SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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DEUTSCHE BANK AG,

Plaintiff,

Index No. 161257/13

- against -

ALEXANDER VIK, CARRIE VIK, AS AN INDIVIDUAL and as TRUSTEE of THE CSCSNE TRUST, THE CSCSNE TRUST, C.M. BEATRICE, INC., and SEBASTIAN HOLDINGS, INC.,

Defendants.

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SINGH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff Deutsche Bank (DB) brings this action to enforce a judgment entered against defendant Sebastian Holdings, Inc. (SHI) by a court in the United Kingdom (the UK court). Defendants move to dismiss, pursuant to CPLR 3211 and to lift the notice of pendency on a condominium in Manhattan (motion sequence number 001). DB moves, by order to show cause, to lift the stay of disclosure pending the determination of defendant's motion (motion sequence number 002).

Plaintiff DB, a German corporation with a branch in New York City, provides financial management and business services around the globe. SHI, a Turks and Caicos Islands (TCI) corporation, deals in securities, currencies trading, and other financial endeavors. Defendant Alexander Vik, described as a "multi-billionaire" by the UK court, is the sole shareholder and sole director of SHI. The other defendants are Carrie Vik, sued as an individual and as trustee of

the Cscsne Trust (the Trust), the Trust, and C.M. Beatrice, Inc. (Beatrice). The Trust owns Beatrice, a TCI corporation. Carrie and Alexander Vik are spouses. Carrie Vik owns a house in Greenwich, Connecticut, where she resides with the couple's children, and the condominium apartment in Manhattan.

In 2006, SHI opened a foreign-exchange (FX) trading account with DB's FX prime brokerage group, which was based in New York City. In 2008, SHI opened a series of additional accounts, which DB terms the GPF accounts, with DB for the purpose of engaging in equities, futures, options, and FX trading. The FX and GPF accounts were subject to various agreements, some of which pertained to both kinds of accounts. "In 2008, SHI accumulated hundreds of millions of dollars in losses in connection with its FX and other trading" (Complaint, ¶ 36). These losses led to SHI owing debts to DB as a result of unpaid margin calls and the close-out of SHI's FX and GPF accounts.

SHI sued DB in the New York County Supreme Court in November 2008 (index no. 603431/08; hereinafter "SHI's action"). SHI's action is pending.[1] SHI's complaint alleges that DB increased SHI's line of credit without obtaining its consent, allowed SHI to unwittingly borrow against the increased credit line by failing to supply SHI with the required calculations of figures, forced SHI to fund margin calls in incorrect amounts, took funds from SHI accounts with DB that were completely unrelated to the FX account to satisfy margin calls, and forced liquidations of positions at a substantial loss. One of SHI's causes of action was for breach of

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[1] Decisions have been issued in SHI's action (*Sebastian Holdings, Inc. v Deutsche Bank, AG.*, 108 AD3d 433 [1st Dept 2013]; 78 AD3d 446 [1st Dept 2010]; 2012 NY Misc LEXIS 6050, 2012 WL 7869958, 2012 NY Slip Op 33155[U] [Sup Ct, NY County 2012]; 35 Misc 3d 1227[A], 2009 NY Slip Op 52835[U] [Sup Ct, NY County 2009]).

the FX prime brokerage agreement, which was subject to the non-exclusive jurisdiction of New York courts.

In January 2009, DB commenced the UK action in the United Kingdom High Court of Justice, Queens Bench Division, Commercial Court, seeking moneys owed in connection with trading losses under two agreements, both of which contained exclusive English jurisdiction clauses. SHI asserted counterclaims in the UK action similar to its claims in its New York action. The UK action was tried for 45 days during 2013. On November 8, 2013, the UK court issued a 1,595-paragraph judgment in DB's favor and denied SHI's counterclaims, finding that SHI was not entitled to any recovery. DB was found entitled to $116,989,618 on the FX account and $118,656,727 on what the UK decision calls the Equities account and which DB calls the GPF accounts. Judgment was awarded for DB in the sum of $243,023,089, which included interest. SHI was found liable for 85% of DB's costs, plus interest.

DB then brought a motion for summary judgment in lieu of complaint against SHI to enforce the UK judgment in New York (index no. 161079/13, "DB's action"), pursuant to Article 53 of the CPLR, Recognition of Foreign Country Money Judgments. The motion for summary judgment in lieu of complaint was granted on June 19, 2014.

DB commenced the instant action based on the following causes of action: 1) a declaration of alter ego liability on the basis that Vik completely dominated SHI and used its corporate form to commit wrongs against plaintiff; 2) a declaration of alter ego liability based on Vik's similar domination and use of Beatrice; 3) an enforcement of the UK judgment against Vik; 4) unjust enrichment against Vik; 5) fraudulent conveyance against Vik, SHI, and Beatrice; 6) fraudulent conveyance against Vik and Carrie Vik, as an individual; 7) fraudulent conveyance

against Vik, Carrie Vik, as trustee for the Trust, and the Trust; 8) aiding and abetting fraudulent conveyance against Vik and Beatrice; and 9) a declaration that Vik and SHI are jointly and severally liable to DB for expenses pursuant to agreements between DB and SHI. The fraudulent conveyance claims are based on the Debtor & Creditor Law (DCL) § 270, *et seq.*

The instant action seeks to hold Vik and Beatrice liable for the judgment against SHI and also asserts independent claims against all of the defendants. The complaint alleges that Vik caused SHI to transfer funds to himself and Beatrice, that Vik transferred the Manhattan condominium to Carrie Vik in October 2012 and that, in the same month, Vik transferred Beatrice to the Trust. Allegedly, the purpose of the transfers was to shield SHI's and Vik's assets from DB.

The instant complaint alleges the following. SHI is a special purpose vehicle, created to engage in trading, entirely owned and controlled by Vik, its sole director. SHI had no employees, phone number, separate email servers, or filing system. It observed no corporate formalities, such as holding regular board meetings, having bylaws, and maintaining a stock ledger or proper books and records, as required by TCI law. It was not adequately capitalized. Vik commingled his personal assets with those of SHI and vice versa and treated its debts as his own.

The complaint alleges that the account that SHI opened with DB's FX trading prime brokerage group was based in New York City. Vik appointed one Klaus Said as SHI's agent to conduct the trading in the FX account. Said was not technically employed by SHI, but by another entity of Vik's which provided him with salary and benefits. SHI paid Said 10% of the profits that he made for SHI. Said worked at an office annexed to the house in Greenwich, Connecticut, where others engaged by SHI also worked and where Vik himself had an office.

The complaint alleges that, in 2008, Vik instructed DB to use Beatrice to establish an FX prime brokerage account to hold FX trading positions that Vik conducted on behalf of SHI. Beatrice's account was never funded and was closed by Vik's order on October 15, 2008. Beatrice had no employees or phone number. Vik completely controlled and dominated Beatrice and treated its assets as his own and as interchangeable with his other assets and those of other companies that he owns and controls, including SHI. Vik intermingled his personal accounts with those of Beatrice. He disposed of SHI's and Beatrice's assets as he wished and moved money back and forth from one company to the other.

The complaint alleges that, in October 2008, Said told Vik about SHI's potential losses in the FX account, shortly after which Vik transferred SHI funds to other accounts held by SHI or Vik or other entities controlled by him or his family. Between October 9 and 15, 2008, Vik transferred $730 million from SHI's accounts, including the GPF accounts, to Beatrice, and then transferred his shares in Beatrice to the Trust. Additional transfers of SHI's property are alleged.

Allegedly, Vik created Beatrice to hold assets and make investments for his benefit. Through October 30, 2008, Vik was the sole shareholder and director of Beatrice. On or after that date, Vik transferred ownership of Beatrice to the Trust. The Trust, which did not exist before October 2008, is now the sole owner and director of Beatrice. Members of Vik's family are the beneficiaries of the Trust and Carrie Vik is the trustee.

Vik states that he is a citizen of Norway and a resident of Monaco, that he comes to the United States infrequently, that he has always used the Manhattan apartment as a pied-a-terre, and that he does not reside in New York or Connecticut. Carrie Vik and the children live in the Connecticut house.

Defendants argue that the complaint should be dismissed for several reasons, including improper service, the lack of any basis on which to assert long-arm jurisdiction, failure to properly plead alter ego relationships, and failure to state causes of action for fraudulent conveyance. Defendants argue that foreign law applies to some claims and that the foreign law necessitates the dismissal of the action.

Legal Standards for CPLR 3211 motions

On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs., Inc. v Jupiter Partners,* 309 AD2d 288, 289 [1st Dept 2003] [internal citation and quotation marks omitted]). The pleadings are afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). At the same time, however, "bare legal conclusions" and "inherently incredible" facts are not entitled to preferential consideration (*Matter of Sud,* 211 AD2d 423, 424 [1st Dept 1995]).

CPLR 3211 (a) (8) allows dismissal of a complaint for lack of personal jurisdiction. While the ultimate burden of proving jurisdiction rests on the party asserting it, a plaintiff need only make a prima facie showing that jurisdiction has been obtained over the defendant in order to avoid dismissal (*Alden Personnel, Inc. v David*, 38 AD3d 697, 698 [2d Dept 2007]). The evidence concerning jurisdiction must be viewed in the light most favorable to the plaintiff (*id.*).

Jurisdiction

Personal jurisdiction consists of two main components; one is service of process, by

which a party receives notice and the opportunity to be heard, and the other is the power of the court to enforce its decrees upon a party (*Keane v Kamin,* 94 NY2d 263, 265 [1999]). The first component concerns the manner in which a person or entity is notified that it is party to an action, that is, how the papers commencing the action are served on the party. The second component, "the jurisdictional basis," is satisfied when there is "a constitutionally adequate connection between" the party, the state in which the action is brought, and the action (*id.*). Both components must be present in order for the court to exercise jurisdiction over a party (*id.*).

Service on SHI under CPLR 303

SHI was served by service on the attorneys acting for it in SHI's action, the same attorneys acting for it in this action. Under CPLR 303, a non-domiciliary who commences an action in New York is deemed to have designated its New York attorney as an agent upon whom process may be served in another separate action in New York commenced by a party in the non-domiciliary's New York action (*Giglio v NTIMP, Inc.* 86 AD3d 301, 309 [2d Dept 2011]). CPLR 303 specifies that the claims in the new action must be such as could have been brought as counterclaims in the first action.

A non-domiciliary, such as SHI, that brings an action in New York is deemed to have consented to the jurisdiction of the New York courts and to service of process under CPLR 303 (*Rockwood Natl. Corp. v Peat, Marwick, Mitchell & Co.,* 63 AD2d 978, 978 [2d Dept 1978]; *Matter of Cohen*, 5 Misc 3d 869, 871 [Sur Ct, Kings County 2004]; *Waterman S.S. Corp. v Ranis,* 141 Misc 2d 772, 774 [Sup Ct, NY County 1988]). Service under CPLR 303 is proper service of process, and provides a jurisdictional basis, as well.

Regarding whether DB's claims in the instant action could have been asserted as

counterclaims in SHI's action, CPLR 3019 (a) provides that a counterclaim may be any cause of action in favor of a defendant against a plaintiff or a person whom a plaintiff represents or a plaintiff and other allegedly liable persons. "It may happen that D has a claim against P and X together, but that X is not a party to the action. CPLR 3019 (a) allows D to assert that claim as a counterclaim against both P and also X," the other allegedly liable person and, in this way, to bring X into the action (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3019:6 [Westlaw ed]). While the counterclaim must be linked to the plaintiff as well as to the new party, it need not be coextensive against both the plaintiff and the new party (*id.*; citing *Linzer v Bal*, 184 Misc 2d 132, 136 [Civ Ct, NY County 2000]).

As DB's claims in this action concern both Vik and SHI, it would have been proper for DB to assert the claims in this action as counterclaims in SHI's action and to add Vik as a defendant in SHI's action. Accordingly, this court has jurisdiction over SHI pursuant to CPLR 303. Also, it is noted that DB's motion for summary judgment in lieu of complaint was served upon SHI's attorneys. As part of granting the motion for summary judgment in lieu of complaint, the court determined that service was properly made under CPLR 303 and that the motion for summary judgment in lieu of complaint, which sought to enforce the UK judgment against SHI, could have been brought as a counterclaim in SHI's action.

Service on Vik under CPLR 303

DB claims that Vik is the alter ego of SHI or vice-versa. Service on the alter ego of a corporation constitutes effective service on the corporation (*Transfield ER Cape Ltd. v Industrial Carriers, Inc.*, 571 F3d 221, 224 [2d Cir 2009]). Persons that are alter egos to each other are treated as one entity for jurisdictional purposes (*Wm. Passalacqua Bldrs., Inc. v Resnick Devs. S,*

Inc., 933 F2d 131, 142-143 (2d Cir 1991]). "[I]t is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court" (*Transfield,* 571 F3d at 224 [internal quotation marks and citation omitted]). Service on corporations constituted service on their purported alter ego, which allegedly owned and controlled the corporations (*see Securities & Exch. Commn. v Aimsi Tech., Inc.*, 650 F Supp 2d 296, 301 [SD NY 2009]). Jurisdiction over a company that did no business in New York was acquired by service on its subsidiary in New York, the alter ego of the parent through which it acted (*ABKCO Indus., Inc. v Lennon*, 52 AD2d 435, 440 [1st Dept 1976]; *Milan Indus. Ltd. v Wilson Worldwide Proprietary Ltd.*, 2011 WL 11071743, 2011 NY Misc LEXIS 6842, *18-19, 2011 NY Slip Op 33770[U], *7 [Sup Ct, NY County 2011]).

The court's jurisdiction over SHI would extend to Vik, if SHI were his alter ego. The same service of process and jurisdictional basis that enable the court's jurisdiction over SHI would be effective over Vik. Whether SHI is Vik's alter ego is a factual question that must be determined at trial. For the purposes of surviving a CPLR 3211 motion, the alter ego relationship between Vik and SHI is adequately stated.

Service on Vik pursuant to CPLR 318

Vik's attorney was served with process in December 2013 in New York. In his affidavit, Vik states that the attorney is not and was not, at the time of service, his designated agent for service. Under CPLR 318, a person may designate another as an agent for service in writing. Attorneys are not automatically regarded as agents for service of process pursuant to CPLR 318;

there must be a proper designation (*see Broman v Stern*, 172 AD2d 475, 476 [2d Dept 1991]). As the attorney was not properly designated, Vik was not served pursuant to CPLR 318.

Service on Vik under CPLR 308 (2) and (4)

CPLR 308 provides for service upon a natural person. Under consideration is whether Vik was served under sections 2 and 4 of that statute. Under CPLR 308 (2), an individual may be served by delivering the papers within the state to a person of suitable age and discretion at the individual's "actual place of business, dwelling place or usual place of abode" and by mailing the papers to that person at "his or her last known residence" or to "his or her actual place of business". When this service, known as leave and mail, cannot be made despite "due diligence," the process server can turn to the method known as nail and mail or affix and mail (CPLR 308 [4]). The process server must affix the summons to the door of the defendant's actual place of business, dwelling place, or usual place of abode within the state and mail the summons to the defendant's last known residence or actual place of business (CPLR 308 [4]).

Nail and mail service on Vik was attempted in Connecticut. The process server's affidavit of service states that he was not allowed past the gate of the Connecticut property, so he affixed the papers to the gate. The process server does not state that he mailed any papers, so the mail part of nail and mail is missing. The affidavit of service does not mention any diligent efforts to effect service according to the CPLR 308 (2) leave and mail method before turning to the nail and mail method of CPLR 308 (4). The "due diligence" requirement of CPLR 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received (*O'Connell v Post,* 27 AD3d 630, 631 [2d Dept 2006]). The process server did not act with due diligence and does not explain that there would have been no point in

due diligence. Service under 308 (4) was not accomplished.

Another attempt at service was made via the leave and mail method of CPLR 308 (2). An affidavit of service shows that the process server left papers with someone at the Manhattan address and mailed the papers to the Connecticut address. In regard to the CPLR 308 (4) nail and mail service addressed in the preceding paragraph, that mailing does not satisfy the mail element of nail and mail. The mailing was part of the service that involved leaving the papers at the Manhattan apartment. As stated above, service under CPLR 308 (4) must be strictly observed, and the court will not count one mailing as applying to service under both CPLR 308 (4) and CPLR 308 (2).

For the CPLR 308 (2) leave and mail service on Vik to be proper, the Manhattan apartment would have to be Vik's dwelling place or usual place of abode and the Connecticut house his last known residence or actual place of business. That is what DB alleges. Vik's affidavit states that he resides in Monaco, and that he manages his business interests from his home there, where he has a main office, and that he "visits" the United States infrequently. Vik says that he and his family do not live in the New York apartment, which he visits for one day or night a few times a year.

Vik and his wife used to own the Connecticut property jointly. Currently, Carrie Vik owns it, and Vik claims to own no property in Connecticut. Vik states that he previously owned the Manhattan apartment and that he transferred it to his wife in October 2012, "as part of general estate planning." Vik alleges that neither he, nor SHI, have maintained employees at the Connecticut house or transacted business there. "On occasions," when Vik is at the Connecticut house, he has "use of a desk in the basement." Vik points out that the UK judgment, upon which

plaintiff bases its action and which it cites as unassailable factual authority, determined that Vik was in the United States for 60 days or less per year, that he resided in Monaco and that, while he had an office in Connecticut, his main office was in Monaco. In response, plaintiff points to Vik's Connecticut driving license and to articles in which Vik is quoted as saying that his family lives in Connecticut, and that his children go to school there, and that "we" live there.

The terms "actual dwelling place" and "usual place of abode," found in CPLR 308 (2), imply some degree of permanency and stability, and a casual stay at a given location does not qualify (*Bernardo v Barrett,* 87 AD2d 832, 832 [2d Dept], *affd* 57 NY2d 1006 [1982]). A dwelling place and a usual place of abode can be the same place (*Krechmer v Boulakh,* 277 AD2d 288, 289 [2d Dept 2000]) or different places (*see CC Home Lenders v Cioffi,* 294 AD2d 325, 325 [2d Dept 2002]; *Federal Home Loan Mtge. Corp. v Venticinque,* 230 AD2d 412, 415 [2d Dept 1997]).

Plaintiff argues correctly that Vik need not have abided or dwelled for extended periods in Manhattan for it to be deemed his usual abode or dwelling place (*see CSC Holdings, Inc. v Fung,* 349 F Supp 2d 613, 618 [ED NY 2004]; *Argent Mtge. Co., LLC v Vlahos,* 66 AD3d 721, 722 [2d Dept 2009] [defendant's usual place of abode was New York; he resided in Florida for business purposes, but with no degree of permanence or stability, never changed his New York address with the post office or the Division of Motor Vehicles, and visited New York every year]; *Dunn v Burns*, 42 AD3d 884, 885 [4th Dept 2007] [defendant's usual place of abode or dwelling place was the New York home that he owned and occupied with his wife and children; he never changed his address with the post office and failed to establish an intent to reside permanently abroad]; *Litton Loan Servicing, LP v Vasilatos,* 7 AD3d 580, 581 [2d Dept 2004] [a

Greek resident was deemed to have his dwelling place or usual place of abode at the New York house where he maintained telephone service, belongings, and furniture; he stayed there when he returned to New York and maintained a post office box in the town]; *Krechmer*, 277 AD2d at 289 [although defendant, a Moscow resident, "only sporadically stayed" in the New York vacation house, it was deemed to be his usual place of abode or dwelling place; he owned it and shared it with his daughter and her mother]; *Montes v Seda,* 208 AD2d 388, 388 [1st Dept 1994] [the New York house where the defendant lived before being imprisoned was her abode or dwelling place; it was the address on her driver's licence and where she kept her belongings]). It is possible that the Manhattan condominium was Vik's abode or dwelling place. Whether that is so presents a question of fact.

As to whether the Connecticut house is Vik's last known residence, a last known residence need not be the same place as the usual place of abode or dwelling place (*Feinstein v Bergner,* 48 NY2d 234, 239 [1979] [usual place of abode and dwelling place should not be automatically equated with last known residence]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C308:3 [d] [Westlaw ed]), although sometimes the abode or the dwelling may be the same place as the last known residence (*Dunn,* 42 AD3d at 885; *Litton,* 7 AD3d at 581). Even a temporary residence at an address may qualify it as one's dwelling place or place of abode (*Grammenos v Lemos,* 457 F2d 1067, 1071 n 1 [2d Cir 1972]). Last known residence has been determined to be synonymous with last known address (*Feinstein,* 48 NY2d at 240, n 4; *Donohue v La Pierre,* 99 AD2d 570, 570 [3d Dept 1984]).

Residence is the "act or fact of living in a given place for some time" or the "place where

one actually lives, as distinguished from a domicile" (Black's Law Dictionary [9th ed 2009]). "Residence [usually] just means bodily presence as an inhabitant in a given place; domicile [usually] requires bodily presence plus an intention to make the place one's home" (*id.*). "A person thus may have more than one residence at a time but only one domicile" (*id.*; *see also Litton*, 7 AD3d at 581). Connecticut need not be Vik's domicile for it to be his residence. Residence in Monaco does not automatically rule out a residence elsewhere. The fact that Vik has a Connecticut driving license indicates residency in that state, since generally residency is a requirement for obtaining such a license. Whether Vik's last known residence is in Connecticut is an issue of fact.

As to whether Connecticut is Vik's actual place of business, CPLR 308 (6) describes that as any location that the defendant, through regular solicitation or advertisement, has held out as its place of business. An actual place of business includes a place where the defendant regularly transacts business (*Katz v Emmett,* 226 AD2d 588, 589 [2d Dept 1996]). It can be a business location owned or operated by the defendant, giving rise to a clear identification of the work performed by the defendant with that place of business, despite the fact that the defendant works mainly from another location (*see Columbus Realty Inv. Corp. v Weng–Heng Tsiang*, 226 AD2d 259, 259 [1st Dept 1996]; *see also Gibson, Dunn & Crutcher LLP v Global Nuclear Servs. & Supply, Ltd.,* 280 AD2d 360, 361 [1st Dept 2001] [address that defendant held out to plaintiff as his business address was his actual place of business for purposes of service, although defendant conducted business elsewhere at times]). Plaintiff alleges that Vik had an office at the Connecticut house, where he conducted business. Whether the Connecticut house can be deemed Vik's actual place of business is an issue of fact.

Vik was served in his capacity as SHI's alter ego. He was not served in his personal capacity under CPLR 308 (4). There is a question of fact regarding whether he was served in his personal capacity under CPLR 308 (2).

Jurisdiction over Vik pursuant to CPLR 302

CPLR 302, the long-arm statute, authorizes the court to exercise personal jurisdiction over a non-domiciliary who has certain contacts with New York state, provided, of course, that there has been service of process. For personal jurisdiction to exist, the non-domiciliary must have engaged in purposeful acts in New York, and there must be a substantial relationship between those particular acts and the transaction giving rise to the plaintiff's cause of action (*McGowan v Smith,* 52 NY2d 268, 272 [1981]). The long-arm statute is a "single act statute," and proof of a lone transaction is sufficient to invoke jurisdiction over a defendant, even one who never physically enters New York, so long as his or her activities here are purposeful and there is a significant relationship between the transaction and the claim asserted (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Sections 2, 3, and 4 of CPLR 302 (a) are under consideration.

CPLR 302 (a) (4) - confers long-arm jurisdiction over a person who is not domiciled in New York who "owns, uses or possesses any real property situated" in the state. For jurisdiction to lie, the defendant must own the realty at the time that the cause of action arises, but need not own it at the time that the plaintiff files suit asserting said cause of action (*Tebedo v Nye,* 45 Misc 2d 222, 223 [Sup Ct, Onondaga County 1965]). There must be a relationship between the real property and the cause of action sued upon (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 159 [1st Dept 1992]). Vik purchased the Manhattan condominium in 2004 and

transferred it to Carrie Vik in October 2012. Thus, Vik owned the real property during the time that he allegedly became liable to DB, which was before he transferred it. A relationship exists between the real property and DB's claims, in that DB seeks to set aside the transfer of the real property. Jurisdiction over Vik exists pursuant to CPLR 302 (a) (4).

CPLR 302 (a) (2) - allows jurisdiction over those who commit a tort in the state, including a fraudulent conveyance of real property (*see CIBC Mellon Trust Co. v HSBC Guyerzeller Bank AG*, 56 AD3d 307, 308-309 [1st Dept 2008]; *Atwal v Atwal*, 24 AD3d 1297, 1297-1298 [4th Dept 2005]; *Neilson v Sal Martorano, Inc.*, 36 AD2d 625, 626 [2d Dept 1971]; *Staten Island Care Ctr., LLC v Wilkinson*, 2001 WL 1358150, 2001 NY Misc LEXIS 435, 2001 NY Slip Op 40177[U], *3 [Sup Ct, Richmond County 2001]). It is alleged that New York real estate was fraudulently conveyed. In regard to the claims concerning the Manhattan property, CPLR 302 (a) (2) and (4) confer long-arm jurisdiction over Vik.

CPLR 302 (a) (3) provides jurisdiction over a defendant who (1) commits a tortious act outside New York (2) that causes injury within New York (3) and the defendant either (i) does or solicits business, or engages in any other course of conduct, or derives substantial revenue from activities in New York, or (ii) expects or should expect that its tortious act will have consequences in New York, and derives substantial revenue from interstate or international commerce. DB alleges that Vik fraudulently transferred SHI's money from or to bank accounts in England, Chile, Switzerland, Monaco, and Uruguay, thus injuring DB in New York. DB claims that Vik caused SHI to open the FX prime brokerage account in New York with DB's New York office, that Vik, as SHI's sole owner and director, had reason to expect that transferring SHI's money out of DB's reach would have consequences in New York, and that

Vik made the transfers to avoid liability on the account in New York. DB claims that Vik derives substantial revenue from interstate or international commerce.

Defendants argue that DB's injuries arose in Germany, DB's place of incorporation, or London, allegedly where SHI's FX account was located. Defendants point out that, in SHI's action and in the UK action, DB emphasized that SHI's account was in London and that DB should not now be allowed to retreat from that position.

That the conveyances were torts committed in another jurisdiction is sufficiently alleged. The question is whether DB can show that it sustained injury in New York. To determine if an out-of-state tort caused an injury in New York, courts apply the "situs-of-injury" test. The situs-of-injury in a commercial case, meaning a case where the harm is not physical but economic, is where the original critical events associated with the action or dispute take place, not where the resultant monetary loss occurs (*CRT Invs., Ltd. v BDO Seidman, LLP,* 85 AD3d 470, 471-472 [1st Dept 2011]; *Marie v Altshuler*, 30 AD3d 271, 272-273 [1st Dept 2006]). The situs of the injury is the location of the original event which caused the injury, not where the plaintiff felt the resulting damages (*Whitaker v American Telecasting, Inc.*, 261 F3d 196, 209 [2d Cir 2001]). A party is not injured in New York merely because it is domiciled, incorporated, or resident here (*McGowan v Smith,* 52 NY2d 268, 274-275 [1981]; *Sybron Corp. v Wetzel,* 46 NY2d 197, 205 [1978]). This purpose of this limitation is to prevent personal jurisdiction from being based on injuries which have only an indirect connection to New York (*Patterson, Belknap, Webb & Tyler LLP v Bushkin,* 1999 WL 1216632, *1, 1999 US Dist LEXIS 19604, *2 [SD NY 1999]).

In regard to the location of the FX account, the UK court stated that Said carried out FX trading through the arrangements set up by DB in New York, "although the account was technically a London account" (UK decision, ¶ 6). Said worked in the office annexed to Vik's wife's house in Connecticut (*id.*). The FX account "was administered out of New York and New Jersey, although the account was technically a London account" (*id.*, ¶ 10). DB's FX Operations Team was based in New Jersey, while its Sales team was in New York (*id.*, ¶ 64). The personnel in New York and New Jersey handled the FX account (*id.*, ¶ 357). Said "was in regular contact" with those persons "during the operation of the" FX account (*id.*).

In the context of deciding whether UK law or New York law should apply to SHI's misrepresentation claim against DB, the UK court determined that New York law should apply, because the tort either took place in New York or New York was where "the most significant element or elements of the events took place" (*id.*, ¶ 1043). The UK court found that, although it was not clear where Vik's reliance upon DB's alleged misrepresentations took place, said reliance allegedly gave rise to the continuation of trading by Said in New York, where Said conducted the FX business (*id.*, ¶ 1046-1047). SHI's losses "relate to the New York trading activities of Mr Said under the FXPBA which was governed by New York law" (*id.*, ¶ 1047).

At least one court has found that the rules for deciding choice of law are not the same as those for deciding place of injury (*Spectacular Promotions. Inc. v Radio Station WING,* 272 F Supp 734, 737 [ED NY 1967] [explaining why that is so]). Nonetheless, this court finds the statements of the UK court significant in determining where the FX account was administered. Said worked in Connecticut, from where he reached out to DB offices in New York and New Jersey to work on the FX account. The connections to New York are enough to establish that DB

incurred suffered an injury here.

In *Universitas Educ., LLC v Nova Group, Inc.* (2014 WL 3883371, *6, 2014 US Dist LEXIS 109077, *19 [SD NY 2014]), the plaintiff brought claims pursuant to DCL § 273, 275, and 276, seeking to make defendants turn over assets transferred from a judgment debtor. Although the complained-of transfers, which were performed in another state, took place before the plaintiff obtained its judgment, the person responsible for the transfers knew at the time that the creditor was asserting a right to the assets and was considering litigation. The court determined that "the situs of the injury is New York, because the fraudulent conveyances impeded Petitioner's ability to enforce its New York judgment" (*id.*). In *Bank of Communications v Ocean Dev. Am., Inc.* (2010 WL 768881, 2010 US Dist LEXIS 21061, *9-10 [SD NY 2010]), the plaintiff sought to enforce a New York judgment against a company and asserted claims based on DCL § 272, 273, and 276 against the company's officers. Before the plaintiff had obtained a judgment against the company, while the suit was pending, the officers, who resided in California, had conveyed the company's California warehouse to themselves. The plaintiff argued and the court agreed that by taking possession of the warehouse during the pendency of the New York action, the officers committed an act which they reasonably could have expected to have consequences in New York. The court determined that the plaintiff was injured in New York because the transfer of the warehouse was intended to prevent the satisfaction of the plaintiff's New York judgment.

In *Patterson* (1999 WL 1216632, *1, 1999 US Dist LEXIS 19604, *2), the plaintiff alleged that the defendant participated in fraudulent conveyances to avoid the payment of legal fees owed to plaintiff. The situs of injury was found to be New York, because the alleged tort

was directed at and intended to avoid an obligation to plaintiff, a New York entity, and the obligation arose out of the parties' agreement that the plaintiff would perform legal services in New York (*id.*). The court also noted that the plaintiff was seeking to enforce a previously obtained judgment against the defendant's employer for the recovery of the same fees, and that the judgment was "issued by this Court in New York" (*id.*). The New York judgment was another reason to situate the situs-of-injury in New York.

DB alleges that Vik, knowing about SHI's indebtedness to DB, effected transfers of SHI's assets. In addition, DB's motion for summary judgment in lieu of complaint against SHI to enforce the UK judgment in New York has been granted. The location of the injury is New York, despite the fact that the transfers were performed in other jurisdictions, because the fraudulent conveyance impeded DB's ability to enforce its New York judgment and to recover the debts created by SHI through its New York-administered FX account.

"Rendering a creditor unable to recover on a defaulted debt in New York through a fraudulent conveyance constitutes injury in New York that is reasonably foreseeable" (*Universitas Educ.*, 2014 WL 3883371, *6, 2014 US Dist LEXIS 109077, *19). It was reasonably foreseeable to Vik and he should have expected that DB might obtain a judgment in New York, as SHI's agents worked on the FX account in New York at DB's New York branch. The requirement that the defendant expect its tort to have instate consequences in thus satisfied. The requirement that the defendant derive substantial revenue from interstate or international commerce is also satisfied. That Vik has New York and international business interests is sufficiently alleged.

Judicial admission/estoppel - Defendants argue that DB has made formal or informal

judicial admissions that the FX account was situated in London. As defendants point out, in pleadings and in witness affidavits, DB often stated that the FX account was not in New York, but London. DB's attorneys made the same arguments. SHI has just as strenuously argued that its FX account was in New York.

A formal judicial admission is one of fact (*Naughton v City of New York,* 94 AD3d 1, 12 [1st Dept 2012]), made in pleadings or in other documents that are filed in judicial proceedings (*Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 674 [1st Dept 2010]). A formal judicial admission takes the place of evidence and is conclusive of the facts admitted in an action (*People v Brown*, 98 NY2d 226, 232 n 2 [2002]; *Bank Leumi Trust Co. v Toms*, 117 AD3d 555, 556 [1st Dept 2014]; *GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 624 [1st Dept 2011] [Roman, J., concurring]).

Informal judicial admissions are "facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit" (*Matter of Liquidation of Union Indem. Ins. Co. of NY*, 89 NY2d 94, 103 [1996] [citation and quotation marks omitted]). Statements made by a party's counsel are also informal judicial admissions (*id.*). A statement that is a binding formal judicial admission in one proceeding may be an informal judicial admission in another proceeding (*Cramer v Kuhns,* 213 AD2d 131, 138 [3d Dept 1995]). An informal judicial admission is not conclusive, but it is evidence of the facts admitted *(Wenger v DMR Realty Mgt., Inc.,* 90 AD3d 647, 648-649 [2d Dept 2011]).

DB's statements, whether they are judicial admissions or informal judicial admissions in the actions in which they were made, would be informal judicial admissions in this action and

would be evidence of the facts contained in the statements. The statements are not conclusive and binding statements that the FX account was in London. For now, there is enough evidence to maintain the claim that the account was in New York and that DB was injured there.

DB cannot be judicially estopped from claiming that New York is the situs of injury. The doctrine of judicial estoppel precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed (*Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 [1st Dept 1998]). DB argued that the FX account was in London in the context of moving to stay SHI's action. DB's motion was not granted. SHI's action was stayed, but for another reason. It cannot be said that DB secured a judgment in its favor.

Jurisdiction over Carrie Vik

Carrie Vik was served by leaving process at the Manhattan property and mailing it to the Connecticut property. In order for this service to be effective, Manhattan must be Carrie Vik's actual place of business, dwelling place or usual place of abode, and Connecticut must be her last known residence or actual place of business (CPLR 308 [2]). Carrie Vik does not deny that Connecticut is her last known and present residence. However, she does claim that Manhattan is not her usual abode or dwelling place. That presents a question of fact. As with Vik, there is a question whether Carrie Vik was properly served.

Carrie Vik claims to be a Connecticut domiciliary and DB does not allege otherwise. The bases for long-arm jurisdiction over Carrie Vik are her ownership of the Manhattan condominium (CPLR 302 [a] [4]) and engaging in a tort in Manhattan by receiving an allegedly

fraudulent conveyance (CPLR 302 [a] [2]). Thus, there is long-arm jurisdiction over Carrie Vik insofar as the claims against her relate to the Manhattan property. No other basis for long-arm jurisdiction is alleged.

Jurisdiction over the Trust

The Trust is a defendant in this case because it owns Beatrice, and Beatrice is allegedly a transferee of SHI's property. The Trust was served by leaving process at the Manhattan address and mailing it to Connecticut, care of Carrie Vik, allegedly a trustee of the Trust. Service of the summons and complaint upon any qualified trustee is service upon a trust (*Caruso Glynn, LLC v Sai Trust*, 2012 WL 4053802, *3, US Dist LEXIS 134345, *8 [SD NY 2012]; *Citibank, N.A. v Kollen*, 162 Misc 2d 883, 886 [Sup Ct, Suffolk County 1994]). "[A] trustee, although acting in a representative capacity, may be properly served pursuant to the respective method provided for in the CPLR, depending on who or what holds the position of trustee" (*Citibank*, 162 Misc 2d at 886; *see also MLG Capital Assets, L.L.C. v Judith Eidelkind Trust*, 283 AD2d 619, 620 [2d Dept 2001]). When the trustee is an individual, he or she may be served pursuant to CPLR 308 (*id.*). As stated above, there is a question of fact regarding whether Carrie Vik was served. Therefore, there is a question of fact whether the Trust was served. If Carrie Vik was properly served and if she was a trustee of the Trust at that time, the Trust was also served.

Carrie Vik alleges that she was no longer a trustee at the time of service. A letter, dated October 1, 2013, signed by Carrie Vik, states that, as of that date, she resigns all duties associated with the Trust. The letter is not addressed to anyone. Also submitted is a page consisting of one statement that it is a trust indenture dated October 30, 2008, and another page with one paragraph stating that any trustee may resign at any time in writing. No other part of the alleged trust

indenture is submitted. There is no way to tell what these papers really are.

A trustee cannot resign from his or her position except with the permission of the proper court, in accordance with the terms of the trust, or with the consent of the beneficiaries, if they have the capacity to give such consent (Restatement [Second] of Trusts § 106). Defendants do not reveal the terms of the Trust, so the court does not know whether Carrie Vik properly resigned as trustee. There is also the allegation that the trust was created to fraudulently shield assets. For these reasons, Carrie Vik's letter and the other documents are insufficient to establish compliance with the legal requirements for resignation as a trustee (*see Barclays Bank v Skulsky Trust,* 287 AD2d 365, 366 [1st Dept 2001]). Whether Carrie Vik resigned as trustee is a factual question.

In addition, even if Carrie Vik resigned as trustee, the alleged fraud was committed before she resigned. "The resignation of the trustee does not, of course, relieve him from liability for breaches of trust committed prior to his resignation" (Restatement [Second] of Trusts § 106, Comment *b*). A resignation would not necessarily shield Carrie Vik from liability as a trustee.

Although DB does not explicitly argue so, the Trust may be liable pursuant to the alter ego theory, which may be used to pierce a trust which has been used to conceal assets or to engage in fraudulent conveyances (*In re Maghazeh*, 310 BR 5, 16 [Bankr ED NY 2004] [veil of trust pierced where the debtor treated it as his own personal vehicle to shield his assets from creditors, even though the trust was allegedly created for legitimate estate planning purposes]).

The basis for long-arm jurisdiction over the Trust is the same as that for long-arm jurisdiction over Vik, fraudulent conveyance in another state causing injury to plaintiff in this state, the injury consisting of preventing the collection of debts from SHI and the enforcement of

a judgment against SHI. The Trust is allegedly a transferee of SHI's assets

Jurisdiction over Beatrice

Beatrice was served by leaving papers care of Carrie Vik at the Manhattan apartment and by mailing papers to the Connecticut house. DB claims that leave and mail service on the Trust (via Carrie Vik, the purported trustee) effects service on Beatrice. The Trust is allegedly Beatrice's sole director and owner.

Service of process on a corporation can be effected by making personal delivery to any of the corporate representatives listed in CPLR 311 (a) (1). Jurisdiction is not obtained over a corporation based on "leave and mail" or "nail and mail" (*Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551, 552 [2nd Dept 1984], *affd* 65 NY2d 865 [1985]; *Napic, N.V. v Fverfa Invs., Inc.*, 193 AD2d 549, 549 [1st Dept 1993]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C311:1 [Westlaw ed]). Beatrice was not served through leave and mail service on Carrie Vik or the Trust.

Next, DB contends that service on Vik is service on Beatrice and that in-personam jurisdiction over Vik amounts to the same over Beatrice. It is alleged that Beatrice is used solely to hold fraudulently conveyed assets, and that it has no existence apart from Vik.

"Where one defendant is subject to personal jurisdiction and service of process, its alter egos are subject to personal jurisdiction and may be served by serving it" (*Glory Wealth Shipping Pte Ltd. v Industrial Carriers, Inc.*, 590 F Supp 2d 562, 564 [SD NY 2008]). That SHI is subject to personal jurisdiction and was served with process, and that Vik, as SHI's alter ego, is subject to personal jurisdiction and was served has been determined. It is alleged that Beatrice has the same relationship to SHI as Vik does and to Vik as SHI does. It is alleged that SHI and Beatrice

are Vik's alter egos and also that the three are each other's alter egos.

Defendants claim that service on Vik cannot be service on Beatrice because that would mean that Beatrice was Vik's alter ego, instead of the other way around. Defendants contend that the claims based on alter ego should be dismissed because DB is asserting reverse piercing claims by trying to hold Beatrice and SHI liable for Vik's debts.

Under the traditional veil piercing theory, the owner is found liable for the debts of its company (*Harvardsky Prumyslovy Holding, AS.-V Likvidaci v Kozeny*, 117 AD3d 77, 83 [1st Dept 2014]). Under the doctrine of reverse veil piercing, the company is found liable for the debts of the owner (*id.*). Either way, recovery is based on a disregard of the corporate form and the owner treating the corporation as its alter ego and vice versa (*id.* [parties that are alter egos of each other may be treated as one and the same for the purpose of enforcing a judgment]). New York law allows the corporate veil to be pierced either when there is fraud or when the corporation has been used as an alter ego (*Passalacqua*, 933 F2d at 138). In a reverse veil piercing situation, jurisdiction obtained over the owners of a partnership was also jurisdiction over the partnership (*International Equity Invs., Inc. v. Opportunity Equity Partners, Ltd.*, 475 F Supp 2d 456, 458-460 [SD NY 2007]).

Thus, service of process on SHI and on Vik, in his alter ego capacity, effects service of process on Beatrice. In addition, personal jurisdiction over SHI and over Vik, in his alter ego capacity, constitutes personal jurisdiction over Beatrice.

Deficiency of affidavits of service

CPLR 313 requires that service outside New York on a non-domiciliary be made by a New York resident or by a person authorized to make service by the state in which service is

made. Defendants argue that the affidavits of service regarding service in Connecticut must be disregarded because no information is provided regarding the process server's residence or qualification to effect service in Connecticut. Under CPLR 2001, such a violation of CPLR 313 is a technicality that can be overlooked (*Ruffin v Lion Corp.*, 15 NY3d 578, 581-582 [2010]; *American Home Assur. Co. v Morris Indus. Bldrs.*, 176 AD2d 541, 544 [1st Dept 1991]). In this case, the deficiency of the process server's affidavit will be overlooked. The defects in the affidavits do not mean that service did not take place.

Law Governing Alter Ego Claims

TCI or New York law - Defendants argue that the doctrines of alter ego and piercing the corporate veil should be determined according to TCI law, and that under that law or New York law, the complaint fail to adequately allege any such claims against defendants.

DB's complaint alleges that SHI does not comport with corporate formalities according to the law of TCI. Defendants contend that this is a judicial admission that TCI law governs the corporate veil and alter ego issues. DB's statement about TCI law is not a judicial admission, since it is not a statement of fact, but of law. A statement that a particular law governs does not bind parties to the application of that law.

In general, New York courts apply the law of the corporation's state or county of incorporation to determine whether its veil should be pierced (*Flame S.A. v Worldlink Intl. [Holding]*, 107 AD3d 436, 438 [1st Dept 2013]). However, courts do not always follow this rule; instead, they consider the nature of the contacts that the corporation has with its place of incorporation and the location of the allegedly wrongful acts (*see Serio v Ardra Ins. Co., Ltd.*, 304 AD2d 362, 362 [1st Dept 2003]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 30 Misc 3d

1230[A], 2011 NY Slip Op 50297[U], *8-9 [Sup Ct, NY County 2011], *affd in part, mod in part* 93 AD3d 489 [1st 2012]). Where corporate internal affairs are considered, the internal affairs doctrine recognizes that only one state, the state where the company is incorporated, should have the authority to regulate the internal affairs (*UBS*, 2011 NY Slip Op 50297[U], *3). "In contrast, alter ego liability and the related doctrine of piercing the corporate veil involve the abuse of the corporate form to the detriment of third parties" and do not implicate the corporation's internal affairs (*id.*, citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-141 [1993]).

In the complaint in SHI's action, SHI states that it is an exempted corporation under TCI law. According to TCI law, cited by DB, an exempted corporation does no business in its place of incorporation in TCI. SHI does not deny that, apart from being incorporated under TCI law, it has no ties to that jurisdiction and that it conducts business in New York and other places. SHI's complaint in its action states that the FX account was opened in New York. SHI's sole shareholder, Vik, is not located in TCI. Due to scant contacts between SHI and TCI, and because the internal affairs of SHI are not implicated, the law of New York will be applied to the alter ego and veil piercing claims.

Piercing the corporate veil - In New York, the corporate form will be disregarded to prevent fraud, the improper avoidance of a corporate obligation, or when a corporation has been so dominated by one individual or another corporation that it serves the latter's purposes rather than its own (*Passalacqua,* 933 F2d at 138-139; *Walkovszky v Carlton,* 18 NY2d 414, 417-418 [1966]; *Austin Powder Co. v McCullough,* 216 AD2d 825, 827 [3d Dept 1995]). The plaintiff seeking to pierce the corporate veil and establish alter ego liability must show that the

corporation was completely dominated in regard to the transaction complained of, and that such domination was used to commit a wrong against the plaintiff (*Morris,* 82 NY2d at 141).

Signs of a situation warranting veil-piercing include:

> "(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms['] length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own"

(*Shisgal v Brown*, 21 AD3d 845, 848-849 [1st Dept 2005], quoting *Passalacqua,* 933 F2d at 139).

As stated above, the complaint alleges that Vik completely dominated SHI and Beatrice, that he moved money in and out of those companies at his pleasure, that neither companies bore signs of independent corporate existence, and that this was done to avoid obligations to DB. Because of the alter ego status, the judgment is capable of enforcement against all three parties (*see Motorola Credit Corp. v Uzan,* 739 F Supp 2d 636, 638–640 [SD NY 2010] [a nonparty determined to be the judgment debtors' alter ego was liable to the plaintiffs to the same extent as those defendants]).

Law applicable to Fraudulent Conveyances

Foreign or New York law - Defendants and DB disagree whether New York law should apply to the fifth and seventh causes of action which assert fraudulent conveyance claims. The

fifth cause of action alleges that Vik caused SHI to transfer hundreds of millions of dollars to Beatrice and to Vik himself, and the seventh cause of action alleges that Vik transferred Beatrice to the Trust, of which Carrie Vik is trustee. Defendants contend that, as the conveyances were made primarily from accounts in England and Switzerland, the laws of those countries should apply to the fraudulent conveyance claims in the fifth and seventh causes of action.

In light of the parties' disagreement as to applicable laws, the first step is to determine whether there is an actual conflict between the laws of the jurisdictions (*Elmaliach v Bank of China, Ltd.*, 110 AD3d 192, 200 [1st Dept 2013]). An actual conflict exists where, "the laws in question . . . provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a significant possible effect on the outcome of the trial" (*id.* [citation and quotation marks omitted]). Where a conflict exists, the court will conduct a choice of law analysis to determine which jurisdiction's law should apply (*id.*). If no conflict exists between the laws of competing jurisdictions, the court will apply the law of the forum (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd* 3 NY3d 577 [2004]).

Defendants produce statements by foreign law experts to show that DB has no standing to bring fraudulent conveyance claims in England and Switzerland. In England, the expert asserts, DB cannot bring a claim for constructive fraudulent conveyance. DB's expert disputes this and, indeed, it is not shown to be the case that in all cases where a creditor pleads fraudulent conveyance, actual fraudulent intent must be established. English law on fraudulent conveyances is not shown to differ from New York law.

Defendants' Swiss expert, translating from the French, declares that Swiss law permits "a creditor to sue recipients of assets fraudulently conveyed to them only after such a creditor has

unsuccessfully tried to collect a debt by way of seizure of property and has received a provisional or definitive act certifying the debtor's insolvency" (Bertschy declaration, ¶ 6). The right to bring a claim "is barred unless brought within two years of" receiving a certificate (*id.*, ¶ 8). Only acts performed by a debtor for a period of five years before the commencement of a proceeding to receive a certificate are actionable. "Further, absent intent to harm, only acts performed by a debtor during the period of one year" before the commencement of said proceeding are actionable (*id.*, ¶ 10).

As defendants say, Swiss law and New York on fraudulent conveyances are different. New York does not require a certification of the debtor's insolvency to bring a fraudulent conveyance action. In New York, constructive fraud is governed by a six year statute of limitations (CPLR 213 [1]), which accrues at the time the fraud or conveyance occurs (*Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 2013]). Actual fraudulent conveyance must be commenced within six years from the date of the fraud or within two years after the plaintiff discovers the fraud, whichever is longer (CPLR 203 [g]; 213 [8]; *Miller v Polow*, 14 AD3d 368, 368–369 [1st Dept 2005]).

Defendants also argue that German law must apply to the statute of limitations since DB is a German company and, under that law, DB's claim is time-barred. Under German law, claims for constructive fraudulent conveyances must be brought within four years of the end of the year in which the conveyance is made. As the conveyances alleged here took place in 2008, none of them would be timely under German law.

The differences between Swiss and New York law, and German and New York law, require the court to undertake an interest analysis to identify the jurisdiction with the greatest

interest in the particular law in conflict, because of its relationship or contact with the occurrence or the parties (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]; *Cooney v Osgood Mach., Inc.*, 81 NY2d 66, 72 [1993]). A state's interest is defined based on the facts or contacts "which relate to the purpose of the particular law in conflict" (*Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 197 [1985]). The significant contacts in such an analysis are, "almost exclusively, the parties' domiciles and the locus of the tort" (*id.*). For claims based on fraud, the locus of the tort is generally deemed to be the place where the injury was inflicted, rather than where the fraudulent act originated; the place of infliction is where the loss is sustained (*In re Thelen LLP*, 736 F3d 213, 220 [2d Cir 2013]; *BHC Interim Funding, L.P. v Finantra Capital, Inc.*, 283 F Supp 2d 968, 990 [SD NY 2003]; *Orthotec, LLC v Healthpoint Capital, LLC*, 2013 WL 2471606, *9, 2013 NY Misc LEXIS 2340, *26, 2013 NY Slip Op 31189[U], *18 [Sup Ct, NY County 2013]; Restatement [First] of Conflict of Laws § 377, Comment *a*, Illustration 4). Where a defendant's wrongful conduct occurs in one jurisdiction and the plaintiff suffers injuries in another, "the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred;" that is where the plaintiffs' injuries occurred (*Schultz*, 65 NY2d at 195).

None of the injured parties are located in Switzerland. New York and the UK are two principal places of business for DB. SHI is a TCI corporation. Defendants claim that DB was injured in Germany or Switzerland, while DB claims that it was injured in New York because the loss was recorded there. DB does not allege any connection with Switzerland beyond its relationship with SHI and Vik. It was DB's New York office that dealt with SHI and where an account for Beatrice was opened. It seems that the alleged injury to DB did not occur in

Switzerland or Germany, even if SHI's money was transferred out of accounts in those locations.

The interest analysis also asks whether the purpose of the law is to regulate conduct or allocate loss (*Padula,* 84 NY2d at 521-522; *Schultz,* 65 NY2d at 197). A fraudulent conveyance statute is conduct regulating rather than loss allocating (*Paradigm BioDevices, Inc. v Viscogliosi Bros., LLC*, 842 F Supp 2d 661, 665 [SD NY 2012]; *Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC*, 45 Misc 3d 1204[A], 2014 NY Slip Op 51461[U], *10 [Sup Ct, NY County 2014]). "If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders" (*Cooney,* 81 NY2d at 72). The rationale of this rule is that the locus jurisdiction has an interest in protecting the reasonable expectations of the parties who relied on it to govern their conduct (*Atsco Ltd. v Swanson,* 29 AD3d 465, 466 [1st Dept 2006]).

The fraudulent conveyance law ensures that a creditor can reach its debtor's assets. The claims here arise out of accounts opened and obligations incurred in New York. The creditor, DB, has a reasonable expectation that New York law will protects its right. The debtor, SHI, has a reasonable expectation, as well. The parties' reasonable expectations should be considered in resolving the choice of law question (*Schultz,* 65 NY2d at 198). Given the limited nature of the contacts with other jurisdictions discussed above, DB's place of organization, Germany, "is not by itself sufficient to overcome the significance of th[e] contacts" with New York (*Thelen,* 736 F3d at 220; *BHC,* 283 F Supp 2d at 991). Therefore, New York law shall apply to the constructive fraudulent conveyance claims in the fifth and seventh causes of action.

Pleading of Fraudulent Conveyance Claims - DCL § 273 provides that a conveyance

made by a person who is or will be rendered insolvent by making the conveyance is fraudulent if the person does not receive fair consideration in return for the conveyance. Liability under DCL § 273 is based on constructive fraud and does not require actual intent to defraud (*Jaliman v D.H. Blair & Co., Inc.*, 105 AD3d 646, 647 [1st Dept 2013]). DCL § 276 provides that a conveyance made and obligation incurred with actual intent to hinder, delay, or defraud present or future creditors is fraudulent. Liability under that statute is based on intentional fraud. A transaction determined to be fraudulent can be avoided under DCL § 278 and 279.

Defendants argue that the fifth cause of action does not allege fraudulent conveyance under DCL § 276 with particularity. The fifth cause of action alleges that Vik caused SHI to transfer funds from the GPF accounts to accounts held by himself, Beatrice, or other entities that Vik controls and that other transfers of SHI funds were made to accounts in other countries. The complaint provides dates and approximations of amounts transferred, such as $730 million, $20 million, $14 million, EUR 5 million and others. These transfers allegedly left SHI insolvent, SHI received no consideration from them, and the transfers were accomplished at a time when Vik knew that SHI bore DB obligations.

CPLR 3016 (b) requires that the fraud complained of be set forth in sufficient detail to clearly inform a defendant what it must expect to defend against (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). Because of the difficulty of proving actual intent to commit fraud, the pleader may rely on "badges of fraud" to support its case (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). Badges of fraud are circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent (*id.*). Those circumstances include a close relationship between the parties to the alleged fraudulent transaction; a

questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance (*id.*).

DB alleges a close relationship between Vik and the transferees, which included Vik himself, a lack of consideration, transfers not in the usual course of business, Vik's knowledge of DB's claims, and Vik's retention of control of the transferred property. The dates and amounts of the transfers are alleged. That is sufficiently particular pursuant to CPLR 3016.

The complaint alleges that Vik and Beatrice aided and abetted each other and SHI in the fraudulent transfers, and that SHI and Beatrice were transferees, that Vik was a transferor, and that Vik was also a transferee, since transferring funds to SHI and Beatrice were the same as giving them to Vik personally. Under New York law, the elements for aiding and abetting a fraudulent conveyance are: "(1) the existence of a violation by the primary wrongdoer; (2) knowledge of the violation by the aider and abettor; and (3) proof that the aider and abettor substantially assisted the primary wrongdoer" (*Chemtex, LLC v St. Anthony Enters., Inc.*, 490 F Supp 2d 536, 545 [SD NY 2007]). An addition requirement is that the aider and abettor must be a transferee or beneficiary of the fraudulent conveyance (*Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]). A beneficiary includes one who has dominion or control over the conveyed assets (*Blakeslee v Rabinor*, 182 AD2d 390, 391 [1st Dept 1992]). The claim is sufficiently stated.

Defendants incorrectly argue that money judgments are not available against parties who aid and abet fraudulent transfers. Generally, the creditor's remedy in a fraudulent conveyance action is limited to reaching the property which would have been available to satisfy the

judgment had there been no conveyance (*Capital Distrib. Servs., Ltd. v Ducor Express Airlines, Inc.*, 440 F Supp 2d 195, 204 [ED NY 2006]). "However, where the assets fraudulently transferred no longer exist or are no longer in the possession of the transferee, a money judgment may be entered against the transferee in an amount up to the value of the fraudulently transferred assets" (*id.*). A money judgment may properly be granted as a substitute for those assets in circumstances where the debtor's assets have been sold and commingled with those of a transferee (*Manufacturers & Traders Trust Co. v Lauer's Furniture Acquisition, Inc.*, 226 AD2d 1056, 1057 [4th Dept 1996]).

Unjust Enrichment

The statute of limitations for unjust enrichment is six years (CPLR 213 [1]; *Massey v Byrne*, 112 AD3d 532 [1st Dept 2013]; *Whittemore v Yeo,* 112 AD3d 475 [1st Dept 2013]). The cause of action cannot be dismissed pursuant to defendants' argument that the limitations period is three years.

The ninth cause of action for costs

SHI and DB entered into an ISDA Master Agreement which applies to SHI's trading in the FX account. The agreement provides that a defaulting party will indemnify the other party against all reasonable expenses incurred by reason of enforcing rights under that agreement, including costs of collection. The ninth cause of action seeks a declaration that Vik and SHI are both liable under this provision.

Defendants state that the UK judgment has already awarded DB the costs incurred in that case, and that the relief sought in the ninth cause of action should be subsumed in the UK judgment. The costs in the instant action are not the same as the costs in the UK action. The UK

action led to a judgment against SHI. The present action seeks to collect the amount of that judgment from Vik on the basis of alter ego liability. This action seeks the costs of said collection. The UK action and this action are not asking for the same costs.

DB's motion to lift the stay

CPLR 3214 (b) states that disclosure is stayed until a motion under CPLR 3211 is determined, unless the court orders otherwise. DB moves to lift the stay of disclosure. The motion is denied as moot.

Need for a traverse hearing

This matter shall be referred to the Special Referee to determine whether Alexander Vik and Carrie Vik were served pursuant to CPLR 308 (2), and whether the Cscsne Trust was served by service on Carrie Vik, the purported trustee, which will entail determining whether Carrie Vik was the trustee on the date that the trust was purportedly served. The part of the defendants' motion to dismiss the complaint as against Alexander Vik, Carrie Vik and the trust is held in abeyance pending the traverse hearing.

In conclusion, it is

ORDERED (motion sequence number 001) that the part of defendants' motion to dismiss the complaint as against Alexander Vik in his personal capacity, Carrie Vik, and the Cscsne Trust is held in abeyance pending the traverse hearing and is otherwise denied; and it is further

ORDERED (motion sequence number 002) that plaintiff's motion to lift the stay is denied; and it is further

ORDERED that the issue of service over defendants Alexander Vik in his personal capacity, Carrie Vik, and the Cscsne Trust is referred to a Special Referee to hold a traverse

hearing to determine whether: 1) the place to which process was delivered in New York City was Alexander Vik's dwelling place or usual place of abode; 2) the place to which process was mailed was his actual place of business; 3) the place to which process was delivered in New York City was Carrie Vik's dwelling place or usual place of abode; and 4) Carrie Vik was a trustee of the Cscsne Trust on the date that the trust was purportedly served; and it is further

ORDERED that in the event of and upon the filing of a stipulation of the parties as permitted by CPLR 4317, the Special Referee or another person designated by the parties to serve as referee shall hold the aforesaid hearing; and it is further

ORDERED that a copy of this order with notice of entry shall be served by defendants on the Clerk of the Special Referee's Office (Room 119M) to arrange a date for the reference to a Special Referee.

No costs.

Dated: 1/30/15

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE