

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

DOW KIM,

Index No.

Petitioner,

Motion Sequence #1

-against-

**NOTICE OF PETITION**

VITALY DUKHON,

**10600515**

Respondent.

**Motion By:**

Petitioner Dow Kim

**Motion is Returnable**

**March 24, 2010, at 9:30 a.m.** or as soon thereafter as counsel may be heard, in Motion Support, Room 130 of the Supreme Court of the State of New York, New York County, at the Courthouse located at 60 Centre Street, New York, NY, 10013.

**Supporting Papers:**

Verified Petition dated March 1, 2010 and exhibits attached thereto and Memorandum of Law in Support dated March 1, 2010.

**Relief Requested:**

An Order pursuant to CPLR §7503 staying the arbitration as against Dow Kim, and granting such other and further relief as the Court deems just necessary and proper.

**Answering Affidavits:**

If any, must be served upon the undersigned at least seven (7) days before the return date of this motion. See CPLR § 2214.

**FILED**  
MAR. 01 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

DATED: New York, New York  
March 1, 2010

COLE, SCHOTZ, MEISEL,  
FORMAN & LEONARD, P.A.  
A Professional Corporation

By: Leo Leyva  
Leo V. Leyva  
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TO:

WINSLETT STUDNICKY MCCORMICK & BOMSTER, LLP  
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6 East 39<sup>th</sup> Street, 8<sup>th</sup> Floor  
New York, NY 10016

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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DOW KIM,

Index No.

Petitioner,

**VERIFIED PETITION**

-against-

VITALY DUKHON,

Respondent.  
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10600515

Petitioner, Dow Kim ("Petitioner" or "Kim"), by and through his attorneys, Cole Schotz Meisel Forman & Leonard, P.A., for his Verified Petition, states and alleges as follows:

**INTRODUCTION**

1. This Petition is submitted in support of an application made pursuant to CPLR §7503(b) for an Order permanently staying an arbitration between Kim and Respondent, Vitaly Dukhon ("Dukhon" or "Respondent"), on the basis that there is no valid arbitration agreement between the parties requiring Kim to arbitrate any alleged dispute with Dukhon.

2. On or about February 9, 2010, Dukhon commenced an arbitration against Kim before the International Institute for Conflict Prevention and Resolution (the "Arbitration") alleging, in sum, that Kim has breached certain oral agreements, and that Kim is personally liable for the purported debts of Diamond Lake Investment Group, L.P. and Diamond Lake GP, LLC (collectively, "Diamond Lake" or the "Corporate Entities"), entities that were formed in anticipation of launching a hedge fund (the "Fund"). Dukhon brought the Arbitration against Kim in his personal capacity despite Kim never having agreed to submit to arbitration of any such purported claims and never having personally signed the agreements that form the basis of Dukhon's claims, or that permit Dukhon to arbitrate his dispute. In fact, in an act of recently

**FILED**  
MAR 01 2011  
CLERK OF THE COURT  
COUNTY OF NEW YORK

brought by another member of Diamond Lake, this Court previously held that Kim may not be held personally liable for any alleged liabilities of Diamond Lake. Dukhon's commencement of the Arbitration is thus nothing short of a desperate attempt to litigate in a different forum claims against Kim that this Court has already determined to be without merit.

3. Because Kim never agreed to be personally obligated to arbitrate the purported claims raised by Dukhon, he cannot be compelled to arbitrate. Simply stated, Kim did not personally sign any of the agreements that Dukhon alleges compel Kim to arbitrate and, therefore, the arbitration brought against Kim must be permanently stayed.

#### **THE PARTIES**

4. Kim is a resident of the State and City of New York.

5. Dukhon is a resident of the State and City of New York, having an address at 167 East 61<sup>st</sup> Street, New York, NY, 10065.

#### **STATEMENT OF FACTS**

##### **The Attempted Launch of Diamond Lake and the Parties' Agreements**

6. Dukhon was a limited partner in Diamond Lake Investment Group, L.P., and a non-managing member of Diamond Lake GP, LLC. The Fund created by these entities was unable to raise the requisite capital to launch and, therefore, the venture failed.

7. For approximately one year, Kim and others invested substantial time and work in trying to raise money and make the Fund a success. Despite Dukhon's allegations, the Fund was in fact well capitalized over a 12 month period and Kim lost over \$12 million of his personal money in the attempted launch. During this time, Diamond Lake paid salaries and rent, worked with outside professionals, and observed all corporate formalities. Regrettably, through no fault of anyone, the condition of the financial markets and all of the issues that were dominating the

financial world in 2007 and 2008, and which continue today, made it impossible for the Fund to raise the requisite capital needed to sustain operations.

8. On October 1, 2007, Dukhon, who graduated from Harvard University *summa cum laude*, and who described himself in his Notice of Arbitration as a “highly sought-after financial professional with multiple employment options”, voluntarily executed a First Amended and Restated Limited Partnership Agreement (the “Limited Partnership Agreement”). (A true and accurate copy of the Limited Partnership Agreement is attached hereto as Exhibit “A.”). The signatories to the Limited Partnership Agreement were Dukhon personally, and Kim as managing member of DLIG LLC, a limited liability corporation. Exhibit “A”.

9. Section 9.14 of the Limited Partnership Agreement states, as follows, “This agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof. . .except with respect to any Supplementary Agreements.”

10. On October 1, 2007, Dukhon also voluntarily executed a Supplementary Agreement to the Limited Partnership Agreement (the “Supplementary Agreement”). (A true and accurate copy of the Supplementary Agreement is attached hereto as Exhibit “B.”). Again, the signatories to the Supplementary Agreement were Dukhon personally, and Kim as managing member of DLIG LLC, a limited liability corporation. Exhibit “B”.

11. Dukhon also executed a “Term Sheet” memorializing his relationship with the Corporate Entities. (A true and accurate copy of the Term Sheet is attached hereto as Exhibit “C.”) As expected, the signatories to the Term Sheet were Dukhon personally, and Kim as managing member of DLIG, LLC and Diamond Lake, G.P. LLC. Exhibit “C”.

12. By its terms, Section 1 of the Supplementary Agreement expressly incorporates the provisions of the “Term Sheet” See Exhibit B, p. 1. Accordingly, the Limited Partnership

Agreement, Supplementary Agreement, and Term Sheet, constitute the entire agreement between the parties regarding the partnership.

13. On January 23, 2008, Dukhon also executed a Limited Liability Company Agreement of Diamond Lake GP LLC ("LLC Agreement"). (A true and accurate copy of the LLC Agreement is attached hereto as Exhibit "D.") Again, the signatories to the LLC Agreement were Dukhon personally, and Kim as managing member. Exhibit "D".

Consistent with the other controlling agreements, the LLC Agreement, at Section 9.14, provides as follows:

This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior and contemporaneous agreements and understanding of the parties in connection therewith, except with respect to any Supplementary Agreements.

LLC Agreement, p. 32, §9.14. Accordingly, the above described documents altogether embody the contract between Dukhon and the Corporate Entities.

14. §9.06 of the Limited Partnership Agreement, and §9.06 of the LLC Agreement, both contain arbitration provisions. Specifically, §9.06 states, in pertinent part:

With respect to any controversy or dispute arising out of this Agreement. . .each of the parties consents to submit any such controversy or dispute to the finally resolved by arbitration. . .

15. There is no other agreement entered into by Dukhon and Kim or the Corporate Entities that contains an arbitration agreement. Kim never entered into any agreement with Dukhon that personally obligates Kim to participate in an arbitration, especially if Dukhon is attempting to bring claims against Kim in his individual capacity. Finally, Kim never agreed to arbitrate any claims brought by any employee or partner of Diamond Lake.

16. Despite the fact that no arbitration agreement exists between Dukhon and Kim, Dukhon commenced the Arbitration against Kim personally. (A copy of the Notice of Arbitration is attached hereto as Exhibit "E").

**Dukhon's Attempt to Bring the Arbitration Against Kim Personally**

17. Dukhon alleges that the agreements which permit him to bring an arbitration action against Kim are the Limited Partnership Agreement and the LLC Agreement, which he admits, and as stated, were not signed by Kim. Exhibit "E", p. 38 – 39.

18. Dukhon attempts to compel Kim to arbitrate his disputes with the Corporate Entities by claiming that Kim was an "alter ego" of the Corporate Entities. In a desperate attempt to piece the corporate veil and subject Kim to arbitration, Dukhon includes certain veil-piercing "buzzwords" in his Notice of Arbitration.

19. Dukhon's inclusion of these words and specious allegations, however, ring hollow, and cannot be used as a basis to strip Kim of the important corporate protections afforded to him by the creation of the Corporate Entities.

20. In a desperate attempt to force Kim into arbitration personally, in direct contravention of the controlling agreements, Dukhon relies on an entire section of his Notice of Arbitration entitled, "Operating the Companies as Mr. Kim's Alter Ego". Dukhon's attempts to paint the Corporate Entities as an alter ego of Kim strain credulity, and are nothing short of a desperate effect to compel Kim to arbitration where he does not belong. Notably, not one of the 18 exhibits that Dukhon cites in support of his Notice of Arbitration is referenced in this scurrilous section, and Dukhon cannot point to a single document that reflects Kim acting in his personal capacity. Dukhon's argument is clearly without merit.

21. First, Dukhon states that as evidence that the Corporate Entities were simply an alter ego of Kim, Kim "failed to consult" with his partners regarding the true status of his capital-

raising efforts, and took vacations to the Bahamas and Asia seemingly to avoid confrontations with the partners/members regarding his failed efforts.

22. Even if those allegations were correct, which as evidenced by a lack of citation they are not, they fail to provide any support whatsoever that the Corporate Entities were an alter ego of Kim. Instead, the allegations are merely conclusory statements that Kim was not communicative and liked to travel, hardly language that supports the “heavy burden” associated with a veil piercing analysis.

23. Second, Dukhon alleges that Kim held himself out to the public at large as the alter ego of the Corporate Entities. As evidence of this seemingly widespread public dissemination of information, Dukhon references one individual, Tatiana Segal (“Segal”), to whom Dukhon alleges Kim verbally insinuated that he controlled the Corporate Entities, and one letter, a retainer agreement with Shulte Roth & Zabel (“Shulte Roth”), that Dukhon alleges Kim signed in his personal capacity.

24. Again, even assuming that Dukhon is correct that Kim insinuated to Segal, once, that he controlled the Corporate Entities, which he did not, a single conversation with an employee of Kim’s is hardly evidence of Kim “referr[ing] to himself and the Companies interchangeably”. Notably, this passing reference to a single conversation is the only allegation in 162 paragraphs of Kim holding himself out as an alter ego of the Corporate Entities.

25. Additionally, the agreement that Kim purportedly signed in his individual capacity with Shulte Roth had to be signed in his individual capacity because when it was signed the Corporate Entities did not yet exist. The agreement with Shulte Roth was signed on June 11, 2007, four months before the Corporate Entities existed, a fact that Dukhon fails to bring to the arbiter’s attention. Kim retained Shulte Roth for legal advice regarding formation of the



Corporate Entities. (A copy of the agreement signed by Kim before formation of the Corporate Entities is attached hereto as Exhibit "F").

26. Therefore, it stands to reason that Kim could not have signed the letter on behalf of the Corporate Entities at that point in time, and the fact that he signed the letter personally cannot be used as evidence that the Corporate Entities were merely an alter ego of Kim.

27. Third, Dukhon alleges that Kim's use of the Company car and the office computers evidences that the Corporate Entities were merely an alter ego of Kim. Notably, Dukhon does not, because he cannot, explain how rides in the Company car, the chauffeur's salary, or log-ins to the Company computer in any way support his alter ego argument. Rather, Dukhon clearly inserted these false and conclusory accusations in an attempt to prejudice the panel, and this Court, in anticipation of this Petition.

28. Lastly, Dukhon alleges that the Corporate Entities were undercapitalized. This too is incorrect. The Corporate Entities were not undercapitalized, but rather operated and paid salaries, rent and other corporate obligations for nearly one year while attempting to launch the Fund. Regrettably, the Companies could not secure additional financing, which lead to the Fund's failure. The fact that the venture failed, and that Kim had invested some of his own money into the venture, is hardly evidence that the Corporate Entities were an alter ego of Kim.

29. Dukhon's specious allegations make clear that there is no support for Dukhon's alter ego claim.

#### **The Prior Attempt to Sue Kim**

30. Notably, Dukhon is not the first former partner/member of the Corporate Entities to try to pierce the corporate veil and hold Kim personally liable for the unfortunate failure of the Fund.

31. On or about December 22, 2008, Karl J. Wachter ("Wachter"), a fellow partner/member of Dukhon's, who also drafted and executed the same agreements as Dukhon, and held the same interest in the Corporate Entities as Dukhon, commenced an action against Kim personally in the Supreme Court, New York County. (A copy of Wachter's Summons and Complaint is attached hereto as Exhibit "G".)

32. In his Complaint, Wachter alleged that Kim personally breached certain alleged oral agreements, and was also personally liable for the Corporate Entities' alleged breaches of the agreements discussed above. See Exhibit "G".

33. On or about February 3, 2009, Kim moved to dismiss Wachter's complaint. Kim argued that Wachter is unable to pierce the corporate veil and hold Kim personally responsible for any of the Corporate Entities' alleged breaches of contract, and any alleged oral agreements Kim purportedly entered into were barred by the Statute of Frauds.

34. On or about September 10, 2009, Judge Charles E. Ramos, Justice of the Commercial Part, Supreme Court, New York County, granted Kim's motion to dismiss in its entirety. (A copy of Justice Ramos's September 10, 2009 decision granting Kim's motion to dismiss is attached hereto as Exhibit "H".)

35. In addition to correctly finding that any of Kim's purported oral agreements were outright unenforceable pursuant to the Statute of Frauds, Justice Ramos also found that because Kim was not a party, personally, to any of the agreements that Wachter (and now Dukhon) alleges were breached, Kim cannot be personally liable to Wachter.

36. Specifically, the Court held, "[f]atal to Wachter's claim is that Kim was not a signatory to the contract. Rather, Kim signed the [contract] in his corporate capacity. . .". Exhibit "H", p.5. (emphasis added).

37. The Court also rejected Wachter's claims, echoed by Dukhon in his Notice of Arbitration, that Kim was an "affiliate" of Diamond Lake as set forth in the preamble to the Term Sheet, and is therefore responsible for the Corporate Entities' liabilities. The Court held,

**"To read into the Term Sheet that the parties intended Kim, individually, to be regarded as an affiliate under the Term Sheet would amount to re-writing the agreement under the guise of contract interpretation."**

Exhibit "H", p. 6. (Emphasis added).

38. Lastly, as it pertains to the instant case, the Court rejected Wachter's claims that Kim should be considered an "affiliate" under the Term Sheet according to the common meaning in the industry, and therefore liable for the Corporate Entities' alleged breaches. Specifically, the Court held:

**"Wachter additionally asserts that Kim should be regarded as 'affiliate' under the Term Sheet according to common meaning in the industry. However, where a written agreement is clear and unambiguous on its face, extrinsic and parol evidence is not admissible to create an ambiguity."**

Exhibit "H", p. 6.

39. Clearly, in light of Justice Ramos's well reasoned decision, and realizing the futility of commencing a legal action against Kim in the Courts of this State, Dukhon instead commenced an arbitration action against Kim personally in an effort to succeed where Wachter could not. Dukhon, however, should not be permitted to flout the well established laws of this State that protect individuals from actions that should instead be brought against the corporate form, particularly where this Court has already held that Kim cannot be sued in his personal capacity.

40. A valid agreement for arbitration was never entered into between Kim and Dukhon. Simply stated, Kim never entered into any agreements that personally subject him to

any arbitration proceedings. Because Kim did not personally enter into any of the agreements that Dukhon relies upon to initiate his meritless Arbitration, he should not be subject to arbitration and the Court should enter an order permanently staying the arbitration as to Kim.

**FIRST COUNT**  
**(Permanent Stay of the Arbitration)**

41. Kim repeats and realleges each and every allegation contained in the prior paragraphs of his Petition as if set forth at length herein.

42. There is no valid and enforceable arbitration agreement between the parties.

43. Kim should not be compelled to arbitrate any claims in his personal capacity that Dukhon purportedly has against the Corporate Entities.

44. Pursuant to CPLR § 7303(b), Kim is entitled to an Order permanently staying the Arbitration commenced against him by Dukhon.

WHEREFORE, Kim hereby demands an Order, as follows:

- A. Permanently staying the Arbitration commenced against him by Dukhon;
- B. Staying the Arbitration in its entirety pending the outcome of this Petition;
- C. Awarding him attorneys' fees and costs of suit; and
- D. Such other and further relief as the Court deems just and equitable under the circumstances.

COLE, SCHOTZ, MEISEL,  
FORMAN & LEONARD, P.A.  
Attorneys for Petitioner Dow Kim

By: Leo Leyva  
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900 Third Avenue  
New York, NY 10022-1906  
(212) 752-8000

DATED: March 1, 2010

**VERIFICATION**

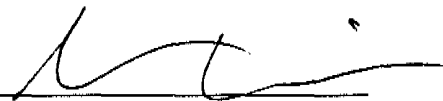
STATE OF NEW YORK            )  
  ) SS  
COUNTY OF NEW YORK        )

DOW KIM, being duly sworn, deposes and says:

1.            I am the Petitioner in the within action.
2.            I have read the foregoing Petition and know the contents thereof and believe  
the same to be true to the best of my knowledge.

  
\_\_\_\_\_  
DOW KIM

Sworn to before me this 1 day of  
February, 2010  
*March*

  
\_\_\_\_\_  
Notary Public

**JED WEISS  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 02WE6182152  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES: FEBRUARY 19, 2012**

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VITALY DUKHON,

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**NOTICE OF PETITION**

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