20 A. Fifth Amendment.
21 Q. And your line of credit account is
22 secured by real property. Is that true?
23 A. Fifth Amendment.

Exhibit M, pp. 59-60.

- 21 Q. Mr. Hanukov, did you treat the
22 Alert Ambulette funds as your personal funds?
23 A. Fifth Amendment.
24 Q. Did you treat Jacob Hanukov Bus
25 Company funds as your personal funds?
2 A. Fifth Amendment.
3 Q. Did you buy cigars and liquor for
4 your own personal use from Alert Ambulette Bus
5 Company funds?
6 A. Fifth Amendment.
7 Q. Did you go to nightclubs and hotels
8 on the company credit card?
9 A. Fifth Amendment.
10 Q. Did you go skydiving and go to
11 Costa Rica on the company credit card?
12 A. Fifth Amendment.
13 Q. What is Junior's Cheesecake?
14 (Discussion off the record.)
15 A. Fifth Amendment.
16 Q. Have you ever been to Costa Rica?
17 A. Fifth Amendment.

Exhibit M, pp. 22-23.

Similarly, Defendant Hanukov repeatedly asserted his Fifth Amendment privilege against self-incrimination in response to questions about the transfer, assignment, disposal, encumbrance, secreting or location of Defendants' property. Specifically, Defendant Hanukov testified:

- 24 Q. Have you transferred any work
25 formerly done by Alert to another company?
2 A. Fifth Amendment.
3 Q. Have you transferred any funds from
4 Alert Ambulette to any relatives?

5 A. Fifth Amendment.

Exhibit M, pp. 18-19.

7 Q. Has any part of the business of
8 Alert been sold or transferred in any way?

9 A. Fifth Amendment.

10 Q. Has any part of Jacob Hanukov Bus
11 Company been sold or transferred in any way?

12 A. Fifth Amendment.

Exhibit M, p. 20.

13 Q. Do you have any bank accounts,
14 personal bank accounts?

15 A. Fifth Amendment.

16 Q. Do you have any offshore accounts?

17 A. Fifth Amendment.

Exhibit M, p. 29.

19 Q. Do you have any bank accounts?

20 A. Fifth.

21 Q. Do you have any investment accounts
22 or investment vehicles of any kind?

23 A. Fifth Amendment.

24 Q. Do you have any offshore assets?

25 A. Fifth Amendment.

2 Q. Do you have any other assets that
3 you own with other people?

4 A. Fifth Amendment.

5 Q. Are there any other individuals,
6 such as family members, that have assets belonging
7 to you?

8 A. Fifth Amendment.

Exhibit M, pp. 38-39. Finally, while Defendant Hanukov conceded that he sold real property to his mother subsequent to the commencement of this case, his recollection of how much he sold it to her for was inaccurate, he claimed he could not recall how much the property was appraised for, he incorrectly claimed that he sold the property for the amount it was appraised for, and he was elusive about why he sold it to her:

25 Q. Have you ever owned any other real
2 property?

3 A. I have.

4 Q. What else have you owned?

...

12 A. I was a part owner in a condominium
13 apartment.

14 Q. Address?

15 A. 150 Oceania Drive West, Apartment
16 PH6, Brooklyn, New York, 11235.

17 Q. And did you own that with anyone
18 else?

19 A. Yes.

20 Q. And who?

21 A. My mother.

22 Q. And did you have a mortgage on that
23 property?

24 A. Yes.

...

5 Q. Were you both on the mortgage?

6 A. I don't recall.

7 Q. Were you on the mortgage?

8 A. I really don't recall at the
9 moment.

10 Q. And when did you sell that
11 property?

12 A. In the summer of 2011.

13 Q. And you sold it to your mother.
14 Correct?

15 A. Yes.

16 Q. And how much did you sell it to her
17 for?

18 A. I don't remember the exact amount
19 but I believe I received somewhere in the lines of
20 175,000. No, I'm sorry, wait a second. I can't
21 remember. I'm sorry.

22 Q. But to the best of your
23 recollection you received 175,000?

24 A. I believe so, yes. I just can't
25 remember at the moment.

2 Q. And did you receive that in cash or
3 did that money go to pay off the mortgage?

4 A. I received it in the form of a
5 check.

6 Q. Did you have an appraisal done for

7 the property in the course of the sale?
8 A. Yes.
9 Q. And who did the appraisal?
10 A. I don't remember at the moment.
11 Q. Do you have a copy of the
12 appraisal?
13 A. I might. Yeah, I should.

Exhibit M, pp. 29-32.

12 Q. What did the appraisal state was
13 the value of the property?
14 A. I don't remember.
15 Q. How much of a mortgage did you have
16 on the property?
17 A. I don't recall.
18 Q. How much did you buy the condo for?
19 A. I don't remember.

Exhibit M, p. 33.

23 Q. When did you have the appraisal
24 done for the property?
25 A. Right before the sale.
2 Q. And was the sale price the same as
3 the appraisal value?
4 A. Yes.

Exhibit M, pp. 35-36.

2 Q. Why did you sell the property to
3 your mother?
4 A. I just did.
5 Q. No reason?
6 A. No reason.
7 Q. Did you ask to sell it to her or
8 did she ask to buy it from you?
9 A. It was a mutual decision.
10 Q. You just happened to arrive at the
11 same thought at the very same time?
12 A. Yes.

Exhibit M, pp. 34.

ARGUMENT

I. PLAINTIFFS HAVE DEMONSTRATED ALL THE NECESSARY ELEMENTS FOR AN ORDER OF ATTACHMENT

Fed. R. Civ. P. 64 authorizes a federal court to apply the jurisdiction's state law for seizing property to secure satisfaction of a potential judgment, including prejudgment attachment. *See New York Dist. Council of Carpenters Pension Fund v. KW Const., Inc.*, No. 07 Civ. 8008, 2008 WL 2115225, *1 (S.D.N.Y. May 16, 2008). N.Y. law provides for prejudgment attachment:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

...

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

...

N.Y. C.P.L.R. § 6201 (McKinney 2011). Under N.Y. C.P.L.R. § 6212, "a party may obtain an "order of attachment upon demonstrating that (1) it has stated a claim for a money judgment; (2) it has a probability of success on the merits; (3) the defendant 'with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts;' and (4) the amount demanded from the defendant is greater than the amount of all counterclaims known to the party seeking attachment." *Carpenters Pension Fund*, 2008 WL 2115225 at *1 (citations omitted).

A. Plaintiffs Have Stated a Claim for a Money Judgment and Have Demanded an Amount Greater Than All Counterclaims

Plaintiffs clearly meet the first and fourth elements. Plaintiffs Second Amended Collective and Class Action Complaint (Doc. No. 13) sets forth their claim for a money judgment pursuant to the Fair Labor Standards Act and New York Labor Law. *See Ally Bank v. Reimer*, 2010 WL 446025, *3 (E.D.N.Y. Jan. 29, 2010) (“The standard for determining whether a cause of action exists for purposes of attachment under New York law is a liberal one. Unless the plaintiff’s papers clearly establish that the plaintiff must ultimately be defeated, a cause of action exists.”) (citation omitted).

The amount demanded from Defendants is \$1,153,377 (\$939,212 in damages¹ and \$214,165 in fees and costs). *See* Exhibits N and O. This amount is greater than the amount of all counterclaims known to Plaintiffs, as Defendants’ Answer (Doc. No. 15) sets forth no counterclaims. *JSC Foreign Econ. Ass’n. Technostroyexport v. Int’l Dev. and Trade Serv., Inc.*, 306 F.Supp.2d 482, 485 (S.D.N.Y. 2004) (“Because the defendants have not set forth any counterclaims in the papers before the Court, the amount demanded from the defendants exceeds the amount of all counterclaims known to the plaintiff.”). As shown below, Plaintiffs also meet the second and third elements and are therefore entitled to an order of attachment.

¹ Damages are based on the payroll documents produced by Defendants in discovery. For the named Plaintiffs, minimum wage, overtime and spread of hours damages were calculated using actual payroll data. For the class members, minimum wage, overtime and spread of hours damages were calculated by averaging the named Plaintiffs’ weekly damages and multiplying that figure by the number of weeks worked by each class member. For all Plaintiffs, deductions damages were calculated by multiplying an average weekly deduction amount by the number of weeks worked by each Plaintiff. *See Reich v. Gateway Press*, 13 F.3d 685, 701-02 (3d Cir.1994) (“Courts commonly allow representative employees to prove violations with respect to all employees.”). Since Defendants have failed to provide time sheets for the period 2/24/11 to 3/26/11, Plaintiffs have been forced to extrapolate the claims for this period.

B. Plaintiffs Have Shown a Likelihood of Success on the Merits

In considering [the likelihood of success on the merits of at least one of plaintiff's claims], the court "must give the plaintiff the benefit of all the legitimate inferences that can be drawn from the facts." *Allstate Insurance Company v. TMR Medibill Inc.*, No. CV-00-0002, 2000 WL 34011895, *14 (E.D.N.Y. July 13, 2000). Moreover, courts can draw adverse inferences or presume a violation when a person invokes the Fifth Amendment privilege in a civil proceeding. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause."); *S.E.C. v. Freiberg*, No. 2:05-CV-00233PGC, 2007 WL 2692041, *10 (D. Utah Sept. 12, 2007); *Casey v. Philadelphia Elec. Co.*, Civ. A. No. 85-5924, 1987 WL 9292, *3 (E.D. Pa. Apr. 10, 1987) ("the prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences... 'where the privilege is claimed by a party to a civil cause.' ... This is no less true where the invocation of the Fifth Amendment occurred at a deposition, rather than in open court."). *See also Penfield v. Venuti*, 589 F. Supp. 250, 255 (D. Conn. 1984) (same); *U.S. v. Bartesch*, 643 F. Supp. 427, 430 (N.D. Ill. 1986) (same).

Defendant Hanukov invoked his Fifth Amendment privilege repeatedly in response to questions about Defendants' liability regarding Plaintiffs' claims in this case. Specifically, he asserted his Fifth Amendment privilege when asked if Defendants paid Plaintiffs minimum wage, overtime and spread-of-hours pay. Exhibit M, p. 15. He also pled the Fifth when asked about the deduction from wages by Defendants to cover employer expenses. Exhibit M, pp.48-49. Plaintiffs are thus entitled to a negative inference that Defendants did not pay them lawfully. Furthermore, Plaintiffs' declarations submitted with respect to the class and collective action

application (Docs. No. 19-4 through 19-8) show that Plaintiffs never received overtime or spread of hours pay, that Defendants did not ensure payment at the minimum wage rate for some drivers, and that Defendants made unlawful deductions from their wages for employer expenses such as uniforms, parking and traffic tickets, for van equipment, etc. Because Defendants have not and cannot now offer any testimony to refute the facts as presented by Plaintiffs in this case, and because Plaintiffs are entitled to an inference from Defendants' refusal to testify in this case based on the Fifth Amendment, Plaintiffs have shown a likelihood of success on the merits.

C. Plaintiffs Have Shown That Defendants Have Disposed of and Secreted Property with Intent to Defraud Creditors

In *Carpenters Pension Fund*, the court discussed the standards for demonstrating intent to defraud or frustrate judgment.

Because “[f]raudulent intent is rarely susceptible to direct proof,” *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir.1983), plaintiffs often seek to prove intent to defraud circumstantially by proof of certain “objective facts”-“badges of fraud”-that give rise to an inference of intent to defraud. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540-41 (1994).

2008 WL 2115225 at *4. The court cited the decision in *Lippe v. Bairnco Corp.*, 249 F.Supp.2d 357, 374-75 (S.D.N.Y. 2003) finding the following to be “badges of fraud”: (1) gross inadequacy of consideration; (2) a close relationship between transferor and transferee; (3) the transferor's insolvency as a result of the conveyance; (4) a questionable transfer not in the ordinary course of business; (5) secrecy in the transfer; and (6) retention of control of the property by the transferor after the conveyance. 2008 WL 2115225 at *4-*5.

It also looked to the decision in *United States v. Mazzeo*, 306 F.Supp.2d 294, 312 (E.D.N.Y. 2004) that similarly identified indicia of fraud, including (1) the family, friendship or close associate relationship between the parties; (2) the retention of possession, benefit or use of

the property in question by the debtor; (3) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (4) the general chronology of the events and transactions under inquiry. 2008 WL 2115225 at *5

In examining these “badges” and indicia of fraud, the court in *Council of Carpenters Pension Fund* found intent to fraud because the defendant had “repeatedly transferred his personal assets as well as the assets of KW Construction to family members or close business associates for little to no consideration, at or near the time when plaintiffs [raised their claims].” 2008 WL 2115225 at *5. The court also found that a showing of a current intent is not necessary. The requirements of “§ 6201(3) may be satisfied where the plaintiff merely demonstrates *past* fraudulent transfers by the defendant. 2008 WL 2115225 at *6, citing *Bank Leumi Trust Co.*, 892 F. Supp. 478, 482 (S.D.N.Y. 1995); *Mineola Ford Sales Ltd. v. Rapp*, 661 N.Y.S.2d 281, 282 (App. Div. 1997); *Bd. of Educ. of City of New York v. Treyball*, 446 N.Y.S.2d 417, 417 (App. Div. 1982).

1. Defendant Hanukov’s Transfer of Real Property to His Mother Indicates Intent to Defraud

In the instant proceeding, Defendant Hanukov transferred real property to his mother at significantly lower than its likely value, and at significantly lower than its purchase price, near the time when Plaintiffs commenced this proceeding. The transaction displays many of the indicia of fraud, such as inadequate consideration, a family relationship between the parties, and questionable timing. Defendant Hanukov was also remarkably elusive in answering questions about the transfer, further indicating that Defendants have intent to defraud their creditors or frustrate the enforcement of a judgment that might be rendered in Plaintiffs favor.

2. Defendant Hanukov's Assertion of the Fifth Amendment When Questioned About Corporate Assets Indicates Intent to Defraud

Moreover, Defendant Hanukov's assertion of his Fifth Amendment privilege against self-incrimination when questioned about the existence, location and transfer of personal and corporate assets supports both intent to defraud creditors or frustrate the enforcement of a judgment, and the assertion that Defendants are about to assign, dispose of, encumber or secret property, or remove property from the state. Particularly telling is Defendant Hanukov's assertion of his Fifth Amendment privilege when questioned about the sale or transfer of any part of Alert Ambulette or Hanukov Bus Co. Exhibit M, p. 20. The court may infer from Defendant Hanukov's assertion of his Fifth Amendment privilege that parts of Alert Ambulette and/or Hanukov Bus Co. have been sold or transferred. Defendant Hanukov's secrecy indicates that these conveyances were likely for inadequate consideration and leave the companies insolvent.

3. Defendant Alert Ambulette's Use of Two Sets of Payroll Books and Issuance of Incorrect W-2 Forms Indicates Intent to Defraud

Defendant Alert Ambulette has undeniably kept two sets of books in order to deceive the Internal Revenue Service and pay fewer taxes. It has also undeniably issued W-2 forms stating fewer wages than it actually paid to Plaintiffs in order to cheat Plaintiffs out of unemployment insurance benefits and workers compensation. These acts clearly show that Defendants have run their businesses using unscrupulous practices. Such behavior corroborates Defendants' intent to defraud creditors.

4. Defendant Hanukov's Personal Use of Corporate Funds Indicates Intent to Defraud

Also revealing is Defendant Hanukov's assertion of the Fifth Amendment when asked about the use of corporate funds for personal purposes. The documentary evidence undisputedly

shows that he has charged thousands of dollars on company credit cards for things like cigars, liquor, nightclubs, hotels, skydiving, and trips to Costa Rica. These transactions are undoubtedly questionable transfers not in the ordinary course of business and will result in the insolvency of the companies, indicating intent to defraud creditors

5. Defendant Hanukov's Transfers of Alert Ambulette's Funds to Himself and to His Mother While Simultaneously Maintaining Multiple Large Lines of Credit Indicate Intent to Defraud

Lastly, Defendant Hanukov has undisputedly issued and cashed checks made payable to "Cash" from Alert Ambulette's accounts and has issued checks to his mother for "rent" from Alert Ambulette's accounts. He then asserted his Fifth Amendment privilege against self-incrimination when asked about the checks to "Cash" (Exhibit M, pp. 57-58) and transfers of Alert Ambulette's funds to relative (Exhibit M, pp. 18-19). He has also irrefutably maintained multiple large lines of credit with various banks. These transactions are undoubtedly questionable transfers not in the ordinary course of business and will result in the insolvency of the companies, indicating intent to defraud creditors. Having demonstrated all the necessary elements, Plaintiffs are entitled to an order of attachment.

II. PLAINTIFFS SHOULD BE PERMITTED TO ATTACH ANY FUNDS, MONIES, AND/OR PROPERTY OF DEFENDANTS AND TO GIVE AN UNDERTAKING OF \$500

In *Carpenters Pension Fund*, the court declined to resolve a dispute as to what properties the defendants actually owned and issued an order permitting plaintiffs to attach any "funds, monies, personal or real property and/or interest in property" of defendants. 2008 WL 2115225 at *6, fn 3. It left any disputes as to the scope and implementation of the attachment order to the procedures prescribed by New York law, N.Y. C.P.L.R. §§ 6219-6224. *Id.* Likewise, this Court should permit Plaintiffs to attach any funds, monies, personal or real property and/or interest in

property of Defendants and leave any disputes as to the scope and implementation of the attachment order to the procedures prescribed N.Y. C.P.L.R. §§ 6219-6224.

On a motion for an order of attachment, plaintiffs are required to give an undertaking “in a total amount fixed by the court, but not less than five hundred dollars...” N.Y. C.P.L.R. § 6212(b) (McKinney 2011). Here, Plaintiffs request an undertaking of \$500 for attachment of up to \$1,153,377 in assets, or [.04]% of the assets. This is appropriate given that Plaintiffs do not believe that Defendants actually have \$1,153,377 in assets. Further, the amount of the undertaking requested, when calculated as a percentage of assets, is similar to those in other attachment cases. *See, e.g., In re Amaranth Natural Gas Commodities Litigation*, 711 F.Supp.2d 301, 313 (S.D.N.Y. 2010) (undertaking of \$250,000 on assets of \$72.4 million [.35% of the assets]); *OSRecovery, Inc. v. One Groupe Int’l, Inc.*, 305 F.Supp.2d 340, 348 (S.D.N.Y. 2004) (undertaking of \$100,000 on assets of 250,000,000 [.04%]); *Garden City Irrigation, Inc., v. Donna Salamanca*, 801 N.Y.S.2d 234 (table), 2005 WL 927001, *3 (N.Y. Sup. Ct. 2005) (undertaking of \$500 where plaintiff sought to recover \$150,000 [.33%]).

CONCLUSION

Plaintiffs have demonstrated all the necessary elements for an order of attachment. Accordingly, Plaintiffs should be granted an order permitting them to attach any funds, monies, personal or real property and/or interest in property of Defendants. Finally, Plaintiffs should be allowed to give an undertaking of \$500.