Wimbledon Fin. Master Fund, Ltd. v Bergstein
2017 NY Slip Op 31505(U)
July 17, 2017
Supreme Court, New York County
Docket Number: 150584/2016
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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WIMBLEDON FINANCING MASTER FUND, LTD.,

Petitioner,

-against-

DAVID BERGSTEIN, GRAYBOX LLC, ISKRA ENTERPRISES LLC, WESTON CAPITAL ASSET MANAGEMENT, LLC, ASIA CAPITAL MARKETS LIMITED LLC, GEROVA MANAGEMENT INC., K JAM MEDIA, INC., HENRY N. JANNOL, SPILLANE WEINGARTEN LLP, and VENABLE, LLP,

Respondents.

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Index No: 150584/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002, 008, and 016 are consolidated for disposition.

I. Introduction

The court assumes familiarity with its: (1) August 19, 2016 decision (Dkt. 283),[1] which was affirmed by the First Department on February 23, 2017 [*Wimbledon Financing Master Fund, Ltd. v Bergstein*, 2016 WL 4410881 (Sup Ct, NY County 2016) (the August 19 Decision), *aff'd* 147 AD3d 644 (1st Dept 2017)]; (2) December 22, 2016 decision in a related special proceeding, where the court granted summary judgment to Wimbledon [*Wimbledon Financing Master Fund, Ltd. v The Wimbledon Fund, SPC*, 2016 WL 7440844 (Sup Ct, NY County 2016) (the December 22 Decision)]; and (3) the decision contemporaneously issued with this decision in the related plenary action (Index No. 653468/2015) (the Plenary Action), which extensively sets forth the facts of the Gerova and Arius Libra schemes. Here, the court limits its discussion

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

of facts to the specific alleged fraudulent transfers at issue in this special proceeding, as well as the facts pertinent to Sulmeyer's cross-petition. Capitalized terms not defined herein have the same meaning as in the court's prior decisions.

In the August 19 Decision, the court, *inter alia*, denied the Bergstein Respondents' motion to dismiss and granted the motion of SulmeyerKupetz, PC (Sulmeyer), a law firm which represented Bergstein in a bankruptcy matter, for leave to intervene. At this juncture, Wimbledon seeks summary judgment on the DCL claims pleaded in its petition and dismissal of Sulmeyer's cross-petition. Seq. 002. As explained herein, the subject of the petition and cross-petition are very different. The former concerns fraudulent transfers similar in nature to those at issue in the December 22 Decision and in the Plenary Action (some, indeed, are identical), while the latter concerns Sulmeyer's claim that it has an attorneys' lien on funds attached by the August 19 Decision. Also before the court are motion sequences numbers 008 and 016. In Motion 008, Wimbledon moves to dismiss Bergstein's cross-petition for an accounting (*see* Dkt. 304 at 7-10). Bergstein opposes this motion. In Motion 016, Wimbledon moves for a default judgment against respondent Asia Capital Markets Limited, LLC (ACM). That motion is unopposed.

For the reasons that follow, the court grants summary judgment to Wimbledon on its petition and denies both cross-petitions. The default judgment motion is denied as moot since the identical relief is issued in the Plenary Action.

II. Background

The petition in this action (Dkt. 1), filed on January 22, 2016, seeks turnover of portions of the Arius Libra loan proceeds disbursed to respondents, which Wimbledon claims were both intentional and constructive fraudulent transfers under the DCL. Critically, Wimbledon does not

assert these claims in its capacity as an allegedly defrauded investor in Arius Libra (i.e., the basis of its claims in the Plenary Action), but rather as assignee of Partners II, the lender on the Arius Libra loan. For this reason, as discussed herein, many of the defenses proffered by respondents are inapposite, as they conflate the harm suffered by Wimbledon and Partners II, caused by the Arius Libra scheme.

"Between August 3, 2011 and November 18, 2011, Bergstein, with the assistance of Jam, Wellner and the Hallacs, transferred $8,385,572 of the funds supposedly 'loaned' to Arius Libra directly from Partners II into the accounts of other entities or individuals, most of which were under their control or served as their alter egos." Petition ¶ 25. Bergstein, either personally or through his companies, received approximately $3.16 million of the proceeds: (1) $500,000 to Graybox; (2) $150,000 to Iskra; (3) $2,209,897 also to Bergstein and his entities but through Henry N. Jannol, P.C. (the Jannol Firm), his attorney's firm; and (4) $200,000 went to another law firm representing Bergstein, Spillane Weingarten LLP (the Weingarten Firm) (collectively, the Bergstein Conveyances).[2] Another $2.5 million of the proceeds were disbursed as follows: (1) $900,000 went to WCAM;[3] (2) $700,000 went to ACM;[4] (3) $500,000 went to Gerova Management, Inc.;[5] and (4) $400,000 went to KJM.

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[2] The Weingarten Firm did not file an answer to the petition nor was it a party to respondents' opposition brief. "[I]t is a defunct law firm." *See* Petition ¶ 17. The court treats Wimbledon's motion for judgment on the petition as having been defaulted on by the Weingarten Firm. It should be noted that while Weingarten is named as an individual defendant in the Plenary Action, he is not personally named as a respondent in this petition.

[3] This transfer is distinct from the $250,000 transfer at issue in the December 22 Decision.

[4] This transfer is duplicative of the $700,000 transfer for which Wimbledon is granted a default judgment in the Plenary Action and, therefore, relief against ACM on this transfer is denied in this action. That said, this $700,000 is included in the judgment issued against Bergstein since veil piercing relief (discussed herein) has not been addressed in the Plenary Action.

There is no evidence in the record that any consideration was provided *to Arius Libra* (as opposed to Gerova) for these conveyances. Moreover, regardless of the existence of consideration, none of these conveyances can be said to have been made with the requisite good faith under the DCL because they were made to Arius Libra insiders at a time when Arius Libra was insolvent. As explained herein, respondents have not carried their burden of raising a genuine question of fact as to Arius Libra's solvency. Instead, they misguidedly rely on the value of the Assets and their worth to Wimbledon, when they should be concerned with their worth to Partners II, the allegedly defrauded creditor from whose perspective solvency must be assessed. As noted, Wimbledon merely seeks to enforce the judgment as assignee of Partners II. Hence, in this proceeding, Wimbledon stands in Partners II's shoes. Wimbledon's assets are no more relevant than if Partners II has sold its judgment to an unrelated third-party.[6]

To the extent the value of the Assets is relevant to the question of Arius Libra's solvency, as respondents concede, the relevant inquiry is the Assets' value at the time of the subject

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[5] This transfer also is identical to the one at issue in the Plenary Action. While there were service issues with Gerova Management in the Plenary Action, service was effected here (*see* Dkt. 319). The court decides the DCL claims against Gerova Management in this action.

[6] It should be noted that Partners II was not required to liquidate the collateral (i.e., the Assets) before seeking enforcement of the debt. *See Marine Midland Bank v Hakim*, 247 AD2d 345 (1st Dept 1998), citing *First Int'l Bank of Israel, Ltd. v L. Blankstein & Son, Inc.*, 59 NY2d 436, 447 (1983). Where, as here, there are legitimate reasons not to immediately liquidate collateral (i.e., the Assets' illiquidity), the lender need not do so. *See First Int'l Bank of Israel*, 59 NY2d at 447 ("a secured creditor has no obligation to 'play the market' by selling nonperishable collateral when it appears that the market is most favorable.") And while Wimbledon might ultimately have to reimburse Arius Libra depending on what proceeds the Assets eventually generate [*see Chemtex, LLC v St. Anthony Enterprises, Inc.*, 490 FSupp2d 536, 545 (SDNY 2007) ("the rights of a secured creditor in collateral are always restricted by the amount of the debt.")], given Wimbledon's claim in the Plenary Action that its Assets were fraudulently taken from it, it is not clear that it will have any obligation to do so. That is an issue for another day.

conveyances. *See* Dkt. 713 at 6 ("Solvency is considered at the time of the transfers."). Their current value is irrelevant. Bergstein, not Wimbledon, had control of Arius Libra when the transfers were made. Consequently, Bergstein cannot claim the need for an accounting of the Assets from Wimbledon to ascertain Arius Libra's solvency at the time of the conveyances. And since a current accounting of the Assets sheds no light on the relevant solvency inquiry, the question of whether Wimbledon owes Bergstein a fiduciary duty is irrelevant in this special proceeding.

III. The Merits of the Petition

A. Legal Standard

In the December 22 Decision, the court set forth the following applicable summary judgment burden shifting standard in a special proceeding seeking turnover orders based on DCL claims:

> "CPLR 5225(b) permits a special proceeding to be brought against, and recovery to be had from, 'a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee.'" *Hotel 71 Mezz Lender, LLC v Rosenblatt*, 64 AD3d 431, 432 (1st Dept 2009). CPLR 409 provides that in a special proceeding, "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" and "[t]he court may make any orders permitted on a motion for summary judgment." The standards governing summary disposition of a special proceeding are the same standards applicable on a motion for summary judgment. *See Gonzalez v City of New York*, 127 AD3d 632, 633 (1st Dept 2015).
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> It is well settled that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing

> has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).
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> In applying this summary judgment burden shifting standard to proceedings under the DCL, New York courts have long held that once the petitioner establishes that "a transfer has been made **without consideration, the initial burden to establish solvency is on the transferor**." *Shelly v Doe*, 249 AD2d 756, 757 (3d Dept 1998) (emphasis added). To be sure, "'[w]hether the subject conveyance has rendered the debtor insolvent, and whether fair consideration was paid, are generally questions of fact which must be determined under the circumstances of the particular case' and, generally, 'the burden of proving these elements is upon the party challenging the conveyance.'" *Chen v New Trend Apparel, Inc.*, 8 FSupp3d 406, 445 (SDNY 2014), quoting *Joslin v Lopez*, 309 AD2d 837, 838 (2d Dept 2003). "However, **when a transfer has been made for no consideration**, the courts recognize **a rebuttable presumption of insolvency and fraudulent transfer**, and **the burden then shifts to the transferee to overcome that presumption**. *Chen*, 8 FSupp3d at 445 (collecting cases; emphasis added), *see, e.g., RTC Mort. Trust 1995-S/N1 v Sopher*, 171 FSupp2d 192, 199 (SDNY 2001) ("When a transfer is made without consideration, courts have applied a presumption of insolvency that shifts the burden to the defendant to rebut by showing continued solvency after the transaction.") (collecting cases); *McCarthy v Estate of McCarthy*, 145 FSupp3d 278, 286 (SDNY 2015) (same).

December 22 Decision at 6-8 (emphasis in original).

The court then explained the elements of a claim for constructive fraudulent conveyance under DCL § 273:

> DCL § 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or **will be thereby rendered insolvent** is fraudulent as to creditors **without regard to his actual intent** if the conveyance is made or the obligation is incurred **without a fair consideration**." (emphasis added). DCL §§ 274 and 275, respectively, further provide:

> [§ 274] Every conveyance made **without fair consideration** when the person making it is **engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital**, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction **without regard to his actual intent**.
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> [§ 275] Every conveyance made and every obligation incurred **without fair consideration** when the person making the conveyance or entering into the obligation intends or believes that he will **incur debts beyond his ability to pay as they mature**, is fraudulent as to both present and future creditors.

(emphasis added). Simply put, "[a] conveyance that renders the conveyor insolvent is fraudulent as to creditors **without regard to actual intent**, if the conveyance was made without fair consideration." *CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. P'ship*, 25 AD3d 301, 302 (1st Dept 2006) (emphasis added). Moreover, even if there is fair consideration, a transfer is still constructively fraudulent in the absence of good faith on the part "**of both** the transferor and the transferee." *Id.* at 303 (emphasis added), quoting *Berner Trucking, Inc. v Brown*, 281 AD2d 924, 925 (1st Dept 2001); *see Sardis v Frankel*, 113 AD3d 135, 142 (1st Dept 2014) ("'Fair consideration' ... is not only a matter of whether the amount given for the transferred property was a 'fair equivalent' or 'not disproportionately small,' which the parties vigorously dispute, but whether the transaction is made 'in good faith,' an obligation that is imposed on both the transferor and the transferee."). Importantly, as pertinent here, "[a]n insider payment is not in good faith, regardless of whether or not it was paid on account of an antecedent debt." *Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 (1st Dept 2016), citing *EAC of N.Y., Inc. v Capri 400, Inc.*, 49 AD3d 1006, 1007 (3d Dept 2008) ("The requirement of good faith is not fulfilled through preferential transfers of corporate funds to directors, officers or shareholders of a corporation that is, or later becomes, insolvent, in derogation of the rights of general creditors."); *Am. Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 (2d Dept 2006) (same); *P.A. Bldg. Co. v Silverman*, 298 AD2d 327, 328 (1st Dept 2002) (same).

December 22 Decision at 8-9 (emphasis in original).

Finally, the court explained the standard for proving a claim of intentional fraudulent conveyance under DCL § 276:

> DCL § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." *Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999). A claim under DCL § 276 must be pleaded with particularity under CPLR 3016 (b). *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 (1st Dept 2015). However, "[d]ue to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent.'" *Wall St. Assocs.*, 257 AD2d at 529 (citations omitted); *see Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *CIT Group*, 25 AD3d at 303. "The badges of fraud include circumstances such as '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.'" *Square Mile Structured Debt (ONE) LLC v Swig*, 2013 WL 6409967, at *3 (Sup Ct, NY County 2013) (emphasis added), quoting *Wall St. Assocs.*, 257 AD2d at 529; *see Bd. of Managers of Loft Space Condo. v SDS Leonard, LLC*, 142 AD3d 881, 883 (1st Dept 2016). Where the plaintiff alleges badges of fraud, upon "defendants' failure to proffer any legitimate explanation for the conveyances, the defendants' actual fraudulent intent is readily inferrable, and the plaintiff is entitled to a judgment setting those conveyances aside under [DCL § 276]." *Machado v A. Canterpass, LLC*, 115 AD3d 652, 654 (2d Dept 2014) (collecting cases).

December 22 Decision at 11-12 (emphasis in original).

B. Arius Libra's Solvency

"A person is insolvent when the **present fair salable value of his assets** is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." DCL § 271 (emphasis added). Respondents contend that Arius Libra had two principal assets: (1) the Assets; and (2) an interest in Pineboard (i.e., the medical billing company Arius Libra allegedly was to acquire). Respondents maintain that the value of these assets exceeded the amount owed to Partners II and, therefore, Arius Libra was solvent at the time of the subject conveyances. They are wrong.

As an initial matter, there is a deep cynicism in respondents (especially Bergstein) relying on the Assets to justify the contention that Arius Libra was solvent. In the Plenary Action, Bergstein is alleged to have stolen the Assets from Wimbledon by lying about why they were being swapped for Arius Libra equity – namely, to acquire an interest in what was purportedly a medical billing company. In reality, according to Wimbledon, "[t]he very purpose of Arius Libra appears to have been to take the Loan proceeds, default on the Loan, and permit Wimbledon to lose its assets, which were pledged to guaranty repayment of the Loan." December 22 Decision at 13. In other words, Wimbledon claims Bergstein transferred the Assets to Arius Libra with the knowledge that they would be foreclosed upon after Bergstein absconded with the loan proceeds, leaving Arius Libra to foreseeably default on the loan *because it had no other assets to pay off the loan.*

To be sure, it is implausible to believe that the Assets were worthless. If that were so, then Wimbledon would not be so aggressively litigating their loss. Wimbledon clearly believes the Assets have substantial enough value to justify the Plenary Action. That the Assets are valuable, however, is not the relevant inquiry under DCL § 271. Rather, it is their "fair salable value" *at the time of the conveyances*. Such value was below their long-term value since it is undisputed that the Assets were highly illiquid interests in hedge funds. No other reasonable inference can be drawn from this record. If the Assets were capable of liquidation in an amount sufficient to satisfy the judgment, it strains credulity to believe that Wimbledon would have spent the last two years seeking to enforce the Judgment via DCL claims when, all along, it could have obtained their value. The far more plausible explanation is that – as Bergstein does not dispute – the Assets are highly illiquid hedge fund interests that would likely sell for a deep discount on the secondary market, regardless of their long-term value. That is both why

Wimbledon has been prosecuting the DCL claims and, likewise, why simply selling the Assets would not have been sufficient to pay off Partners II. The latter point is the very reason why owning the Assets did not prevent Arius Libra from being considered insolvent within the meaning of DCL § 271.

Nonetheless, assuming *arguendo* that the Assets, in 2011, had a then-present fair salable value sufficient to repay Partners II, it is respondents that bear the prima facie burden of proving that to be true. As the cited case law makes clear and as discussed further herein, where, as here, the subject conveyances were made to insiders without consideration, it is respondents – and not Wimbledon – that have the prima facie burden of proving solvency. They have not met that burden. Bergstein controlled the Assets at the time of the conveyances by virtue of his control of Arius Libra (and, as discussed in the Plenary Action, his control of Gerova, Wimbledon, and the Weston Parties). He cannot credibly contend that he has no means of proving their value or that he needs discovery or an accounting from Wimbledon to do so. Bergstein not only failed to provide any valuation of the Assets (despite the court permitting him to submit multiple rounds of supplemental briefing), but he does not even bother to provide a detailed explanation of the Assets. The court cannot (and will not) guess their worth.[7]

With respect to Pineboard, Arius Libra's interest in it was not worth much. No one contends that Arius Libra owned a profitable (if extant) medical billing company. Bergstein has provided no evidence that Arius Libra's interest Pineboard was worth more than $6 million.

[7] The only sense of the nature of the Assets the court can glean from its experience with these cases is that they are illiquid hedge fund interests with exposure to highly speculative investments whose future value is difficult to predict. *See generally Stillwater Liquidating LLC v Partner ReIns. Co.*, 2017 WL 318658 (Sup Ct, NY County 2017). Thus, their present value at any given time is uncertain.

For these reasons, the court concludes that the record is devoid of any evidence on which a reasonable finder of fact could determine that Arius Libra was solvent at the time of the subject conveyances. All of the evidence in the record points to the fact that Arius Libra was a worthless company. To be sure, it had value to the respondents that looted its loan proceeds. But that did not make Arius Libra a solvent company with the means to pay back the Partners II loan.

C. Constructive Fraudulent Conveyances (DCL § 273)

Given the court's finding that Arius Libra was insolvent at the time of the subject conveyances, the court finds that the Bergstein Conveyances were constructively fraudulent because they were made without any consideration to Arius Libra. As discussed in the December 22 Decision, the only consideration that respondents identify relate to Gerova's obligations. While Gerova was a fraud, that fact is neither a necessary or sufficient predicate to Wimbledon's DCL claims. Even assuming Bergstein was not in on the Gerova fraud from the outset and that Gerova's financial obligations to Bergstein were bona fide, Bergstein had no right, under the guise of an "unwind", to use Arius Libra's assets to satisfy Gerova's obligations. In other words, even if Bergstein made an actual and legitimate investment in Gerova and was, like Wimbledon, defrauded by Galanis, that fact would not give Bergstein the right to prioritize recoupment of his investment by leveraging Wimbledon's Assets.

To be sure, even if Wimbledon somehow benefited from the unwind (a dubious assumption on this record), Partners II – the lender – did not. Partners II loaned money to Arius Libra, not to Gerova. It could not collect on that loan because the proceeds were used to satisfy Gerova's debts. Ergo, even if the Gerona unwind cannot be said to have been a fraud on Wimbledon, ***that fact has no bearing on whether Partners II was defrauded*** when the loan proceeds remitted to Arius Libra were used to repay Gerova's creditors. This is exactly what a

claim for constructive fraudulent conveyance looks like – causing an entity to become insolvent without providing any consideration ***to that entity*** for the transfers that caused the insolvency.

Taking the most favorable, if tortured, view for Bergstein by assuming that Arius Libra did receive some consideration for the conveyances, it would still not be enough to sanitize the conveyances. As an insider in Arius Libra (i.e., the person who actually controlled it), Bergstein was not permitted to pay himself before other creditors. To do so is per se bad faith under DCL § 273. "Transfers to a controlling shareholder, officer or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent." *CIT Group*, 25 AD3d at 303; *see Am. Media,* 135 AD3d at 478 ("An insider payment is not in good faith, regardless of whether or not it was paid on account of an antecedent debt."), citing *EAC*, 49 AD3d at 1007 ("The requirement of good faith is not fulfilled through preferential transfers of corporate funds to directors, officers or shareholders of a corporation that is, or later becomes, insolvent, in derogation of the rights of general creditors."). "While a creditor has every right to seek full payment of a debt despite the existence of other creditors, '[t]he rule that a debtor may generally favor one creditor over another [*see Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86, 90-91 (1st Dept 1993)] is not a license to engage in sham transactions in furtherance of that preference." *Stillwater*, 2017 WL 318658, at *8, quoting *CIT Group*, 25 AD3d at 302. Hence, under any plausible view of the facts, the Bergstein Conveyances were constructively fraudulent due to Arius Libra's insolvency, the absence of any consideration to Arius Libra, and the Bergstein's status as an Arius Libra insider.

The same is true with respect to the other four conveyances. WCAM, controlled by the Hallacs and Wellner, also supposedly was owed money by Gerova. But since the Hallacs and Wellner were Gerova insiders, this conveyance was made in bad faith. Similarly, Gerova

Management was controlled by Bergstein; the transfer is fraudulent for the same reason as the Bergstein Conveyances. In like manner, KJM was controlled by Jam (an Arius Libra director) and, therefore, was not entitled to receive payment preference based on Gerova's debts. Finally, ACM, as discussed in the contemporaneously issued decision, was controlled by Galanis. While ACM's conveyance was made in bad faith, as previously noted, judgment regarding this conveyance is issued against ACM in that decision and will not be awarded here.

D. Intentional Fraudulent Conveyances (DCL § 276)

In addition, the court finds the subject conveyances were intentionally fraudulent under DCL § 276, a claim which gives rise to reasonable attorneys' fees. *See Setters v AI Props. & Devs. Corp.*, 139 AD3d 492, 494 (1st Dept 2016).

As in the December 22 Decision, the court finds that Wimbledon has proven the existence of myriad badges of fraud, none of which were explained away by respondents. *See Bd. of Managers of Loft Space Condo. v SDS Leonard, LLC*, 142 AD3d 881, 883 (1st Dept 2016) ("Plaintiff alleged sufficient 'badges of fraud' to support [claim under DCL § 276], including '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; [and] the transferor's knowledge of the creditor's claim and the inability to pay it.'"), quoting *Wall St. Assocs*, 257 AD2d at 529; *see also 172 Van Duzer Realty Corp. v 878 Education, LLC*, 142 AD3d 814, 818 (1st Dept 2016). Since respondents were insiders, there was a close relationship between the parties to the alleged fraudulent transaction. The conveyances were not made to satisfy an Arius Libra debt, and as discussed, were made for inadequate consideration. They, thus, were not made in the usual course of business. The court also finds that all of the individual respondents, given their role with Gerova and Arius Libra, knew that Arius Libra had

no other means to pay of the Partner II loan. Moreover, at least with respect to Bergstein, there was a retention of control of the property after the conveyances since he was on both sides of the transactions. These badges of fraud leave no material question that the subject conveyances were made with the intent to defraud Partners II.

E. Liable Parties

Each of the respondents is liable for the amount of their respective conveyances.[8] *See* DCL § 278. That said, it should be noted that Jannol's contention that he bears no personal tort liability for conveyances he made using his California law firm is contrary to California law. *See Charness v Rand*, 2006 WL 241501, at *13 (Cal Ct App 2006), citing *T & R Foods, Inc. v Rose*, 47 CalApp4thSupp 1, 9 (1996) ("a professional person cannot avoid personal liability for his or her own malpractice or tortious conduct through incorporation ... since a tortfeasor is always liable for his or her own acts, even if performed on behalf of another."). Bergstein too is jointly and severally liable for all of the conveyances because the court pierces Arius Libra's corporate veil.

Delaware law governs because Arius Libra is a Delaware corporation. *See MMA Meadows at Green Tree, LLC v Millrun Apts. LLC*, 130 AD3d 529, 530 (1st Dept 2015); *Flame S.A. v Worldlink Int'l (Holding) Ltd.*, 107 AD3d 436, 438 (1st Dept 2013). "To state a 'veil-piercing claim' [under Delaware law], the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created **a sham entity designed to defraud investors and creditors**." *Crosse v BCBSD, Inc.*, 836 A2d 492, 497 (Del 2003) (emphasis added).

[8] Where only one transfer was made, the court uses that date to compute pre-judgment interest. Where multiple transfers were made, the court selects a reasonable intermediate date. CPLR 5001(b); *see Solow Mgmt. Corp. v Tanger*, 43 AD3d 691 (1st Dept 2007).

"Delaware takes corporate formalities seriously." *Base Optics Inc. v Liu*, 2015 WL 3491495, at *23 (Del Ch 2015), citing *Wallace v Wood*, 752 A2d 1175, 1183 (Del Ch 1999). "[P]ersuading a Delaware court to pierce the corporate veil is a difficult task. Absent compelling cause, a court will not disregard the corporate form or otherwise disturb the legal attributes, such as limited liability, of a corporation." *Midland Interiors, Inc. v Burleigh*, 2006 WL 4782237, at *3 (Del Ch 2003) (quotation marks omitted). Delaware "courts have only been persuaded to pierce the corporate veil after substantial consideration of the shareholder-owner's disregard of the separate corporate fiction and the degree of injustice impressed on the litigants by recognition of the corporate entity." *Crosse*, 836 A2d at 497. "Determining whether to [pierce the corporate veil] requires a fact intensive inquiry, which may consider the following factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; or (5) whether, in general, the company simply functioned as a facade for the controlling shareholder." *Winner Acceptance Corp. v Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del Ch 2008).

There is no question that Arius Libra was used by Bergstein as "a sham entity designed to defraud investors [e.g., Wimbledon] and creditors [e.g., Partners II]." *See Crosse*, 836 A2d at 497; *cf. NPR, LLC v Met Fin Mgmt., Inc.*, 63 AD3d 1128, 1130 (2d Dept 2009) (applying New York veil piercing law to pierce corporate veil on DCL claim). To pay himself and the other insiders, he levered the Assets to obtain a loan from Partners II and then paid himself and the others what was supposedly owed to them by Gerova. This was done at the expense of Wimbledon, a shareholder, and Partners II, the primary creditor. It is hard to fathom a more extreme abuse of the corporate form. As the perpetrator of the fraud, Bergstein is not entitled to

rely on the protections of corporate form; he is personally liable for all of the fraudulent transfers made by Arius Libra.

IV. Bergstein's Cross-Petition

Bergstein correctly contends that since Arius Libra is a Delaware corporation, its internal affairs are governed by Delaware law. *See Hart v Gen. Motors Corp.*, 129 AD2d 179, 185 (1st Dept 1987). Under Delaware law, an equitable accounting may not be demanded until a predicate breach of fiduciary duty is established. *See Gallagher v Long*, 2013 WL 718773, at *4 (Del Ch 2013) ("any request for an accounting must be based on a successful claim for breach of fiduciary duty"), *aff'd*, 65 A3d 616 (Del 2013). Bergstein has not alleged, let alone proven, that Wimbledon breached any fiduciary duties to him. On the contrary, it is Bergstein who is alleged to have breached his fiduciary duties to Wimbledon during the time he controlled Arius Libra. Ergo, Bergstein is not entitled to an accounting. In any event, as discussed earlier, Bergstein's control over Arius Libra and the Assets at the time of the subject conveyances precludes him from complaining that he needs Wimbledon to account for the value of the Assets at that time.

To the extent Bergstein suggests that he should not be held liable because the Judgment has been satisfied, Wimbledon's counsel has affirmed that it has not, and Bergstein proffers no evidence to the contrary. Indeed, the total judgment issued herein in less than $5 million, which is more than $1.5 million less than the amount of the Judgment.

V. Sulmeyer's Cross-Petition

As discussed in the August 19 Decision (*see id.* at 7-8), Sulmeyer contends that Bergstein owes it more than $1 million for work performed in five bankruptcy proceedings in California (the California Bankruptcy Cases) between December 2011 and October 2014. Sulmeyer claims in its cross-petition (Dkt. 293), filed on August 22, 2016, that it is entitled to priority over

Wimbledon due to the existence of an attorneys' lien and should be paid first from the funds attached by the August 19 Decision. Wimbledon filed an answer to Sulmeyer's cross-petition on January 26, 2017 and opposes the claim. *See* Dkt. 667.

Sulmeyer's representation of Bergstein is governed by a letter retainer agreement dated December 13, 2011, which is governed by California law (the Retainer Agreement). *See* Dkt. 294 at 1. The Retainer Agreement makes clear that the scope of the representation is limited to the California Bankruptcy Cases. *See id.* at 2. It provides that Sulmeyer had "not been asked nor have we agreed to represent [Bergstein] in any litigation or other contested proceeding, and no chapter 11 or other reorganization options are being contemplated", and that "[t]o the extent that we are asked to do anything more than that described above, we will need to discuss new arrangements and possibly an additional cash retainer." *See id.* at 3. The Retainer Agreement further states that Sulmeyer "is being engaged by David Bergstein" and not "any other entity or person." *See id.* at 3. Paragraph 10 of the Retainer Agreement, titled "Lien", provides:

> You hereby grant us a lien on any and all claims or causes of action, and proceeds of such claims or causes **that are the subject of our representation under this Agreement.** Our lien will be for any and all sums owing to us. The lien will attach to any recovery you may obtain, whether by arbitration award, judgment, settlement or otherwise.

Id. at 7 (emphasis added).

In the summer of 2014, Sulmeyer began preparing motions to withdraw as counsel for Bergstein in the California Bankruptcy Cases. In conjunction with the termination of Sulmeyer's representation, Bergstein executed a $1.5 million Promissory Note dated July 15, 2014 (the Note), in favor of Sulmeyer, which purports to represent the amount he owed Sulmeyer for unpaid legal work. Paragraph 2 of the Note requires Bergstein to pay to Sulmeyer, *inter alia*, 25% of amounts recovered from Aramid. *See* Dkt. 295. Sulmeyer's motions to withdraw were

granted in late October and early November of 2014. *See* Dkt. 670 at 2. By letter dated November 17, 2014, Sulmeyer wrote to Bergstein that it no longer represented him in "any pending legal matter." *See id.* at 1. At the time of its withdrawal, Sulmeyer had been paid $1.4 million. "Sulmeyer received nearly all of these payments from [Graybox,] the entity through which [as explained herein and in the August 19 Decision] Bergstein funneled millions of dollars of proceeds from Partners II's 'loan' for his personal benefit." Dkt. 668 at 12.

Prior to Sulmeyer's withdrawal, "Aramid and two of its affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Aramid Bankruptcy")." *Id.* at 13. In August 2014, Bergstein reached a $6 million settlement with Aramid, which was approved by the New York bankruptcy court in December 2014. It is undisputed that "Sulmeyer did not represent Bergstein or any of his related entities in the Aramid Bankruptcy", "nor did it represent Bergstein or any of his related entities in connection with the settlement." *Id.* Bergstein was represented by another law firm. After the settlement with Aramid was agreed to, but prior to it being approved by the bankruptcy court, in September 2014, Bergstein and Sulmeyer, among others, entered into an Allocation Agreement (Dkt. 298) in which Sulmeyer agreed to reduce its entitlement to the Aramid settlement under the Note from $1.5 million to $825,000.

The parties agree that California law governs the existence of Sulmeyer's lien, while New York law governs payment priority. *See* Dkt. 668 at 19 n.4. This is significant because California and New York law take different approaches to attorney liens (though both approaches lead to the same conclusion in this case). California's attorney lien law is exclusively a matter of contract, while New York's attorney lien law is concerned only with who represented the client in the lawsuit. Under California law, "[u]nlike other liens, 'an attorney's

lien is not created by the mere fact that an attorney has performed services in a case.'" *Mojtahedi v Vargas*, 228 CalApp4th 974, 977 (2014), quoting *Carroll v Interstate Brands Corp.*, 99 CalApp4th 1168, 1173 (2002). Rather, "[a]n attorney's lien is created only by an attorney fee contract with an express provision regarding the lien or by implication in a retainer agreement that provides the attorney will be paid for services rendered from the judgment itself." *Mojtahedi*, 228 CalApp4th at 977; *see generally S. Cal. Gas Co. v Flannery*, 5 CalApp5th 476, 495 (2016), *aff'd as mod. on other grounds*, 232 CalApp4th 477 (2016). New York law, in contrast, limits attorney's lien to actions in which the attorney represented the client; "[i]t is well settled that only the attorney of record in a particular action is entitled to a charging lien pursuant to Judiciary Law § 475." *Hoganwillig, PLLC v Hendel*, 126 AD3d 1311 (4th Dept 2015), citing *Rodriguez v City of New York*, 66 NY2d 825, 827 (1985); *see Cabukyuksel v Ascot Props., LLC*, 99 AD3d 405, 407 (1st Dept 2012), citing *Weg & Myers, P.C. v Banesto Banking Corp.*, 175 AD2d 65, 66 (1st Dept 1991) (§ 475 "grants a charging lien to an attorney only when there has been an appearance by that attorney in an action which creates or is the source of the funds against which the lien is asserted.").

Sulmeyer's cross-petition is denied. Wimbledon does not dispute that if the Aramid settlement occurred in one of the California Bankruptcy Cases, in which Sulmeyer actually represented Bergstein, then Sulmeyer may well have had a valid lien. However, Sulmeyer did not represent Bergstein in the Aramid Bankruptcy, nor does the Retainer Agreement provide for a lien over a settlement or judgment in the Aramid Bankruptcy. Moreover, the Retainer Agreement provides that Sulmeyer's lien is limited to proceeds of "claims or causes that are the subject of our representation under this Agreement." *See* Dkt. 291 at 7. The Retainer Agreement is equally clear that the scope of such representation was limited to the California

Bankruptcy Cases. *See id.* at 2-3. It is undisputed that the Retainer Agreement did not cover the Aramid Bankruptcy, and it also is undisputed that Sulmeyer did not represent Bergstein in the Aramid Bankruptcy. Also, neither the Note nor the Allocation Agreement contain an agreement for Sulmeyer to have a lien on the Aramid Bankruptcy settlement funds. While they evidence a legal entitlement to such funds, unlike the Retainer Agreement, they do not purport to grant Sulmeyer a lien. Hence, under both New York and California law, Sulmeyer has no right to an attorneys' lien on settlement proceeds obtained in the Aramid Bankruptcy.

The cases cited by Sulmeyer are not to the contrary. They do, to be sure, suggest that a claim settled in a subsequent action that relates to a prior action may give rise to attorneys' lien where the attorney did not represent the client in the subsequent action. But in four of the cases, *In re Popov*, 2007 WL 1970102 (ND Cal 2007), *In re Bush*, 356 BR 28 (Bankr SD Cal 2006), *In re Bouzas*, 294 BR 318 (Bankr ND Cal 2003), and *In re Pacific Far East Line, Inc.*, 654 F2d 664 (9th Cir 1981), "the attorneys in question had obtained judgments on behalf of their clients in underlying actions, but were forced to execute on their respective attorney's liens in bankruptcy court **after their respective clients** filed for bankruptcy protection." Dkt. 668 at 23 (emphasis added). Here, in contrast, it was Bergstein's adversary (Aramid), not Bergstein (i.e., the client) that filed for bankruptcy. The question of whether an attorney can enforce his lien in the client's bankruptcy proceeding has nothing to do with the issues in this case. That being said, it is worth noting that *In re Bush* reiterates that "California law provides that the attorney's charging lien can be created only by contract" and that "[t]he scope of the lien must therefore be determined by the language in the contract." *Id.* at 35; *see also In re Bouzas*, 294 BR at 321-22 ("Under California law, the only way an attorney may acquire an attorney's charging lien is by contract. No California statute creates such a lien nor do California courts recognize a common law or

equitable lien."). As discussed, the scope of the Retainer Agreement here does not cover the Aramid Bankruptcy. If it had been the parties' intent to grant Sulmeyer a lien over proceeds recovered in the Aramid Bankruptcy, the Allocation Agreement, which specially governs Sulmeyer's rights to funds Bergstein recovers in the Aramid Bankruptcy, would have so provided. It does not.[9]

To be sure, Sulmeyer may well be owed significant legal fees by Bergstein (an issue on which the court will not opine). Nonetheless, Sulmeyer has no lien on the Aramid settlement because it is beyond the scope of the Retainer Agreement and because Sulmeyer did not represent Bergstein in the Aramid Bankruptcy or play any role in negotiating the settlement. The court will not opine on the parties' tangential arguments, which include, as noted, the amount Bergstein owes Sulmeyer. Nor will the court opine on Wimbledon's claim that Sulmeyer transferred its rights to Bergstein's unpaid legal fees to a collection firm, as that issue is moot.[10] Accordingly, it is

ORDERED that Wimbledon's petition is granted to the extent set forth herein, and the Clerk is directed to enter judgment in favor of Wimbledon and against: (1) Graybox and

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[9] Also not on point is *Istim, Inc. v Chem. Bank*, 78 NY2d 342 (1991), because that case concerned a "right to a settlement fund from a terminated Illinois Federal court action in which neither party was a litigant" and which only decided whether New York or Illinois law should be applied. *See id.* at 344-45. *Istim*, in fact, remanded the "determination of which of the parties' valid claims has priority to the settlement fund." *See id.* at 345. *Istim* does not actually contain a relevant controlling holding.

[10] While this may not actually have occurred, the collection firm represented to a California court that Sulmeyer did, in fact, transfer its claims. *Compare* Dkt. 677 at 1 (alleging in complaint that Sulmeyer assigned claims to collection firm), *with* Dkt. 686 (contingency fee agreement lacking assignment language). Sulmeyer is directed to promptly clarify this issue with the California court and ensure that all representations to that court are correct, and e-file an affidavit confirming that it has done so on NYSCEF.

Bergstein, jointly and severally, in the amount of $500,000 plus 9% pre-judgment interest from September 1, 2011 to the date judgment is entered; (2) Iskra and Bergstein, jointly and severally, in the amount of $150,000 plus 9% pre-judgment interest from October 24, 2011 to the date judgment is entered; (3) Jannol and Bergstein, jointly and severally, in the amount of $2,209,897 plus 9% pre-judgment interest from October 1, 2011 to the date judgment is entered; (4) the Weingarten Firm and Bergstein, jointly and severally, in the amount of $200,000 plus 9% pre-judgment interest from October 31, 2011 to the date judgment is entered; (5) WCAM and Bergstein, jointly and severally, in the amount of $900,000 plus 9% pre-judgment interest from August 3, 2011 to the date judgment is entered; (6) Gerova Management and Bergstein, jointly and severally, in the amount of $500,000 plus 9% pre-judgment interest from September 1, 2011 to the date judgment is entered; (7) KJM and Bergstein, jointly and severally, in the amount of $400,000 plus 9% pre-judgment interest from September 1, 2011 to the date judgment is entered; and (8) Bergstein in the amount of $700,000 plus 9% pre-judgment interest from August 3, 2011 to the date judgment is entered; and it is further

ORDERED that the cross-petitions by Sulmeyer and Bergstein are denied with prejudice, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the amount of reasonable attorneys' fees owed to Wimbledon by respondents (except for ACM) by virtue of Wimbledon prevailing on its claims under DCL § 276 are hereby severed and referred to a Special Referee to hear and report; and it is further

ORDERED that within 7 days of the entry of this order on NYSCEF, Wimbledon shall serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the

calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date.

Dated: July 17, 2017

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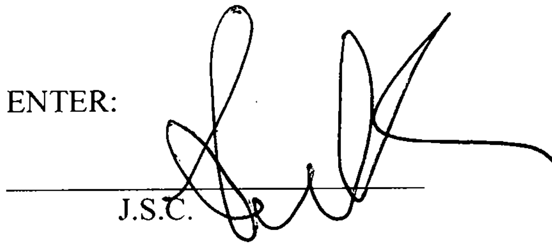

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C