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Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC
2014 NY Slip Op 51461(U)
Decided on October 3, 2014
Supreme Court, New York County
Kornreich, J.
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Taberna Preferred Funding II, Ltd., TABERNA PREFERRED FUNDING IV, LTD. and TABERNA PREFERRED FUNDING VI, LTD., by and through TP MANAGEMENT LLC, solely in its capacity as collateral manager and attorney-in-fact, Plaintiffs,

against

Advance Realty Group LLC n/k/a METROGATE LLC, ADVANCE CAPITAL PARTNERS, LLC, ADVANCE REALTY DEVELOPMENT, LLC, PETER COCOZIELLO, ROTHSCHILD REALTY MANAGERS, LLC n/k/a ALMANAC REALTY INVESTORS, LLC, FIVE ARROWS REALTY SECURITIES, III, LLC n/k/a ALMANAC REALTY SECURITIES III, LLC, JOHN D. MCGURK, D. PIKE ALOIAN, PATRICIA K. SHERIDAN, JOHN DOES 1-50 and JANE DOES 1-50, Defendants.

652884/2013

Alston & Bird LLP, for plaintiffs.

Gibbons P.C., for defendants.

Shirley Werner Kornreich, J.

Defendants move to dismiss the complaint pursuant to CPLR 3211. Defendants' motion is granted in part and denied in part for the reasons that follow.

Background

As this is a motion to dismiss, the following facts are taken from the complaint and documents submitted.

A. The FARS Loan

Defendant Advance Realty Group LLC (ARG) is a Delaware limited liability company formed by defendant Peter Cocoziello, its president and chief executive officer (CEO), in 2001 (complaint ¶¶ 42, 44). ARG develops, owns and manages commercial properties in the [*2]Northeastern United States (*id.* at ¶¶ 43). By a credit agreement and promissory note, both dated August 6, 2001, ARG entered into a $60 million credit facility with Five Arrows Realty Securities, III, LLC (FARS) (*id.* at ¶¶ 51-55, exhibit C [FARS Credit Agreement], exhibit D [FARS Note]). FARS is owned, managed and controlled by defendant Rothschild Realty Mangers, LLC (Rothschild), which was founded by John D. McGurk in 1981 (*id.* at ¶¶ 25, 28, 52). According to the FARS Credit Agreement, FARS, at its "sole and absolute discretion," had the right to convert all or a portion of its outstanding debt into common units in ARG (Credit Agreement § 8.01[a]). The parties acknowledged that if the entire $60 million sum were

to be immediately advanced and converted, FARS would be entitled to 3,604,215 common units of ARG, or 51.50% of the company (*id.* at § 8.01[c]). Further, under the terms of the credit facility, FARS was granted the right to appoint two members to ARG's four member managing board (complaint ¶ 56). FARS appointed two of its principals, defendants McGurk and D. Pike Aloian (*id.* at ¶ 57). Cocoziello and non-party Gregory Senkevitch made up the remainder of the ARG board (*id.*). Defendant Patricia Sheridan served as ARG's chief financial officer (CFO) (*id.* at ¶ 35). The maturity date for any sums advanced by FARS was August 8, 2008 (*id.* at ¶ 54, FARS Note).

B. The Trust-Preferred Securities

In October 2005, ARG created a trust, Advance Realty Group Capital Trust II (the Trust), which issued preferred stock to plaintiffs (the Taberna Funds) in exchange for $35 million (complaint ¶¶ 62-63, exhibit E [Trust Agreement] § 6.10 [b]). Pursuant to an indenture dated October 14, 2005, the Trust loaned the proceeds of the preferred stock issuance to ARG (*id.* at ¶ 61, exhibit A [the Indenture]). Notes evidencing the loan were held by the Trust for the benefit of the holders of the preferred stock, and payments made by ARG on the loan were to flow through the Trust to the Taberna Funds (complaint ¶¶ 66, 71). Interest payments on the loan, at an annual rate of 4.25% above LIBOR, were due quarterly (*id.* at ¶ 70).

Under the terms of the Indenture, if ARG failed to make an interest payment when due and failed to cure such default within thirty days, the Trust's loan could be accelerated and become immediately due and payable (Indenture §§ 5.1[a], 5.2[a]). The Indenture and the Trust Agreement explicitly permit "[a]ny registered holder of the Preferred Securities to institute a suit directly against [ARG] for enforcement of payment to such holder" upon ARG's default on its payment obligations to the Trust (*id.* at § 5.8; *see also* complaint, exhibit E [Trust Agreement] § 6.10[b]).

Simultaneously with the execution of the Indenture, ARG, FARS and the Trust executed an agreement subordinating "any payment or other distribution on or in respect of the [2001 FARS loan] (a "*Payment or Distribution*")" to the new, 2005 Trust loan (complaint, exhibit C [the Subordination Agreement] § 2.1). Section 2.5 of the

Subordination Agreement provides:

Notwithstanding anything to the contrary in this Agreement, including *Section 2.1*, FARS may . . . convert all or any portion of the [FARS Note] to Common Units at any time in accordance with the terms of the [FARS] Credit Agreement. *Furthermore*, except during the continuation of a Payment Blockage Event . . . (i) FARS may demand, sue for, take or receive, and exercise any and all of its remedies under the [FARS] Credit Agreement . . . (ii) ARG may pay interest on the [FARS Note] . . . (iii) ARG may pay principal in respect of the [FARS Note].

FARS shall have no right to take any of the actions or to accept any Payments or Distributions *described in the preceding clauses (a)(i) through (iii)* during the continuation of any of the following events (each such event hereinafter referred to as a "*Payment Blockage Event*"): (i) [ARG] shall fail to pay when due, whether at stated maturity, by acceleration or otherwise, any amount payable by it with respect to principal of, or interest on, the [Trust loan] and either such amount payable by it or such principal and interest, as the case may be, remains unpaid (a "*Payment Default*") (italics added).

The Subordination Agreement also subordinated FARS's rights to ARG's assets upon liquidation:

Upon any payment or distribution, whether of cash, securities or other property, to creditors of [ARG] in a bankruptcy, reorganization, insolvency, receivership or similar proceeding relating to [ARG] or all or any substantial part of its property or upon any total or partial liquidation or any dissolution or winding up of [ARG], whether voluntary or involuntary (a "*Proceeding*"): (a) [the Trust loan] shall be paid in full in cash before FARS shall be entitled to receive any Payment or Distribution from [ARG].

(Subordination Agreement § 2.4). As a remedy, the agreement provided:

If FARS receives any Payment or Distribution at a time when such Payment or Distribution should not have been made to FARS under *Section 2.4* or *2.5*, then, such Payment or Distribution shall be deemed to have been received and held in trust for the benefit of, . . . and be paid and delivered as promptly as possible to, the Trustee for application to the payment or prepayment of the [Trust loan].

(*id.* at § 2.7). The Subordination Agreement states that the parties acknowledge and agree that "this subordination is for the benefit of the Trustee and the Holders [FN1] and shall be enforceable by the Trustee on behalf of the Holders, or any of them" (*id.* at § 2.1).

C. ARG Restructuring

When the FARS Note came due in August 2008, 3,906,884 common units of ARG (approximately 88% of the common equity) were held by defendant Advance Capital Partners, LLC (Advance Capital), a New Jersey limited liability company owned and controlled by Cocoziello (complaint ¶ 102, exhibit B [ARG Operating Agreement], exhibit A). ARG, in turn, wholly owned defendant Advance Realty Development, LLC (Advance Development), another New Jersey limited liability company. FARS and Advance Capital at that time valued ARG at $25 per unit (complaint ¶ 93; affirmation of John Doherty, Feb 12, 2014 exhibit C). Assuming, per the FARS Credit Agreement, that FARS had a right to convert its debt into 3,604,215 common units, that placed the value of FARS's convertible debt at $90,105,375. Upon maturity of the FARS Note, rather than demand payment of its $60 million (plus interest) *or* exercise its right to convert (which would have effectively made it a nearly equal partner with Advance Capital in ARG), FARS negotiated the exit of Advance Capital from its equity position and the surrender of the company to FARS's control.

Specifically, in an agreement dated September 5, 2008 (amended affirmation of William M. Moran, December 5, 2013, exhibit B [the Conversion Agreement]), FARS, ARG, Advance [*3]Capital and Advance Development agreed to restructure ARG as

follows: FARS would convert a sufficient amount of its debt into a majority interest in ARG; the FARS Note would be cancelled and replaced by two new notes totaling $90,105,375 (the value of the convertible debt) less the sum which had been converted into equity; and ARG would redeem all of Advance Capital's equity (common and preferred) in exchange for (i) two notes payable to Advance Capital, totaling $12,008,115, (ii) all the common units of Advance Development, and (iii) a note payable to Advance Development in the amount of $40,663,985. When the transaction was complete, FARS was a 54.89% owner of ARG, and Advance Capital had exchanged its equity stake for ARG's promise to pay it approximately $66 million and ownership of Advance Development.

The transfer of Advance Development, directly or indirectly, resulted in ARG's relinquishing approximately $45 million of interest in what the complaint characterizes as "development properties"; ARG, now controlled by FARS, retained its "income-producing properties" (complaint ¶ 110). However, although it relinquished control of the Advance Development portfolio, ARG guaranteed loans secured by certain of those transferred development properties (*id.* at ¶¶ 125-27). Further, ARG was not required to make interest payments during the terms of the new notes issued to FARS, Advance Capital or Advance Development, but, nevertheless, did make such payments and further caused its subsidiaries to borrow money from FARS or its affiliates at high interest rates (*id.* at ¶¶ 121-24, 128-31).[FN2]

ARG failed to make the interest payments on the Trust loan in October 2009 and January 2010 (*id.* at ¶ 145). On February 9, 2010, Taberna Capital Management, LLC, then the collateral manager for the Taberna Funds, sent ARG and the Trustee a notice of acceleration (*id.* at ¶¶ 149-50, exhibit G).

II.Procedural History

The Taberna Funds, acting through their current collateral manager, TP Management LLC, commenced this action on August 16, 2013 by filing a summons and complaint. In their first cause of action for breach of contract, the Taberna Funds claim that ARG's interest payment default on the Trust loan and the Taberna Funds' subsequent acceleration notice entitles them to a judgment against ARG for the full

amount of the preferred securities held by them, approximately $35 million. In addition, the Taberna Funds contend that the 2008 restructuring caused ARG to make payments or distributions to FARS in violation of the Subordination Agreement, and seek either to hold FARS and ARG liable for breach of that agreement or the imposition of a constructive trust on any assets FARS received thereby (second, third and seventh causes of action). The complaint also alleges that the transfer of assets undertaken by ARG as part of the restructuring and the obligations that ARG subsequently incurred as a result constituted a fraudulent conveyance under New York's Debtor and Creditor Law, or, alternatively, unjust enrichment on defendants' part (fourth, fifth and sixth causes of action). The Taberna Funds further allege that defendants failed to fully disclose the 2008 restructuring and subsequent activity, and told them that such actions were taken in the "best interests" of ARG and its creditors, thereby depriving the Taberna Funds of an opportunity to stop the restructuring (*id.* at ¶¶ 226-27 & 234), actions which the Taberna Funds argue amount to [*4]fraudulent concealment by all defendants (ninth cause of action).[FN3] Plaintiffs seek to hold all defendants liable for the alleged fraudulent conveyances or fraudulent concealment under a theory of conspiracy to commit fraud (*id.* at ¶¶ 241-49), and urge the court to disregard ARG as an independent entity and hold FARS, its managing entities (both present and past), Cocoziello, McGurk, and Aloian jointly and severally liable for ARG's obligations (*id.* at ¶¶ 250-63). Finally, the Taberna Funds demand an accounting by ARG and FARS of all transfers made or obligations incurred to the defendants (eighth cause of action). In response, defendants move to dismiss the complaint in its entirety for failure to state a cause of action and for lack of personal jurisdiction over Cocoziello and Sheridan.

III.Discussion

Personal Jurisdiction

Both Cocoziello and Sheridan move to dismiss the complaint against them for lack of

personal jurisdiction, averring that they live and work in New Jersey (affidavit of Peter Cocoziello, sworn to on October 24, 2013; affidavit of Patricia K. Sheridan, sworn to on October 24, 2013). Where a defendant has moved to dismiss pursuant to CPLR 3211(a)(8), it is the plaintiff's burden to prove the court has jurisdiction. *Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009), citing *Bunkoff Gen. Constr. v State Auto. Mut. Ins. Co.*, 296 AD2d 699, 700 (3d Dept 2002). However, if plaintiff shows that facts justifying the exercise of jurisdiction may exist but are not presently in its possession, then the court may direct that discovery take place to explore the issue. CPLR 3211(d); *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466-67 (1974).

It is not disputed that Cocoziello and Sheridan are New Jersey residents or that Advance Development, Advance Capital and ARG are based in New Jersey and are not New York companies. The claimed basis for asserting jurisdiction over Cocoziello and Sheridan is the allegation, made on information and belief, that the Conversion Agreement (which the Taberna Funds contend amounted to an agreement to defraud them) was negotiated, in part, in New York State, where FARS maintains its offices (complaint ¶ 38).

Under New York's long-arm jurisdiction statute, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent [] transacts any business within the state . . .; or commits a tortious act within the state." CPLR 302(a). Such jurisdiction is limited to causes of action arising out of such in-state activity. *Id.* However, while ARG, Advance Capital and Advance Development were all parties to the Conversion Agreement, the complaint does not allege that either Cocoziello or Sheridan personally took part in the New York negotiations on behalf of ARG, Advance Development or Advance Capital. Furthermore, even assuming (without deciding) that ARG, Advance Capital and Advance Development could be considered agents of Cocoziello or Sheridan for jurisdictional purposes, the complaint simply does not say what, exactly, happened in New York that could justify this court's assertion of jurisdiction over those companies' purported principals. Not all contract negotiations amount to the transaction of business within the state. *See, e.g., Presidential Realty Corp. v Michael Sq. W.*, 44 NY2d 672 (1978) (New York meetings insufficient to establish [*5]jurisdiction where there was no evidence as to substance of meetings); *Leiderman Assoc. v Robotool Ltd.*, 154 AD2d 515 (2d Dept 1989) (single exploratory meeting insufficient predicate for jurisdiction).

It is plaintiffs' burden to establish a *prima facie* case that the New York activity in question was substantial enough to justify jurisdiction under CPLR 302. The complaint's deficiencies on this point are not remedied by the Taberna Funds' submission of an affidavit by Gregory Senkevitch, detailing *other* instances where Cocoziello conducted business in New York on behalf of ARG. It is silent on the subject of the 2008 restructuring, the only transaction relevant to this case (affidavit of Gregory Senkevitch, sworn to January 13, 2014). Similarly, the submitted testimony from the related Delaware action is insufficient in this regard, for it only shows that a meeting in New York was held with the minority members of ARG, at which they made certain demands (Doherty affirmation, exhibit G, 1295-96),[FN4] but provides no details about the in-state discussions between the Advance companies and FARS that ultimately resulted in the execution of the Conversion Agreement.

In short, the Taberna Funds have failed to demonstrate that Cocoziello or Sheridan, whether personally or through their agents, engaged in activity in this state in relation to the 2008 restructuring that would subject them to the jurisdiction of this court. Given, however, that the Taberna Funds claim that they were deliberately kept in the dark about the Conversion Agreement, they should not necessarily be prejudiced by their inability to state where and when Cocoziello's team met with FARS and who exactly represented ARG, Advance Capital or Advance Development at those meetings. Indeed, FARS does have an office in New York, the Conversion Agreement was executed by Cocoziello and Sheridan, and Advance Capital appears to be wholly owned by a Cocoziello-family trust (Doherty affirmation, exhibit G, 9:14-19). The Taberna Funds have demonstrated that facts may exist to defeat defendants' attack on jurisdiction and, therefore, are entitled to CPLR 3211 discovery. *See Peterson*, 33 NY2d at 466-67. Where "the plaintiffs have made a sufficient start, and shown their position not to be frivolous .[t]hey should have further opportunity" to prove defendants' contacts and activities subjected them to New York jurisdiction. *Id*. at 467.

Alternatively, plaintiffs rely on *Indosuez Int'l Fin., B.V. v Nat'l Reserve Bank*, 304 AD2d 429, 431 (1st Dept 2003) for the proposition that Cocoziello and Sheridan should be bound by the Indenture's forum selection clause even though they are not parties to the Indenture. In *Indosuez*, the Appellate Division held that "Plaintiff's parent and subsidiary, although not parties to the agreement containing the choice of law and forum selection clauses, were sufficiently close in their relation to plaintiff to be included." *Indosuez* cited federal cases in support of this holding, including *Direct Mail Prod. Servs. Ltd. v MBNA Corp.*, 2000 WL 1277597 (SDNY 2000) (Stein, J.), which

held that the relevant inquiry for "discerning whether parties are closely related'" is "whether the non-signatory [is an] intended beneficiar[y] entitled to enforce' the clause in question." *Direct Mail*, 2000 WL 1277597, at *3, quoting *Roby v Corp. of Lloyd's*, 996 F2d 1353, 1358 (2d Cir 1993). This is an accurate recitation of New York law. *See Freeford Ltd. v Pendleton, 53 AD3d 32*, 40 (1st Dept 2008). While defendants maintain this rule only applies to corporate subsidiaries and not individuals, they cite no law in support of this proposition. In fact, the rule has been applied to an individual in the arbitration context. *See [*6]Hirschfeld Prods., Inc. v Mirvish*, 88 NY2d 1054, 1055-56 (1996); *see also Interventure 77 Hudson LLC v Falcon Real Estate Invest. Co.*, 2014 WL 4613034, at * 8 (Sup Ct, NY County Sept. 8, 2014) (Schweitzer, J.) (setting forth circumstances when "[j]urisdiction can be exercised over officers for their actions on behalf of a company"). Nonetheless, as this basis for jurisdiction turns on intent [*see L-3 Comm's Corp. v Channel Techs., Inc.*, 291 AD2d 276, 277 (1st Dept 2002)], a question of fact, the parties may pursue this issue in jurisdictional discovery and have leave to brief the issue more substantively on a subsequent motion to dismiss.

Standing

The Trust is the holder of the notes issued by ARG, the Taberna Funds are the holders of preferred securities issued by the Trust, and the Trust is required to convey to the Taberna Funds the payments ARG makes on the Notes. Nonetheless, ARG and the Taberna Funds are not in privity. However, the Indenture explicitly authorizes the Trust's preferred equity holders to institute suit "directly against [ARG]" in the event of ARG's default, as does the Trust Agreement. At the same time, the Indenture and the Trust Agreement are careful to distinguish between the rights of the Trust (as noteholder) and the Taberna Funds (as holders of Trust preferred securities). Thus, while the Trust Agreement allows the holders of the Trust preferred securities to stand in for the Trust in a suit "against [ARG]" for nonpayment and for the purpose of accelerating ARG's debt, except for these two circumstances, "the Holders of Preferred Securities shall have no right to exercise directly any right or remedy available to the holders of, or in respect of, the Notes" (Trust Agreement § 6.10 [b]). Similarly, the Indenture explicitly limits the Trust preferred security holders' ability to claim to be third-party beneficiaries of the transaction between ARG and the Trust, stating:

Nothing in this Indenture or in the Securities, express or implied, shall give to any Person, other than the parties hereto . . . and, *to the extent expressly provided in*

Sections 5.2, *5.8*, *5.9*, *5.11*, *5.13*, *9.2* and *10.7*, the holders of Preferred Securities, any benefit or any legal or equitable right, remedy or claim under this Indenture"

(Indenture § 1.10 [italics added]).

Consequently, as the holders of the Trust preferred securities, the Taberna Funds have standing to sue ARG to enforce that company's payment obligations under the notes, as set forth in Section 5.8 of the Indenture and Section 6.10 of the Trust Agreement. But, the Taberna Funds may only institute suit against ARG after its default, and both the Trust Agreement and the Indenture make clear that the Taberna Funds' ability to act as ARG's obligee is limited to those instances where there is an explicit exception. As a result, the Taberna Funds' rights as the intended beneficiaries of the Indenture, the notes and the Subordination Agreement, are limited to accelerating ARG's debt and suing ARG for the money owed to the Trust. The Taberna Funds lack standing to sue FARS for payments or distributions it may have received in breach of the Subordination Agreement.

The Subordination Agreement does not otherwise provide. While it notes that "this subordination is for the benefit of the Trustee and the Holders," it further states that it "shall be enforceable *by* the Trustee *on behalf of* the Holders, or any of them" (Subordination Agreement [*7]§ 2.1 [emphasis added]). At best,[FN5] then, this means that the Subordination Agreement is no different than the Indenture itself — it is an instrument entered into for the benefit of the Trust preferred security holders, but enforcement is left to the Trust.

In response to this argument, the Taberna Funds point to Section 2.10 of the Subordination Agreement. That section provides that the "right of the Trustee or of any Holder to enforce" the agreement shall not be impaired despite "any act or omission in good faith by the Trustee or such Holder" or any knowledge the Trustee or any Holder may have of a breach of the agreement by FARS or ARG. A provision protecting the enforceability of the agreement is not the same as one *empowering* the Holders to bind or act on behalf of the Trust. Section 5.8 of the Indenture and Section 6.10 of the Trust Agreement make it clear what *that* sort of provision would look like, and those

documents also make clear that the ability of the Trust's preferred equity to assume the rights of the Trust is extremely limited. In sum, the Taberna Funds lack standing to maintain the second and third causes of action for breach of the Subordination Agreement.

Breach of Subordination Agreement

Even if the Taberna Funds had standing, however, the complaint fails to state a cause of action for breach of the Subordination Agreement. The Taberna Funds' first theory is that by letting Advance Capital walk away with the Advance Development portfolio, the 2008 restructuring constituted a partial liquidation of ARG. As such, the transaction triggered Section 2.4 of the Subordination Agreement, which provides that in such event, "all Senior Security Obligations shall first be paid in full in cash before FARS shall be entitled to receive any Payment or Distribution from [ARG]."

This theory fails for the simple reason that whether the relinquishment of the Advance Development portfolio can be called a "partial liquidation" of ARG or not, the assets in question did not go to FARS but rather to Advance Capital as partial redemption for its common units in ARG. The Subordination Agreement "defines the relative rights of FARS and the Trustee" (Subordination Agreement § 2.9), not those of ARG's members and its creditors, and by its own terms, Section 2.4 addresses ARG's liquidation, providing that the Trust must be paid out of the liquidated assets "before FARS." Whether the redemption of Advance Capital's units violated any of the Trust's rights as lender has nothing to do with its position vis-à-vis FARS, and is more properly the subject of the Indenture (*see* Indenture § 5.1 [c] & [f]) or the applicable fraudulent conveyance law (see below) rather than the Subordination Agreement.

Nor does the fact that the restructuring left FARS in control of ARG give rise to a breach of the Subordination Agreement. The Subordination Agreement expressly preserves FARS' right to convert its debt. As the Taberna Funds would no doubt be the first to acknowledge, a [*8]change in control of a company does not relieve that company of its obligations towards its creditors. In short, as the 2008 restructuring did not result in FARS receiving any of ARG's assets, it could not have constituted a breach

of the Subordination Agreement.

The Taberna Funds also claim that FARS violated Section 2.5 of the Subordination Agreement by causing ARG to make payments to it. Section 2.5(b) bars FARS from accepting "Payments and Distributions" from ARG during a "Payment Blockage Event". The earliest Payment Blockage Event is alleged to have occurred in October 2009, when ARG defaulted on its quarterly interest payments to the Trust. However, while the complaint is replete with allegations that ARG made payments to FARS, both on the FARS debt and otherwise, nowhere do the Taberna Funds allege that any such payments were made after ARG's default on the Trust loan. The Taberna Funds contend that they "are not required to plead a *specific* payment at a *specific* time at this point" (plaintiffs' brief 9). This misses the point. Without alleging that FARS was paid after October 2009, the Taberna Funds have not alleged a violation of the Subordination Agreement.

Finally, the Taberna Funds fail to state a claim for a breach of the duty of good faith and fair dealing, a covenant implied in every contract. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995). "While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship,' they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *Id.*, quoting *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293, 304 (1983) and *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978). However, "[a] claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." *Skillgames, LLC v Brody*, 1 AD3d 247, 252 (1st Dept 2003). In other words, "[t]he covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp.*, 25 AD3d 309, 310 (1st Dept 2006).

The Taberna Funds cannot revive their nonviable breach of contract claim by casting it as a good faith violation. Moreover, it is well settled that a "cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties." *Duration Mun. Fund, L.P. v J.P. Morgan Secs., Inc.*, 77 AD3d 474 (1st Dept 2010), citing *Phoenix Capital Invs. LLC v Ellington Mgmt. Group, L.L.C.*, 51 AD3d 549 (1st Dept 2008). Ergo, a good faith claim requires privity. Without the right to sue under the Subordination Agreement (which is lacking for the reasons discussed above), the Taberna Funds cannot maintain a good faith claim thereunder.

Fraudulent Conveyance

Choice of Law

Defendants move to dismiss the causes of action which are based upon New York's Debtor and Creditor Law. They argue that New York's choice-of-law principals require that [*9]New Jersey or Delaware law be applied.[FN6]

"The first step in any case presenting a potential choice of law issue is to determine whether there is any actual conflict between the laws of the jurisdictions involved." *Matter of Allstate Ins. Co. [Stolarz]*, 81 NY2d 219, 223 (1993). New York has adopted the Uniform Fraudulent Conveyance Act, while Delaware and New Jersey (along with most other states) employ the Uniform Fraudulent Transfers Act (UFTA).[FN7] Both statutory schemes recognize claims for actual and constructive fraudulent conveyance, issues here presented. *See* DCL § 276 & 6 Del C § 1304(a)(1) (actual intent to defraud); DCL § 273 & 6 Del C §§ 1304 (a)(2)(b) & 1305(a) (constructive fraudulent conveyance where transfer renders debtor insolvent); DCL § 274 & 6 Del C § 1304(a)(2)(a) (constructive fraudulent conveyance where transfer leaves debtor with too little capital). Furthermore, both New York and UFTA jurisdictions permit a claim for actual fraud to be based on factors or circumstances giving rise to an inference of intent, the so-called "badges of fraud". *See Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529 (1st

Dept 1999); *Marine Midland Bank v Murkoff*, 120 AD2d 122, 126-29 (2d Dept 1986) (holding that while facts sufficient to establish constructive fraud did not give rise to legal presumption of fraudulent intent, such intent "by its very nature, is rarely susceptible to direct proof and must be established by inference"); *see also Matter of Uni-Rty Corp.*, 117 AD3d 427, 428 (1st Dept 2014) and 6 Del C § 1304(b) (enumerating certain circumstantial factors that may be considered, among others, "[i]n determining actual intent").[FN8]

However, UFTA states and New York differ in their method of determining when a transfer in satisfaction of an antecedent debt or for fair value can be deemed constructively fraudulent. Under the UFTA, a transaction is fraudulent when made "to an insider for an antecedent debt [when] the debtor was insolvent at that time and the insider had reasonable cause [*10]to believe that the debtor was insolvent." 6 Del C § 1305(b). The term "insider" is delineated in a list of specifically enumerated relationships. *Id.* at § 1301(7).

The reach of New York's constructive fraud statutes is broader. In New York, constructive fraud encompasses any transfer which 1) is made by an insolvent or renders the transferor insolvent (DCL § 273); 2) is made after the docketing of a judgment or during the pendency of an action which results in a money judgment (*id.* at § 273-a); 3) leaves the transferor with unreasonably small capital with which to carry out his business (*id.* at § 274); or 4) is made at a time that the transferor intends to incur other debts beyond his ability to repay (§ 275), as long as such transfer is made "without a fair consideration" (*id.* at §§ 273-75). The law does state that "[f]air consideration is given for property, or obligation, when in exchange . . . as a fair equivalent thereof, *and in good faith*, property is conveyed or an antecedent debt is satisfied." DCL § 272(a) (emphasis added). In other words, under New York law, any transfer that would have been constructively fraudulent if it had not been made for fair value can *alternatively* be avoided if it was not made in "good faith", which "is required of both the transferor and the transferee, and . . . is lacking when there is a failure to deal honestly, fairly, and openly." *The CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. L.P.*, 25 AD3d 301, 303 (1st Dept 2006), quoting *Berner Trucking, Inc. v Brown*, 281 AD2d 924, 925 (4th Dept 2001). In comparison with the UFTA, which only allows the avoidance of "insider" transfers in satisfaction of an antecedent debt made while the debtor is already insolvent, New York law potentially allows a much broader set of for-value transactions to be deemed constructive fraudulent conveyances, and the transfer would be set aside without any showing as to the *transferor's* intent.

See, e.g., Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP v Upstate Bldg. Corp., 262 AD2d 981, 982 (4th Dept 1999) (avoiding payment of fees to judgment debtor's lawyers as constructively fraudulent); *Matter of Brosnahan*, 324 BR 199, 206-07 (Bankr WDNY 2005) (avoiding mortgage securing loan by bank as constructively fraudulent).

Hence, New York law and the UFTA conflict in ways that are potentially relevant to this action. Consequently, a determination of which jurisdiction's law should govern must be made. In making this determination, New York typically seeks to give effect to the "law of the jurisdiction having the greatest interest in resolving the particular issue" [*Cooney v Osgood Mach., Inc.*, 81 NY2d 66, 72 (1993)], the so-called "interest analysis". "In fraud claims, the paramount concern of a court is the locus of the fraud[,] which [] is where the injury is inflicted, not where the fraudulent act originated." *Orthotec, LLC v Healthpoint Capital, LLC*, 2013 WL 2471606, at *9 (Sup Ct, NY County 2013) (Schweitzer, J.); *RCA Corp. v Tucker*, 696 FSupp 845, 856 (EDNY 1988) ("New York has an especially strong interest in applying its law when one of its domiciliaries alleges that it has been defrauded"). Here, the "victim" of the fraudulent conveyance is merely an "arrangement" where payments made to a Delaware Trust are funneled to certain Cayman Islands funds and, then, to the holders of the CDOs issued by those Cayman Islands funds. The creditor does not "do business" anywhere, and the victims of the fraud are not located in any particular jurisdiction. In short, the interest analysis cannot turn on the location of the victim, although the victim and his expectations should be considered.

Proper interest analysis in a fraudulent conveyance claim, although concerned with the victim, at core, also is "conduct regulating."[FN9] Applying foreign law to foreign SPVs [*11]does not necessarily incentivize lawful conduct by the SPV in the jurisdiction where the injury occurred if that SPV is managed and operated from a different jurisdiction. To deter the managers of SPVs from committing fraud, the law of the state in which those managers reasonably expect to be held accountable ought to apply.

In the end, fraudulent conveyance law is primarily an enforcement tool that ensures a debtor's (here, the SPV's) assets are available to satisfy his obligations to his creditors (the victims). The obligation here is governed by New York law. Ergo, the investors in the trust-preferred securities (the victims) have a reasonable expectation that their rights

will be safeguarded by New York law. *See Schultz*, 65 NY2d at 198 (parties' "reasonable expectations" should be used to resolve choice of law question). Similarly, the managers of the SPVs, therefore, have an expectation that the law of New York will hold them accountable. Since fraudulent conveyance law is an essential tool in ensuring that creditors' rights manifest into a real recovery, rather than a worthless, unrecoverable judgment, applying New York law is a sensible way to fulfill the parties' expectations.

To be sure, where the contacts with another jurisdiction are overwhelming, then, too, the outcome is obvious, and the court's decision would include a sentence repeatedly naming that jurisdiction. *See Atsco*, 29 AD3d at 466 (applying Malaysia law in case involving "transfer of assets by a Malaysian citizen out of Malaysia in the face of a Malaysian injunction during a Malaysian proceeding that resulted in a Malaysian judgment"); *Orthotec,* 2013 WL 2471606, at *9 ("since the plaintiffs injuries occurred in California as that is where it is located, and the California Judgments arose out of lawsuits in California, California law will, therefore, apply to the tort claims"). But where, as here, such an obvious answer is lacking and traditional interest analysis is unhelpful, looking to the parties' reasonable expectations is the most sensible way to make a choice of law determination. New York is that jurisdiction in this case. Thus, the court applies New York fraudulent conveyance law.

New York DCL

Turning now to the merits, the Taberna Funds assert claims for both actual and constructive fraudulent conveyance. DCL § 278 "provides that a creditor whose claim has matured may have a fraudulent conveyance set aside against any person' other than a good faith purchaser for value, defined as a purchaser for fair consideration without knowledge of the fraud.'" *Commodity Futures Trading Com'n v Walsh*, 17 NY3d 162, 174-75 (2011).[FN10] Under [*12]DCL § 276, "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." To properly plead a claim for actual fraudulent conveyance under § 276, "the claimant must allege that (1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that this thing was transferred or disposed of by the debtor and (3) that the transfer was done with

actual intent to defraud." *Chambers v Weinstein*, 44 Misc 3d 1224(A), at *7 (Sup Ct, NY County 2014) (Sherwood, J.), quoting *In re Monahan Ford Corp. of Flushing*, 340 BR 1, 37 (Banr EDNY 2006). Pursuant to CPLR 3016(b), a claim under the DCL, like all fraud claims, must be pled with the requisite detail. *Uni-Rty*, 117 AD3d at 488-89; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY2d 553, 559 (2009) ("CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference' of the alleged misconduct"), quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 493 (2008).

Alternatively, to state a claim for constructive fraudulent conveyance, the plaintiff must allege one of the following three scenarios: "(i) the transferor is insolvent or will be rendered insolvent by the transfer in question, DCL § 273;[FN11] (ii) the transferor is engaged in or is about to engage in a business transaction for which its remaining property constitutes unreasonably small capital, DCL § 274;[FN12] or (iii) the transferor believes that it will incur debt beyond its ability to pay, DCL § 275."[FN13] *In re Sharp Int'l. Corp.*, 403 F3d 43, 53 (2d Cir 2005).

As an initial matter, the court rejects defendants' argument that the Taberna Funds have not satisfied the pleading requirements of CPLR 3016(b) based on the Taberna Funds' qualification of certain facts, such as defendants' intent, as being "on information and belief." The Taberna Funds have satisfied their heightened pleading obligations because they provided [*13]defendants sufficient notice for them to understand the accusation [*see Sargiss v Magarelli*, 12 NY3d 527, 530-31 (2009)] — that ARG's transfers to FARS were made for the purpose of ensuring the Taberna Funds could not collect on ARG's debt. This is a viable theory under the DCL, even though such transfers do not, as discussed earlier, constitute a breach of the Subordination Agreement. The DCL, irrespective of the parties' contractual bargain, prohibits stripping a debtor of its assets in an attempt to become judgment proof. While the relative subordination of the parties' debt is not entirely dispositive as to whether the transfers were fraudulent, FARS's former status as a junior creditor does provide context, and, thus, an inference of *scienter*, to reasonably infer defendants' motive to prioritize a debt that otherwise would be second in line to the Taberna Funds. This showing is more than sufficient, as plaintiffs merely need to plead the existence of "badges of fraud", which they have done. *See Uni-Rty*, 117 AD3d at 489; *Wall St. Assocs.*, 257 AD2d at 529; *see also 3 W. 16th St., LLC v Ancona*, 2013 WL 5459456, at *2 (Sup Ct, NY County 2013) ("Badges of fraud are circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent").[FN14]

Likewise, the Taberna Funds have properly pled a claim for constructive fraud. While defendants argue that the consideration paid to ARG was fair, this is a question of fact that cannot be resolved on this motion to dismiss. " Fair consideration' is not only a matter of whether the amount given for the transferred property was a fair equivalent' or not disproportionately small,' which the parties vigorously dispute, but whether the transaction is made in good faith,' an obligation that is imposed on both the transferor and the transferee." *Sardis v Frankel*, 113 AD3d 135, 141 (1st Dept 2014), quoting *CIT Group*, 25 AD3d at 303; *see Berner Trucking*, 281 AD2d at 925 ("Good faith is required of both the transferor and the transferee and it is lacking when there is a failure to deal honestly, fairly, and openly"). Additionally, while defendants challenge the Taberna Funds' allegations that the transfers rendered ARG insolvent, ARG's solvency is a question of fact that cannot be resolved on a motion to dismiss.[FN15]

Finally, defendants' contention that the Taberna Funds were not creditors of ARG at the time of the transfers because they occurred before the October 2009 default, is inapposite. DCL § 276 "is applicable to both present and future creditors." *Bd. of Managers of Chocolate Factory [*14]Condo. v Chocolate Partners, LLC*, 43 Misc 3d 1223(A), at *16 (Sup Ct, Kings County 2014) (Demarest, J.), citing *Planned Consumer Marketing, Inc. v Coats & Clark, Inc.*, 71 NY2d 442, 450 (1988); *see* DCL § 270 (" Creditor' is a person having any claim, whether *matured or unmatured*, liquidated or unliquidated, absolute, fixed or contingent") (emphasis added). A junior creditor that strips a debtor of its assets, takes them for itself, and then, when the junior creditor assumes control of the debtor (here, by virtue of the conversion) and causes the debtor to default — that (formerly) junior creditor may not then claim that the senior creditor cannot maintain a DCL claim because, at the time the debtor's asserts were stripped, the *junior creditor* had not yet caused the debtor to default. This argument, if accepted by the court, would pervert the purpose of the DCL. The point of allowing a creditor to maintain a DCL claim for transfers made prior to a debt technically becoming due is to prevent the very scenario that allegedly occurred here.

Unjust Enrichment

Similarly, the Taberna Funds claim that defendants were unjustly enriched by the

alleged fraudulent transfers. It is well settled that "[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Paramount Film Distributing Corp. v State*, 30 NY2d 415, 421 (1972). "[I]n order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.'" *Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 (2012), quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011). However, "[w]here the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009), accord *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987).

Defendants argue that since the parties' rights are governed by written contracts (the Indenture, the Conversion Agreement, and the Subordination Agreement), the Taberna Funds cannot maintain an unjust enrichment claim. The Taberna Funds, however, aver that by virtue of not being a party to some of the contracts (a basis for dismissal of the claim for breach of the Subordination Agreement, discussed earlier), they should be able to maintain an unjust enrichment claim. Indeed, there is precedent for allowing a noteholder to maintain an unjust enrichment claim under similar circumstances, where loan proceeds are wrongfully transferred to a non-contracting party, against whom a breach of contract claim does not lie. *See Hughes v BCI Int'l Holdings, Inc.*, 452 FSupp2d 290, 304 (SDNY 2006); *see also SungChang Interfashion Co., Ltd. v Stone Mountain Accessories, Inc.*, 2013 WL 5366373, at *20 (SDNY 2013) (permitting unjust enrichment claim against defendants who "wrongfully obtained plaintiffs' assets", against whom a similar DCL claim survived a motion to dismiss). While the Taberna Funds' unjust enrichment claim is somewhat duplicative of the DCL claims, the Taberna Funds may proceed with both claims.[FN16]

*[*15]Constructive Trust*

"The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment." *Abacus Fed. Savings Bank v Lim*, 75 AD3d 472, 473-74 (1st Dept 2010). The Taberna

Funds claim that FARS violated its fiduciary duty under sections 2.4 and 2.5 of the Subordination Agreement to hold payments made thereunder "in trust." Even assuming a fiduciary duty exists here (which is not the case, since a junior lender does not ordinarily have fiduciary duties to a senior lender),[FN17] a constructive trust claim is duplicative of the unjust enrichment claim. While it is well settled that the factors for determining whether to impose a constructive trust should not be rigidly applied [*see Lipton v Donnenfeld*, 5 AD3d 356, 357 (2d Dept 2004)], it is equally well settled that the real "purpose of [a] constructive trust is prevention of unjust enrichment." *See Genger v Genger*, 990 NYS2d 498, 503 (1st Dept July 24, 2014), quoting *Simonds v Simonds*, 45 NY2d 233, 242 (1978). To wit, a "constructive trust will be erected whenever necessary to satisfy the demands of justice [and its] applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them." *Id.* at 241, quoting *Latham v Father Divine*, 299 NY 22, 27 (1949); *see Kaufman v Cohen*, 307 AD2d 113, 127 (1st Dept 2003) ("we read plaintiffs' complaint to state a viable cause of action for a constructive trust notwithstanding the absence of a promise by the recipient or a transfer in reliance upon the promise"). While the equitable circumstances warranting a constructive trust may be present here, such claim is nonetheless dismissed because it is duplicative of the Taberna Funds' unjust enrichment claim.

Accounting

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Lawrence v Kennedy*, 95 AD3d 955, 959 (2d Dept 2010). "To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law." *Unitel Telecard Distribution Corp. v Nunez*, 90 AD3d 568, 569 (1st Dept 2011). The Taberna Funds are not entitled to an accounting because defendants owe them no fiduciary duty and, in any event, the surviving breach of contract, DCL, and unjust enrichment claims, if proven, provide the Taberna Funds an adequate legal remedy.

Fraudulent Concealment

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia*, 12 NY3d at 559. "In addition to these elements, a cause of action for fraudulent concealment requires an allegation that the defendant had a duty to disclose material information [*16]and failed to do so." *Mandarin Trading*, 16 NY3d at 179, quoting *P.T. Bank Cent. Asia, NY Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003). As noted earlier, fraud claims must be pled with the specificity mandated by CPLR 3016(b). *See Pludeman*, 10 NY3d at 493.

The Taberna Funds claim that defendants fraudulently concealed the details of the Conversion Agreement. The Taberna Funds aver that their reliance on the Subordination Agreement was the reason they did not object to the Conversion Agreement (which suggests they knew about the Conversion Agreement, negating a claim that such agreement was concealed). The Taberna Funds do not allege that these "hidden" details could not have been discovered (or that they made any inquiry about them). The Taberna Funds also take the position that defendants committed fraud by telling them that the Conversion Agreement "was in the best interests' of ARG and its creditors."**[FN18]** The Taberna Funds are highly sophisticated entitles capable of vetting such a representation before relying on it. If the Taberna Funds did rely on defendants' assurance without legal counsel or other due diligence, their conduct was not justified. As Justice Ramos recently explained:

Under New York law, there is an affirmative duty imposed on sophisticated investors, such as plaintiffs, "to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions [and] "[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it."

Phoenix Light SF Ltd. v Goldman Sachs Group, Inc., 43 Misc 3d 1233(A), at *5 (Sup Ct, NY County 2014), quoting *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 (1st Dept 2006) and *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-95 (1st Dept 2012). The Taberna Funds fraudulent concealment claim, therefore, is dismissed. Consequently, the causes of action for conspiracy to commit fraud and aiding and abetting (the latter of which, as noted earlier, was withdrawn) are not viable. *See Oster*

v Kirschner, 77 AD3d 51, 55 (1st Dept 2010) (pleading underlying fraud claim required to maintain aiding and abetting claim).

Alter Ego

The parties agree that the Taberna Funds' veil piercing claims are governed by Delaware law because ARG is a Delaware LLC. *See Capmark Fin. Group Inc. v Goldman Sachs Credit Partners L.P.*, 91 BR 325, 346 (SDNY 2013) (" Piercing the corporate veil is a state law theory of liability that requires facts establishing that a controlling entity ignored the separate legal status of, and dominated the affairs of, a controlled entity.' Under New York's choice of law rules, the law of the state of incorporation determines when the corporate form will be [*17]disregarded'"), quoting *In re Champion Enter., Inc.*, 2010 WL 3522132, at *10 (Bankr D Del 2010) and *Fletcher v Atex, Inc.*, 68 F3d 1451 (2d Cir 1995). "To state a veil-piercing claim' [under Delaware law], the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors." *Crosse v BCBSD, Inc.*, 836 A2d 492, 497 (Del 2003). Vice Chancellor Parsons explained:

[P]ersuading a Delaware court to pierce the corporate veil is a difficult task. Absent compelling cause, a court will not disregard the corporate form or otherwise disturb the legal attributes, such as limited liability, of a corporation. Although the legal test for doing so cannot be reduced to a single formula that is neither over- nor under-inclusive, our courts have only been persuaded to pierce the corporate veil after substantial consideration of the shareholder-owner's disregard of the separate corporate fiction and the degree of injustice impressed on the litigants by recognition of the corporate entity.

Midland Interiors, Inc. v Burleigh, 2006 WL 4782237, at *3 (Del Ch 2003) (quotation marks omitted). "Determining whether to [pierce the corporate veil] requires a fact intensive inquiry, which may consider the following factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; or (5) whether, in general, the company simply functioned as a facade for the controlling shareholder."

Winner Acceptance Corp. v Return on Capital Corp., 2008 WL 5352063, at *5 (Del Ch 2008).

The Taberna Funds' claim that ARG is an alter-ego of the other defendants is based on the allegations pertinent to the DCL claims. However, even if the DCL claims have merit, it does not necessarily follow that ARG and FARS are alter egos. Indeed, if that were the case, all DCL claims would automatically give rise to alter ego liability. Here, while the challenged transfers are alleged to have been made to defraud the Taberna Funds, there is an absence of any factual support for the notion that the companies are generally alter egos, as opposed to them having engaged in a one-time improper set of transfers. Moreover, there are no facts pled to warrant an application of alter-ego liability to the individual defendants. The individual defendants are alleged to have facilitated the transfers between ARG and FARS (an allegation that may give rise to DCL and unjust enrichment liability), but there are no facts pled to support the allegation that the companies are alter-egos of the individuals. A lack of corporate formalities between two companies does mean that the alter-ego companies themselves did not observe corporate formalities that kept them distinct from the individuals who controlled them.

Simply put, there is a difference between a DCL claim, which seeks a determination that certain transfers were improper, and an alter-ego claim, which seeks a much broader determination that the involved companies are not generally distinct. While the Taberna Funds sufficiently pled the former, the complaint lacks factual support for the latter. The veil-piercing and alter-ego claims, therefore, are dismissed. Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in part to the extent of dismissing the second (breach of the Subordination Agreement), third (breach of the duty of good faith and fair dealing), seventh (constructive trust), eighth (accounting), ninth (fraudulent concealment), eleventh (conspiracy to commit fraud), and twelfth (veil piercing & alter-ego) causes of action, jurisdictional discovery shall proceed as directed herein, and the motion is otherwise denied.

Dated: October 3, 2014ENTER:

J.S.C.

Footnotes

Footnote 1:" *Holder*' means a Person in whose name a Trust Security issued under the Indenture is registered in accordance with the terms of the Indenture" (Subordination Agreement § 1.1).

Footnote 2: It is also alleged that ARG made distributions to certain non-party minority members (complaint ¶ 141).

Footnote 3: The Taberna Funds have withdrawn, without prejudice, the tenth cause of action for aiding and abetting fraud, against all defendants (plaintiffs' brief, 20 n 23).

Footnote 4: The court further notes that the identity of the testifying witness cannot be ascertained from either the transcript provided or plaintiffs' other papers.

Footnote 5: As noted, the Subordination Agreement defines the term "Holder" as "a Person in whose name a Trust Security issued under the Indenture is registered in accordance with the terms of the Indenture" (Subordination Agreement § 1.1). This definition, however, is ambiguous, as the Trust Securities were not issued or registered "under the Indenture" but rather under the Trust Agreement. It, therefore, is unclear whether the parties intended "Holder" to refer to the holders of the Trust preferred securities and merely referenced the wrong agreement, or intended "Holder" to refer to the noteholder (which is its meaning in the Indenture).

Footnote 6: For the reasons set forth below, the court holds that New York law applies. However, New York law does not apply, as the Taberna Funds argue, by virtue of the choice of law provision in the Indenture and the Conversion Agreement because the Taberna Funds are not parties to the Indenture, and the choice of law provision does not apply to tort claims. The Taberna Funds, moreover, conflate a forum selection clause, which dictates where a lawsuit may be filed and a choice of law clause, which determines the governing law. The Taberna Funds cite authority [*Triple Z Postal Servs., Inc. v United Parcel Serv., Inc.*, 13 Misc 3d 1241(A), at *8 (Sup Ct, NY County 2006)]

for the proposition that a forum selection clause may be used to assert jurisdiction over related tort claims. *See also Montoya v Cousins Chanos Casino, LLC*, 34 Misc 3d 1211(A), at *6 (Sup Ct, NY County 2012). However, such authority does not stand for the proposition that a forum selection clause resolves a choice of law analysis, a proposition for which the Taberna Funds cite no authority.

Footnote 7: Based on the authority cited herein, the Taberna Funds' contention that the laws of the potentially relevant jurisdictions do not differ is erroneous.

Footnote 8: Defendants cite to *Drenis v Haligiannis*, 452 FSupp2d 418, 426-27 (SDNY 2006), which stated that under New York law (in contrast to the UFTA), being an innocent purchaser for value is no defense in a case of actual fraud. This conclusion appears to be inconsistent with DCL § 278, which protects "a purchaser for fair consideration without knowledge of the fraud at the time of the purchase," a provision not addressed by that court.

Footnote 9:*See Atsco Ltd. v Swanson*, 29 AD3d 465, 466 (1st Dept 2006) ("[T]he locus jurisdiction's interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct[,] and in the admonitory effect that applying its law will have on similar conduct in the future[,] assume critical importance and outweigh any interests of the common-domicile jurisdiction"), quoting *Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 198 (1985); *see generally Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 201-03 (1st Dept 2013).

Footnote 10:DCL § 278, in its entirety, provides:

Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,

Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

Disregard the conveyance and attach or levy execution upon the property conveyed.

A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as

security for repayment.

Footnote 11:DCL § 273 provides that: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

Footnote 12:DCL § 274 provides that: "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent."

Footnote 13:DCL § 275 provides that: "Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

Footnote 14:"The badges of fraud include circumstances such as a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance.'" *Square Mile Structured Debt (ONE) LLC v Swig*, 2013 WL 6409967, at *3 (Sup Ct, NY County 2013), quoting *Wall St. Assocs.*, 257 AD2d at 529.

Footnote 15: It should be noted that while "the party challenging a conveyance has the burden of proving insolvency, "[o]nce it is established that a debtor transferred property without fair consideration, however, the law *presumes* that the transfer rendered the debtor insolvent." *First Keystone Consultants, Inc. v Schlesinger Elec. Contractors, Inc.*, 871 FSupp2d 103, 120 (EDNY 2012). Hence, if plaintiffs establish lack of fair

consideration, the burden shifts to defendants "to overcome that presumption by demonstrating the debtor's continued solvency after the transfer." *Id.*

Footnote 16: For reasons that are not entirely clear to the court, defendants protest greatly about being subject to New York tort law when it comes to the DCL claims, yet they do not register a similar objection to the unjust enrichment claim. The court considers defendants' citation to New York law to be a concession that such law applies.

Footnote 17: Indeed, since "an arm's length borrower-lender relationship is not of a confidential or fiduciary nature" [*Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 (1st Dept 2009)], the Taberna Funds cannot seriously argue that there is a lender-lender fiduciary relation, particularly when, as here, those lenders' interests are adverse.

Footnote 18: To the extent this allegation can also be construed to be an allegation that defendants lied about their intention to continue to fulfill their obligations under the governing contracts after the conversion, such a claim does not constitute fraud. *See Manas v VMS Assocs., LLC*, 53 AD3d 451, 454 (1st Dept 2008), quoting *NY Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 (1995) ("allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim").

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