Van Deventer v CS SCF Management Limited

2005 NY Slip Op 30337(U)

September 14, 2005

Supreme Court, New York County

Docket Number: 603151/03

Judge: Herman Cahn

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SCANNED ON 9/23/2005

[*1]

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

PRESENT: [redacted] PART 49

0603151/2003

DEVENTER, JOHN M.
vs
CS SCF MANAGEMENT LTD.

INDEX NO. _____

MOTION DATE 1/26/05

MOTION SEQ. NO. 001

MOTION CAL. NO. 5

SEQ 1

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE
NEW YORK
SEP 23 2005
FILED

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/24/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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JOHN M. VAN DEVENTER, JAMES R. CLARK and C2C CONSULTANTS, LTD.,

Plaintiffs,

-against-

Index No. 603151/03

CS SCF MANAGEMENT LIMITED, CREDIT SUISSE FIRST BOSTON, CREDIT SUISSE FIRST BOSTON (USA), CS CAPITAL PARTNERS, LTD., CS STRUCTURED CREDIT FUND, LTD., CREDIT SUISSE FUND ADMINISTRATION LIMITED, and QUEENSGATE BANK AND TRUST COMPANY, LTD.,

Defendants.

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FILED
SEP 23 2005
COUNTY CLERK'S OFFICE
NEW YORK

Herman Cahn, J.:

Motion sequence numbers 001, 004, and 005 are consolidated for purposes of disposition.

In motion sequence 001, defendants CS SCF Management Limited (the Manager), Credit Suisse First Boston (CSFB), Credit Suisse First Boston (USA) (CSFB-USA), CS Capital Partners, Ltd. (CS Capital), CS Structured Credit Fund, Ltd. (the Structured Credit Fund), and Credit Suisse Fund Administration Limited (the Administrator) (collectively, the Credit Suisse defendants) move to dismiss the first through seventh causes of action asserted in the complaint and the first amended complaint, pursuant to

CPLR 3211 (a) (1), 3211 (a) (7), and 3211 (a) (8)[1].

In sequence 004, the Credit Suisse defendants move to dismiss the first amended complaint in its entirety, pursuant to CPLR 3211 (a) (1), 3211 (a) (7), 3211 (a) (8), and 327 (a).

In sequence 005, plaintiff C2C Consultants, Ltd., moves for partial summary judgment on its claim for possession of pledged account funds held in its name by defendant Queensgate Bank and Trust Company, Ltd., and to direct the Credit Suisse defendants and Queensgate Bank to release to C2C the more than $4.6 million presently being held in the account and to pay to C2C all amounts to be repaid into the account.

The Complaint's Allegations

In summary, in the first amended complaint, plaintiffs C2C, John M. Van Deventer, and James R. Clark allege that, in September 1995, CSFB and CSFB USA (collectively, CS) and C2C entered into a written joint venture agreement pursuant to which CS would create a family of investment funds to be exclusively managed by Van Deventer. They agreed that, in exchange for his services, Van Deventer would receive 49% of the management fees earned by the joint venture and that CS would retain the other 51%.

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[1] While motion sequence number 001, to dismiss the original complaint, was pending, plaintiff served a first amended complaint incorporating the seven causes of action asserted in the original complaint and asserted eight new causes of action. By written stipulation dated May 26, 2004, plaintiffs and the Credit Suisse defendants agreed that the motion papers served in sequence 001 would be incorporated into a motion (later denominated motion sequence 004), to dismiss the first amended complaint.

C2C was created by Van Deventer as one of the "Cabot corporations." It placed funds in a pledged account in its name maintained at Queensgate Bank as collateral for its contractual obligation to repay some of the management fees in certain circumstances.

The joint venture agreement required the parties to remain committed to the joint venture until at least October 31, 2006. Under the agreement, as modified, CS was to contribute start-up capital. In addition, it was required to pay plaintiffs a $1,000,000 "break-up fee," in the event that CS terminated the agreement prior to that date. Plaintiffs allege that they and the Credit Suisse defendants memorialized the terms of the joint venture in a letter dated December 13, 1995.

Plaintiffs allege that the Credit Suisse defendants breached the joint venture and associated agreements by, among other things, withdrawing from the joint venture prior to the termination date, causing plaintiffs to incur significant monetary losses, and by failing to pay them earned management fees and the break-up fee.

Van Deventer incorporated a number of corporations (collectively, the Cabot corporations) to further the business of the joint venture. Plaintiffs allege that the Cabot corporations and CS formed a joint venture identified as the Cabot Fund Enterprise. Van Deventer also recruited Clark to join him as a partner in the Cabot Fund Enterprise.

The Cabot corporations entered into several agreements with CS. Between January 1996 and November 1996, CS and the Cabot corporations developed a

structure for the Cabot Fund Enterprise that would help each side achieve certain goals. CS wanted to avoid United Kingdom taxes; to avoid consolidating high risk investments on its balance sheet or reflecting such investments in its capital adequacy calculations; and to retain operational control over funds managed by the Cabot Fund Enterprise. The Cabot corporations wished to structure the Enterprise in a way that ensured that they would have exclusive control over the investment program, or alternatively, that provided appropriate compensation to them in the event that CS terminated the Enterprise without their consent. Both CS and the Cabot corporations wanted a structure that could manage a number of funds in different jurisdictions without creating a new structure for each fund.

In 1996, CS sponsored the Structured Credit Fund. Pursuant to the fund management agreement (the FMA), dated November 4, 1996, the Structured Credit Fund delegated all authority and responsibility for investment strategy, management, administrative, and operational functions to defendant CS SCF Management Limited, the Manager.

Plaintiffs allege that CS incorporated and controlled the Manager as an "echo company," located in Guernsey, an off-shore "tax haven." Plaintiffs allege that the Manager had only nominal authority over the affairs of the investment funds, and was, in reality, merely a transparent conduit that did not exercise actual control over those funds. The Manager delegated its administrative duties to Credit Suisse Fund

Administration Limited, the Administrator, in a series of agreements.

The IAA

One such agreement was the investment advisory agreement (the IAA), dated November 4, 1996, between a Cabot corporation, the Manager, and the Structured Credit Fund. Pursuant to the IAA, the Cabot corporation was appointed exclusive investment advisor to the Manager, and by extension, to the Fund.

The SCA

Another such agreement was the strategic consulting agreement (the SCA), dated October 31, 1996, between the Manager, another Cabot corporation, and the Structured Credit Fund. Pursuant to the SCA, the Manager was appointed to manage the Fund's investment portfolio on a discretionary basis and to provide certain administrative services to the Fund. The Manager could not initiate action, but could only act upon, or veto, a "recommendation" from the Cabot corporation. The SCA also named C2C as the exclusive consultant to the Fund. The SCA was to terminate on the later of January 31, 2003 or the termination of the Fund. CS agreed to pay certain fees, if the SCA was terminated for reasons other than the passage of time.

From 1996 through 2003, the Cabot corporation sent the Manager more than 1,300 recommendations. Plaintiffs allege that, on February 28, 2003, the first time the Manager failed to act in accordance with such a recommendation, CSFB put the

Structured Credit Fund into liquidation over the Cabot corporation's objection.

Plaintiffs allege that, through a series of contracts, the Manager delegated all its remaining non-investment related authority relating to the administrative and operational functions of the Structured Credit Fund, to CSFB. For example, in the risk monitoring agreement, the Manager delegated to CSFB its oversight responsibilities relating to the Fund's investment program. In the administration agreement, the Manager delegated to the Administrator all the administrative duties that it had assumed under the FMA. In the global custody agreement, CSFB assumed the Manager's responsibility for the safekeeping of the Fund's assets.

In December 1999, CSFB and other companies created a second investment fund vehicle, defendant CS Capital Partners. Its only assets were the Structured Credit Fund shares. The Fund retained ownership of the companies and other assets in its portfolio. CS Capital Partners' term expired January 31, 2003.

In December 1999, the delegation agreements executed by the Manager were terminated and replaced with new contracts to which both CS Capital Partners and the Structured Credit Fund were parties. For example, the FMA was replaced by the 1999-FMA, pursuant to which all managerial, operational, and administrative duties were delegated to the Manager. The SCA and the IAA were replaced by the 1999-SCA and the 1999-IAA, in which all of the Manager's operational and strategic management and investment functions were delegated to a Cabot corporation.

These agreements at section 9.2 retained CSFB's commitment to pay the Cabot corporations a break-up fee, in the event CSFB withdrew from the Cabot Fund Enterprise prior to the October 31, 2006, termination date.

The 1999-SCA was later modified to provide that, upon the agreement's early termination, "all Assets shall be deemed distributed in kind on the effective date of such termination" (1999-SCA, § 7.3 [a]). Plaintiffs allege that, upon early termination, the Structured Credit Fund's assets were to be deemed sold at fair market value and the Cabot corporation would receive a final consulting fee based on each of the deemed sales.

Plaintiffs allege that CSFB had an unfettered right to daily review the Cabot corporations' operations and that its approval was sought and obtained by them for every material decision by the Cabot corporations relating to the Cabot Fund Enterprise.

Plaintiffs assert that, beginning in 2001, a series of unanticipated geopolitical and financial events, including the 9-11 attacks, had a significant negative impact on the Structured Credit Fund's portfolio of companies. The Cabot corporations repeatedly advised the Credit Suisse defendants of the status of the portfolio and that these defendants repeatedly advised that they remained committed to the Fund, until the time was right for sale of the portfolio companies.

On January 31, 2002, plaintiffs, on behalf of C2C, executed the Resource

Partners Group Limited loan agreement (RPG agreement), pursuant to which they loaned $1.5 million to portfolio companies to enable them to grow while the Cabot corporations continued to manage them.

Plaintiffs allege that, in May 2002, CS, using "intimidation" tactics, informed Cabot that it would be discontinuing its investment in the Cabot Fund Enterprise, over the Cabot corporations' objections. On February 28, 2003, CS caused the shareholders of the Funds to pass a special resolution placing each of the Funds into voluntary liquidation. Plaintiffs allege that CSFB or its successor-in-interest, CSFB USA, improperly caused the termination of the Fund in February 2003.

Plaintiffs allege that, at a March 2003 meeting in Barbados, nonparty Steven Rattner, a senior CSFB officer, falsely stated to the senior management team of nonparty Elegant Hotels Limited that " 'those Cabot guys are a bunch of crooks. They have been stealing $5,000,000 a year from you and CSFB for years. We have finally stopped them' " (First Amended Complaint, ¶ 158). Rattner allegedly repeated these statements in April 2003 at the office of nonparty First Caribbean Bank, a subsidiary of nonparty Barclay's Bank, a Cabot partner, and nonparty CIBC, a potential investor. CIBC declined to invest in a new fund created by the Cabot corporations, allegedly as a result of Rattner's remarks.

Plaintiffs' Claims

In the first amended complaint, plaintiffs assert 15 causes of action. The

claims include: breach of the 1999-SCA by failing to pay the final consulting fee and the break-up fee; breach of fiduciary duty; slander per se and defamation; tortious interference with contractual relations; breach of the RPG loan agreement by failing to use best efforts to ensure repayment of the loan; fraudulent inducement to enter into the RPG loan agreement; conversion by failing to return the Cabot corporations' software programs; unjust enrichment from the sale of the software programs; and breach of fiduciary duty and the joint venture agreement by failing to use Van Deventer as an exclusive advisor to the Structured Credit Fund and by failing to introduce the Credit Suisse defendants' substantial customers to the Funds.

In the first amended complaint, plaintiffs seek compensatory and punitive damages and release of the pledged account funds, together with interest, costs, and attorneys' fees.

Discussion

Credit Suisse Defendants' Motions to Dismiss

Causes of Action against CSFB and CSFB USA

The Credit Suisse defendants seek to dismiss all 15 claims asserted against them in the first amended complaint, on the ground that plaintiffs do not allege misconduct by each entity individually, rather they are referred to jointly as CSFB or CS.

In opposition, plaintiffs contend that they had no other choice since public

documents make little if no distinction between the two companies and, therefore, they require discovery regarding the relationship between the two and their individual functions before they can assert claims against each individually.

Plaintiffs acknowledge that CSFB and CSFB USA are separate entities and contend that each is a successor-in-interest to Credit Suisse, the original joint venture partner. Inasmuch as knowledge as to corporate succession is not presently available to plaintiffs, that branch of the motion in which the Credit Suisse defendants seek dismissal of the causes of action asserted against CSFB and CSFB USA, is denied with leave to renew if defendants are so advised, at the conclusion of the discovery.

1999-SCA Breach Claims

The Credit Suisse defendants next seek dismissal of the first, second, and third causes of action pleaded against CSFB, CSFB USA, and the Administrator on the grounds that plaintiffs have failed to allege that these defendants are parties to the 1999-SCA and that, in fact, they are not signatories to the agreement. The Credit Suisse defendants also contend that plaintiffs' allegations of domination and control are conclusory and form an inadequate basis to pierce the corporate veil, and that plaintiffs must plead specific factual allegations indicating precisely how the corporate parent accomplished total control and domination.

On a motion addressed to the sufficiency of the pleadings, the court must

accept every factual allegation as true and liberally construe the allegations in the light most favorable to the pleading party (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]). In considering a CPLR 3211 (a) (1) motion, the court must determine whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (id. at 88).

In the first amended complaint, plaintiffs allege that CS totally dominated the Funds, the Manager, and the Administrator, and submit affidavits and documents in support of those allegations. Agreements such as the 1996 and 1999 versions of the FMA, SCA, and IAA appear to demonstrate that the Manager had little or no independent authority and was required to defer to the Cabot corporations. Further, the Manager delegated much of its authority to the Administrator. Plaintiffs further allege that CS used its domination and control over the Funds, the Manager, and the Administrator to deprive plaintiffs of the benefit of the 1999-SCA and avoid its contractual obligations owed to plaintiffs.

Generally, a breach of contract claim will be dismissed where the plaintiff fails to allege that privity exists between the parties (Green v Lake Placid 1980 Olympic Games, Inc., 147 AD2d 860 [3d Dept 1989]). Here, however, plaintiffs have adequately alleged direct intervention by CS in the management of the

Manager and Funds to such an extent that their " 'paraphernalia of incorporation, directors and officers' are completely ignored" (Billy v Consolidated Mach. Tool Corp., 51 NY2d 152, 163 [1980] [citation omitted]). Although some of the evidence demonstrates that the Manager did observe the corporate formalities, plaintiffs also allege that, eventually, CS exercised its dominant control of the Manager to breach the 1999-SCA. Plaintiffs also allege that the Manager was a legal fiction created and used by CS to accomplish tax and regulatory objectives. The extent of CS' control over the Manager, the Structured Credit Fund, CS Capital Partners, and the Administrator is within the exclusive knowledge of these parties. Plaintiffs allege that CS decided to thwart C2C's business by causing the Manager, the Fund, and CS Capital Partners to breach the 1999-SCA, and deny plaintiffs the break-up and final consulting fees owed them under the express terms of that agreement upon CS' early termination of the 1999-SCA.

These allegations are sufficient to plead viable claims for breach of the 1999-SCA. Therefore, the branches of the motion to dismiss the first three causes of action as asserted against CSFB and CSFB USA are denied.

The Credit Suisse defendants next argue that the first amended complaint does not set forth factual allegations demonstrating that either the Structured Credit Fund or CS Capital Partners breached any obligation imposed upon them by the 1999-SCA.

"The common-law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage" (Ledain v Town of Ontario, 192 Misc 2d 247, 250 [Sup Ct, Wayne County 2002], affd 305 AD2d 1094 [4th Dept 2003]).

In the first three causes of action for breach of the 1999-SCA, plaintiffs refer to contractual obligations imposed on the Manager only. Therefore, the branches of the motion to dismiss the first, second, and third causes of action as asserted against the Structured Credit Fund and CS Capital Partners are granted.

In so holding, the court notes that, even if the Structured Credit Fund or CS Capital Partners were found to be an alter ego of CSFB or CSFB USA, the claims would not be legally cognizable because plaintiffs have not alleged any breach of the 1999-SCA by the Fund or CS Capital Partners.

Personal Jurisdiction over Administrator

The Credit Suisse defendants seek dismissal of all claims asserted in the first amended complaint against the Administrator, a company incorporated in Guernsey, a British Channel Island, for lack of personal jurisdiction, pursuant to CPLR 301. Specifically, they contend that plaintiffs do not allege a basis for personal jurisdiction over the Administrator, nor do the factual allegations of the first amended complaint indicate that the Administrator had the necessary minimum

contacts with this State to provide a jurisdictional basis. Movants note that the first three causes of action against the Administrator arise from the 1999-SCA, to which the Administrator is not a party.

In opposition, plaintiffs contend that the court has jurisdiction over the Administrator because it is the alter ego of the Manager, a signatory of the 1999-SCA, and is, therefore, bound by the forum selection clause set forth in that agreement, and because it is the alter ego of CSFB and CSFB USA, a New York banking corporation.

In order to enforce the 1999-SCA forum selection clause against the Administrator, which itself is not a party to that agreement, plaintiffs must demonstrate that the Administrator bears such a close relation to the signatories and the agreement "as to have been foreseeably bound by and thus implicitly included within the agreement's forum selection clause" (L-3 Communications Corp. v Channel Tech., Inc., 291 AD2d 276, 277 [1st Dept 2002]).

First, however, plaintiffs must establish that the court has jurisdiction over the Manager. Plaintiffs allege jurisdiction over the Manager based on the 1999-SCA, which is governed by the laws of New York State. In the agreement, the parties "irrevocably submit to the jurisdiction of [the courts of the State of New York]." The Credit Suisse defendants contend that the contracting parties deliberately excluded the Administrator from the 1999-SCA. Paragraph 15 of the

1999-SCA provides that the agreement "shall be binding upon and inure to the benefit of the Manager, [C2C] and their respective successor and permitted assigns." Thus, the court does have personal jurisdiction over the Manager.

The Credit Suisse defendants next contend that plaintiffs have failed to allege sufficient facts to demonstrate that the Administrator and the Manager are alter egos. Courts will disregard the corporate form when necessary to prevent fraud or to achieve equity (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 140 [1993]). A court will not pierce the corporate veil without a proper inquiry and proof according to established guidelines (Matter of Seagroatt Floral Co. [Riccardi], 78 NY2d 439, 450 [1991]). In general, to pierce the corporate veil, the plaintiff must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Matter of Morris v New York State Dept. of Taxation & Fin., supra, 82 NY2d at 141). To show domination, the complaint must include allegations such as "whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form" (Matter of Island Seafood Co. v Golub Corp., 303 AD2d 892, 893-894 [3d Dept 2003]).

Plaintiffs have supplemented the first amended complaint with affidavits and

documentary evidence. According to Steven Siegler, general counsel of the Cabot corporations, and William John Jenkins, a CSFB employee, no meaningful distinction existed between the Manager and the Administrator, prior to the liquidation of the Manager. Siegler argues that the Manager was an extension of the Administrator, with no employees. According to Siegler, the Manager's telephone was located at the Administrator's office, and its fax machine was on the desk of one of the Administrator's account officers. Siegler contends that the Manager was a shell company.

Significantly, although those allegations may indicate a "close relationship" (Dogmoch Intl. Corp. v Dresdner Bank AG, 304 AD2d 396 [1st Dept 2003]), plaintiffs have failed to connect those facts with the causes of action or any wrongdoing on the part of the Administrator. At most, plaintiffs have alleged that the veil between the Administrator and the Manager is a very thin one.

Plaintiffs also contend that the Administrator is the successor-in-interest with respect to the Manager's contractual relationship with plaintiffs. The Administrator argues that the claim is conclusory and insufficient to assert personal jurisdiction over it, because none of the alleged facts satisfy any basis for imposing successor liability. Successor liability must be supported by a showing that (1) the successor corporation expressly or impliedly assumed its predecessor's liability, (2) there was a consolidation or merger between the successor and predecessor, (3) the successor

was a mere continuation of the predecessor, or (4) the succession was fraudulently entered into for the purpose of escaping obligations (see Schumacher v Richards Shear Co., 59 NY2d 239, 245 [1983]).

Plaintiffs do not present any legal arguments on the issue of personal jurisdiction over the Administrator as the alleged successor-in-interest. The allegation that the Administrator is the liquidator of the Manager is not sufficient to conclude that the Administrator is the successor-in-interest of the Manager. Further, no factual allegations indicate that the Manager is a subsidiary of the Administrator. Consequently, that branch of the motion to dismiss the first amended complaint in its entirety, asserted against the Administrator, is granted.

Standing of Van Deventer and Clark

The Credit Suisse defendants contend that Van Deventer and Clark lack standing to assert the second cause of action for breach of the 1999-SCA by failing to pay the break-up fee, on the grounds that they are not parties to the agreement, nor are they its intended third-party beneficiaries.

In opposition, plaintiffs contend that the express terms of the 1999-SCA demonstrate that Van Deventer and Clark are intended to be the agreement's third-party beneficiaries.

Non-parties to a contract seeking to recover for its breach, must establish the existence of a binding contract that was intended for their benefit, and that the

benefit to them was direct (Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co., 261 AD2d 117 [1st Dept 1999]). The beneficiary must show that the benefit was not incidental, but immediate to such a degree as to indicate the assumption of a duty to make reparation if the benefit is lost (id.).

In the 1999-SCA, Van Deventer and Clark are specifically mentioned and their skills and knowledge as consultants are acknowledged and vital elements to the agreement. However, although Van Deventer and Clark may benefit from the 1999-SCA as employees or investors in C2C and other Cabot corporations, they have failed to show that they are intended beneficiaries, rather than essential workers. At most, the 1999-SCA may benefit the joint venture, which, in turn, would benefit Van Deventer. Therefore, C2C's claim for breach of contract, which the Credit Suisse defendants do not challenge, provides adequate protection for Van Deventer's interests. The second cause of action against the Credit Suisse defendants is dismissed to the extent that it is asserted by Van Deventer and Clark.

Fiduciary Duty Breach Claim

The Credit Suisse defendants seek dismissal of the fourth cause of action for malicious breach of fiduciary duty on the ground of failure to state a cause of action.

In opposition, plaintiffs contend that they have adequately alleged the existence of a joint venture consisting of themselves and the Credit Suisse defendants.

"The essential elements of a joint venture are 'an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses' " (Tilden of New Jersey v Regency Leas. Sys., 230 AD2d 784, 785-86 [2d Dept 1996], quoting Ackerman v Landes, 112 AD2d 1081, 1082 [2d Dept 1985]). The Court of Appeals has stated that "the burden of making good the losses" is an "indispensable" element of a joint venture agreement (Matter of Steinbeck v Gerosa, 4 NY2d 302, 317 [1958]; see also Andrews v Cerberus Partners, 271 AD2d 348, 348 [1st Dept 2000]). If no possibility of loss exists, the pleading party may not have to allege that they agreed to share losses (see Cobblah v Katende, 275 AD2d 637, 639 [1st Dept 2000]).

Giving plaintiffs the benefit of every favorable inference, such intent may be implied from the totality of the conduct alleged here. In the fourth cause of action, plaintiffs allege that the Credit Suisse defendants breached their fiduciary duty of undivided loyalty and candor to plaintiffs arising out of the terms of the 1999-SCA. However, the factual allegations they assert are based solely on alleged misconduct by CSFB or CSFB USA. Plaintiffs also allege that, pursuant to the terms of the joint venture, Van Deventer was to be the exclusive investment advisor to the Funds and

was to control the investment functions of the joint venture.

Plaintiffs submit documents referring to a joint venture that appear to demonstrate that the parties agreed to share losses, control, and ownership. The Credit Suisse defendants contend that the 1999-SCA supercedes any prior joint venture agreement.

At this stage of the litigation, the Credit Suisse defendants have not conclusively demonstrated that the 1999-SCA superceded any joint venture agreement, which would, in any event, be an issue of fact. Several documents refer to a joint venture involving Van Deventer, Clark, and CS. The allegations concern CS' intent to cause a breach of the 1999-SCA, one of the endeavors of the joint venture. Plaintiffs accuse CS of avoiding obligations in a dishonest and malicious manner in order to appropriate bank fee income. In particular, in the first amended complaint, plaintiffs allege that CSFB intentionally stopped its investment in the Cabot Fund Enterprise in a way that would damage plaintiffs, if they did not cooperate. Plaintiffs also allege that CS advised a debtor of the enterprise to stop repayment of its loan.

With these allegations, plaintiffs have asserted a legally viable claim by Van Deventer and Clark for breach of fiduciary duty against CS. However, plaintiffs have failed to sufficiently allege that any of the Credit Suisse defendants breached a fiduciary duty owed to C2C.

For these reasons, that branch of the motion to dismiss the fourth cause of action asserted by C2C against the Credit Suisse defendants is granted.

C2C - RPG Loan Agr. Breach

The Credit Suisse defendants seek to dismiss the eighth and ninth causes of action asserted against CSFB, CSFB USA, CS Capital Partners, and the Administrator for breach of the RPG loan agreement by CS' default on its contractual obligations and by its failure to use its best endeavours to ensure repayment of the loan under the terms of the agreement. The Credit Suisse defendants contend that the claims are not legally viable because none of them executed the RPG loan agreement and, therefore, cannot be held liable for its breach, and because the claims are based on conclusory allegations of alter ego, joint, several, and successor liability.

This claim is legally viable for the same reasons as are the first, second, and third causes of action for breach of the 1999-SCA. Here, again, plaintiffs have adequately alleged that CS directly intervened in the daily management of the Manager and the Structured Credit Fund. Therefore, the branches of the motion to dismiss the eighth and ninth causes of action are denied.

C2C - Fraudulent Inducement

The Credit Suisse defendants seek dismissal of the tenth cause of action for fraudulent inducement to enter into the RPG loan agreement asserted against the

Manager, the Administrator, the Structured Credit Fund, and CS.

This fraud claim is duplicative of the contract claim. "While . . . the same acts which give rise to a cause of action for fraud may also form the basis for a breach of contract claim, a cause of action for fraud will not arise if the alleged fraud merely relates to the breach of contract" (MBW Advertising Network, Inc. v Century Bus. Credit Corp., 173 AD2d 306 [1st Dept 1991] [internal citation omitted]). "It is well settled that a cause of action for fraud does not arise where . . . the only fraud alleged merely relates to a contracting party's alleged present intent to breach a contractual obligation" (Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233, 234 [1st Dept 1994]; Gordon v Dino De Laurentiis Corp., 141 AD2d 435 [1st Dept 1988]). To be legally viable, a fraud claim must arise out of a duty to the plaintiff separate and apart from the contractual duty (Rockefeller Univ. v Tishman Constr. Corp. of New York, 240 AD2d 341 [1st Dept], lv denied 91 NY2d 803 [1997]; Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 389 [1987]). "[W]here a party is merely seeking to enforce its bargain, a tort claim will not lie" (New York Univ. v Continental Ins. Co., 87 NY2d 308, 317 [1995]).

Here, the material fact identified by plaintiffs consists of the Credit Suisse defendants' allegedly false statement at the time of execution of the RPG loan agreement that they had no intent to take any steps to wind-up the Structured Credit Fund, nor were they aware of any other outstanding processes to wind it up (see First

Amended Complaint, ¶¶ 250-255). Van Deventer attests in his affidavit that he would never have authorized C2C to make the loan, had he known that CS was planning to wind-up the Fund in January 2003 because any such action before the end of 2004, at the earliest, would severely damage the Fund's ability to repay the loan to RPG.

Significantly, however, in the RPG loan agreement, the Manager expressly warrants that "no meeting has been convened for its winding-up, no such steps are intended by it and, so far as it is aware, no petition, application or other process is outstanding for its winding-up" (RPG Loan Agr., § 10.1.6). Thus, the material fact upon which plaintiffs rely is not extrinsic to the contract, but is, instead, one of the express terms of the contract. The fraud claim is, therefore, duplicative of the contract claim and not legally viable. For this reason, that branch of the motion to dismiss the fraud claim is granted.

C2C - Software Conversion & Unjust Enrichment

The Credit Suisse defendants next seek dismissal of the 11th and 12th causes of action for conversion of software and unjust enrichment by sale of the software. They contend that C2C does not allege or hold any property rights in the allegedly converted software, which was developed by nonparty Cabot Square Capital Advisors Ltd. They also contend that C2C does not allege that any of them committed the conversion, but rather seeks to hold them liable for an alleged

conversion by non-party Cabot Financial (Europe) Limited, based solely upon the Structured Credit Fund's alleged former ownership interest in Cabot Financial.

The parties do not dispute that the software was authored by nonparty Jay Derrett during the course of his employment by Cabot Square. As Derrett's employer when he developed the software, Cabot Square retained the intellectual property ownership rights over it. Cabot Square was formed by Van Deventer to serve as investment advisor under the IAA and the 1999-IAA. C2C has allegedly purchased an ownership interest in Cabot Square. With these allegations, plaintiffs have adequately pleaded that C2C owns property rights in the software and, therefore, has standing to assert the conversion and unjust enrichment claims.

Plaintiffs have also pleaded sufficient facts to demonstrate that the Credit Suisse defendants interfered with the software. "A very slight interference with the ownership is sufficient to constitute a conversion" (Employers' Fire Ins. Co. v Cotten, 245 NY 102, 105 [1927]). "Conversion is concerned with possession, not with title" (State of New York v Seventh Regiment Fund, Inc., 98 NY2d 249, 259 [2002] [citation omitted]). A conversion claim will be held sufficiently pleaded where "plaintiffs have not yet been accorded the opportunity to complete discovery as to critical facts in the exclusive possession of defendants" (Marcus v Hemphill Harris Travel Corp., 193 AD2d 543, 544 [1st Dept 1993]).

Here, as discussed above, plaintiffs have adequately alleged that CSFB,

acting through its alter ego instrumentalities, the Manager and the Structured Credit Fund, exercised dominion over the software through Cabot Financial, an asset owned by the Fund. The complaint contains allegations that, pursuant to the 1999-SCA, the Fund "delegated all responsibility and authority for the investment strategy, management, administrative and operational functions to the Fund Manager" (First Amended Complaint, ¶ 54). Plaintiffs also allege that "all of the corporate, administrative, and executive duties that had been entrusted to the Manager were delegated to CSFB or entities it controlled" (id., ¶ 67). Further, they assert that "the Manager is owned and controlled by, and is the alter ego of, CSFB" (id., ¶ 13). Plaintiffs contend that these allegations demonstrate that CSFB, through its control of the Manager, which itself controlled the Fund, which owned and controlled the assets, exercised dominion over Cabot Financial and the software. There is no dispute that the software was sold to a third party when the Fund's assets were liquidated.

C2C has pleaded a legally cognizable claim for unjust enrichment by the Credit Suisse defendants' conversion of the software. An unjust enrichment claim based on the same set of facts as is a legally viable conversion claim, is itself legally viable (Lynch v Upper Crust, Inc., 294 AD2d 237 [1st Dept 2002]; Bank of New York v Asati, Inc., 184 AD2d 443 [1st Dept 1992]; Banco Nacional Ultramarino, S.A. v Chan, 169 Misc 2d 182 [Sup Ct, NY County 1996], affd sub nom. Banco

Nacional Ultramarino, S.A. v Moneycenter Trust Co. Ltd., 240 AD2d 253 [1st Dept 1997]).

Forum Non Conveniens

The Credit Suisse defendants also seek dismissal of the 11th and 12th causes of action for conversion and unjust enrichment pursuant to the doctrine of forum non conveniens on the ground that C2C has failed to allege that the claims have any connection to New York. The Credit Suisse defendants argue that the United Kingdom is the proper forum for these claims, which involve parties incorporated there, as well as evidence and witnesses located there, and require the application of English law.

In opposition, plaintiffs contend that New York is the proper forum because most of the relevant evidence and witnesses are, or will be, located here, because CS is bound by the forum selection clause in the 1999-SCA, and because CSFB should be judicially estopped from making the request.

The common-law doctrine of forum non conveniens, as codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478-479 [1984], cert denied 469 US 1108 [1985]). Among the factors a court will consider are "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of

an alternative forum in which plaintiff may bring suit" (id. at 479). Other relevant factors include the situs of the transactions at issue, the residence of the parties, the location of witnesses and evidence, and the substantive law governing the parties' dispute (Blueye Navigation, Inc. v Den Norske Bank, 239 AD2d 192 [1st Dept 1997]). A motion to dismiss or stay on the ground of forum non conveniens is subject to the discretion of the trial court, and no single factor is controlling (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra). "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (id.at 479).

Plaintiffs have adequately alleged that the joint venture was being run out of the Credit Suisse defendants' New York offices and that the overwhelming majority of CSFB employees who were involved in managing the joint venture are located in New York. The court notes that plaintiffs have agreed to produce documents responsive to the Credit Suisse defendants' document demand in New York and will make witnesses available for deposition in New York.

In addition, the 1999-SCA contains a forum selection clause which provides, in relevant part, that "[e]ach of the parties hereto irrevocably agrees that the courts of the State of New York shall have non-exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with this Agreement and, for such purposes, irrevocably submits to the

jurisdiction of such courts" (1999-SCA, § 18.2). The agreement further provides that "[e]ach of the parties hereto waives any objection which it might now or hereafter have to the selection of the laws and the courts [of the State of New York] to hear and determine any suit, action or proceeding, and to settle any disputes which may arise out of or in connection with this Agreement and agrees not to claim that any such court is not a convenient or appropriate forum" (id.).

The issue of ownership of the software is an issue that arises in connection with the 1999-SCA because, in that agreement, the Manager delegated its administrative and operational functions over the Structured Credit Fund to the Administrator. In the conversion and unjust enrichment claims, plaintiffs allege that the Credit Suisse defendants forced the Fund to liquidate, which, in turn, caused the sale of Cabot Financial and its primary asset, the software. Therefore, the forum selection clause governs the choice of venue in which these claims may be resolved.

Last, the Credit Suisse defendants are judicially estopped from asserting a forum non conveniens argument (see Black v White & Case, 280 AD2d 407 [1st Dept 2001]; Kimco of New York, Inc. v Devon, 163 AD2d 573 [2d Dept 1990]). The record demonstrates that they obtained a stay of an action brought in the Bahamas by Cabot Square and Van Deventer against Elegant Hotels Limited (see Cabot Square Capital Advisors Ltd. v Elegant Hotels Ltd., Sup Ct, Commonwealth of the Bahamas, claim no. 2003 CLE/GEN/1149) on the strength of their argument

that the Bahamian action formed a small part of what is a much bigger matrix of relationships and issues to be litigated in New York (see id.; Lianne Craig, Esq., Jan. 15, 2004, Aff., ¶ 4).

C2C - Unjust Enrichment by Fee Retention

The Credit Suisse defendants seek dismissal of the 13th cause of action for unjust enrichment by retention of certain fees, on the ground that there exists a valid and enforceable written contract, the 1999-SCA, governing the same subject matter.

In opposition, plaintiffs contend that a claim in contract and one in quasi contract are not mutually exclusive.

The 13th cause of action is fatally defective. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (Clark-Fitzpatrick, Inc. v Long Isl. R.R. Co., 70 NY2d at 388; Aviv Constr., Inc. v Antiquarium, Ltd., 259 AD2d 445 [1st Dept 1999]). In the first amended complaint, plaintiffs allege that the Credit Suisse defendants caused the Administrator to replace the Manager in order to deprive C2C of the fees to which it is entitled as the Structured Credit Fund's assets were sold. The only fees to which this pleading can refer are the break-up and final consulting fees. C2C's entitlement to these fees is governed by the express terms of the 1999-SCA. Therefore, that branch of the motion to dismiss the 13th cause of action is granted.

Van Deventer - Breach of Fiduciary Duty & Joint Venture Agr.

The Credit Suisse defendants seek dismissal of the 14th and 15th causes of action for breach of the joint venture agreement and breach of fiduciary duty by failing to use Van Deventer as an exclusive advisor to the Structured Credit Fund and by failing to introduce its customers and investors to the benefit of the Fund. They contend that these claims are defective because the first amended complaint is bereft of factual allegations showing the existence of any joint venture relationship among themselves and plaintiffs or any agreement among C2C, Van Deventer, CSFB, and CSFB-USA. They also contend that any such agreement would have been superseded by the 1999-SCA and other written agreements.

As discussed above, at this stage of the litigation, plaintiffs have adequately alleged the existence of a joint venture among the parties and a fiduciary duty owed among joint venturers. Therefore, that branch of the motion to dismiss the 14th and 15th causes of action is denied.

C2C's Motion to Release Pledged Account Funds

In motion sequence number 005, C2C seeks an order granting it partial summary judgment and directing the Credit Suisse defendants and Queensgate Bank to release the more than $4.6 million presently being held in a pledged account.

The account was created in accordance with the pledged account agreement (the PAA), dated February 22, 2001, executed by C2C, the Manager, and

Queensgate Bank. In accordance with the PAA, C2C deposited more than $6 million into a pledged account maintained at Queensgate Bank in order to secure its potential obligation to repay the Manager certain fees imposed by the 1999-SCA.

Each time an asset of the Structured Credit Fund is sold or otherwise disposed, the Fund is obligated by the FMA to pay the Manager a performance fee and, pursuant to the 1999-SCA, the Manager must pay C2C a consulting fee. In the event that the total return on investment for the Fund does not reach a certain threshold, the Manager is required to refund to the Fund some portion of its fees. C2C is required to reimburse the Manager for a prescribed portion of the refund (the consultant excess amount) (see 1999-SCA, § 7.3; 2000 FMA, § 9.1).

The PAA provides that the collateral in the pledged account is to be automatically released to C2C within 90 days of the occurrence of either of two triggering events. One is the termination of the 1999-SCA for any reason other than the passage of time (see PAA, § 3 [d]). The other is the sale or other disposition of the last asset of the Fund (see PAA, § 3 [c] [i]). However, if, within 90 days after a triggering event, the Administrator and nonparty KPMG "deliver a notice to [C2C], the Manager and [Queensgate] Bank certifying either (i) a final determination of the Consultant Excess Amount, or (ii) a good faith estimate of the Consultant Excess Amount" (the clawback notice), then the funds will not be released (PAA, § 3 [c] [i]; see 1999-SCA, § 7.3 [d]).

The 1999-SCA naturally expired on February 28, 2003. The last asset of the Fund was disposed of on May 26, 2004. Therefore, if no clawback notice was issued within 90 days of the date of disposition, C2C is entitled to release of the funds in the pledged account.

By letter dated August 24, 2004, the Administrator forwarded to C2C, the Manager, and Queensgate Bank a letter of the same date by KPMG to the Administrator, which the Credit Suisse defendants contend together constitute the clawback notice, as defined by the PAA.

In its August 24, 2004, letter, the Administrator states that "[i]t is currently estimated that, pursuant to clause 9.1(c) of the Management Agreement, the Manager will be required to refund the full amount of the Performance Fee paid to the Manager (the 'Clawback Amount') by the Fund under such agreement, due to the fact that the Net Operating Profit of the Fund is currently estimated to be negative." The Administrator also advises in the letter that, pursuant to 1999-SCA, § 7.3 (d) and PAA, § 3 (c), "the Administrator has made a good faith estimate that the Consultant Excess Amount is not less than the full Pledge Amount currently on deposit in the Pledged Account."

In its August 24, 2004, letter annexed to the Administrator's letter, KPMG states that "[t]he scope of our review is different from that of an audit and will not give the same level of assurance as an audit." KPMG also states that "[w]e have

compared the Net Operating Loss of [C2C] to the unaudited management accounts of the [C2C] as at 23 August 2004 . . . and found to be in agreement." KPMG also states that "[w]e have reperformed the calculations of the Clawback Amount and Consultant Excess Amount and these were found to be arithmetically correct."

In addition, in the letter, KPMG stated that "[w]e are prepared to consent to the provision of this report to C2C . . . and Queensgate . . . on condition that they are only entitled to place reliance on our report if they agree to be bound by the terms of our engagement letter dated 24 August 2004 as if they each had been an Other Beneficiary."

C2C contends that the letters do not constitute the clawback notice contemplated in the PAA agreement and, therefore, are not effective to trigger the Manager's contractual right to the funds remaining in the pledged account. Specifically, C2C argues that the Administrator's letter does not provide the accounting promised by the Credit Suisse defendants and does not provide any information upon which the Administrator's "good faith estimate" of the clawback amount is based, nor is it addressed to the appropriate contracting party (see PAA, § 3 [c] [i]). C2C argues that the KPMG letter is insufficient to provide the intended independent certification of the Administrator's estimate because, in the letter, KPMG states that it performed no independent inquiry, tests, or analysis of the estimate provided by the Administrator, but has merely rechecked the

Administrator's mathematical calculations.

In opposition, the Credit Suisse defendants contend that the motion is procedurally defective because they have not yet filed an answer and because the motion is based on factual allegations regarding notice deficiencies not pleaded in the first amended complaint. In the alternative, the Credit Suisse defendants request that summary judgment be granted in their favor on the ground that the letters provide the clawback notice sufficient to satisfy the purpose, provisions, and tenor of the PAA and 1999-SCA – to provide a good faith estimate of the consultant excess amount, if any, owed by C2C. They also contend that any deviations or deficiencies are minor. They also argue that C2C is not ultimately entitled to retain the funds and will be held liable for reimbursement of a portion of its consultant excess fee to the Manager.

C2C's motion for summary judgment is denied. The motion is premature because issue has not yet been joined and, in any event, each side has failed to establish that either is entitled to accelerated relief inasmuch as genuine triable issues of material fact exist (see Costalas v Amalfitano, 305 AD2d 202 [1st Dept 2003]; Park Ridge Hosp., Inc. v Richardson, 175 AD2d 631 [4th Dept 1991]; CPLR 3212). A review of the record indicates that discovery needs to be completed. Plaintiffs have failed to comply with the Credit Suisse defendants' document requests concerning the negotiation, creation, interpretation, terms, and/or

performance of the PAA and the 1999-SCA. These documents are directly relevant to the issues raised in the motion, including the role that KPMG was intended to play, which services the parties intended KPMG to provide in "certifying" the Administrator's estimate, and whether the Administrator's estimate was made in "good faith."

Accordingly, it is

ORDERED that motion sequence numbers 001 and 004 are granted to the extent that the following claims are dismissed: the first, second, and third causes of action asserted against defendants CS Structured Credit Fund and CS Capital Partners, Ltd.; the first through 15th causes of action asserted against defendant Credit Suisse Fund Administration Limited; the second cause of action asserted by plaintiffs John M. Van Deventer and James R. Clark against the Credit Suisse defendants; the fourth cause of action asserted by plaintiff C2C Consultants, Ltd. against the Credit Suisse defendants; the 10th cause of action; and the 13th cause of action; and it is further

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SEP 23 2005
COUNTY CLERK'S OFFICE
NEW YORK

ORDERED that the remaining causes of action shall continue; and it is further

ORDERED that motion sequence number 005 is denied in its entirety.

Dated: September 14, 2005

ENTER:

J.S.C.