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COURT OF APPEALS

STATE OF NEW YORK

CORTLANDT STREET RECOVERY CORP.,

Respondent,

-against-

No. 14

BONDERMAN,

Appellant.

20 Eagle Street
Albany, New York
January 9, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

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1 CHIEF JUDGE DIFIORE: The next matter on the
2 calendar is appeal number 14, Cortlandt Street Recovery
3 Corp. v. Bonderman and three related actions.

4 Counsel.

5 MR. FISCHLER: Thank you, Your Honor. May it
6 please the court, I'm Robert Fischler. I represent the
7 Apax appellants, and with the court's permission I will
8 address the standing issue and Mr. O'Connor will address
9 the alter ego issue. Your Honor, may I reserve one minute
10 for rebuttal?

11 CHIEF JUDGE DIFIORE: You may, sir.

12 MR. FISCHLER: Your Honors, this court should
13 reverse the decision below and hold that Section 6.03, the
14 so-called remedies clause of the indenture, does not confer
15 standing on the trustee to assert the third-party claims at
16 issue in this case.

17 CHIEF JUDGE DIFIORE: Go right to the language -
18 - -

19 JUDGE RIVERA: What's the purpose of the
20 litigation - - - I'm sorry.

21 CHIEF JUDGE DIFIORE: Go ahead, Judge Rivera.

22 JUDGE RIVERA: No, no, please.

23 CHIEF JUDGE DIFIORE: No, no, please.

24 JUDGE RIVERA: What's the purpose of this
25 litigation?



1 MR. FISCHLER: The primary claims, Your Honor,
2 are for fraudulent conveyance. They - - -

3 JUDGE RIVERA: Yes, but to what end is that?

4 MR. FISCHLER: To what end is that?

5 JUDGE RIVERA: Yes.

6 MR. FISCHLER: That - - - that end is to recover
7 from third parties who allegedly received fraudulent
8 conveyances as a result of the transaction at issue monies
9 that the trustee presumably would then disperse to the
10 noteholders.

11 JUDGE RIVERA: So why is that not a type of
12 action on the notes to recover on behalf of all the
13 noteholders, pay them pro rata, why - - - why does that not
14 fit that definition? The whole purpose of that is not to
15 treat noteholders differently other than by the amount that
16 they get.

17 MR. FISCHLER: We would - - -

18 JUDGE RIVERA: That's not stepping into their
19 shoes for any kind of claim that a noteholder would have.

20 MR. FISCHLER: It's not a claim on the notes,
21 Your Honor, for a few reasons, primarily because it has
22 nothing to do with the payment terms of the notes. The
23 fraudulent conveyance claims turn primarily on such issues
24 as, was the debtor insolvent at the time of the challenged
25 transaction, did the debtor receive fair consideration in



1 exchange for the challenged transfers, those types of
2 issues that have nothing to do with the payment terms of
3 the notes. Remember that the remedies clause says
4 explicitly that the trustee is authorized only to sue to
5 quote, "collect the payment of principal, premium, and
6 interest on the notes." Even if - - - even if you were to
7 posit that there would be a judgment against one of the
8 fraudulent conveyance defendants that judgment would have
9 virtually nothing to do with the terms of the notes
10 governing principle, premium, and interest. What would the
11 principal amount be that the defendant owed? It - - -

12 JUDGE RIVERA: Well, but wouldn't that - - - I
13 mean they basically have a - - - they - - - trustee sues to
14 collect on the notes. There's a default. They get a
15 judgment, and now you basically have debtors who are
16 judgment proof. And they say, well, that's because the
17 money's been siphoned off and the action that the trustee
18 is pursuing or successor trustee is pursuing with Cortlandt
19 is to get those funds brought back in so that they can
20 again collect on the debt on the notes. I still don't see
21 how that doesn't fit a very broad language in 6.06.

22 MR. FISCHLER: We would respectfully disagree,
23 Your Honor. We think that is very narrow language, and
24 there is multiple cases we have cited to the court - - -

25 JUDGE WILSON: Well, any - - - any available



1 remedy sounds pretty broad, doesn't it? Any available
2 remedy? I mean it could have been - - -

3 MR. FISCHLER: Any available remedy - - -

4 JUDGE WILSON: - - - it could have been more
5 limited. It could have been an action, a contract action
6 for breach, but it doesn't say that.

7 MR. FISCHLER: Your Honor, we believe that if you
8 look at the qualifying language that immediately follows
9 any available remedy, i.e.. to collect the payment of
10 principal, premium, and interest, if any, on the notes - -
11 -

12 JUDGE WILSON: Well, of course, the on the notes
13 might modify interest or it might modify the whole string.
14 I mean typically you talk about interest on something,
15 interest on your loan, interest on whatever. You could
16 certainly read this to say any available action to collect
17 the principle, any - - - any to collect the - - - and then
18 interest is on the notes, but on the notes doesn't modify
19 the other.

20 MR. FISCHLER: Your Honor, this is not the first
21 time this issue has arisen. As you know from our briefs,
22 we've cited multiple cases where courts have construed
23 language substantially similar and in some cases virtually
24 identical to the language at issue here.

25 JUDGE WILSON: Well, most of those cases, at



1 least as I read them, deal with Canby 5 actions where
2 there's a different defendant like an underwriter being
3 sued.

4 MR. FISCHLER: Many of those actions - - -

5 JUDGE WILSON: Not - - - not a fraudulent
6 conveyance action.

7 MR. FISCHLER: Many - - - some of those actions
8 do deal with fraudulent conveyance, Your Honor. And at the
9 end of the day, conceptually we don't think there's really
10 any difference. If it's a third-party claim that's not a
11 note-spaced payment claim then it is not, as the trial
12 court held and in our view, a claim for payment on - - -

13 JUDGE RIVERA: So - - - so your position is - - -

14 MR. FISCHLER: - - - the notes.

15 JUDGE RIVERA: - - - once they sued and they got
16 a judgment and now the debtor's judgment proof there's
17 absolutely nothing the trustee can do. Is that your
18 position?

19 MR. FISCHLER: Well, let me clarify one thing,
20 Your Honor, that - - - that is very confusing from the
21 briefs here.

22 JUDGE RIVERA: Okay.

23 MR. FISCHLER: The judgment has nothing to do
24 with this case.

25 JUDGE RIVERA: I understand that.



1 MR. FISCHLER: The judgment came after this case.
2 They have brought separately in the Supreme Court a
3 judgment enforcement action against virtually all of the
4 defendants here. So they are separately pursuing judgment
5 enforcement not based on their status as a trustee but
6 rather based on their status as a judgment creditor.
7 That's a different issue altogether.

8 CHIEF JUDGE DIFIORE: Counsel, if the trustee can
9 bring - - - is authorized to bring a fraudulent conveyance
10 claim, if authorized appropriately by the bondholders,
11 correct, the correct number; is that - - - that's your
12 position?

13 MR. FISCHLER: Right, so this, Your Honor, goes
14 to the issue of the no-action clause.

15 CHIEF JUDGE DIFIORE: Right.

16 MR. FISCHLER: So recognizing that the case law
17 on the remedies clause is - - - is uniformly against the
18 trustee, they then argue that you should construe the
19 remedies clause to permit these claims. Why? Because the
20 no-action clause, another clause in the indenture,
21 supposedly precludes anybody else from bringing these
22 claims.

23 JUDGE STEIN: Well, do you agree with the fact
24 that - - - with the argument that it precludes other
25 claims?



1 MR. FISCHLER: No. No, Your Honor, that's a
2 mischaracterization of that provision. That provision very
3 explicitly - - - very similar to the no-action clause that
4 was at issue in the Quadrant case recently decided by this
5 court, provides very clearly a very clear contractual
6 framework pursuant to which these claims could be brought,
7 both by the trustee and by the noteholders subject to of
8 course compliance with the conditions. The principal one
9 being that a minimum of registered noteholders representing
10 twenty-five percent of the outstanding notes has to support
11 the claims. If they do, they simply request the trustee to
12 bring the claims. If the trustee does so, fine, if it
13 doesn't then the noteholders themselves can bring the
14 claims. So the argument is based on - - -

15 JUDGE RIVERA: But - - - but didn't we say in
16 Quadrant that really the purpose of these no-action clauses
17 is to prevent a security holder - - - let me just say a
18 security holder to - - - to bring about these unpopular
19 suits? But that's - - - that's not what's going on here,
20 right? The trustee is merely - - -

21 MR. FISCHLER: And we - - -

22 JUDGE RIVERA: - - - is merely trying to get
23 funds back in making argument about the fraudulent
24 conveyance for purposes of them showing that every
25 noteholder gets paid, again pro rata. So that strikes me



1 as very different from the intent of the no-action clause,
2 right?

3 MR. FISCHLER: Your Honor, that - - - it may be -
4 - -

5 JUDGE RIVERA: It's a different concern.

6 MR. FISCHLER: Some may see the collection of
7 monies that comes into the estate and is - - - and is
8 available for distribution to the noteholder writ large as
9 a desirable result. But at the end of the day, it is black
10 letter law in this state based on decisions from this court
11 that a trustee is limited to the authority explicitly given
12 - - - given to it in the indenture. The no-action clause,
13 you're right, essentially is for the purpose of restricting
14 minority shareholders from bringing unpopular claims, and
15 you say this isn't one.

16 I say it is an unpopular claim because if it were
17 popular, where is the twenty-five percent threshold? They
18 could have, if they had rounded up, the twenty-five percent
19 of registered holders had these - - - they could have
20 properly directed the trustee just like in the Feldbaum and
21 Lange cases on which they so heavily rely. And then they
22 would have had - - - we would have been having a different
23 discussion today.

24 JUDGE RIVERA: So noteholders could see it as
25 this falls right within the authority under the indenture



1 for them to pursue any remedy available.

2 MR. FISCHLER: Your Honor, let me say this.

3 There - - - the cases that we have cited, every single one
4 of them that has construed a remedies clause similar to or
5 virtually identical to this one, every one of those cases
6 predated the indenture in this case. The sophisticated
7 parties to this indenture I would submit at least were
8 constructively aware of that precedent. And if they wanted
9 Section 603, the remedies clause here, to mean something
10 different than the - - - the courts that had construed the
11 clause up to that point in time as meaning, they could have
12 easily changed the language, but they didn't.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 Counsel.

15 MR. O'CONNOR: Thank you. May it please the
16 court, my name is Paul O'Connor on behalf of the TPG-
17 related respondents, and I'm going to address the - - - the
18 alter ego issues. As this - - -

19 JUDGE STEIN: Well, if - - - if we hold that the
20 trustee lacks standing, do we ever - - - do we need to get
21 to this issue at all?

22 MR. O'CONNOR: No, if the trustee lacks standing
23 you don't need to get to this issue at all.

24 JUDGE STEIN: Okay.

25 MR. O'CONNOR: And I think that - - - that what



1 Justice Friedman said in her opinion was that even if there
 2 was standing, and she had found that there was not
 3 standing, that the - - - that there was - - - alter ego had
 4 been inadequately pled and in any event it was duplicative
 5 of the fraudulent conveyance claim and was therefore barred
 6 but for those reasons as well. But I would submit that the
 7 - - -

8 JUDGE FEINMAN: Why is this case different from
 9 ABN AMRO v. MBIA?

10 MR. O'CONNOR: Pardon?

11 JUDGE FEINMAN: Why is this case different from
 12 ABN ARMO v. MBIA?

13 MR. O'CONNOR: It's - - - it - - -

14 JUDGE FEINMAN: How - - - how is it different?

15 MR. O'CONNOR: It's different because the
 16 pleading in this case is extraordinarily thin. If you take
 17 a look at the - - - at the complaint, we're looking at two
 18 pages of one cause of action in which they basically cite
 19 the elements of an alter ego cause of action and
 20 essentially then lump twenty-four appellants together as
 21 the private equity defendants and then say that the private
 22 equity defendants dominated and controlled - - -

23 JUDGE RIVERA: To - - - but to assess whether or
 24 not they - - - they met the liberal pleading standard
 25 you're not just going to look at the paragraphs in the



1 cause of action, right? You're also going to look at the
2 factual assertions, and they've made numerous factual
3 assertions about a scheme and the looting and the dominance
4 and the intent of taking out this money for the benefit of
5 Apax and the individual defendants, right?

6 MR. O'CONNOR: Sure, we look at the - - - we look
7 at the entire complaint. But - - - but if - - - again, if
8 you look at the entire complaint most of what they're
9 talking about relating to alter ego is on those two pages
10 in the cause of action. And if you look in - - - at the
11 factual section you'll see it's no more specific. I mean
12 it's just words. It's just descriptions.

13 JUDGE RIVERA: What else would they - - - what
14 else would they have had to have said to - - - to meet the
15 threshold for the liberal pleading on this particular type?

16 MR. O'CONNOR: What they would have to say is
17 they would have to go to the twenty-four different
18 appellants here. And it's very important to understand
19 you've got twenty-four appellants, individuals, TPG-related
20 entities, Apax-related entities. Some of those entities
21 and individuals have some connection with some of the
22 Hellas entities, not these particular Hellas entities.
23 Others have absolutely no connection at all. And as the
24 First Department has said, unlike this decision, they have
25 said numerous times in other decisions that alter ego

1 requires specific pleading. This court itself has
2 described in the TNS Holdings case alter ego and piercing
3 the corporate veil as a heavy burden. The - - - the courts
4 of this state have recognized the importance of limited
5 liability corporations. And what this does, what the
6 Appellate Division's decision says - - -

7 JUDGE FEINMAN: So - - - so let's say they did
8 make out an application that established complete
9 domination. Does that get them through?

10 MR. O'CONNOR: No, domination and control is
11 simply one element of a - - - of an alter ego cause of
12 action.

13 JUDGE FEINMAN: So - - - so what's missing in
14 addition to that?

15 MR. O'CONNOR: What's missing are - - - are
16 specific allegations of wrongdoing. You not only have to
17 dominate and control. You have to use that domination and
18 control in order to effect a wrongdoing. And the - - -
19 again, the pleading in this case is simply that there was
20 domination, there was control, and it was used to
21 effectuate a wrongdoing. And - - -

22 JUDGE RIVERA: Yeah, but don't they say it's to
23 bleed the companies dry so that they're insolvent and then
24 they can't pay?

25 MR. O'CONNOR: Well, they - - - that - - - that's



1 what they say, bleed the company. But they don't - - -
2 they don't indicate how any of the twenty-four appellants
3 that are at issue in this case bled the company dry and led
4 to its - - - and led to its downfall.

5 JUDGE RIVERA: You have to say how each
6 individual - - - well, the individual defendants, what each
7 of them did?

8 MR. O'CONNOR: Yes, Your Honor. I mean these are
9 - - - these are twenty-four different appellants, some
10 individuals - - -

11 JUDGE STEIN: Are you saying that all twenty-four
12 did the very same things?

13 MR. O'CONNOR: Well - - -

14 JUDGE STEIN: They all got together and - - - and
15 they - - - they made this plan and - - - and this is what
16 was going to happen and these conveyances and so on and so
17 forth. Why isn't that enough?

18 MR. O'CONNOR: Because if all twenty-four of
19 these appellants were similarly situated - - - and they
20 cite to - - - to a case where they're talking about the
21 senior lenders, all of whom were the senior lenders and
22 were defined as the senior lenders and in that case, it was
23 found to be sufficient. But that's because all eleven, in
24 that case, were exactly similarly situated. The - - -
25 that's not the case here. We have twenty-four different



1 appellants and they are spread - - - again, some are
 2 entities, some are individuals, some are related to TPG,
 3 some are related to Apax. Some of them had some minor
 4 connection with some of the Hellas entities, not the ones
 5 in this case, some of them had nothing to do with it at
 6 all. Some of them were here in the U.S., some were in
 7 London. Again, this is a Luxembourg-related transaction.
 8 There's also an equitable aspect to this, and I think it's
 9 important to get to it. The light's on, but if I just - -
 10 -

11 JUDGE RIVERA: Your light went on, so let me ask
 12 you this question - - -

13 MR. O'CONNOR: Sure.

14 JUDGE RIVERA: - - - on the duplicative. What -
 15 - - I'm a little unclear on what's the standard to
 16 determine whether or not it's duplicative of the first - -
 17 -

18 MR. O'CONNOR: The standard is - - -

19 JUDGE RIVERA: - - - or the other claim.

20 MR. O'CONNOR: It's the underlying relief that's
 21 being sought. I mean what they're - - - what they're
 22 basically arguing in the - - - in the fraudulent conveyance
 23 claim is that - - - is a - - - is the return of some
 24 monies. And I think that they're - - - when you're taking
 25 a look at that, they - - - that's what - - - that's what



1 she was saying there. But again, I don't think that's a
 2 particularly relevant aspect to this appeal because at the
 3 of the day, what was really going on in alter ego is that
 4 Justice Friedman had found that claim to be inadequately
 5 pled. And again, she's not the first person. These - - -
 6 these folks had a federal cause of - - - complaint in front
 7 of Judge Oetken, and he also had found that they had
 8 inadequately pled their alter ego claim and - - -

9 JUDGE RIVERA: So you're saying your strongest
 10 argument on the duplicative is that they're requesting the
 11 exact same relief, the return of funds?

12 MR. O'CONNOR: No, the - - - essentially what's
 13 going on between the - - - between the two causes of action
 14 is that they're alleging that we engaged in wrongdoing - -
 15 - through domination and control and wrongdoing. It's - -
 16 - it's the allegations that these - - - that the same basic
 17 generalized allegations that they're - - - that they're
 18 making to try to make the alter ego - - -

19 JUDGE RIVERA: And the elements are exactly the
 20 same for the two?

21 MR. O'CONNOR: No, they're different. They're
 22 different. But that's - - - but that is essentially what
 23 she was arguing. But again, I don't think that's a
 24 particularly important aspect of the alter ego arguments
 25 here. I think what is important is the fact that the - - -



1 that the allegations are basically so thin that you cannot
2 figure out what any of these twenty-four appellants
3 allegedly did. Thank you.

4 CHIEF JUDGE DIFIORE: Thank you, sir.
5 Counsel.

6 MR. ZAUDERER: May it please the court, Mark
7 Zauderer for the respondent. To the extent my time
8 permits, I'm going to address each and every point that's
9 been made, but I'd just like to begin to respond to a
10 question that Judge Stein asked. If you were to decide - -
11 - and we suggest you should not, of course, that's our
12 position - - - that the trustee did not have standing, that
13 would not dispose of the other claim, and I'd like to
14 explain that. There are two claims here. One is
15 fraudulent conveyances, but the other is the alter ego
16 claim. The theory of an alter ego claim is that because of
17 the control and the other factors which I'm going to
18 discuss, the third party - - - the people who were the
19 transferees are regard at law as one and the same. You
20 collapse them into the party, in this case the company, so
21 that if that - - -

22 JUDGE STEIN: No, I understand the nature of the
23 claim, but I thought that - - - that the alter ego theory -
24 - -

25 MR. ZAUDERER: Right.



1 JUDGE STEIN: - - - is not itself a separate
2 cause of action.

3 MR. ZAUDERER: We agree.

4 JUDGE STEIN: Okay. All right. So - - - so - -
5 -

6 MR. ZAUDERER: Need to be.

7 JUDGE STEIN: So - - - right, so it's - - - it's
8 a theory as to why you're entitled to the relief on the
9 fraudulent conveyances claim, isn't it?

10 MR. ZAUDERER: It's not - - -

11 JUDGE STEIN: Against these defendants.

12 JUDGE FAHEY: Well, to take it further, isn't it
13 really your attempt to assert to assert jurisdiction over -
14 - - over the theoretical owners or - - - or the party's
15 exercising - - - the person's exercising dominance over the
16 actual parties in the case?

17 MR. ZAUDERER: That's correct.

18 JUDGE FAHEY: Okay.

19 MR. ZAUDERER: And it's not dependent on - - -

20 JUDGE FAHEY: And that's what Judge Stein was
21 getting at.

22 MR. ZAUDERER: I'm sorry, Your Honor.

23 JUDGE FAHEY: That's what Judge Stein is getting
24 at I believe.

25 MR. ZAUDERER: Yes.



1 JUDGE FAHEY: Yeah.

2 MR. ZAUDERER: But it's not dependent on the
3 fraudulent conveyance claim. It's - - - you're - - - it's
4 a claim against the principal debtor, in effect, that
5 because the - - - they are one and the same, the person who
6 is controlling is liable to the extent that the principal
7 debtor is. That's the theory of alter ego.

8 JUDGE WILSON: But - - - so as applied to this
9 case, if I understand your argument correctly - - -

10 MR. ZAUDERER: Yes.

11 JUDGE WILSON: - - - what you're saying is if we
12 would rule in your favor on the alter ego claim the
13 defendant here would essentially all be collapsed into the
14 company and the - - - there's no dispute that the indenture
15 would allow you to sue on the notes for recovery of the
16 principle. And that's the claim you could bring?

17 MR. ZAUDERER: Precisely.

18 JUDGE WILSON: Okay.

19 MR. ZAUDERER: Precisely. Let me address the
20 note issue. My - - -

21 JUDGE RIVERA: So can I just ask what's the
22 difference then in the way these two would proceed?

23 MR. ZAUDERER: Yes.

24 JUDGE RIVERA: I already heard what you said on
25 the alter ego. What happens on that other fraudulent



1 conveyance claim?

2 MR. ZAUDERER: The fraudulent conveyance claim is
3 you have to establish the elements of a fraudulent
4 conveyance.

5 JUDGE RIVERA: Right.

6 MR. ZAUDERER: The alter ego claim, the - - - you
7 need simply establish that the elements of alter ego are
8 there and then the law collapses the two into one. The
9 party that is controlling is found to be, as was suggested
10 by Judge Wilson, the equivalent to the party of the
11 principal obligor who is the transferrer in effect. You
12 basically collapse the transferrer and the transferee under
13 that theory.

14 JUDGE RIVERA: Yes, to make - - - yes, you're
15 trying to get them to pay for the company that's insolvent.

16 MR. ZAUDERER: Correct.

17 JUDGE RIVERA: So on the fraudulent conveyance,
18 though, let's say you're successful in that all the way.

19 MR. ZAUDERER: Different view.

20 JUDGE RIVERA: Let's just go with that
21 hypothetical for one moment.

22 MR. ZAUDERER: Sorry.

23 JUDGE RIVERA: You actually have standing and you
24 establish it because that's the next, right, the merits.

25 MR. ZAUDERER: Right.



1 JUDGE RIVERA: So then what happens there? Does
2 that mean that those ill-gotten gains, what they bled out
3 of the companies, goes back to the companies?

4 MR. ZAUDERER: Yes, and - - -

5 JUDGE RIVERA: And then what?

6 MR. ZAUDERER: Ultimately to the - - - to the
7 noteholders.

8 JUDGE RIVERA: Yes, but I'm saying do you have to
9 then take some other step, and is that also what's
10 different? You're saying under the alter ego you don't
11 have to take another step?

12 MR. ZAUDERER: Well, no, we have a summary
13 judgment against the company. If the funds come back then
14 you levy on the funds, and you're there because we have the
15 judgment.

16 JUDGE RIVERA: Can you explain to me his point or
17 your response to his point that - - - that the enforcement
18 came after this litigation? I'm not sure I'm understanding
19 what he's talking about.

20 MR. ZAUDERER: I - - - I don't think that's a
21 significant point. The elements were pled, pled properly,
22 but we are now advantaged in that we have the judgment. So
23 our job is easier if our claims goes forward. That's the
24 only differences to me. I didn't frankly understand the
25 significance of that point. May I turn to - - -



1 JUDGE RIVERA: But I thought is point was you got
2 the judgment after you filed this lawsuit. Is that
3 correct?

4 MR. ZAUDERER: I believe that's correct.

5 JUDGE RIVERA: Okay.

6 MR. ZAUDERER: Now let me, if I may, address the
7 claim that my friend here has made, and I think there's a
8 little bit of intellectual sleight of hand here. It is - -
9 - in Section 603 is the remedies clause. It is not - - -
10 if I may respond to a point that Judge Stein made, the
11 trustee's power under 603 is not dependent on a demand.
12 The trustee has - - - that's an alternative route which
13 I'll discuss. The trustee's power arises under 6.03. I
14 think we agree on that. Now with regard to the language of
15 the trustee's authority to collect the payment of
16 principal, premium, et cetera on the notes, which is the
17 principle lynchpin of the argument on the other side, you
18 know, when we collect on notes we're not physically
19 collecting the note. We're not taking possession of the
20 note. We're collecting on the - - - on the money that's
21 owed under the notes. And that - - -

22 JUDGE STEIN: But - - - but I guess the question
23 is how you interpret that language or are you talking about
24 collecting pursuant to the terms of the notes, the
25 indentures on the notes - - -



1 MR. ZAUDERER: Right.

2 JUDGE STEIN: - - - and - - - and all of the
3 things that surround the notes themselves rather than some
4 other legal theory.

5 MR. ZAUDERER: And I would answer this question
6 with the observation that the words that immediately
7 proceed the words that I just called your attention to are
8 the words "any available remedy." And those go tongue in
9 groove with the concept that I'm addressing of collecting -
10 - - collecting the payment of principal, premium, and
11 interest on the notes. And it's a - - -

12 JUDGE STEIN: It's circular to me.

13 MR. ZAUDERER: It - - - well, you know, let me
14 say I think it's clear that this is - - - this is what the
15 language says in common parlance. But I would observe that
16 - - - and this is - - -

17 JUDGE STEIN: What about the fact that - - - that
18 other courts have - - - have interpreted it very
19 differently, the - - - the argument your - - - your
20 adversary made and that - - - that these very sophisticated
21 parties certainly were aware of that.

22 MR. ZAUDERER: Right.

23 JUDGE STEIN: And if that was not their intention
24 would have drafted it differently.

25 MR. ZAUDERER: I respectfully disagree. They



1 have mis-cited the cases and I'll explain why. Okay.
2 There's a difference between fraud in the inducement, which
3 their cases are typical and a case for fraudulent transfer.
4 The latter is a claim common to all the bondholders.
5 That's the one we're talking about here and is subject to
6 enforcement by the trustee. All of the cases they cite,
7 and I can name them, I don't have time to go through them,
8 Regions Bank, Continental Bank v. Caton, Central Bank of
9 Denver, Premier Bank v. Tierney, In Re: Washington Power
10 Supply, all of those cases are where the claim is
11 distinguishable because it was an individual claim. For
12 example, many of them are fraudulent inducement claims,
13 okay. Fraudulent inducement claim brings to the fore
14 individual issues, what did I read, did I rely on the
15 prospectus, was there causation, and those are the claims
16 that are not brought by the trustee. They're cited against
17 us but they're distinguishable because they did not involve
18 a fraudulent conveyance claim. They were fraud in the
19 inducement claims and all they have in common is the root
20 fraud. But they're entirely different. And when you think
21 about and review those cases, you'll see that I've
22 correctly described them and they're entirely - - -

23 JUDGE FEINMAN: Is there also a distinction based
24 on whether the - - - the plaintiff is a purchaser or a
25 creditor?



1 MR. ZAUDERER: Yes, there - - - there are
2 purchaser and seller issues in those claims. Some of them
3 are securities claims. These are the claims in those
4 cases. And what the courts say is look, this is what the
5 no-action clause - - - you know, this is what the no-action
6 clause is about. Those are individual claims. These are
7 not common claims. What you can't do is bring claims that
8 are common to everybody which are the claims such as to
9 collect on the notes, whether it's from the principal
10 obligor, the guarantor, or the fraudulent transferees.

11 JUDGE RIVERA: And - - - and what is the concern
12 that's addressed by that distinction?

13 MR. ZAUDERER: The concern is that the policy in
14 the - - - the literature supports this. I mean we cite - -
15 - we agree on the same literature is in the structure of a
16 bond offering we don't want individual people bringing
17 claims, except their own claims. We don't want them
18 bringing claims that step on the toes of the champion, the
19 representative of everybody who is the trustee, and that is
20 the no-action clause. And I'd like to turn to the no-
21 action clause, and what I think puts the nail in the coffin
22 I suggest to you of their argument. We have made the point
23 here that the - - - under 603 the trustee has this power
24 that we're talking about. They've talked about 6.06 which
25 provides as to the so-called noncontractual claims.



1 That's what we agree we're talking about. They
2 say, look, the - - - there is a remedy. If you deny us,
3 the trustee, the right to bring to it, there's an
4 alternative remedy. They say, well, twenty-five percent of
5 the - - - of the interest of the notes can request a
6 trustee to pursue the remedy. That's one of the
7 conditions, condition number two. There is a logical flaw
8 in that because to request - - - to have a provision which
9 says that they can request a trustee to act presumes that
10 the trustee has the power to act.

11 JUDGE FAHEY: So your argument is is in the
12 common law claims if either has the ability to act or he
13 doesn't and that the - - - the minority shareholders or - -
14 - or the minority group of bondholders can only force them
15 to act where he has the authority to act.

16 MR. ZAUDERER: Precisely.

17 JUDGE FAHEY: Okay.

18 MR. ZAUDERER: Precisely.

19 JUDGE FAHEY: All right.

20 MR. ZAUDERER: May I turn to the alter ego claim,
21 if I may? You only see briefed this control and domination
22 point because that's the point they raise. But if you go
23 to the complaint, every element - - - every element of an
24 alter ego claim is factually supported. The only group
25 allegation relates to what they in their offering



1 memorandum described as a consortium. We use essentially
2 the same concept they used. They described this group of
3 entities as a consortium. And as to the individuals,
4 although it's not discussed in the briefs it's in the
5 record, it's in the complaint, and I will summarize them if
6 I may, in one minute. Control and domination, the private
7 equity defendant's own and control the management of the
8 Hellas entities; overlap in ownership officers and
9 directors; alleged in detail - - - I don't have time to go
10 through all the detail.

11 JUDGE FEINMAN: Let - - - let me ask you this. I
12 mean piercing the veil is essentially an equitable tool,
13 and don't you need more than just fraud - - -

14 MR. ZAUDERER: For? I'm sorry.

15 JUDGE FEINMAN: - - - to - - - to be able to, you
16 know, use that equitable tool of, you know, piercing the
17 veil.

18 MR. ZAUDERER: Yes.

19 JUDGE FEINMAN: So - - - so what is it that
20 you've alleged in terms of the misconduct that's beyond
21 mere fraud?

22 MR. ZAUDERER: The misconduct is the transaction.
23 Look, stepping back, what happened here, bondholders
24 invested, the company's bust, the transaction itself was
25 structured to immediately transfer out the money to the



1 transferees. You know, it takes a - - - I give credit to
2 the lawyer that drafted this complaint because this was
3 impenetrable until you take it apart. But that's what
4 happened. That was the transaction. This was a fraudulent
5 transaction. Basically, the money was dividended out as
6 soon as it came in from the bondholders. And what we're
7 saying is that was a transaction. We'll get to the merits
8 of it. We'll have to prove that. But that's what the
9 transaction's about. There's no dispute that that's what
10 happened. We may dispute the characterization of that
11 transaction. That's for the merits. But the purposes of
12 pleading, it's all there.

13 And as to the individuals, all of the allegations
14 are specific to the individuals. And I'll read them, they
15 were all alleged to have been transferees of the funds,
16 Halusa and Megrue as to Apax, Bonderman and Coulter as to
17 TPG. Bonderman and Coulter are the founding partners.
18 Each is a transferee of proceeds constituting the
19 fraudulent conveyances alleged in this complaint. Martin
20 Halusa is the worldwide CEO of Apax and John Megrue the CEO
21 Officer of Apax. Each is a transferee. Aliberti and
22 Calice are the partners of Apax and TPG responsible for
23 running the - - - what's called the bleed out. Aliberti
24 and Calice signed the notes and indentures. Each is a
25 transferee of the proceeds of the fraudulent conveyances.



1 I could go through the whole complaint. It's laid out
2 there. As I say, the only group pleading is to what they
3 described as the consortium, and we just have - - - there's
4 no distinction among them. They have eliminated the
5 distinction by their own description in their - - - in
6 their offering memorandum.

7 CHIEF JUDGE DIFIORE: Thank you, Mr. Zauderer.

8 MR. ZAUDERER: No further questions? Thank you.

9 CHIEF JUDGE DIFIORE: Counsel, what about your
10 adversary's argument about the presumption of the trustee's
11 power to act?

12 MR. FISCHLER: That, Your Honor, is a very
13 misleading description because we - - - it's very important
14 here to distinguish between the power to act under the no-
15 action clause, the Feldbaum and Lange cases on which they
16 heavily rely in the briefs both talk about how the trustee
17 in the first instance may bring a claim. But it's
18 important to note that that is not talking about a remedies
19 clause. That is simply talking about a properly directed
20 trustee under the no-action clause. It's that simple. All
21 of those cases deal with the same fundamental issue. None
22 of them - - - none of them deal with the rights of a
23 trustee under a remedies clause. It's simply if you're
24 properly directed by the minimum threshold under the no-
25 action clause then you can proceed. And by the way, it's



1 worth noting that the no-action clause here is a very
2 modest threshold, the twenty-five percent. Quadrant was a
3 majority, Feldbaum and Lange were majorities. That's the
4 typical one. Here you have twenty-five percent. There's
5 no argument that it's been satisfied.

6 I wanted to very briefly address the
7 characterization of the cases and the argument that you can
8 distinguish the cases that we rely on that do interpret a
9 remedies clause based on the notion that there are
10 individualized fraudulent inducement claims. That is
11 simply fundamentally incorrect and all you need do is look
12 at the cases themselves. The Regions Bank case that was
13 securities fraud and common law fraud claims based on what?
14 Based on alleged misrepresentations in the offering memo.
15 These notes and securities of this ilk are not sold one-on-
16 one. I don't come to Chief Judge DiFiore and say would you
17 like to buy these notes. These are marketed through - - -
18 to sophisticated institutions through an offer memorandum
19 that gets widely distributed. Fraud claims with - - - in
20 this case to the extent the - - -

21 JUDGE WILSON: Isn't the holding - - - isn't the
22 holding in Regions Bank that the trustee there was not a
23 buyer or seller or securities and therefore had no standing
24 under 10(b) (5)?

25 MR. FISCHLER: I don't believe so, Your Honor. I



1 think the holding there was based on and a holding in each
2 of these cases, Regions Bank, Continental Bank, the Central
3 Bank of Denver case from the Colorado Court of Appeals, the
4 Premier Bank case, the cases cited in those cases. Not one
5 of them held that the remedies clause did not authorize
6 third-party claims based on the notion that the fraudulent
7 inducement claims are individualized claims. Each one of
8 them rested on the plain language of the remedies clause.
9 And in each case you had virtually the same language we had
10 here. Regions Bank was the - - - virtually identical, one
11 word was different. It used "on the bonds" instead of "on
12 the notes." In Premier Bank, "under any of the bonds."
13 Continental Bank, "under any of the bonds." Central Bank
14 of Denver - - -

15 JUDGE RIVERA: Well, what's - - - what's the
16 concern, a policy that animates that?

17 MR. FISCHLER: The policy that animates it, Your
18 Honor, is that fundamentally all claims belong to the
19 noteholders, to the security holders, except - - - except
20 those limited claims what they - - - which they choose in
21 effect to assign to the trustee under the indenture. So if
22 it doesn't assign it to the trustee, the trustee is not
23 authorized to bring it. That is a fundamental precept of -
24 - - of the law in this area. Very, very briefly on the - -
25 -



1 JUDGE RIVERA: Can't - - - can't - - -

2 MR. FISCHLER: I'm sorry.

3 JUDGE RIVERA: That's okay. Can't the remedies
4 clause be read as saying use any means legally available to
5 collect the money - - - the noteholder that I am owed? I
6 just don't see how that - - - this litigation isn't in
7 pursuit of that.

8 MR. FISCHLER: If they wanted to - - - if they
9 wanted it to be that broad it was very easy to say it.
10 Instead, in - - - with the precedent of all these cases
11 we've now been discussing that interpreted remedies clause
12 is not to say that. That's the language they use. And we
13 would submit that the - - - if you look through the briefs
14 you will never find - - - they have - - - they do not cite
15 a single case that interprets the phrase "on the notes."
16 Not a single case. If you look at - - - we - - - we cite
17 the United Bonding case from the Fifth Circuit. It's - - -
18 it's admittedly in a different context. It doesn't involve
19 an indenture. But it - - - it for purposes of subject
20 matter jurisdiction interprets the phrase "on the notes."
21 It's - - - the interpretation - - - I apologize, I don't
22 have it handy at the moment. It is precisely the same
23 interpretation that we ascribe to it and that all these
24 other cases we have relied on ascribe to it.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. FISCHLER: Thank you, Your Honors.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Cortlandt Street Recovery Corp. v. Bonderman, No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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