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Majority Opinion >

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

STILLWATER LIQUDATING LLC, Plaintiff, -against- PARTNER REINSURANCE COMPANY, LTD., BREVET ASSET SOLUTIONS, LLC, BREVET CAPITAL MANAGEMENT LLC, and LFR COLLECTIONS, LLC, Defendants. Index No.: 652451/2015

652451/2015

January 23, 2017, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SHIRLEY WERNER KORNREICH, J.S.C.

SHIRLEY WERNER KORNREICH

**DECISION & ORDER**

SHIRLEY WERNER KORNREICH, J.:

Defendants Partner Reinsurance Company, Ltd. (PartnerRe), Brevet Asset Solutions, LLC (BAS), Brevet Capital Management LLC (collectively with BAS, Brevet), and LFR Collections, LLC (LFR) move, pursuant to CPLR 3211 , to dismiss the amended complaint (the AC). Plaintiff Stillwater Liquidating LLC (Stillwater Liquidating or plaintiff) opposes the motion. Defendants' motion is granted in part and denied in part for the reasons that follow.

### *1. Factual Background & Procedural History*

As this is a motion to dismiss, the facts recited are taken from the AC (*see* Dkt. 20)1 and the documentary evidence submitted by the parties. The plaintiff in this action, Stillwater Liquidating, is a Delaware LLC formed pursuant to a Global Settlement Agreement entered into by creditors of two failed hedge funds, Stillwater Asset Backed Fund LP (Stillwater Onshore) and Stillwater Asset Backed Offshore Fund, Ltd. (Stillwater Offshore) (collectively, the Funds), and approved by federal district and bankruptcy courts in the Southern District of New York. *See* AC ¶¶ 1-3. Between 2004 and 2009, Stillwater Onshore, among other things, originated hundreds of millions of dollars in loans to law firms, secured by nearly $1 billion of those firms' accounts receivable. AC ¶ 16. Stillwater Offshore owned participation interests in the loans and receivables (the Law Firm Loans).2 AC ¶ 19. According to plaintiff, non-parties Stillwater Capital Partners, LLC and Stillwater Capital Partners, Inc. controlled the Funds and operated them as alter egos without adhering to corporate formalities. AC ¶¶ 14-15.3

Plaintiff, essentially, is an SPV created to collect on more than $575 million allegedly owed by the Funds to their creditors. AC ¶¶ 5, 22. In this action, plaintiff seeks to unwind two related transactions involving the Funds and PartnerRe on the ground that they are constructive fraudulent transfers under New York Debtor and Creditor Law (DCL) §§ 274, 275, and 278. In the first transaction, the Funds' interest in the Law Firm Loans was transferred to non-party Stillwater Funding LLC (Stillwater Funding), and Stillwater Funding subsequently pledged the Law Firm Loans to PartnerRe as collateral for a $31.5 million loan (the PartnerRe Loan). The second transaction involved the settlement of Stillwater Funding's default on the PartnerRe Loan, pursuant to which PartnerRe took control of the Law Firm Loans, which were allegedly worth tens (if not hundreds) of millions of dollars more than the amount of Stillwater Funding's debt to PartnerRe. Plaintiff's operative pleading, the AC, also asserts claims for violations of PartnerRe's obligations under Article **[*2]** 9 of the New York Uniform Commercial Code (UCC), declaratory judgment against all defendants, unjust enrichment against all defendants, conversion against PartnerRe and LFR, breach of fiduciary duty against all defendants, and breach of contract against PartnerRe.

To begin, plaintiff alleges in the AC, on information and belief, that the Funds "became illiquid at the end of 2008, and, as a result, were unable to pay their creditors." AC ¶ 21. By 2009, the Funds allegedly owed more than $575 million to their creditors. AC ¶ 22. In July 2009, despite their alleged insolvency, the Funds arranged for a credit line of up to $31.5 million from PartnerRe. The PartnerRe Loan is governed by two contracts dated as of July 27, 2009: (1) a Note Purchase Agreement (the NPA) (Dkt. 26) between Stillwater Funding (as issuer), Stillwater Onshore (as servicer), and PartnerRe (as purchaser); and (2) an Indenture (Dkt. 27) between Stillwater Funding and non-party Wilmington Trust Company (the Trustee). Both agreements are governed by New York law and contain New York forum selection clauses. *See* Dkt. 26 at 27-28; Dkt. 27 at 84-85.

Pursuant to the NPA and Indenture, PartnerRe issued notes to Stillwater Funding (the Notes). Stillwater Funding's obligation to pay off the Notes was secured by collateral — the Law Firm Loans owned by the Funds. Between July 24 and December 4, 2009, Stillwater Funding received the maximum available amount under the credit facility from PartnerRe — $31.5 million.4 According to plaintiff, at the time the NDA was executed in 2009, the Law Firm Loans were worth $221 million. *See* AC ¶ 28.5 Under section 2.4(b) of the NPA, Stillwater Funding was required to make monthly principal and interest payments on this debt. *See* Dkt. 26 at 11. The interest rate was 21.25% per annum, and increased to 28% upon default. *See* id. at 6-7.6 Upon default, moreover, PartnerRe had the right, under section 5.2(a) of the Indenture, to accelerate payment on the Notes and direct the Trustee to foreclose on the Law Firm Loans in accordance with section 5.4(a). *See* Dkt. 27 at 53.

On December 15, 2009, approximately five months after the NDA was entered into, Stillwater Funding defaulted on the NDA by failing to make its monthly payment on the Notes. In response, plaintiff alleges that ParnerRe attempted to "obtain for itself the full value of the Law [Firm] Loans." *See* AC ¶ 38.7 More than a year-and-a-half after plaintiff's default, on June 17, 2011, Stillwater Funding and PartnerRe, among others,8 entered into a Consent Foreclosure and Sale Agreement (the CFSA). *See* Dkt. 28. The CFSA is governed by New York law and contains a New York forum selection clause. *See* id. at 33-34.

The CFSA's "Whereas" clauses memorialize its context:

> WHEREAS, as a result of, among other things, [Stillwater Funding's] failure to make the payments required under the terms of the [Notes] and as demanded pursuant to the terms of the Acceleration Notice, the [Trustee], for the benefit of [PartnerRe], currently has the right to enforce its security interest in and lien upon the [Law Firm Loans] pursuant to the terms of the Indenture and applicable law, including the right to foreclose on and **[*3]** sell the [Law Firm Loans] in accordance with the applicable provisions of [the UCC]; WHEREAS, [the Trustee] has given notice to [Stillwater Funding] that it may dispose of the [Law Firm Loans] under the applicable provisions of the [UCC] by entering into a private sale transaction on or after June 13, 2011; WHEREAS, in contemplation of a Private UCC Sale, [Stillwater Funding], Stillwater Capital and the [PartnerRe] engaged in settlement negotiations in an attempt to consensually and finally resolve various matters as to the Known Defaults and the aforementioned failures to pay amounts due; [and] WHEREAS, as a result of such negotiations, **the Parties hereto have agreed to provide for the foreclosure of the lien and security interest of the [Trustee] and the absolute surrender, transfer and conveyance of the [Law Firm Loans] from [Stillwater Funding] to [PartnerRe] (with the simultaneous contribution of [the Law Firm Loans] by [PartnerRe] to [LF12]), in full satisfaction of the outstanding obligations of the [Stillwater Funding] under the Indenture and other Basic Documents, upon the terms and conditions set forth herein**.

*See* id. at 7 (emphasis added; paragraph breaks and lettering omitted). Simply put, the CFSA purports to be a contract whereby PartnerRe foreclosed on the Law Firm Loans in full satisfaction of the $39 million, inclusive of interest and fees accrued since the default, allegedly owed on the Notes by virtue of Stillwater Funding's default. Despite the CFSA purporting to be a foreclosure agreement, section 11.1 provides Stillwater Funding the right, for five years, and under certain circumstances, to receive 80% of the proceeds on the Law Firm Loans in excess of the amount owed to PartnerRe. *See* id. at 29-30.

Section 3 of the CFSA contains broad releases between the parties to the CFSA that only exclude breaches of the CFSA post-dating its execution, as well as fraud, gross recklessness, and intentional misconduct. *See* id. at 16-17. Plaintiff and the Funds' creditors are not parties to the CFSA and, therefore, as explained below, are not bound by CFSA's releases.

Section 8.4 addresses the value of the collateral, i.e., the Law Firm Loans:

> Each of the Issuer Parties [defined to include Stillwater Funding] [*see* id. at 12] acknowledges and agrees that: (a) the Secured Parties [defined to mean the Trustee, PartnerRe, and BAS] assert that [**Stillwater Funding] has no equity in [the Law Firm Loans] and the current fair market value of the [the Law Firm Loans], commonly known as the "as-is value," is significantly less than the amount of the obligations owing to the Secured Parties that are secured by [the Law Firm Loans];** (b) any diminution in the value of the [Law Firm Loans], if any, from and after January 27, 2010 has not resulted from any action or inaction by any of the Foreclosing Parties; and (c) **[Stillwater Funding] is receiving, at a minimum, reasonably equivalent value and fair consideration** in return for the Sale and the other transactions contemplated by the Sale Documents and that the Sale and such other transactions **are in the best interests of [Stillwater Funding], its [*4] estate, its creditors, and other parties in interest**.

*See* id. at 26 (emphasis added).

Allegedly, prior to entering into the CFSA, PartnerRe threatened to conduct, respectively, a public and private sale of the Law Firm Loans in March and June 2011. *See* AC ¶¶ 54, 56. These threats, according to plaintiff, were made in bad faith and caused Stillwater Funding to enter into the CFSA under conditions of duress. Plaintiff claims that, at the time, the Law Firm Loans were worth approximately $286 million and the accounts receivable securing such loans were worth more than $1 billion. Hence, plaintiff claims that the exchange of approximately $286 million worth of collateral to satisfy a debt worth less than $40 million is not fair consideration. In light of the alleged insolvency of the Funds and Stillwater Funding, plaintiff claims that the CFSA was a constructive fraudulent conveyance that had the effect of hindering their creditors' collection efforts (i.e., but for the CFSA, the Funds' creditors would have had the right to go after the Funds' membership interest in Stillwater Funding, which would have had value but for the foreclosure on its principal asset, the Law Firm Loans). Likewise, plaintiff contends that the terms of the CFSA are procedurally and substantive unconscionable (i.e., made in bad faith under the UCC) because:

> For example, evidently cognizant of the unconscionability of seizing $286 million in value in exchange for illusory forgiveness of $39 million in debt, the [CFSA] purports to grant the Stillwater Parties a right to receive a contingent payment out of any collections, recoveries or further sales with respect to the [Law Firm Loans]. That right, however, also was purely illusory. PartnerRe, LFR (the entity to which PartnerRe caused the [Law Firm Loans] to be transferred) and Brevet (whom LFR hired to service the [Law Firm Loans]) explicitly disclaimed in the [CFSA] any obligations at all to make any collection, recovery or sales efforts; the Stillwater Parties' right to receive the contingent payment would expire after 5 years, creating a conflict of interest incentivizing the Defendants simply to wait until then before making any real effort to monetize the [Law Firm Loans];9 the contingent payment right would only obtain after the Defendants fully recouped out of collections, recoveries and sales the entire $39 million in debt PartnerRe purportedly forgave, **after the Defendants recouped all costs associated with such collections, recoveries and sales, and after Defendants recouped out of collections, recoveries and sales an "Acquirer Return" of 19% per annum,10 compounding quarterly, on the $39 million debt PartnerRe supposedly forgave, and all costs associated with Defendants' collection, recovery and sales efforts**. Moreover, the Stillwater Parties' rights to the contingent payment could be cancelled at any time if Defendants merely assign their rights under the [CFSA] to a third party. By way of example, if Defendants made no collection, recovery or sales efforts with respect to the [Law Firm Loans] until the end of **[*5]** the five year period, Defendants at that point would need to collect nearly $100,000,000 before the Stillwater Parties would see a dime; and if the Defendants simply waited to the day after the Stillwater Parties' entitlement to the contingent payment expires, or at any time simply assigned their rights under the Sale Agreement to a third party, the Stillwater Parties would receive nothing at all even if the subsequent collections and recoveries total

multiples of $100,000,000.

AC ¶ 74 (emphasis added).11 According to the AC, as of March 31, 2014 (i.e., nearly three years after the CFSA was executed), Brevet and the law firm of Mayer Brown, acting as servicer and enforcement counsel under the CFSA, collected approximately $11 million on the Law Firm Loans and were paid about $8.7 million in fees and expenses for doing so. *See* AC ¶¶ 90-91.

Plaintiff commenced this action on July 10, 2015 and filed its AC on December 23, 2015. Defendants filed the instant motion to dismiss on February 29, 2016, arguing, among other things, that plaintiff failed to properly plead a DCL claim for constructive fraudulent conveyance. Consequently, according to defendants, the remainder of plaintiff's causes of action fail because, for instance, if the court does not hold that the CFSA is unenforceable, the remaining causes of action dependent on the parties' relationship being governed by their pre-CFSA rights would necessarily be infirm. The court reserved on the motion after oral argument. *See* Dkt. 43 (10/27/16 Tr.).

### *II. Discussion*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247 , 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98 , 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362 , 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268 , 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, *60 NY3d at 491* . "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250 , citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiffs factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY.*, 98 NY2d 314 , 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83 , 88 (1994).

As an initial matter, the court rejects defendants' argument that section 3 of the CFSA released defendants from any liability they may have for the claims **[*6]** asserted in this action by plaintiff. At a minimum, the first cause of action under the DCL is not covered by the release since plaintiff is not a party to the CFSA and the CFSA does not purport to (nor could it) release non-signatory creditors' claims against defendants.12 Moreover, the DCL claim, if meritorious, would result in the CFSA being deemed unenforceable. Additionally, the release carves out the very sort of behavior alleged in the AC, namely fraud and intentional misconduct.

Turning now to the merits, DCL § 278(1) 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,
>
> **a. Have the conveyance set aside** or obligation annulled to the extent necessary to satisfy his claim, or
>
> **b. Disregard the conveyance** and attach or levy execution upon the property conveyed.

(emphasis added). In this case, by virtue of the CFSA allegedly amounting to a fraudulent conveyance, plaintiff seeks to set aside the transfers of the Law Firm Loans to defendants and/or recover the Law Firm Loans or their value from defendants. *See* Dkt. 20 at 26 (AC, Prayer for Relief).

Generally, to establish a fraudulent conveyance, the plaintiff must prove either intentional or constructive fraud. *See Wall St. Assocs. v Brodsky*, 257 AD2d 526 , 529 (1st Dept 1999). In this case, plaintiff only asserts a claim for constructive fraudulent conveyance under

DCL §§ 274 and 275. Section 274 provides:

> 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.**

(emphasis added). In other words, a creditor states a claim under § 274 when it alleges a debtor entered into a transaction made without fair consideration which results in the debtor being left with insufficient funds to pay off its creditors; intent is not an element of the claim. *See CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. P 'ship*, 25 AD3d 301 , 302 (1st Dept 2006) ("A conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration"). Likewise, DCL § 275 provides:

> 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.

(emphasis added); *see CIT Group*, 25,AD3d at 302 ("Also fraudulent are conveyances made without fair consideration when the conveyor 'intends or believes that he will incur debts beyond his ability **[*7]** to pay as they mature.").

Integral to DCL §§ 274 and 275 and constructive fraud is the absence of "fair consideration", defined in DCL § 272:

Fair consideration is given for property, or obligation,

> a. When in exchange for such property, or obligation, **as a fair equivalent therefor, and in good faith**, property is conveyed or an antecedent debt is satisfied, or
>
> b. When such property, or obligation is received **in good faith** to secure a present advance or antecedent debt in amount **not disproportionately small as compared with the value of the property**, or obligation obtained.

(emphasis added),13 Also, even if fair consideration is shown, the transfer is still constructively fraudulent if it was not made in good faith. *See CIT Group*, 25 AD3d at 303 ("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"), quoting *Berner Trucking, Inc. v Brown*, 281 AD2d 924 , 925 (1st Dept 2001); *see also Sardis v Frankel*, 113 AD3d 135 , 142 (1st Dept 2014).

Defendants argue that the PartnerRe Loan, as governed by the NDA and Indenture, is not, on its own, a fraudulent conveyance. Plaintiff does not contend otherwise. Rather, plaintiff argues that the NDA and CFSA should be viewed as part of a single transaction. This is neither a necessary nor tenable basis for plaintiff to recover the Law Firm Loans under DCL § 278. As noted earlier, there is no question that the PartnerRe Loan is not a fraudulent conveyance because borrowing money secured by more valuable collateral is not considered a transaction with unfair consideration. *See In re Jesup & Lamont, Inc.*, 507 BR 452 , 472 (Bankr SDNY 2014) ("Ordinarily[,] collateralization of a legitimate debt is not a fraudulent conveyance."), citing *In re Pfeifer*, [2013 BL 194845], 2013 WL 3828509 , at *3 (Bankr SDNY 2013) (explaining why "[m]any decisions in this District and in other Districts applying New York law have consistently used a per se rule that the grant of collateral for a legitimate antecedent debt is not a constructive fraudulent conveyance."). Securing a debt with more valuable collateral is not nefarious since, upon default, the debtor has the right to the value of the collateral that exceeds the amount of the debt. *See Chemtex, LLC v St. Anthony Enterprises, Inc.*, 490 FSupp2d 536 , 545 (SDNY 2007) ("the value of the collateral is not relevant in determining whether the debtor received reasonably equivalent value in exchange for its granting the security interest, because the rights of a secured creditor in collateral are always restricted by the amount of the debt"), citing *In re Applied Theory Corp.*, 323 BR 838 , 841 (Bankr SDNY 2005) ("The security interest did not provide the Lenders with a right to receive anything more than the amount of the money they had provided, and the debtor's liabilities did not increase due to the security interest. The security interest was granted in respect of an antecedent debt—debt that arose by reason of the Lenders having provided the debtor with actual cash in the amount of the debt."), *gird* 330 BR 362 (SDNY 2005). Accordingly, merely securing the $31.5 million loan with more than $200 million in collateral was not a fraudulent conveyance.

The same is not true **[*8]** of the CFSA. First, the court rejects defendants' contention that the CFSA was a foreclosure and that, under New York law, a foreclosure is not a voluntary act that amounts to a "conveyance" for the purposes of the DCL. As plaintiff correctly avers, the terms of the CFSA govern, not the title given to it. *See N.E. Gen. Corp. v Wellington Advertising, Inc.*, 82 NY2d 158 , 162 (1993) (substance of a contract governs, not its "nomenclature"). That the contact's name incudes the word "foreclosure" is not dispositive. To assess whether the CFSA resulted in a conveyance for the purposes of the DCL, its economic substance must be evaluated. *See Chemical Bank v Meltzer*, 93 NY2d 296 , 304 (1999) ("this transaction must be analyzed as an integrated whole. To adopt the approach employed by the lower courts would elevate form over substance, obfuscate the nature of [defendant's] legal obligations and gloss over the essential character of this transaction.").

The AC contains well-pleaded allegations that the CFSA did not result in a bona fine foreclosure, and certainly not one that comports with Article 9 of the UCC and its good faith obligations. As noted in Comment 11 (Role of Good Faith) to UCC § 9-620 :

> Section 1-203 imposes an obligation of good faith on a secured party's enforcement under this Article. This obligation may not be disclaimed by agreement. See Section 1-102. Thus, a proposal and acceptance made under this section in bad faith would not be effective. **For example, a secured party's proposal to accept marketable securities worth $1,000 in full satisfaction of indebtedness in the amount of $100, made in the hopes that the debtor might inadvertently fail to object, would be made in bad faith**. On the other hand, in the normal case proposals and acceptances should be not second-guessed on the basis of the "value" of the collateral involved. Disputes about valuation or even a clear excess of collateral value over the amount of obligations satisfied do not necessarily demonstrate the absence of good faith.

(emphasis added); *see Tudisco v Duerr*, 89 AD3d 1372 , 1376 (4th Dept 2011) ("Defendants had an obligation to enforce the security agreement in good faith *[see generally* UCC 1-203 ]. Defendants, however, retained the backhoes and bulldozer without complying with the provisions of the UCC, either by disposing of those pieces of equipment in a commercially reasonable manner and paying any surplus to plaintiffs *[see* UCC 9-610 [a] , [b]; 9-615 [d] [1]], or by obtaining plaintiffs' consent after the default to retain **the equipment in** satisfaction of debt *[see* UCC 9-620 [a] [1]; [c]]. We therefore conclude that, **because plaintiffs established that the value of the backhoes and the bulldozer exceeded the amount that they owed on the promissory note, plaintiffs had a possessory interest in that equipment and defendants' dominion over it was in derogation of the rights of plaintiffs.")** (emphasis added).

A proper foreclosure under the UCC would have resulted in the value of the debt in excess of the proceeds being remitted to the debtor. Plaintiff plausibly alleges that the economic reality of the CFSA is that defendants obtained rights in the Law Firm Loans with a value far in excess **[*9]** of the amount owed to it by Stillwater Funding. In other words, plaintiff alleges, the consideration was not fair and, thus, was not made in good faith.

Defendants, perhaps recognizing that fair value is a question requiring discovery, seek to take the CFSA entirely out of the purview of the DCL by contending that the CFSA could not amount to a fraudulent conveyance because "PartnerRe was a valid and acknowledged creditor of [Stillwater Funding]." *See* Dkt. 34 at 26. This argument misses the mark. While a creditor has every right to seek full payment of a debt despite the existence of other creditors, "[t]he rule that a debtor may generally favor one creditor over another *[see Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86 , 90-91 (1st Dept 1993)] is not a license to engage in sham transactions in furtherance of that preference." *CIT Group*, 25 AD3d at 302 .14 PartnerRe, as a creditor of Stillwater Funding, was not entitled, through the CFSA or otherwise, to settle Stillwater Funding's default by obtaining from Stillwater Funding consideration disproportionately in excess of the value of Stillwater Funding's debt. Here, plaintiff alleges that the value obtained by PartnerRe was in excess of Stillwater Funding's debt by more than $200 million. To be sure, the actual value of the Law Firm Loans is a question of fact requiring discovery because defendants have not submitted any evidence that clearly shows that the value of the Law Firm Loans was only worth approximately $40 million.15 On the other hand, plaintiff has pleaded facts raising issues about whether such alleged foreclosure was conducted in good faith as required by Article 9 of the UCC. According to defendants, since Stillwater Funding may still have the right to some of the proceeds from the Law Firm Loans, that value somehow renders the consideration received by PartnerRe fair. At best, this is a question of fact for discovery.

Based on the terms of the CFSA and the AC's well pleaded allegations, plaintiff claims the CFSA was simply a scam. If plaintiff's valuations are correct (and, again, they must be assumed to be correct for the purposes of this motion), the value PartnerRe will realize under of the CFSA will be well in excess of the $40 million allegedly owed at the time the CFSA was executed.16 PartnerRe had no right to obtain for itself value disproportionally higher than the debt owed by Stillwater Funding. Doing so would be a fraud on Stillwater Funding's creditors.

Indeed, the very point of the DCL is to ensure that an insolvent17 debtor does not dissipate assets to anyone in excess of what may be considered fair consideration. Here, despite the exceedingly complex underlying facts and contracts, this case involves a simple question: did PartnerRe obtain from Stillwater Funding consideration to settle Stillwater Funding's default disproportionally in excess of the debt owed to PartnerRe? In the AC, plaintiff alleges this is the case because the value of the rights to the Law Firm Loans that inured to PartnerRe was worth far more than the debt.18 As a result, the Funds' creditors lost the ability to **[*10]** enforce their own claims against the Funds. The Funds, after all, gave up their assets (the Law Firm Loans) for ownership of Stillwater Funding, which, in turn, gave up the Law Firm Loans to PartnerRe. The Funds were the real beneficial owners of the Law Firm Loans, so it is the Funds' creditors that directly suffer from Stillwater Funding relinquishing the Law Firm Loans. PartnerRe, along with those that operated the Funds and Stillwater Funding, had no right to cause the Law Firm Loans to be exchanged for disproportionally less than they were worth. If they did so, the Funds' creditors, such as plaintiff, were defrauded for the purposes of DCL § 278 because their ability to collect a judgment from the Funds was impaired.19

That being said, the remainder of the AC's causes of action are dismissed. The claim that the CFSA is unconscionable is dismissed as duplicative of the other DCL and UCC claims because a finding that the CFSA is unconscionable turns on the consideration being grossly unfair, the same claim as that alleged under the DCL. *See B.D. Estate*, 114 AD3d at 478 , quoting *King v Fox*, 7 NY3d 181 , 191 (2006) ("[Alt common law an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other."), accord *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1 , 10 (1988). Likewise, the declaratory judgment cause of action is dismissed as duplicative since a declaration regarding the validity of the subject contracts is duplicative of the relief sought on plaintiff's surviving DCL and UCC claims. *See Cherry Hill Market Corp. v Cozen O'Connor P.C.,* 118 AD3d 514 , 515 (1st Dept 2014), citing *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50 , 54 (1st Dept 1988) ("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract."). The quasi-contract claims of unjust enrichment and conversion, moreover, must be dismissed since a written agreement governs the parties' rights. *See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 , 388 (1987). In any event, the possible recovery on the grounds of unjust enrichment or conversion entirely turn on the merits of the DCL and UCC claims, which are the only proffered bases for finding that it would be "against equity and good conscience" to permit defendants' recovery of the Law Firm Loans. *See Georgia Malone & Co. v Rieder*, 19 NY3d 511 , 516 (2012). Finally, the causes of action for breach of fiduciary duty and breach of contract based on the alleged UCC violation, even if not otherwise subject to dismissal for the reasons set forth in defendants' briefs, also seek duplicative relief. Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint is granted with respect to the third through seventh causes of action, which are hereby dismissed, and the motion is otherwise denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on February 28, 2017, at 11:30 in the forenoon, and the parties' pre- **[*11]** conference joint letter shall be e-filed and faxed to Chambers at least one week beforehand.

Dated: January 23, 2017

ENTER:

/s/ Shirley Werner Kornreich

J.S.C.

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fn 1

References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

fn 2

For simplicity's sake, the court (in accordance with the parties' briefing) refers to these assets as Law Firm Loans, but it should be noted that they also apparently include life insurance policies. *See* AC ¶¶ 17, 28. Two of those law firms (Khorrami, Pollard & Abir, LLP and the Tate Law Group, LLC [TLG]) (*see* Dkt. 26 at 51) have been involved in litigation in this court over their firms' funding arrangements. *See, e.g., Hamilton Capital VII, LLC v Khorrami, LLP*, 48 Misc3d 1223 (A) (Sup Ct, *NY County 2015* ); *Tate Law Group, LLC v Stillwater Funding, LLC*, *2012 WL 10008053* (Sup Ct, *NY County 2012* ) (rejecting TLG's claim to pierce PartnerRe's corporate veil based on allegations regarding its subsidiary, LFR).

fn 3

This allegation, which is not challenged by defendants at this juncture, is assumed to be true on this motion, despite the AC not containing the requite factual detail that would ordinarily be necessary to state a claim to pierce the corporate veil (a claim not asserted in the AC) under Delaware law (the Funds are incorporated in Delaware), such as the so-called fraud prong. *See generally Crosse v BCBSD, Inc.*, 836 A2d 492 , 497 (Del 2003). This alter ego allegation has no bearing on the issues decided herein.

fn 4

The credit line was initially $30 million, but was increased to $31.5 million (i.e. the Maximum Principal Amount, as defined in the NPA *[see* Dkt. 26 at 7], was increased). According to the affidavit of Kathleen A. Servidea (Dkt. 29) and the wire transfers attached thereto (Dkt. 30-33), the $31.5 million was collectively dispersed on July 24, August 21, September 18, and December 4, 2009. This information was submitted by defendants to refute the contention in paragraph 34 of the AC that records possessed by plaintiff indicate that only $13 million was funded and that only $6-8 million was issued to provide credit support for the Law Firm Loans (the latter issue, it should be noted, is not refuted by documentary evidence since Servidea's affidavit does not address the use of the proceeds, nor could such information in an affidavit be considered on a motion to dismiss [*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128 , 134 n.4 (1st Dept 2014)]).

fn 5

Simply put, the Funds transferred their interest in the Law Firm Loans to Stillwater Funding in exchange for all of the membership interests in Stillwater Funding (a Delaware LLC). Thus, instead of the Funds borrowing the money directly from PartnerRe and pledging the Law Firm Loans as collateral, the parties structured an economically equivalent transaction by which the borrower, Stillwater Funding, a newly formed LLC wholly owned by the Funds, did this. The NPA, on its face, is not a fraudulent transaction under the DCL, nor was the transfer of the Law Firm Loans by the Funds in exchange for the equity in Stillwater Funding. While, for instance, paragraph 31 of the AC complains that the Funds encumbered over $200 million in exchange for a $31.5 million credit facility, even if the Funds were insolvent, under the authority cited herein, this is not constructively fraudulent since the Funds gained access to $31.5 million in value by virtue of their ownership of Stillwater Funding. While they put up collateral (allegedly) well in excess of $31.5 million, even upon default, a foreclosure could only result in retention of the amount of the debt; the excess value of the collateral would be returned to Stillwater Funding, and that value would be realized by the Funds by virtue of their ownership of Stillwater Funding. Consequently, at this stage of the transaction, it cannot be said that the Funds gave up value disproportionate to what it received, the *sine qua non* of a DCL claim. That being said, as explained herein, other DCL issues arise from Stillwater Funding's default under the NPA.

fn 6

While a corporate entity cannot avail itself of a civil usury defense, contrary to the argument made by defendants, under *General Obligations Law § 5-521(3)* , a corporate entity is still subject to the criminal usury rate, which was apparently exceeded here. *See B.D. Estate Planning Corp. v Trachtenberg*, [2013 BL 359596], 2013 WL 839779 (Sup Ct, *NY County 2013* ), *aff'd* 114 AD3d 477 (1st Dept 2014). While a usury defense has not been pleaded, usury has been raised as a factor the court should consider when assessing the fair value of the consideration for the purposes of the DCL claims.

fn 7

Allegedly, the sub-servicer of the Law Firm Loans, non-party Oxbridge Financial Group (Oxbridge), proposed a number of options to make PartnerRe whole while retaining Stillwater Funding's interest in the Law Firms Loans, such as a liquidation that would supposedly provide $60-80 million in proceeds, which would have been more than enough to fully pay off PartnerRe. *See* AC ¶¶ 39-46. PartnerRe rejected Oxbridge's proposals, allegedly, because of PartnerRe's desire to realize a greater return on the Law Firm Loans. These allegations are assumed to be true on this motion and raise questions of fact about PartnerRe's good faith obligations under the UCC.

fn 8

Other parties to the contract include the Funds, the Trustee, and Brevet. *See* Dkt. 28 at 2, 6.

fn 9

It should be noted that loans to law firms working on contingency, such as in mass tort cases, ordinarily are not expected to be paid off for many years since such complex litigation (the proceeds from which the loans are repaid) often takes many years to resolve.

fn 10

This 19% return is one of the reasons why plaintiff claims no true foreclosure took place. In a foreclosure, the parties to the underlying debt do not incur or receive further interest payments.

fn 11

The most difficult thing to understand is why, even under conditions of duress, the Funds (by virtue of their control over Stillwater Funding) would agree to these terms if they were so one-sided. It should be noted that plaintiff does not allege that PartnerRe was in cahoots with the Funds (e.g., no kickbacks are alleged); after all, the claim asserted is for constructive fraud (which does not require the pleading of scienter), not intentional fraud (which does). That being said, since Stillwater Funding was an SPV that was effectively judgment proof aside from its ownership of the Law Firm Loans, it does not make sense for Stillwater Funding to give up all of its interest in the Law Firm Loans in return for canceling an uncollectable $40 million debt. In other words, the incentive to provide PartnerRe with grossly excessive consideration does not exist absent bad motive. Since the court must assume the truth of plaintiffs allegation as to the value of the collateral (an issue only discovery can resolve), the AC permits a reasonable inference that the CFSA was at least the product of constructive (and possibly) actual fraud.

fn 12

This is not a situation where plaintiff must step into the shoes of the Funds and Stillwater Funding and, then, is subject to their rights and obligations under the CFSA. The very purpose of the DCL is to protect creditors from fraudulent actions taken by debtors and those that wrongfully acquire the debtors' assets. Debtors and their fraudulent transferees cannot extinguish their creditors' rights by agreeing to waive their creditors' DCL claims.

fn 13

DCL § 270 defines the terms assets, conveyance, creditor, and debt:

> In this article "assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.
>
> "Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.
>
> "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.
>
> "Debt" includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

Insolvency, moreover, is defined in DCL § 271:

> 1. A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.
>
> 2. In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

fn 14

Defendants do not cite any authority supporting the proposition that a fraudulent conveyance made to a creditor is not subject to the DCL. That is an absurd proposition. Aside from the holding in *Ultramar Energy*, DCL § 272(a) addresses how fair consideration must be made for payment of an antecedent debt and belies the notion that a transfer is not fraudulent if, as alleged here, the amount paid to the creditor is far more than the value of the debt.

fn 15

That only $11 million may have been recovered on the Law Firm Loans (as of 2014) is of no moment. The loans may take years to be paid off. Their present value may be difficult to determine and will require expert discovery, but that militates against dismissal at this juncture.

fn 16

As plaintiff further avers, the 19% interest rate along with the significant collection fees may also ensure that defendants end up with far more than they were owed on the Notes. While the value of these "perks" is a question of fact, there is no doubt they may be considered when assessing the value of the consideration since, but for the CFSA, defendants would not have obtained this value. Again, it is the overall substance of the agreement that must be accounted for in determining the value of the consideration.

fn 17

On this motion, the allegations of the Funds' and Stillwater Funding's insolvency have not been disproven by defendants.

fn 18

It is of no moment that section 8.4 of the CFSA, in conclusory fashion, states otherwise. A party cannot immunize itself from liability under the DCL by merely reciting in a contract with its co-conspirator that the consideration was fair.

fn 19

If plaintiff prevails in this action, the court may (among other possible remedies) set aside the fair value of the Law Firm Loans given up by Stillwater Funding to PartnerRe in excess of Stillwater Funding's debt so that the value of the Funds' membership interest in Stillwater Funding may be used to satisfy the Funds' creditors.

# General Information

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|---|---|
| **Judge(s)** | Shirley Werner Kornreich |
| **Topic(s)** | Debtor Creditor; Civil Procedure |
| **Industries** | Financial Services |
| **Date Filed** | 2017-01-23 00:00:00 |
| **Parties** | STILLWATER LIQUDATING LLC, Plaintiff, -against- PARTNER REINSURANCE COMPANY, LTD., BREVET ASSET SOLUTIONS, LLC, BREVET CAPITAL MANAGEMENT LLC, and LFR COLLECTIONS, LLC, Defendants. Index No.: 652451/2015 |
| **Court** | New York Supreme Court |