Cargill Soluciones Empresariales, S.A., de C.V, SOFOM, ENR v WPHG Mexico Operating, L.L.C.
2015 NY Slip Op 30713(U)
April 24, 2015
Supreme Court, New York County
Docket Number: 651242/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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CARGILL SOLUCIONES EMPRESARIALES, S.A., de C.V., SOFOM, ENR,

Plaintiff,

-against-

WPHG MEXICO OPERATING, L.L.C., a Delaware limited liability company, THE WEST PACES HOTEL GROUP I, LLC (f/k/a The West Paces Hotel Group, LLC and West Paces Hotel Company, LLC), WPHG HOLDING LLC, a Georgia limited liability company (f/k/a The West Paces Hotel Group, LLC), WPHG HOLDING II LLC, a Georgia limited liability company (f/k/a The West Paces Hotel Group, LLC), and CAPELLA HOTEL GROUP, LLC, a Delaware limited liability company (f/k/a The West Paces Hotel Group, LLC),

Defendants.

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Index No.: 651242/2014

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendants WPHG Mexico Operating, L.L.C. (WPHG), The West Paces Hotel Group I, LLC (West Paces I), WPHG Holding LLC (WPHG Holding I), WPHG Holding II LLC (WPHG Holding II), and Capella Hotel Group, LLC (CHG) move, pursuant to CPLR 3211, to dismiss the amended complaint (the AC). Defendants' motion is granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

As this is a motion to dismiss, the facts recited are taken from the AC. *See* Dkt. 95.

This action concerns a dispute over the management of the Capella Resort & Spa Pedregal de Cabo San Lucas (the Hotel), a luxury hotel in in Cabo San Lucas, Mexico. AC ¶ 1. Plaintiff, a Mexican corporation called Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR (Cargill), is the current holder of a $65 million note (the Loan), dated February 9, 2007, issued pursuant to a Construction Loan Agreement (the Loan Agreement), the proceeds of which

were used for the construction and development of the Hotel. ¶¶ 1, 2, 11; *see* Dkt. 118. The Loan was originally made by a German bank, WestLB AG (WestLB).[1] ¶ 11. The borrower was a Mexican land trust (a "fideicomiso"), known as Fideicomiso del Proyecto CP 00352 (the Trust). ¶¶ 1, 12. The Trust owns the real estate on which the Hotel is located. *Id.* That real estate was previously owned by Desarrolladora Farallon S. De R.L. De C.V. (Farallon).[2] ¶ 13. Farallon holds a 55% interest in the Trust. *Id.* The other 45% is held by Mexvalo, S. de R.L. de C.V. (Mexvalo). *Id.* In addition to the Loan proceeds, Mexvalo advanced further money to fund the Hotel's construction costs and, allegedly, pursuant to agreements between Mexvalo and Farallon, Mexvalo is entitled to any cash distributions to the Trust. ¶ 14.

Prior to the Loan, pursuant to an Operating Agreement dated October 6, 2005, Farallon hired defendant WPHG to operate and manage the Hotel. ¶ 16; *see* Dkt. 109. The Operating Agreement is governed by Mexican law and contains a binding arbitration clause. *See* Dkt. 109 at 61. Pursuant to section 8.47 of the Loan Agreement [*see* Dkt. 109 at 117], in March 2007, WestLB, as lender.[3] entered in a Subordination, Non-Disturbance and Attornment Agreement (the SNDA) with WPHG. ¶ 17; *see* Dkt. 114. The SNDA requires WPHG to comply with the Operating Agreement, and further provides that WPHG's breach of the Operating Agreement constitutes a breach of the SNDA. The SNDA is governed by New York law and *does not*

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[1] WestLB actually served as the Administrative Agent for a consortium of lenders.

[2] Farralon appears to be owned and/or controlled by a Mexican national named Juan Diaz Rivera and his family. *See* Dkt. 113 (rough organizational chart of the parties' relationship). Rivera is very much at the heart of this action and other related litigation, such as another action before this court involving, *inter alia*, a claim for breach of the Loan guaranty. *See Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR v Hoteles del Cabo S de RL de CV*, Index No. 651607/2014 (Sup Ct, NY County).

[3] Technically, WestLB was acting in its capacity as Administrative Agent, but, for simplicity's sake, the parties agree that WestLB was effectively acting as lender. Hence, Cargill now stands in WestLB's shoes with respect to the SNDA.

contain an arbitration clause. *See* Dkt. 114 at 7. The SNDA also has a prevailing party clause that entitles the winner of this action to collect its reasonable attorneys' fees from the other side.

Paragraph 3 of the SNDA permits WPHG to remain as manager of the Hotel (pursuant to the Operating Agreement) in the event of a foreclosure on the Loan. *See id.* at 3-4. However, paragraph 2 provides that WPHG is not entitled to collect any of its management fees while the Loan is in default. ¶ 26; *see* Dkt. 114 at 3. Moreover, paragraph 5 provides that upon a default under the Loan Agreement, WPHG is required to forward "all revenue, income, proceeds and profits of the [Hotel] collected by [WPHG]" to an account designated by the lender, and to send a written notice to all payors directing them to make payment directly to such account. ¶ 27; *see* Dkt. 114 at 5.

In 2008, after WestLB was placed into receivership during the financial crisis, the Loan was assigned to an entity called Portigon AG (Portigon). ¶ 20. In April 2011, the Trust defaulted on the Loan and, to date, no further payments on the Loan have been made. ¶¶ 24-25. On March 14, 2012, Portigon commenced foreclosure proceedings by filing a writ in a Mexican court, the Juzgado 37 de lo Civil. *See generally* Dkt. 132 (affidavit of Alejandro Sainz Orantes, dated August 22, 2014).[4]

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[4] Defendants argue, erroneously, that the Mexican foreclosure proceedings are "final". Their argument is refuted by Mr. Orantes, a partner at the Mexican law firm of Cervantes Sainz, which is representing Cargill in the Mexican litigation. Mr. Orantes' affidavit, which defendants do not rebut, explains the procedural history of the litigation in Mexico, the details of which the court will not repeat in the decision. The court has little doubt that Mr. Orantes' description of the procedural history of the Mexican litigation is substantially accurate and describes duplicative, parallel litigation in multiple Mexican courts, at both the trial and appellate levels. This is not the first time this court has encountered litigation in the Mexican courts which involve a duplicative stream of appeals and stays which make the resolution of legal matters complicated and protracted. *See, e.g., CT Inv. Mgmt. Co. v Chartis Specialty Ins. Co.*, 40 Misc3d 415 (Sup Ct, NY County 2013). Without reaching the merits or proprietary of the Mexican litigation in this case, there is no question of fact that such litigation is anything but final.

Pursuant to a Loan Purchase and Sale Agreement dated February 13, 2014, Cargill acquired Portigon's rights under the Loan Agreement and the SNDA. ¶ 21; *see* Dkt. 116. By letter dated April 3, 2014, Cargill notified WPHG that it had replaced WestLB and Portigon as lender and Administrative Agent. ¶ 22. By letter dated April 11, 2014, Cargill instructed WPHG, in light of the default, to follow the procedures set forth in paragraph 5 of the SNDA. WPHG refused to do so. Therefore, in a letter dated April 22, 2014, Cargill's counsel notified WPHG's counsel of its intention to commence litigation and seek a temporary restraining order (TRO) to compel compliance with the SNDA. *See* Dkt. 115.

Later that day, Cargill commenced this action by filing its original complaint. *See* Dkt. 1. The following day, on April 23, 2014, Cargill moved by order to show cause seeking the TRO discussed in its letter. *See* Dkt. 6. The court issued a TRO, but amended some of Cargill's proposed language. *See* Dkt. 18. The court later issued a preliminary injunction (the PI) after oral argument on May 1, 2014 (*see* Dkt. 37), after which Cargill was directed to submit a proposed order of attachment. *See* Dkt. 40 (5/1/14 Tr.). On May 5, 2014, after making certain changes to Cargill's proposed order, the court entered an order of attachment (the Attachment). *See* Dkt. 35.

On May 21, 2014, WPHG moved to modify the PI and the Attachment. *See* Dkt. 41. On June 2, 2014, WPHG moved to dismiss the original complaint. *See* Dkt. 46. On June 3, 2014, Cargill opposed WPHG's motion to modify the PI and Attachment and also cross-moved to modify the PI. *See* Dkt. 57. Then, on June 6, 2014, WPHG moved by order to show cause for leave to serve an out-of-state non-party subpoena. *See* Dkt. 65. The court decided the modification and commission motions at oral argument on June 17, 2014. *See* Dkt. 99 & 100 (the Modification Orders); Dkt. 101 (commission order); Dkt. 122 (6/17/14 Tr.).

Cargill filed the AC on June 23, 2014, which added numerous affiliates of WPHG, discussed below, as defendants. *See* Dkt. 95. By stipulation dated June 27, 2014, WPHG's motion to dismiss the original complaint was withdrawn and a deadline to file the instant motion to dismiss the AC was set. *See* Dkt. 97. Defendants filed the instant motion on July 25, 2014. *See* Dkt. 105.

On October 3, 2014, WPHG moved to enforce the Modification Orders, claiming that Cargill was not paying its fees. *See* Dkt. 133. Cargill took control of the Hotel on November 5, 2014, and WPHG moved by order to show cause to enjoin Cargill from removing WPHG as manager. *See* Dkt. 166. On November 9, 2014, WPHG again moved by order to show cause to compel payment of its fees and for its legal costs incurred in this action. *See* Dkt. 191. The court denied all three of WPHG's motions. *See* Dkt. 225, 226, & 234 (orders); Dkt. 231 (11/12/14 Tr.). Oral argument on the instant motion to dismiss was held on December 4, 2014. *See* Dkt. 238 (12/4/14 Tr.). On December 8, 2014, the court entered an order vacating the Modification Orders. *See* Dkt. 236.

In the AC, Cargill adds multiple affiliates of WPHG as defendants. Cargill did so, *inter alia*, because WPHG allegedly transferred its management fees to four affiliated entities, West Paces I, WPHG Holding I, WPHG Holding II, and CHG (collectively, the Affiliate Defendants). CHG is the 100% owner of WPHG. CHG, formerly known as "The West Paces Hotel Group LLC", purports to own the trademarks associated with the "Capella" brand (as noted earlier, the Hotel is known as the Capella Resort). WPHG allegedly paid various fees to CHG, such as fees for the right to use the Capella brand. WPHG Holding I and WPHG Holding II, Georgia LLCs, are special purpose investment entities that previously had ownership interests in CHG. West

Paces I, also a Georgia LLC, is another affiliate of CHG. The Affiliate Defendants share office space in Atlanta, Georgia.

The AC asserts eight causes of action, numbered here as in the complaint: (1) breach of the SNDA; (2) tortious interference with contract; (3) breach of the covenant of good faith and fair dealing; (4) unjust enrichment; (5 & 6) conversion; (7) specific performance of the SNDA; and (8) an accounting. Simply put, Cargill alleges that WPHG breached the SNDA, that the Affiliate Defendants tortiously interfered with the SNDA, and that the Affiliate Defendants are alter egos of WPHG and, therefore, should be held liable for breach of the SNDA. Cargill also alleges that WPHG misallocated Hotel funds and should account for the Hotel's finances for the time it served as manager.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing

Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Personal Jurisdiction and Alter Ego Allegations

The Affiliate Defendants challenge their inclusion in this lawsuit on two separate, but related grounds. First, the Affiliate Defendants, foreign corporate entities that indisputably have no meaningful connection to New York (and certainly no nexus to New York in connection with the underlying disputes), move to dismiss for lack of personal jurisdiction.[5] Second, the Affiliate Defendants claim that the AC's alter ego allegations are conclusorily pleaded and that the lack of any specificity with respect to lack of corporate formalities warrants dismissal of such allegations. In opposition to the jurisdictional arguments, Cargill does not aver that a traditional basis for asserting general or specific jurisdiction exists. Rather, Cargill invokes an alter ego theory for asserting jurisdiction over parties not otherwise subject to suit in New York. Hence,

[5] WPHG does not move to dismiss for lack of personal jurisdiction. Cargill alleges that jurisdiction exists over WPHG by virtue of section 11.14 of the Loan Agreement [*see* Dkt. 118 at 134], which contains a consent to New York jurisdiction clause that applies to disputes arising in connection with all "Loan Documents", defined to include the SNDA. To the extent WPHG argues that this action is barred the mandatory arbitration clause in the Operating Agreement, such argument is clearly erroneous. While many of the present disputes with respect to the Hotel *are* subject to a currently pending arbitration, the claims asserted in the AC, which arise solely under the SNDA (e.g., entitlement to fees while the Loan is in default), are governed solely by the SNDA, not the Operating Agreement. That the parties expressly contemplated litigating the subject claims as breaches of the SNDA, instead of as breaches of the Operating Agreement, is evidenced by the fact that the SNDA has different forum selection and choice of law clauses (New York instead of Mexico).

the sufficiency of Cargill's alter ego allegations determines whether the claims against the Affiliate Defendants survive dismissal.

Exercising personal jurisdiction over a foreign affiliate of a defendant subject to New York's jurisdiction on the basis of alter ego liability is known as the "mere department" doctrine. *See Delagi v Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 NY2d 426, 432 (1972); *Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117 (2d Cir 1984). As the Second Department recently explained:

> In its limited jurisprudence concerning the mere department doctrine, the primary focus of the Court of Appeals has been on the degree of control exercised by the domestic corporation over the foreign corporation. Such control may be manifested in numerous ways and, thus, the method by which such control may be demonstrated will necessarily depend on the attendant facts Although the Court of Appeals has noted that it has never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship, it has nevertheless indicated that this factor is not dispositive. The control over [a] subsidiary's activities ... must be so complete that the subsidiary is, in fact, merely a department of the parent. **It is only when the two corporations are in fact, if not in name ... one and the same corporation, [that] there is realistically no basis for distinguishing between them for jurisdictional purposes**.

Goel v Ramachandran, 111 AD3d 783, 787 (2d Dept 2013) (citations and quotation marks omitted; emphasis added); *see FIMBank P.L.C. v Woori Fin. Holdings Co.*, 104 AD3d 602, 603 (1st Dept 2013) (simply demonstrating common ownership or that entity is "holding company" is insufficient to establish jurisdiction under mere department doctrine).

The relevant factors for establishing mere department jurisdiction are the veil piercing factors [*Tap Holdings, LLC v Orix Finance Corp.*, 109 AD3d 167, 174 (1st Dept 2013), accord *Morris v N.Y. State Dep't of Taxation & Finance*, 82 NY2d 135, 141 (1993)] minus the fraud

prong.[6] *GEM Advisors, Inc. v Corporacion Sidenor, S.A.*, 667 FSupp2d 308, 319 (SDNY 2009). As with veil piercing, "conclusory allegations in the complaint are insufficient." *Barneli & Cie SA v Dutch Book Fund SPC, Ltd.*, 95 AD3d 736, 737 (1st Dept 2012); *see Pine St. Homeowners Ass'n v 20 Pine St. LLC*, 109 AD3d 733, 735 (1st Dept 2013) (plaintiff must plead "particularized facts to warrant piercing the corporate veil"); *see also Bd. of Managers of Gansevoort Condo. v 325 W. 13th, LLC*, 121 AD3d 554, 554-55 (1st Dept 2014) (allegations that SPV is undercapitalized and shares office space, telephone number and email address are insufficient to state veil piercing claim).

The AC does not adequately plead facts sufficient to exercise jurisdiction over the Affiliate Defendants on an alter ego theory. The cases cited above, among a plethora of others, make clear that out-of-state holding companies and special purpose investment vehicles are not automatically subject to this court's jurisdiction merely because money, allegedly wrongfully taken by a defendant subject to jurisdiction in New York, was transferred to that defendant's affiliates. Whatever the reasons behind the Affiliate Defendants' corporate structure, the mere fact that they are all based in the same location in Atlanta is simply not a basis to subject them to jurisdiction in New York.

Cargill's brief does little to buttress the inadequacy of the AC's alter ego allegations. While Cargill conclusorily avers that WPHG is a "shell entity" and points to multiple, similarly named entities, none of the allegations in the AC, on their own, are nefarious. To the contrary, much of what is alleged is, in the court's experience, legitimate common practice. For instance, when one has a business venture, naming multiple investment vehicles "WPHG Holding LLC"

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[6] Of course, once jurisdiction is established, the fraud prong is also required to substantively plead veil piercing liability. *See Fantazia Int'l Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 (1st Dept 2009). The AC does not do so.

and "WPHG Holding II LLC", or naming them all "West Paces", or even creating a separate company purely for the purpose of managing the Hotel (WPHG), is accepted business practice. There are important tax and liability reasons why this is done. Though Cargill takes issue with the legitimacy of the payments WPHG made to the Affiliate Defendants, the propriety of WPHG's disbursement of funds is the very subject of this action.

To the extent discovery on how WPHG spent the Hotel's money sheds light on facts that might give rise to liability against the Affiliate Defendants – either because evidence of actual wrongdoing or sufficient veil piercing facts are uncovered – the claims against the Affiliate Defendants may be repleaded. For now, however, the claims against the Affiliate Defendants are dismissed without prejudice.

B. Other Issues

The myriad remaining arguments are easily disposed of.

First, there is no merit to WPHG's argument that the SNDA is no longer in effect. As Cargill correctly argues, the SNDA governs WPHG's obligations during foreclosure proceedings. As noted earlier, since the Mexican litigation has not reached a definitive conclusion, the SNDA is still in effect. Regardless, even if the foreclosure proceedings had concluded, Cargill is asserting a claim for monetary damages for funds it allegedly should have been paid during the pendency of the foreclosure proceedings. Thus, the claim for breach of the SNDA may proceed.

Second, the court will not reach the issue of whether the claims only asserted against the Affiliate Defendants are sufficiently pleaded or viable since the AC is dismissed against the Affiliate Defendants for lack of personal jurisdiction. It should be noted, however, that while the AC seems to be asserting all claims against all defendants, the claim for tortious interference

with the SNDA can only be asserted against the Affiliate Defendants and not WPHG, since one obviously cannot interfere with one's own contract.

Third, the claims for unjust enrichment, conversion, and breach of the duty of good faith and fair dealing asserted against WPHG are dismissed as duplicative of the claim for breach of the SNDA. The SNDA, as well as the other contracts discussed earlier (e.g., the Operating Agreement), govern all aspects of the sophisticated parties' rights with respect to the Hotel. Claims for unjust enrichment and conversion do not lie when a written contract governs a dispute over money. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009); *Rossetti v Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 AD3d 548 (1st Dept 2015). Moreover, while all contracts have an implied covenant of good faith and fair dealing [*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002)], Cargill baldy alleges bad faith without pleading anything to suggest that its good faith claim is anything more than a breach of contract effectuated with ill will. Breach of the covenant of good faith and fair dealing is a claim to address the undermining of a contract's purpose in a manner not expressly prohibited by the contract. *See Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995) (the implied covenant is "a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'") (citation omitted). Nothing beyond a breach of the contract's explicit obligations is alleged here.

Fourth, Cargill's specific performance claim survives, but only to the extent that Cargill is seeking to enforce its rights (such as its contractual books and records and accounting rights) that arise from the SNDA. *See* Dkt. 114 at 6. The specific performance claim is dismissed to the extent it is duplicative of the claims for breach of the SNDA that are compensable with monetary damages, such as the claim for improper allocation of fees. *See Sokoloff v Harriman Estates*

Dev. Corp., 96 NY2d 409, 415 (2001) ("specific performance will not be ordered where money damages would be adequate to protect the expectation interest of the injured party") (citation and quotation marks omitted). Likewise, the separate accounting cause of action is dismissed as duplicative, since Cargill is entitled to the Hotel's financials and discovery as to how the Hotel's money was allocated.

Fifth, the claim that all necessary parties are not before the court does not warrant dismissal. The "owner" of the Hotel (presumably, the Trust) and whoever now controls it[7] are not parties to the SNDA. The SNDA is a contract between the lender (first WestLB, then Portigon, and now Cargill) and WPHG. It should be noted that the current, multi-forum litigation over the hotel is well known to all stakeholders, and yet none of the other non-party stakeholders have moved to intervene. *See L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 13 (1st Dept 2007) ("Courts have routinely recognized that the ability of a nonjoined party to intervene in an action to avoid prejudice is a compelling factor in determining whether to dismiss a case for failure to join a necessary party."). Every party whose interests are implicated in a lawsuit need not be joined as necessary parties. *See Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 819 (2003).

Sixth, WPHG's *forum non conveniens* argument is not compelling. Forum selection clauses generally bar *forum non conveniens* arguments. *See AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 495, 496 (1st Dept 2011), citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 232 (1st Dept 1999). Regardless, litigation in Mexico will not be more convenient for anyone seeking expeditious resolution of this case, and WPHG presents no

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[7] The parties devote unmerited focus to their dispute over how a Cargill parent entity may now effectively own or control the Hotel. Cargill and its parent are distinct legal entities and must be treated as such for the purpose of adjudicating the parties' rights under the SNDA.

compelling basis to believe it will face "substantial hardships if required to litigate in New York." *See Lerner v Friends of Mayanot Institute, Inc.*, 126 AD3d 431 (1st Dept 2015); *see generally Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 (1984).

Finally, Cargill need not comply with the registration requirements of BCL § 1312 since, while it is a foreign corporation, it does not regularly conduct business in New York. *Tinterorias Ibericas De Peleteria, S. A. v Gafco, Inc.*, 114 AD2d 329, 329-30 (1st Dept 1985); *see generally MKC-S, Inc. v Laura Realty Co.*, 43 Misc3d 1215(A), at *2 (Sup Ct, Kings County 2014) (Demarest, J.) ("The burden is on the defendant asserting the statutory bar to prove that plaintiff's business in New York was 'so systematic and regular as to manifest continuity of activity in the jurisdiction.'"), quoting *Highfill, Inc. v Bruce and Iris, Inc.*, 50 AD3d 742, 743 (2d Dept 2008). Accordingly, it is

ORDERED that the motion by WPHG Mexico Operating, L.L.C. (WPHG), The West Paces Hotel Group I, LLC (West Paces I), WPHG Holding LLC (WPHG Holding I), WPHG Holding II LLC (WPHG Holding II), and Capella Hotel Group, LLC (CHG) to dismiss the amended complaint is granted in part as follows: (1) the claims against West Paces I, WPHG Holding I, WPHG Holding II, and CHG are dismissed without prejudice and with leave to replead should discovery warrant; (2) the second (tortious interference with contract), third (breach of the covenant of good faith and fair dealing), fourth (unjust enrichment), fifth and sixth (conversion), and eighth (an accounting of the Hotel) causes of action are dismissed as against WPHG, and the seventh cause of action (specific performance of the SNDA) is limited to the extent set forth in this decision; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on May 14, 2015 at 11:00 in the forenoon; and it further

ORDERED that before the preliminary conference, the parties must read and comply with the court's rules, and the joint status letter discussed therein must be e-filed and faxed to Chambers (212-952-2777) no later than May 7, 2015 at 4:00 pm.

Dated: April 24, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C