

Avilon Auto. Group v Leontiev
2020 NY Slip Op 30837(U)
March 17, 2020
Supreme Court, New York County
Docket Number: 656007/2016
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**AVILON AUTOMOTIVE GROUP and
KAREN AVAGUMYAN,**

Plaintiffs,

- against -

**SERGEY LEONTIEV, WONDERWORKS
INVESTMENTS LIMITED, LEGION TRUST,
and SOUTHPAC TRUST INTERNATIONAL
INC. AS TRUSTEE OF LEGION TRUST,**

Defendants.

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O. PETER SHERWOOD, J.:

Under motion sequences 15 through 19, defendants individually move to dismiss the plaintiffs' complaint. Plaintiffs submit a consolidated opposition and defendants submit a consolidated reply. For the following reasons, the motions to dismiss of defendants Wonderworks, Legion Trust, Leonid Leontiev, and Vadim Kolotnikov shall be granted in their entirety and the motion of defendant Sergey Kolotnikov's granted in part.

I. BACKGROUND

As these actions are all motions to dismiss, they are taken from the complaint (Second Amended Complaint [NYSCEF Doc. No. 312] [hereinafter "Compl."]). Defendant Sergey Leontiev ("Sergey") and his business partner Alexander Zheleznyak ("Zheleznyak") are Russian nationals who own various Russian business interests organized under an umbrella entity known as Financial Group Life (Compl. ¶¶ 2, 17, 27). Together, Sergey and Zheleznyak owned a large Russian commercial bank called Probusinessbank (PRBB) as well as various shell companies including Ambika Investments Limited ("Ambika"), Vennop Trading Limited ("Vennop"), and ZAO Financial Group "Life" ("FG Life") (collectively, the "Shell Companies" or "Borrowers") (*id.* ¶¶ 2, 4, 29-30). Acting as Sergey's business partner, Zheleznyak began to raise funds for the Shell Companies with the intention of taking those funds via high rate loans that could be rolled over yearly (*id.* ¶¶ 3, 29-30, 32). Zheleznyak contacted his personal friends Alexander Varshavsky ("Varshavsky"), President of plaintiff Avilon Automotive Group ("Avilon"), and plaintiff Karen Avagumyan ("Avagumyan"), and borrowed millions of dollars from both plaintiffs, formalized

through loan agreements and promissory notes involving the Shell Companies (*id.* ¶¶ 1, 4, 15, 35). Avilon loaned approximately \$19.9 million and \$6.625 to Ambika in 2008 and 2011 respectively. Additionally, in 2010, a predecessor entity to Avilon loaned Ambika \$12.25 million (*id.* ¶ 35). Avagumyan loaned approximately \$4.75 million to Vennop and \$21.2 million to FG Life between late 2014 and mid-2015 pursuant to a series of one-year promissory notes (*id.*). Through these high interest rate loans, yielding interest at 12 – 14% (*id.* ¶ 35) which plaintiffs regularly rolled over at the end of their one year terms (*id.* ¶ 39), plaintiffs were able to participate in Sergey’s “highly successful and reliable trading methodology” (*id.* ¶ 4).

Nevertheless, the complaint alleges that unbeknownst to plaintiffs, Sergey transferred assets, including the Loaned Funds, from the Shell Companies to other entities he controlled, including his personal investment vehicle, defendant Wonderworks (*id.* ¶¶ 5, 41, 48–49). Sergey then made investments using these looted assets, taking no action to repay the Debt owed to plaintiffs (*id.* ¶ 6). Instead, Sergey left the Shell Companies insolvent and unable to repay their Debts (*id.* ¶¶ 6, 42–47). In August 2015, Probusinessbank collapsed and was taken over by the Russian Central Bank, raising concern among plaintiffs as to their investments and causing them to seek assurances from Sergey that any outstanding Debt would be repaid (*id.* ¶¶ 7, 53–54). When Varshavsky contacted Zheleznyak, he was assured that the Debt would be repaid. Varshavsky also organized an August 2015 meeting in Moscow between himself, Varshavsky and Sergey (*id.* ¶¶ 8, 55–56). At that meeting, Sergey repeatedly admitted he controlled the Loaned Funds and promised to repay the Debt owed to plaintiffs, agreeing to material terms for payment (*id.* ¶¶ 9, 57). The following week, on August 21, Mr. Varshavsky, Sergey Leontiev, and Mr. Zheleznyak met in London to structure terms of repayment, a discussion which defendant Sergey secretly recorded (*id.* ¶¶ 60–61). At the London meeting, Sergey again acknowledged control of the Loaned Funds and gave assurances that it would be repaid, saying “you can be certain that we will perform our obligation to you” (*id.* ¶ 62). In September 2015, Sergey repaid approximately \$17 million owed to Avilon through another shell company controlled by himself and Mr. Zheleznyak, Valkera Investments Limited (“Valkera”) (*id.* ¶ 69). This repayment was formalized as consideration for Avilon’s assignment to Valkera of the 2010 Loan from Avilon to Ambika and corresponded to \$12.25 million principal of the 2010 Loan plus interest (*id.*). After this payment, Sergey’s and Mr. Zheleznyak’s legal counsel continued to communicate with Avilon’s lawyers concerning the parties’ efforts to structure repayment of the remaining Debt (*id.* ¶ 72).

Although Sergey provided assurances of repayment to plaintiffs, in September 2015 he secretly directed the transfer of the Loaned Funds and other assets from Wonderworks, with the help of defendant Vadim Kolotnikov (“Kolotnikov”), to a newly-created offshore trust in the Cook Islands (*id.* ¶¶ 11, 73–75). This offshore trust was designed to shield Sergey’s assets from creditors, and his father, defendant Leonid Leontiev, was appointed the trust’s Protector and contingent beneficiary (*id.* ¶¶ 12, 89). After transferring the Loaned Funds to the trust, Sergey renounced his agreement to repay the Debt, resulting in this action (*id.* ¶¶ 13–14, 85).

As against all defendants, plaintiffs allege fraudulent conveyance. As against defendant Sergey Leontiev, plaintiffs allege unjust enrichment, breach of contract, deceit (fraud), and conspiracy. As against defendant Wonderworks, plaintiffs allege unjust enrichment and conspiracy. As against defendant Leonid, plaintiffs allege unjust enrichment. As against defendant Kolotnikov, plaintiffs allege unjust enrichment and conspiracy. As against the Trust Defendants (Southpac Trust International and Legion Trust), plaintiffs allege unjust enrichment.

II. LEGAL STANDARD

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff’s claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries,

McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,'" (*id.* at 84-85).

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

III. ARGUMENTS

A. Defendants' Arguments Supporting Dismissal

As noted above, each of the five defendants has filed a separate motion to dismiss. Because the same causes of action are alleged against multiple defendants, some of the same arguments are made multiple times. The court will describe the arguments made by Sergey in detail and will not describe similar arguments made by the other defendants in section III A of this decision and order. In reaching its decision the court has considered all of the briefs submitted.

1. Arguments of Defendant Sergey Leontiev

a. Unjust Enrichment

On his motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a claim defendant Sergey asserts that plaintiffs cannot maintain an unjust enrichment claim against him because valid and enforceable agreements govern their claim (Sergey Br. at 7 [NYSCEF Doc. No. 342]); *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Feigen v Advance Capital Mgmt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]). He argues that contracts between plaintiffs and the "non-party Borrowers" (i.e., the three Shell Companies) govern repayment of the Alleged Loaned Funds and set forth relevant terms such as the principal amounts, interest rates,

repayment dates, obligors, and, where applicable, guarantors (Sergey Br. at 1–2, 7; Weigel Aff. Ex. 2 [Promissory Notes] [NYSCEF Doc. No. 345]; Weigel Aff. Ex. 3 [2008 and 2011 Loan Agreements] [NYSCEF Doc. No. 346]). The contracts comprehensively govern the subject matter of this action and, consequently, plaintiffs cannot seek repayment of the Alleged Loan Funds through quasi - contract even against third parties (Sergey Br. at 7–8; *see, e.g., Melcher v Apollo Med. Fund Mgt. LLC*, 105 AD3d 15, 27-28 [1st Dept 2013]; *Maor v Blu Sand Int'l Inc.*, 143 AD3d 579 [1st Dept 2016]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *RXR WWP Owner LLC v WWP Sponsor, LLC*, 132 AD3d 467, 468 [1st Dept 2015]; *3839 Holdings LLC v Farnsworth*, 2017 WL 5649812, at *9 [Sup Ct New York County 2017]). Defendant argues any argument that plaintiffs' unjust enrichment claim is premised on conduct not governed by the contracts is unavailing because the contracts plainly cover the subject matter of plaintiffs' action to recover the millions of dollars loaned and quasi-contractual relief is unavailable (Sergey Br. at 8; Compl. ¶ 1; *see e.g., Second Ave. 1355 Realty LLC v 1355 Second Owner LLC*, 2017 WL 2289323, at *9 [Sup Ct New York County 2017]; *Valentini v Citigroup, Inc.*, 837 FSupp2d 304, 331 [SDNY 2011]).

Defendant next argues that plaintiffs fail to state a claim for unjust enrichment as plaintiffs offer nothing more than conclusory allegations that Sergey took possession of and benefitted from the Alleged Loan Funds (Compl. ¶¶ 99–100). It fails to allege the requisite “sufficiently close relationship” with Sergey (*id.*; *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516–18 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 183 [2011]). Defendant adds that because the complaint pleads no details regarding the alleged transfers, such as which Borrower transferred which funds, when, or to whom, the complaint falls short of sufficiently pleading that proceeds from the Loaned Funds came into Sergey Leontiev's possession or that he was enriched at plaintiffs' expense (Sergey Br. at 9; *see Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332, 333 [1st Dept 2006]; *Aymes v Gateway Demolition, Inc.*, 30 AD3d 196 [1st Dept 2006]). Plaintiffs were well compensated for assuming risks of investing under the contracts, which provided no limitations on the transfer or use of funds by the Borrowers, and that plaintiffs cannot not insert limitations retroactively by seeking quasi-contractual relief (*see, e.g., Murray Schwartz Enters. Emp. Pension Plan Tr. v Four Corners Prods., Inc.*, 293 AD2d 388, 389 [1st Dept 2002]). Moreover, plaintiffs fail to plead a sufficiently close relationship to defendant to show that any hypothetical enrichment was unjust (*Georgia Malone*, 19 NY3d at 516–18; *Mandarin Trading*, 16

NY3d at 182–83). There is no allegation that defendant had any knowledge of or contact with plaintiffs prior to August 2015, nor that defendant had “dealings” with plaintiffs (Sergey Br. at 10–11). Consequently, plaintiffs cannot demonstrate a relationship between the parties that could have caused reliance or inducement and the unjust enrichment claim must fail as a matter of law (*id.*; see *One Madison FM, LLC v 18 East 23rd St. Realty Co.*, 2013 WL 582256, at *2 [Sup Ct New York County 2013]).

b. Breach of Contract

Defendant next argues that plaintiffs’ breach of contract claim fails as a matter of law because the complaint does not adequately plead plaintiffs and defendant formed a valid and enforceable agreement at the London Settlement Negotiation or at any other time (Sergey Br. at 11). Defendant argues that plaintiffs were not present, identified, or mentioned at that meeting and that Varshavsky, who attended and sought to impose an obligation on defendant, conceded in a related federal action that defendant owes Varshavsky nothing “in [his] personal capacity with respect to the [Alleged Loan Funds]” (*id.*; Weigel Aff. Ex. 6 [March 1, 2017 SDNY Judgment] [NYSCEF Doc. No. 349]). Defendant further argues that the Statute of Frauds prevents plaintiffs from inventing a binding oral agreement (Sergey Br. at 11). Defendant argues that a legally enforceable agreement requires offer, acceptance, intention to be bound, and agreement on all essential terms. Neither defendant nor Varshavsky expressed an intent to be bound any proposition discussed at the London Settlement Negotiation (*id.* at 11–12; *Chitty on Contracts* [33rd ed. 2018] at 2-001). Defendant argues that, during this negotiation, he explicitly made the possibility of a future agreement contingent on further negotiations among lawyers and, in turn Varshavsky stated it was fundamentally important to receive essential guarantees (Sergey Br. at 12; Compl. Ex. B [Transcription of Recordings] [NYSCEF Doc. No. 314]). Defendant further argues that plaintiffs’ allegations fail to show any offer was made or accepted by attendees of the London Negotiation. Further, the London Transcript makes no mention of either plaintiff (Sergey Br. at 12). The purported oral promise by defendant to answer for Zheleznyak’s debt was no more than a “special promise to answer[] for the debt . . . of another” which must be in writing (Sergey Br. at 13; see Statute of Frauds 1677 c.3 s.4; *Actionstrength Ltd (t/u Vital Resources) v Int’l Glass Engineering IN.GLENS.P.A.*, [2001] EWCA Civ 1477 ¶ 43; see also N.Y. Gen. Oblig. Law § 5-701(a)(2); *PSI Int’l, Inc. v Ottimo*, 272 AD2d 279, 280 [1st Dept 2000]). Plaintiffs attempt to conjure oral indemnity out of the London Negotiation based on English law, but an indemnity requires the

parties to agree upon a material change in the terms of the underlying contract and, while materially different terms for a repayment schedule were proposed, such terms could not have been verbally confirmed as neither Aylon nor Avagumyan were mentioned at the meeting and the contracts mandate that amendments be in writing and signed (Sergey Br. at 13–14; Weigel Aff. Ex., 3 at 2, 19; *see Erith Holdings Ltd v Murphy*, [2017] EWHC 1364 [TCC] ¶¶ 85–90; *Harburg India Rubber Comb Co v Martin*, [1902] 1 KB 778, 784; *see also Mercator Corp. v Windhorst*, 159 FSupp3d 463, 471 [SDNY 2016]).

c. Fraud

The fraud claim fails as a matter of law because the complaint pleads no factual misrepresentation by defendant, on which plaintiffs intended to, and justifiably did, rely on to their detriment (Sergey Br. at 14–15; *Sokolow, Dunaud, Mercadier & Carreras, LLP v Lacher*, 299 AD2d 64, 70 [1st Dept 2002]). Plaintiffs' accusation, that defendant "false[ly]" "promised Mr. Varshavsky that he would repay the Debt," is a conclusory allegation of unfulfilled promissory statements that are not actionable (Sergey Br. at 15; Compl. ¶¶ 134–35; *P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385 [1st Dept 1994]; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976]; *see also Capricorn Inv'rs III, L.P. v Coolbrands Int'l, Inc.*, 66 AD3d 409 [1st Dept 2009]; *Stuart Lipsky, P.C. v Price*, 2015 AD2d 102, 103 [1st Dept 1995]). Plaintiffs' conclusory statement of defendant's intent does not adequately plead details of scienter (Sergey Br. at 16; Compl. ¶¶ 135–36; *see Zannett Lombardier, Ltd. v Maslow*, 29 AD3d 495–96 [1st Dept 2006]). Defendant could not have sought to deceive parties absent from the London Negotiation, and his demand for lawyers to first finalize any deal belies any notion of an intent to deceive (Sergey Br. at 16; Compl. ¶ 68). Defendant asserts that the record belies any claim that plaintiffs could have reasonably relied on oral statements made in their absence (Sergey Br. at 16; *Johnson v Cestone*, 162 AD3d 526–27 [1st Dept 2018]; *see also Emergent Capital Inv. Mgmt., LLC v Stonepath Grp., Inc.*, 343 F3d 189, 196 [2d Cir 2003]; *see, e.g., Marine Midland Bank, N.A. v Green*, 261 AD2d 340, 341 [1st Dept 1999]; *Unique Goals Int'l, Ltd. v Finskiy*, 2018 WL 5634326, at *7 [Sup Ct New York County 2018]).

d. Conspiracy

Defendant next argues that plaintiffs' conspiracy claims fail as a matter of law. He incorporates, by reference, the arguments made in defendant Vadim Kolotnikov's memorandum of law in support of his motion to dismiss (Sergey Br. at 17).

e. Fraudulent Conveyance

The fraudulent conveyance claim fails as a matter of law as only a creditor has standing to bring it under New York's Debtor and Creditor Law ("DCL") (see DCL §§ 270, 273, 276; see also, e.g., *Paragon v Paragon*, 164 AD3d 1460, 1461–62 [1st Dept 2018]; *Martes v USLIFE Corp.*, 927 F Supp 146, 148 [SDNY 1996]). Plaintiffs are not defendant's creditors and this reason alone requires dismissal of the claim for lack of standing (Sergey Br. at 17–18). The DCL only confers standing on plaintiffs if they were creditors at the time of the alleged fraudulent conveyances or are defendant's present or future creditors (DCL §§ 273, 276). Defendant is not a signatory to the governing contracts or a guarantor of the Alleged Loaned Funds and has no legal responsibility for repayment (Sergey Br. at 18). Defendant also argues that plaintiffs' allegations "on information and belief" that the Funds were transferred through Shell Companies owned and controlled by defendant and Zheleznyak does not make them defendant's creditors (see *Harris v Coleman*, 863 FSupp2d 336, 343 [SDNY 2012]). Plaintiffs plead no facts about the relationship among themselves, defendant, and the Borrowers to suggest that defendant should be held personally responsible for the Borrowers' debts and, consequently, the fraudulent conveyance claim must fail as a matter of law (Sergey Br. at 18–19; see *Paragon*, 164 AD3d at 1461–62).

Defendant further argues that plaintiffs fail to state a fraudulent conveyance claim because plaintiffs do not specify which purported transfer was allegedly fraudulent, when it occurred, whether it was made with consideration, or that it rendered defendant insolvent (Sergey Br. at 19; see *Syllman v Calleo Dev. Corp.*, 290 AD2d 209, 210 [1st Dept 2002]; *3839 Holdings*, 2017 WL 5649812, at *10). Defendant argues that plaintiff's section 276 claim is not pleaded with the particularity required by CPLR § 3016(b) as the complaint lacks particularized factual assertions supporting an inference of intent to defraud. It relies on allegations on information and belief without revealing the source of information (Sergey Br. at 17, 19; Compl. ¶¶ 73–75, 78–79; CPLR § 3016(b); *RTN Networks v Telco Grp., Inc.*, 126 AD3d 477, 478 [1st Dept 2015]; *Jaliman v D.H. Blair & Co.*, 105 AD3d 646, 647 [1st Dept 2013]; *Wildman & Bernhardt Constr., Inc. v BPM Assocs., LP*, 273 AD2d 38, 39 [1st Dept 2000]; *Innovative Custom Brands, Inc. v Minor*, 2016 WL 308805, at *2 [SDNY 2016]; see also *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *3839 Holdings*, 2017 WL 5649812, at *9–11). Defendant argues that plaintiffs' allegations make no sense as defendant never possessed the Alleged Loaned Funds and could not have transferred them; instead, the Borrowers did (Sergey Br. at 20). Defendant further

argues that plaintiffs' section 273 claim lacks factual support regarding the consideration for the alleged conveyance, or defendant's supposed insolvency, as plaintiffs' allegations that a purported transfer "into the Legion Trust through Wonderworks" rendered defendant "and/or Wonderworks insolvent and was made without fair consideration" was conclusory and devoid of factual support (Sergey Br. at 20–21; Compl. ¶¶ 80, 125; *see, e.g., RTN Networks*, 126 AD3d at 478; *NTL Capital, LLC v Right Track Recording, LLC*, 73 AD3d 410, 411–12 [1st Dept 2010]).

2. Arguments of Defendant Wonderworks

a. Unjust Enrichment

As to the unjust enrichment claim against it, Wonderworks makes essentially the same arguments being advanced by Sergey. Specifically, plaintiffs have failed to state a claim because 1) there are written agreements, promissory notes and guarantees governing the loans (*see WW Br. at 6; IDT Corp.*, 12 NY 3d at 142); and 2) the complaint does not allege a sufficiently close relationship between plaintiff and Wonderworks as the complaint does not allege any direct dealings between the parties nor the existence of an actual, substantive relationship, and, instead, alleges that Wonderworks received the funds at issue from the Shell Companies, not from plaintiffs (WW Br. at 7; Compl. ¶ 48; *In re Motel 6 Sec. Litig.*, No. 93 Civ. 2183, 1997 WL 154011, at *7 [SDNY 1997]). Further, the complaint does not allege that plaintiffs performed services for defendant resulting in defendant's unjust enrichment at plaintiff's expense (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002]). In absence of such allegations plaintiffs are merely alleging that defendant received a benefit from plaintiffs' activities which if true, is insufficient for an unjust enrichment claim (*id.* at 108; *Clark v Daby*, 300 AD2d 732 [3d Dept 2002]).

b. Fraudulent Conveyance

Defendant next argues that plaintiffs' cause of action for fraudulent conveyance fails because the complaint does not adequately plead facts constituting either constructive or intentional fraudulent Wonderworks, similarly to defendant Sergey Leontiev, argues that plaintiffs lack standing to challenge defendant because they are not creditors of the defendant (*id.*; *see Martes*, 927 F Supp at 148; *Grace Plaza of Great Neck, Inc. v Heitzler*, 2 AD3d 780 [2d Dept 2003]; *see also* N.Y. Debtor & Creditor Law ("DCL") §§ 273, 276). Moreover, because plaintiffs have failed to allege that defendant Sergey personally signed the loan agreements or agreed to personally guarantee repayment, there can be no liability for any transfers to or from Wonderworks

(WW Br. at 9). Defendant is not a signatory to the loan agreements and, therefore, plaintiffs are not creditors of defendant and do not have standing to object to the transfer of funds from defendant to the Trust Defendants (*id.*; Compl. ¶¶ 125–26; *See Eberhard v Marcu*, 530 F3d 122, 129 [2d Cir 2008]).

Plaintiffs cannot assert a claim for constructive fraudulent conveyance against Wonderworks because their consideration and insolvency allegations are insufficient and contradicted by their own allegations (WW Br. at 10). Plaintiffs do not allege facts establishing that the transfer from defendant to the Trust Defendants was made without consideration. Instead, plaintiffs make conclusory allegations that this transfer rendered defendants Sergey and Wonderworks insolvent and without fair consideration (*id.*; Compl. ¶ 125). Such allegations are speculative and fail to state a cause of action pursuant to Debtor and Creditor Law § 273 (*Riback v Margulis*, 842 NYS2d 54, 55 [2d Dept 2007]; *see also Washington 1998, Inc. v Reles*, 255 AD2d 745, 747 [3d Dept 1998]). Because it allegedly held the assets not for its own purposes but for defendant Sergey to invest, no consideration would be expected to be paid to Wonderworks in exchange for the asset transfer (WW Br. at 11). Plaintiffs' allegations are also contradictory because the complaint alleges both that Wonderworks was insolvent and that, in August 2015, it held more than \$175 million in assets in different accounts and funds not part of the Loaned Assets (*id.*; Compl. ¶¶ 37, 50, 54–64, 73).

3. Arguments of Defendant Legion Trust

a. Lack of Jurisdiction

Defendant Legion Trust (“Legion”) which is settled in Cook Island, moves to dismiss plaintiffs' complaint pursuant to CPLR §§ 3211(a)(1), (3), (7), and (8) (Legion Br. at 1 [NYSCEF Doc. No. 335]). Legion asserts that plaintiffs' unsupported claim that the trust is a “sham” (Legion Br. at 2) ignores the International Trusts Act, the statutory scheme under which modern Cook Island trusts are organized, which sets as a prerequisite to settling a Cook Islands trust that a settlor must pass rigorous due diligence screening to ensure the settlor has full right and title to the assets, that he will remain solvent after settling the trust, and that the assets are not derived from unlawful activities (Cook Is. Fin. Supervisory Comm'n, *Int'l Trusts Am.* [2013]; David R. McNair, *Cook Islands Asset Protection Trust Law*, 3 J. BUS. ENTREPRENEURSHIP & L. 321, 322 [2010]; Trustee Companies Due Diligence Regulations [1996] Reg. 4). The fact that Legion was settled in the

Cook Islands for the benefit of settlor's family cannot form the legal basis for plaintiffs' unjust enrichment claims.

Legion maintains that this court lacks personal jurisdiction over it (Legion Br. at 6). First, defendant argues that plaintiffs fail to allege any contacts between Legion and New York State for long-arm jurisdiction under CPLR § 302(a)(2), which grants jurisdiction over a foreign defendant who, either in person or through an agent, commits tortious acts within New York (*id.*). Plaintiffs have the burden, pursuant to CPLR § 3211(a)(8), to prove personal jurisdiction exists over each defendant (*see Copp v Ramirez*, 62 AD3d 23, 28–29 [1st Dept 2009]; *BGC Partners, Inc. v Avison Young (Canada) Inc.*, 5 NYS3d 327 [Sup Ct New York County 2014]). Courts have interpreted CPLR § 302(a)(2) jurisdiction narrowly (*Carlson v Cuevas*, 932 F Supp 76, 79 [SDNY 1996]). To qualify for jurisdiction under CPLR § 302(a)(2), a defendant's act or omission must have occurred within the State (*see Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F3d 779, 789–90 [2d Cir 1999]; *Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 464 [1965]). Courts have also recognized that, unless there are well-pleaded allegations of conspiracy or agency, a defendant must be physically within New York State when the alleged tortious act occurred (*see, e.g., Sino Clean Energy Inc. v Little*, 35 Misc3d 1226(A), 2012 WL 1849658 [Sup Ct New York County 2012]; *Yellow Page Solutions, Inc. v Bell Atl. Yellow Pages Co.*, No. 00 CIV. 5663, 2001 WL 1468168, at *8 [SDNY 2001]). Defendant argues the New York long-arm statute requires that the alleged tortious conduct arise out of, or have a substantial connection to, the defendant's required contacts with New York (*see, e.g., Norex Petroleum Ltd. v Blavatnik*, 48 Misc3d 1226(A), 2015 WL 5057693, at *17 [Sup Ct New York County 2015]; *de Capriles v Lopez Lugo*, 293 AD2d 405, 406 [1st Dept 2002]). Plaintiffs cannot meet their burden because the complaint alleges mere passive receipt of foreign funds from a foreign transfer in a foreign jurisdiction by a foreign trust with no New York contacts (*see Kddi Am., Inc. v Elec. and Unit Recorder Data Center, Inc.*, No. 0116005/2006, 2007 WL 2815350 at *12–13 [Sup Ct New York County 2007]). Defendant has never had assets in New York and plaintiffs have not alleged otherwise (Legion Br. at 7). Defendant argues that plaintiffs' attempt to connect Legion to New York on a conspiracy theory involving tortious acts must fail because there are no allegations of conspiracy against Legion, plaintiffs' could not make a cognizable allegation of conspiracy against Legion, and, even if they could, plaintiffs cannot rely on conspiracy alone as the basis for jurisdiction because conspiracy is not a tort (*id.* at 7–8; *Yellow Page Solutions, Inc.*, 2001 WL

1468168; *BGC Partners, Inc.*, 2014 WL 7201754). Defendant further argues that plaintiff cannot rely on conclusory allegations of control by Sergey and that Legion is a “sham” to demonstrate agency and establish jurisdiction (*see, e.g., BGC Partners, Inc.*, 2014 WL 7201754 at *5; *Polansky v Monegelorid*, 798 NYS2d 762, 764 [3d Dept 2005]). Defendant also argues that an unjust enrichment claim cannot be asserted as the predicate tort for jurisdiction under CPLR § 302(a)(2) (*see Norex Petroleum Ltd.*, 2015 WL 5057693, at *16).

Defendant next argues that exercise of personal jurisdiction here would violate constitutional due process as plaintiffs allege no contracts between Legion and New York, and none exist (Legion Br. at 9–10; *Shaffer v Heitner*, 433 US 186, 212–14 [1977]; *Int’l Shoe Co. v Washington*, 326 US 310, 316, 318 [1945]; *Al Rushaid v Pictet & Cie*, 28 NY3d 316, 330 [2016]; *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007]). The complaint pleads foreign plaintiffs, foreign nonparty borrowers, foreign funds, foreign transfers, foreign loan agreements, and other foreign conduct that cannot connect Legion to New York. Further, none of Sergey’s alleged conduct, even if it was in New York, can be imputed to Legion (Legion Br. at 10). Defendant argues that Cook Islands has the strongest interest in adjudicated matters related to Legion as stated by the trust deed (Compl. Ex. C ¶ 21.1 [Trust Deed] [NYSCEF Doc. No. 315]). Personal jurisdiction here would offend notions of fair play and substantial justice (*see Int’l Shoe*, 326 US at 316).

Defendant next argues that plaintiffs improperly attempted service on Legion under New York BCL § 307 as such law provides for the “service of process upon a foreign corporation which does business in [New York] state without authority” (*see Comment to BCL § 307; Bowman Imp./export Ltd. v F.J. Elsner N. Am. Ltd.*, 5 Misc3d 1026(A), 2004 WL 2853024 [Sup Ct New York County 2004]). The unauthorized foreign corporation must otherwise be subject to the court’s jurisdiction and Legion does no business in New York (Legion Br. at 11). Defendant argues that plaintiffs’ complaint also contains no allegations that Southpac did business in New York when it was Legion’s trustee (*id.*). Even if plaintiffs were able to claim Legion had done business in New York, service under BCL § 307 would still be improper because Legion is not subject to the jurisdiction of this court (*id.* at 12; *Bowman Imp./export Ltd.*, 5 Misc3d 1026[A]).

Plaintiffs are not entitled to jurisdictional discovery as is argued by defendant Leontiev. Plaintiffs have failed to allege any contacts between Legion and New York and, as such, any discovery here would be a fishing expedition designed to harass Sergey and his parents (Legion

Br. at 12; *see Jazini v Nisasn Motor Co.*, 148 F3d 181, 184–86 [2d Cir 1998]; *Concotilli v Brown*, 88 NYS3d 883 (Mem), 2019 NY Slip Op 00053 [1st Dept 2019]; *Peters v Peters*, 101 AD3d 403 [1st Dept 2012]).

b. Unjust Enrichment

As to the claim, Legion adopts unjust enrichment, the arguments with respect to the legal insufficiency of plaintiffs' unjust enrichment claim raised in memoranda in support of dismissal by defendants Sergey, Leonid, Wonderworks, and Kolotnikov (Legion Br. at 13). Those arguments include 1) plaintiffs are suing upon enforceable written agreements with the nonparty Borrowers, which is impermissible in an action sounding in quasi-contract (*id.*; *Clark-Fitzpatrick, Inc.*, 70 NY2d at 389; *see also IDT Corp.*, 12 NY at 142); 2) the connection between plaintiff and defendant is too attenuated, a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part must be alleged (Legion Br. at 14; *Sperry v Crompton Corp.*, 8 NY3d 204, 216 [2007]; *McMurray v Hye Won Jun*, 168 AD3d 435 [1st Dept 2019]); 3) plaintiffs cannot assert a valid unjust enrichment claim against Legion because it is a third-party non-signatory to the agreements which govern the same subject matter as plaintiffs' claims (Legion Br. at 14); 4) plaintiffs' do not allege any relationship between themselves and Legion so as to sustain their claim (*see Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516, 518 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]); 5) plaintiffs also fail to plead any other facts to support their claims such as details regarding the alleged transfers, to which specific entities the transfers were made, and from where they were transferred (Legion Br. at 15); 6) plaintiffs do not plead that Legion was enriched at plaintiffs' expense (*see Whitman Realty Grp., Inc. v Galano*, 41 AD3d 590, 593 [2d Dept 2007]); and 7) plaintiffs cannot prop their unjust enrichment claim on conclusory allegations made on information and belief (*see Georgia Malone & Co.*, 19 NY3d at 517; *D. Penguin Bros. v Nat'l Black United Fund, Inc.*, 137 AD3d 460, 461 [1st Dept 2016]; *Goel v Ramachandran*, 111 AD3d 783, 791 [2d Dept 2013]). Legion also argues that plaintiffs' allegations are contradictory as the complaint alleges both that Legion was enriched by the alleged transfer and that Sergey continues to have access to the funds in the trust (Legion Br. at 16).

c. Fraudulent Conveyance

Regarding the claim for fraudulent conveyance, Legion incorporates by reference arguments by defendants Sergey, Leonid, Wonderworks, and Kolotnikov (Legion Br. at 17). It

asserts that plaintiffs lack standing as they are not creditors of Legion, Sergey, or Wonderworks which is required by New York's Debtor and Creditor Law (*see* DCL §§ 273, 276; *Eberhard v Marcu*, 530 F3d 122, 129 [2d Cir 2008]; *Grace Plaza of Great Neck, Inc. v Heitzler*, 2 AD3d 780, 781 [2d Dept 2003]); conclusory allegations on information and belief lack CPLR § 3016(b) particularity to state a sufficient claim for either actual or constructive fraudulent conveyance (Legion Br. at 17); plaintiffs have not identified the transferred funds with specificity (Compl. ¶¶ 38, 73, 75, 78–79), the location of the funds, locations of the alleged transfers, consideration, the specific transferees, or the dates and times of the transfers (Legion Br. at 17). In addition, plaintiffs' conclusory allegations regarding fraudulent intent and those made on information and belief fail to meet the heightened particularity requirement of CPLR § 3016(b) (*id.* at 18; Compl. ¶¶ 73–79, 81, 126; *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]); *Wildman & Berngardt Constr., Inc. v BPM Assoc.*, 273 AD2d 38, 39 [1st Dept 2000]; *RTN Networks, LLC*, 126 AD3d at 478).

Plaintiffs' allegations, that the Cook Islands is notorious for its use by debtors, that Legion is a "sham," and that the trust was intended to hinder plaintiffs' claims, are general non-sequitur allegations that fail to support plaintiffs' claim (Legion Br. at 19; Compl. ¶¶ 82–83, 94). Plaintiffs mischaracterize the trust deed as containing provisions to "defeat any attempt by creditors to obtain repayments of the assets of the trust" when, in fact, the trust deed allows creditors to seek enforcement of a judgment in the Cook Islands legal system without triggering an Event of Duress (Compl. ¶ 95; Compl. Ex. C §§ 4.1, 22.1). All other sections of the trust deed plaintiffs refer to are similarly misrepresented and are typical of Cook Island trusts (Legion Br. at 20). Legion argues that plaintiffs' intentional distortions of the trust deed do not satisfy the high burden of CPLR § 3016(b) (*id.*). Plaintiffs' theory is, at its core, that the establishment of a trust permits the inference of intent to defraud and frustrate creditors but plaintiffs offer no support for this conclusion (*id.*). Finally, as every "badge of fraud" claimed by plaintiffs is pleaded on information and belief, a claim for actual fraudulent conveyance must fail (*see, e.g., UBS Sec. LLC v Highland Capital Mgmt., L.P.*, 30 Misc3d 1230(A), 2011 WL 781471 [Sup Ct New York County 2011]).

Plaintiffs also fail to state a constructive fraudulent conveyance claim as they plead only conclusory allegations that the conveyance was made without fair consideration and rendered the conveyor insolvent (Legion Br. at 21; DCL §§ 272–273; Compl. ¶¶ 80, 125; *Swartz v Swartz*, 145 AD3d 818, 828 [2d Dept 2016]; *Michael McDede LLC v Hall Flooring Co., Inc.*, No.

161442/2014, 2016 WL 4987353, at *2 [Sup Ct New York County 2016]; *Granda v Trujillo*, No. 18 CIV. 3949, 2019 WL 367983, at *9 [SDNY 2019]; *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *DoubleLine Capital LP v Odebrecht Fin., Ltd.*, 323 FSupp3d 393, 466 [SDNY 2018]; *Waite v Schoenbach*, No. 10 cv 3439, 2010 WL 4456955, at *7 [SDNY 2010]; *see also Cantor Fitzgerald & Co. v 8an Capital Partners Master Fund, L.P.*, 16 NYS3d 733, 734 [1st Dept 2015]). Such conclusory claims of insolvency are contradicted by plaintiff's own allegations that Wonderworks held over \$175 million in cash and securities other than the Loaned Funds (Compl. ¶¶ 37, 50).

4. Arguments of Leonid Leontiev

a. Jurisdiction

Defendant Leonid Leontiev ("Leonid") argues that this court lacks personal jurisdiction over him (*id.* at 5; *see Shaffer v Heitner*, 433 US 186, 212–14; *Int'l Shoe Co. v Washington*, 326 US 310, 316, 318 [1945]; *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007]; *see Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009]). He is not subject to jurisdiction under New York's long-arm statute, CPLR § 302(a)(1), because plaintiffs have failed to show that he transacted business within the state and that the claims here arose from that business transaction (*see Johnson v Ward*, 4 NY3d 516, 519 [2005]). For a business transaction by a non-domiciliary within the state to give rise to jurisdiction, the transaction must be purposeful which defendant argues is not the case here (Leonid Br. at 7; *First Nat'l Bank & Tr. Co. v Wilson*, 171 AD2d 616, 617 [1st Dept 1991]). To be purposeful, non-domiciliaries must avail themselves of the privilege of conducting activities within New York State, by invoking the benefits and protections of its laws (*see Ripplewood Advisors, LLC v Callidus Cap. SIA*, 151 AD3d 611, 612 [1st Dept 2017]). More than limited contacts are required to establish sufficient jurisdiction; a non-domiciliary must engage in volitional acts through which it avails itself of the State's privileges (*see Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). Plaintiffs' allegations that Leonid receives payments from defendant Sergey made to bank accounts in New York State, are insufficient to establish jurisdiction because Sergey's payments into accounts in New York do not establish that Leonid purposefully transacted business in New York (Leonid Br. at 5–7; *see DirectTV Latin Am., LLC v Pratola*, 94 AD3d 628, 629 [1st Dept 2012]). Further, the mere deposit or maintenance of funds in a New York bank account does not satisfy the transaction of business requirement under CPLR § 302(a)(1) (Leonid Br. at 7–8; *Allied Int'l Fund, Inc. v Gladtko*, No. 650029/2016, 2016

WL 4140824 at *2 [Sup Ct New York County 2016]; *Daventree Ltd. v Republic of Azerbaijan*, 349 FSupp2d 736, 762 [SDNY 2004]; *see also Pramer S.C.A. v Abaplus Int'l Corp.*, 76 AD3d 89, 96 [1st Dept 2010]; *Bankers Com. Corp. v Alto, Inc.*, 30 AD2d 517 [1st Dept 1968]; *Bluwaters Commc'ns Holdings, LLC v Ecclestone*, 122 AD3d 426, 427 [1st Dept 2014]; *Taub v Colonial Coated Textile Corp.*, 54 AD2d 660, 661 [1st Dept 1976]; *Tamam v Fransabank Sal*, 677 FSupp2d 720, 726–27 [SDNY 2010]).

New York courts regularly decline to assert jurisdiction based on conduct that exceeds Leonid's alleged passive receipt of payments (*see Shalik v Coleman*, 111 AD3d 816, 818 [2d Dept 2013] [Court declined to assert jurisdiction under CPLR § 302(a)(1) despite defendant mailing payments to plaintiff in New York and a promissory note providing that it should be governed by New York law]; *see also Faravelli v Bankers Tr. Co.*, 85 AD2d 335, 338 [1st Dept 1982] [mailing documents to New York for payment and maintaining three banks accounts in New York City not sufficient for jurisdiction]; *Hau Yin To v HSBC Holdings PLC*, No. 15CV3590-LTS-SN, 2017 WL 816136, at *5 [SDNY 2017] [sending money into New York not sufficient to establish jurisdiction]). Defendant argues Sergey's alleged payments to Leonid in New York bank accounts are "adventitious" and are not enough to establish jurisdiction over Leonid (*Cnty. Fin. Grp., Inc. v Stanbic Bank Ltd.*, No. 14CV5216(DLC), 2015 WL 4164763, at *4–5 [SDNY 2015]).

Leonid also argues that plaintiffs fail to show a substantial relationship between defendant's alleged New York contacts and plaintiffs' claims as there is no articulable nexus or substantial relationship between such (Leonid Br. at 10; *Johnson*, 4 NY3d at 519; *Khalife v Audi Saradar Priv. Bank SAL*, 129 AD3d 468 [1st Dept 2015]). Plaintiffs' jurisdictional claim rests solely on Leonid's alleged receipt of payments from New York bank accounts, but claims arise from loan agreements between plaintiffs and nonparty foreign entities and alleged fraudulent transfers involving a foreign trust (Compl. ¶¶ 4, 24, 35, 38, 78–79). Where, as here, the claims do not arise from New York contacts but are instead focused on out-of-state transactions, plaintiffs fail to plead that a substantial relationship exists (*see BGC Partners, Inc. v Avison Young (Can.) Inc.*, No. 652669/2012E, 2014 WL 7201754, at *5 [Sup Ct New York County 2014]; *DirectTV Latin Am., LLC v Park 610, LLC*, 691 FSupp2d 405, 423–24 [SDNY 2010] ["mere use of one New York bank account lacks the articulable nexus necessary to establish jurisdiction"]). Plaintiffs offer no explanation for why Sergey made payments to Leonid other than in connection with the foreign trust. At best this is incidental to Leonid's alleged role and his undefined duties regarding

the trust (see, e.g., *Johnson*, 4 NY3d at 520; see also *Hau Yin To*, 2017 WL 816136, at *5–6). Plaintiffs' claims are untethered from Leonid's alleged conduct as the complaint fails to allege that Leonid was paid from the Alleged Loan Funds at issue or that plaintiffs are connected in any way to the New York bank accounts or to Leonid (Leonid Br. at 11). Plaintiffs' claims lack requisite specificity as they are conclusory, rely on information and belief, and lack allegations that Sergey made the payments at all, let alone for the purpose of paying his father in connection with roles as beneficiary of the Trust (*id.* at 11–12; see *Coast to Coast Energy, Inc.*, 149 AD3d at 487; see also *Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]; *BGC Partners, Inc.*, 2014 WL 7201754, at *4).

Plaintiffs are not entitled to jurisdictional discovery because they have failed to make a sufficient start to show that their position is not frivolous and warrants additional discovery (see *Powers v Cent. Therapeutics Mgmt., L.L.P.*, No. 652844/2016, 2018 WL 452014, at *5 [Sup Ct New York County 2018]). Plaintiffs' bare-bones and conclusory allegations are insufficient both to demonstrate long-arm jurisdiction over Leonid and to qualify as a sufficient start to warrant jurisdictional discovery (Leonid Br. at 12–13; *Powers*, 2018 WL 452014, at *6; see also *Concotilli v Brown*, 168 AD3d 426 [1st Dept 2019]; *BGC Partners, Inc.*, 2014 WL 7201754, at *4). Jurisdiction here does not comport with due process which requires more than mere fortuitous contacts for a defendant to be brought into a New York court (see *Walden v Fiore*, 571 US 277, 286 [2014]; see also *Waggaman v Arauzo*, 117 AD3d 724, 726 [2d Dept 2014]; *Pramer S.C.A.*, 76 AD3d at 96–97).

b. Unjust Enrichment

Leonid's arguments concerning the unjust enrichment and fraudulent conveyance claims against him are similar to those of Legion and Wonderworks and will not be described here.

Defendant next argues that the complaint fails to state a claim against him for unjust enrichment or fraudulent conveyance (Leonid Br. at 14–15; see *Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 570–71 [2005]; *Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Caniglia v Chicago Tribune-N.Y. News Syndicate Inc.*, 204 AD2d 233 [1st Dept 1994]). Defendant first addresses the unjust enrichment claim, arguing that plaintiffs' basis for this claim arises from debt they are owed from the Alleged Loan Funds which are governed by an enforceable contract between plaintiffs and nonparty foreign entities (Compl. ¶¶ 4, 35, 115). Defendant argues that, when a party has executed an enforceable written contract governing the subject at issue, recovery via unjust

enrichment there is ordinarily precluded (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *accord Clark-Fitzpatrick, Inc.*, 70 NY2d at 389; *Schultz v Gershman*, 68 AD3d 426, 427 [1st Dept 2009]). Defendant argues that, as a non-signatory, he cannot be held liable on an unjust enrichment theory where there is an express contract governing the matter (*see Feigen v Advance Cap. Mgmt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]; *Randall's Island Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012]; *see also* Sergey Br. at § I.A). Defendant argues that, because this claim is controlled by a governing contract, plaintiffs' claim against him must be dismissed (*see Bd. of Mgrs. of Honto 88 Condo. v Red Apple Child Dev. Ctr., at Chinese Sch.*, 160 AD3d 580, 581–82 [1st Dept 2018]). Defendant further argues that plaintiffs have failed to show that defendant was enriched at their expense and that it would be against equity and good conscience to permit defendant to retain what is sought to be recovered (*see Mandarin Trading*, 16 NY3d at 182).

Defendant argues that plaintiffs have also failed to allege the existence of a sufficiently close relationship between themselves and defendant that may have caused reliance or inducement on the plaintiffs' part (Leonid Br. at 16; *Georgia Malone & Co., Inc.*, 19 NY3d at 516; *McMurray v Hye Won Jun*, 168 AD3d 435 [1st Dept 2019]). Defendant argues that the passive receipt of funds at the direction of another is not enough to sustain this unjust enrichment action (*See, e.g., Fountoukis v Geringer*, 33 AD3d 756, 757 [2d Dept 2006]). Defendant argues that: (i) plaintiffs have not pleaded a sufficient relationship between themselves and Leonid concerning the Alleged Loaned Funds as the parties "simply had no dealings with each other" (*Mandarin Trading*, 16 NY3d at 182–83; *Georgia Malone & Co.*, 19 NY3d at 517), (ii) plaintiffs have pleaded no facts to demonstrate that a benefit was conferred on Leonid from plaintiffs (*see George Malone & Co.*, 19 NY3d at 516–17; *see, e.g., Chambers v Weinstein*, No. 157781/2013, 2014 WL 4276910, at *6–7 [Sup Ct New York County 2014]; *Krinos Food, Inc. v Vintage Good Corp.*, 30 AD3d 332, 333 [1st Dept 2006]; *Martes v USLIFE Corp.*, 927 F Supp 146, 149 [SDNY 1996]), (iii) plaintiffs have alleged no wrongful conduct by Leonid nor have they alleged that the payments he received consisted on the Alleged Loaned Funds (*see Paramount Film Distrib. Corp. v State*, 30 NY2d 415, 421 [1972] [a key factor courts consider is whether the defendant's conduct was tortious or fraudulent]; *see, e.g., Goel v Ramachandran*, 111 AD3d 783, 792 [2d Dept 2013]) and (iv) plaintiffs allegation, that it is against equity and good conscience for Leonid to benefit from his receipt of the payments at plaintiffs' expense, is wholly conclusory and insufficient to state a claim

(see *Goel*, 111 AD3d at 792; see also *Paper Acquisitions, Inc. v Astoria Fed. Sav. & Loan Ass'n.*, No. 504641/13, 2014 WL 2890339, at *6 [Sup Ct New York County 2014]; *Old Republic Nat'l Title Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2d Dept 2005]).

Defendant next argues that plaintiffs fail to state a claim for fraudulent conveyance as the complaint is devoid of any allegation that any alleged transfer to Leonid was fraudulent (Leonid Br. at 19; Compl. ¶¶ 124–25). Defendant argues that, although plaintiffs assert a fraudulent conveyance claim against all defendants, Leonid is not alleged to be a recipient of the alleged fraudulent transfer (*id.* at 19–20). Defendant argues that lumping himself in with the other defendants does not satisfy plaintiffs' pleading burden because the complaint fails to allege each element of this claim as to Leonid (*id.* at 20; Sergey Br. at § V; *Norex Petroleum Ltd. v Blavatnik*, No. 650591/11, 2015 WL 5057693, at *10 [Sup Ct New York County 2015]; see also *Wildman & Bernhardt Constr., Inc. v BMP Assocs., L.P.*, 273 AD2d 38, 39 [1st Dept 2000]; *Rubin v Sabharwal*, 171 AD3d 580, 581 [1st Dept 2019]). Defendant argues that plaintiffs' fraudulent conveyance claim also fails as a matter of law because plaintiffs cannot establish that they were Sergey's, or any other defendant's, creditors at the time of the alleged fraudulent transfer, and only creditors have standing to bring fraudulent conveyance claims (see DCL §§ 270, 273, 276, 278 & 279; see also Sergey Br. at § V.A; *Gio, Buton & C. v Mediterranean Importing Co., Inc.*, 125 AD2d 638 [2d Dept 1986]; *Martes*, 927 F Supp at 148).

5. Arguments of Defendant Kolotnikov

The unjust enrichment, fraudulent conveyance and civil conspiracy arguments of Kolotnikov are similar to those made by Sergey and others. They will not be described here.

Defendant Vadim Kolotnikov ("Kolotnikov") moves to dismiss plaintiffs' complaint pursuant to CPLR §§ 3211(a)(7) (Kolotnikov Br. at 1 [NYSCEF Doc. No. 357]). Defendant argues that plaintiffs fail to state each claim against defendant and, consequently, each must be dismissed (*id.* at 4; *Goldman v Metro Life Ins. Co.*, 5 NY3d 561, 570 [2005]; *JFK Holding Co., LLC v City of New York*, 68 AD3d 477 [1st Dept 2009]). Defendant begins by arguing that plaintiffs fail to state a claim for unjust enrichment because the complaint does not allege that defendant was somehow enriched at plaintiffs' expense (*Georgia Malone & Co.*, 19 NY3d at 516; *Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250 [1st Dept 2009]). Defendant argues that the alleged benefit must flow directly from plaintiff and that an attenuated connection between a defendant's enrichment and plaintiffs' loss is insufficient (see *Sperry v Crompton Corp.*, 8 NY3d

204, 216 [2007]). Mere receipt of ordinary compensation by an employee or agent of a transferee, such as Wonderworks here, cannot form the sole basis for an unjust enrichment claim against that agent (*see Bilinski v Keith Haring Found., Inc.*, 96 FSupp3d 35, 52 [SDNY 2015]; *Bangkok Crafts Corp. v Capitolo di San Pietro in Vaticano*, 331 FSupp2d 247, 256 [SDNY 2004] [held that even if commissions were sourced from funds plaintiff had paid, that would not be sufficient to state a claim for unjust enrichment]; *see also L. Woerner, Inc. v Westside Home Care Agency, Ltd.*, 32 Misc3d 1228, 2011 WL 3432866, at *5 [NY Sup Ct 2011]).

Defendant next argues that plaintiffs fail to state the unjust enrichment claim because the Loaned Funds were made available pursuant to enforceable contracts between plaintiffs and nonparty borrowers (Kolotnikov Br. at 6; *see* Sergey Br. at § I.A). Similarly to other defendants, defendant Kolotnikov argues that plaintiffs cannot recover via unjust enrichment for events arising out of an enforceable written contract governing the subject at issue and, although defendant was not a party to the loan agreements, a non-signatory to a contract still cannot be held liable where an express contract covers the same subject matter (*see IDT Corp.*, 12 NY3d at 142; *Feigen*, 150 AD2d at 283; *see also Mueller v Michael Jamnsen Gallery Pte. Ltd.*, No. 15 Civ. 4827, 2016 WL 7188151, at *4 [SDNY 2016]). Defendant next argues that plaintiffs fail to allege a sufficiently direct relationship between themselves and defendant to support this claim as the complaint alleges no facts showing plaintiffs had *any* relationship or connection with defendant (Kolotnikov Br. at 6–7; *Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015]).

Defendant next argues that plaintiffs fail to state a fraudulent conveyance claim against him because he is not alleged to be the transferee or the transferor of any funds with respect to the challenged funds (Kolotnikov Br. at 7; *Cahen-Vorbürger v Vorbürger*, 41 AD3d 281, 282 [1st Dept 2007] [“there is no fraudulent conveyance claim against non-transferees who merely assist in transferring assets”]; *see e.g., Fed. Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]). Defendant argues that plaintiffs’ do not allege that defendant ever came into possession of the Loaned Funds alleged to have been conveyed and, to the contrary, the complaint alleges the transfers were solely made among defendant Wonderworks, the Trust Defendants, and possibly other unspecified nonparties (Compl. ¶¶ 123–27). Defendant argues that, to the extent plaintiffs allege that defendant’s alleged receipt of compensation from Wonderworks turns him into a “transferee,” such argument would fail because receipt of a salary from the transferee corporation as an officer of the corporation is not sufficient to render the officer a transferee or beneficiary of

the transfer under New York Debtor and Creditor Law (Kolotnikov Br. at 8; Compl. ¶ 119; *D'Mel & Assocs. v Athco, Inc.*, 105 AD3d 451, 452–53 [1st Dept 2013]).

Defendant next argues that plaintiffs cause of action for civil conspiracy fails as a matter of law (Kolotnikov Br. at 8). Defendant argues that individual cannot conspire with a company of which they are owners, officers, or shareholders because, in such circumstances, the individuals and the company are deemed to constitute a single entity, and an individual cannot conspire with himself (see *Lewis v Friedman-Marks Clothing Co.*, 70 AD2d 866 [1st Dept 1979]; *Bereswill v Yablon*, 6 NY2d 301, 305 [1959]; *Christians of California, Inc. v Clive Christian New York, LLP*, No. 13-CV-275, 2015 WL 468833, at * ([SDNY 2015]). Defendant argues that because plaintiffs allege defendant Wonderworks conspired with its officer and director, defendant Kolotnikov, and its alleged owner and controller, defendant Sergey Leontiev, these allegations preclude the establishment of a civil conspiracy claim because the alleged co-conspirators are not independent actors but named members of the same corporate family (Kolotnikov Br. at 9; Compl. ¶¶ 23, 49, 51, 75, 141–43; see e.g., *Tompkins v Metro-N. Commuter R.R.*, No. 16-CV-9920, 2018 WL 4573008, at *8 [SDNY 2018]; *Christians of California Inc.*, 2015 WL 468833, at *9; *Lewis*, 70 AD2d at 866).

Defendant next argues that plaintiffs' conspiracy claim fails because New York law does not recognize claims for conspiracy to breach a contract as the complaint alleges (Kolotnikov Br. at 10; Compl. ¶ 143; see, e.g., *White & Baxter, Inc. v Jade Square & Tower, Ltd.*, 62 AD2d 963 [1st Dept 1978]; *Bereswill*, 6 NY2d at 305; *Health-Loom Corp. v Soho Plaza Corp.*, 209 AD2d 197, 198 [1st Dept 1994]; *Callahan v Gutowski*, 111 AD2d 464, 465 [3d Dept 1985]; see also *Smith v Fitzsimmons*, 180 AD2d 177, 180–81 [4th Dept 1992]). Defendant further argues that plaintiffs' civil conspiracy claim fails because plaintiffs do not plead an actionable underlying tort which is required to maintain such claims (Kolotnikov Br. at 11; *Schleifer v Yellen*, 158 AD3d 512, 513 [1st Dept 2018]; *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [a plaintiff must plead an actionable primary tort plus (i) an agreement between two or more parties, (ii) an overt act in furtherance of the agreement, (iii) the parties' intentional participation in the furtherance of a plan or purpose, and (iv) resulting damage or injury]). Defendant argues that the only underlying tort plaintiffs allege is fraud (deceit) and that this claim must be dismissed for failing to state a cause of action as set forth in Sergey Leontiev's memorandum in support (Kolotnikov Br. at 11; Sergey Br. at § III; *Abacus Fed. Sav. Bank*, 75 AD3d at 474). Defendant

further argues that plaintiffs' claim for conspiracy to commit fraud should be dismissed because plaintiffs fail to allege facts supporting the claim's elements as to defendants Kolotnikov and Wonderworks; specifically, defendant argues that plaintiffs fail to allege that Kolotnikov or Wonderworks entered into an agreement with defendant Sergey Leontiev to make the alleged false representation at the London meeting that he would repay the loans personally, causing plaintiffs to rely on them to their detriment (Kolotnikov Br. at 11–12). Defendant argues that the complaint fails to allege that defendant knew about or attended the London meeting and, because plaintiffs allege no overt acts by defendant or Wonderworks in furtherance of a conspiracy to make a false promise, this claim fails (*id.* at 12; *see, e.g., Ritchie Capital Mgmt., L.L.C. v Gen. Elec. Capital Corp.*, 121 FSupp3d 321, 340 [SDNY 2015]).

Defendant next argues that plaintiffs have no basis to assert a conspiracy claim under English law just because a single meeting is alleged to have taken place there because all other conduct is alleged to have taken place out of England and there is no allegation that the injury arising from said conduct was inflicted in England (Kolotnikov Br. at 12). Defendant argues that the law of the jurisdiction where the tort occurred generally applies because that jurisdiction has the greatest interest in regulating behavior within its borders and, further, a tort generally occurs where the injury was inflicted (*id.* at 13; *Kwiecevski v John K. Renke II, Law Office*, No. 11-CV-2246, 2012 WL 4344589, at *5 [EDNY 2012]; *Orthotec, LLV v Healthpoint Capital, LLC*, No. 601377/08, 2013 WL 2471606, at *8 [Sup Ct New York County 2013]). Defendant argues that plaintiffs cannot allege they suffered any injury in England because none of the plaintiffs is alleged to have attended the August 2015 meeting in London and none of the allegations that comprise plaintiffs' conspiracy claim involve any acts by defendants Kolotnikov or Wonderworks that took place in England (Kolotnikov Br. at 13). Defendant argues that plaintiffs, to the contrary, allege that defendants Sergey Leontiev, Kolotnikov, and Wonderworks "directed and/or participated in tortious conduct within the State of New York, including the fraudulent conveyance of assets from Sergey Leontiev to the Trust Defendants (*id.*; Compl. ¶ 24). Defendant further argues that plaintiffs also allege that defendants Sergey and Kolotnikov are New York residents (Compl. ¶¶ 17, 23). Consequently, defendant argues that plaintiffs' conspiracy claim under English law should be dismissed (Kolotnikov Br. at 13–14; *see, e.g., Amusement Indus., Inc. v Stern*, 693 FSupp2d 301, 314 [SDNY 2010]).

Defendant next argues that even if English law is applied, plaintiffs fail to state a valid conspiracy claim (*see, e.g., Meretz Investments NV v ACP Ltd.*, [2007] EWCA Civ 1303 ¶ 86 [the elements of an English conspiracy claim are: (i) defendants had an agreement or understanding, (ii) pursuant to which they engaged in unlawful concerted action, (iii) with the intention of harming plaintiffs, and (iv) that said unlawful action caused plaintiffs damage]). Defendant argues that, under English law, a conspiracy claim is a scienter-based cause of action that requires proof of intent by each co-conspirator, and whether plaintiffs here have pleaded intent for purposes of their claim is a New York law question (*id.* ¶ 90 [“the tort of conspiracy by unlawful means requires an intention to cause loss by unlawful means”; *see, e.g., Westdeutsche Landesbank Girozentrale v Learsy*, 284 AD2d 251, 252 [1st Dept 2001]; *Reid v Ernst & Young Global Ltd., Eygs LLP*, 13 Misc3d 1242, 2006 WL 3455259, at *6 [Sup Ct New York County 2006 [“pleading requirements . . . are a matter of procedure governed by the law of the forum”]). Defendant argues that, in New York, scienter-based claims must be pleaded with sufficient particularity, especially where the claims sound in fraud (*see Zannett Lombarider, Ltd. v Maslow*, 29 AD3d 495–96 [1st Dept 2006]). Defendant argues that, here, plaintiffs fail to allege, other than in conclusory fashion, that defendant facilitated the transfer of funds to the Trust Defendants with specific intent to harm plaintiffs by concealing the Loaned Funds and making them unrecoverable to plaintiffs (Kolotnikov Br. at 15; Compl. ¶ 143). Defendant further argues that plaintiffs also fail to allege that defendant knew about that the transfers to the Trust Defendants included the Loaned Funds or that defendant Wonderworks itself had any knowledge separate from defendant Sergey Leontiev. Consequently, defendant argues that plaintiffs fail to plead the requisite scienter element of their English law conspiracy claim (*see Zutty v Rye Select Broad Mkt. Prime Fund*, 33 Misc3d 1226, 2011 WL 5962804, at *9 [Sup Ct New York County 2011]).

Finally, defendant argues that plaintiffs fail to plead the damages element sufficiently under English law as the complaint fails to demonstrate that plaintiffs suffered any actionable loss proximately caused by defendants Kolotnikov’s and Wonderworks’ alleged concerted actions [Kolotnikov Br. at 15–16; *Meretz Investments NV*, [2007] EWCA Civ 1303 ¶ 86 [conspiracy is only actionable under English law “where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person . . .”]; *Revenue and Customs Commissioners v Sunico A/S*, [2013] EWHC 941 (Ch) ¶ 69). Defendant argues that plaintiffs do not allege that defendant Kolotnikov’s and

Wonderworks' alleged conspiracy caused plaintiffs any harm but, to the contrary, the complaint's "Prayer for Relief" mentions that the only damages suffered as a result of the alleged conspiracy were those "caused by Mr. Sergey Leontiev's failure to fulfill his agreement to repay the Debt and/or false assurances of repayment of the Debt" (Kolotnikov Br. at 16; Compl. ¶27, ¶ 1). Defendant argues that by failing to plead damages that proximately resulted from defendants Kolotnikov's and Wonderworks' alleged conspiratorial conduct, plaintiffs cannot state a conspiracy claim under English law.

B. Plaintiffs' Consolidated Memorandum in Opposition

Plaintiffs Ailon Automotive Group and Karen Avagumyan submitted a consolidated memorandum in opposition to the five motions (Pl. Br. at 1 [NYSCEF Doc. No. 363]). Plaintiffs begin by arguing that the complaint successfully states unjust enrichment claims against each defendant (*id.* at 6; *Mandarin Trading*, 16 NY3d at 182). The complaint alleges defendants were enriched at plaintiffs' expense through defendant Sergey Leontiev's scheme (Pl. Br. at 6; Compl. ¶¶ 39, 41, 100). Contrary to defendant Sergey's assertions, the complaint alleges that Sergey directly controlled each of the relevant entities—the Borrowers, Wonderworks, and the Trust—and that he directed the fraudulent transfers through these entities for his personal benefit (Compl. ¶ 41). Sergey admitted he possessed the Loaned Funds at the London Meeting in August 2015 and that his \$17 million payment to Ailon the month after that meeting was a confirmation of that fact (Compl. ¶ 69; Compl. Ex. B at 4, 18). Plaintiffs argue that defendant Wonderworks was also enriched by Sergey's scheme as Wonderworks sat in possession of millions of dollars that plaintiffs loaned to the Borrowers and paid defendant Kolotnikov out of plaintiffs' funds (Pl. Br. at 7; Compl. ¶¶ 39, 50, 52, 105). Plaintiffs combat Wonderworks' argument, that the funds did not belong to plaintiffs, by arguing that just because all the money in Wonderworks' possession did not belong to plaintiffs does not mean Wonderworks was not unjustly enriched by plaintiffs' millions of dollars that it controlled and benefitted from (Pl. Br. at 7). Plaintiffs further argue that defendant Leonid Leontiev and Kolotnikov were enriched at plaintiffs' expense because Leonid received a portion of the Loaned Funds as a reward for overseeing the sham Legion Trust and Kolotnikov received a share of the Loaned Funds in the form of a salary from Wonderworks (*id.*; Compl. ¶¶ 51–52, 78–79, 93, 110). In footnotes, plaintiffs argue that (i) defendant Leonid's argument that he was a passive recipient of the funds fails because it "mischaracterize[s] the complaint" (Pl. Br. at n3; Compl. ¶ 12) and (ii) defendant Kolotnikov's contention that one cannot

be subject to an unjust enrichment claim when his enrichment is a salary or commission fails because it is unsupported by case law and the enrichment here is not “too attenuated” (Pl. Br. at n4; *see, e.g.*, Compl. ¶¶ 51–52, 74–76).

Plaintiffs distinguish *Feigen*, a case on which all defendants rely (150 AD2d at 283 [which holds that an enforceable contract for events arising out of a particular subject matter] precludes recovery in quasi contract for events arising out of the same subject matter. Plaintiffs dismiss the case, arguing that the case does not explain what it means for a contract to govern the “same subject matter”). Plaintiffs maintain that where a defendant improperly retains control of or access to plaintiffs’ money for his personal use, even if that money is subject to a contract, an unjust enrichment claim is available (Pl. Br. at 8; *see Sergeants Benevolent Ass’n Annuity Fund v Renck*, 19 AD3d 107 [1st Dept 2005]). Here, as in *Sergeants Benevolent*, defendants’ wrongful diversion of funds from plaintiffs’ borrowers went beyond the subject matter of the loan agreements and promissory notes, creating wrongful and unforeseeable conduct not addressed by said agreements (Pl. Br. at 9; Compl. ¶¶ 34–35, 38–50, 73–75, 77–84, 88–9; *see Sergeants Benevolent*, 19 AD3d at 108). Allowing defendants to retain those funds at plaintiffs’ expense would undermine the equitable principle that a person cannot enrich themselves at another’s expense (Pl. Br. at 10; *Mfrs. Hanover Tr. Co. v Chem. Bank*, 160 AD2d 113, 117 [1st Dept 1990]).

Plaintiffs next argue that they have alleged sufficiently close relationships with each defendant (Pl. Br. at 10; *Georgia Malone & Co.*, 19 NY3d at 516; *Mandarin Trading* 16 NY3d at 182; *see also Choi*, 890 F3d at 69). As to defendant Sergey Leontiev, the August 2015 London meeting between Sergey and Avilon’s president, Mr. Varshavsky, evidences a direct relationship sufficient to support an unjust enrichment claim (Pl. Br. at 10–11). Although Sergey argues that he did not know Varshavsky prior to the London meeting, the complaint sufficiently alleges that the “primary fraudulent conveyances” occurred after the London meeting and, consequently, that meeting alone is enough to establish a relevant relationship between the parties (*id.* at 11; Compl. ¶¶ 73–84; *see, e.g., Choi*, 890 F3d at 69). The complaint also alleges that plaintiffs and Sergey Leontiev had a relationship sufficient to state an unjust enrichment claim prior to that meeting as well (Compl. ¶¶ 4, 34–35). Plaintiffs have also pleaded a sufficiently close relationship with the remaining defendants, Leonid Leontiev, Kolotnikov, Wonderworks, and Legion Trust. Each played a central role in and were directly enriched by Sergey Leontiev’s scheme (Pl. Br. at 11; *Choi*, 890 F3d at 69; *Phillip Int’l Invs., LLC v Pektor*, 117 AD3d 1, 7–8 [1st Dept 2014] [holding

that the central defendant's scheme is imputable to the partnership defendants]; *see also L.I. City Ventures LLC v Sismanoglou*, 158 AD3d 567, 568 [1st Dept 2018]).

Plaintiffs next argue that they have successfully stated a fraudulent conveyance claim as against all defendants (Pl. Br. at 12; DCL §§ 270, 273, 276). Plaintiffs argue, contrary to defendants' assertions, that they are creditors for the purposes of New York Debtor and Creditor Law as the DCL defines "creditor" broadly to include any person having claim, matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent (DCL § 270). Plaintiffs argue that: (i) they are defendants' prejudgment creditors on their claims in this action as a plaintiff with a civil cause of action for damages becomes the defendant's "creditor" and enjoys the fraudulent conveyance statute's protection "the moment the cause of action accrues" (*Shelly v Doe*, 249 AD2d 756, 757 [3d Dept 1998]; *see also Finkleman v Greenbaum*, 2007 WL 102464, at *5 [Sup Ct Nassau County 2007]), (ii) defendant Sergey Leontiev's conduct "makes plain that plaintiffs are his creditors" because he admitted at the London meeting that he had an obligation to pay plaintiffs the Loaned Funds and confirmed such by paying plaintiffs \$17 million of the Debt (Compl. ¶¶ 62–66, 69), and (iii) the complaint pleads that Leontiev may be personally liable for the Loaned Funds on the Borrowers' behalf, thus separately making plaintiffs his direct creditors (Compl. ¶¶ 3, 6, 29–33, 38–42, 49).

Defendants' conveyances were both constructively and actually fraudulent (Pl. Br. at 14): Defendants' conveyances are constructively fraudulent under DCL § 273, which provides that every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard for actual intent if no fair consideration was given (DCL § 273). Plaintiffs argue that a plaintiff-creditor proceeding under DCL § 273 need only plead that a transfer was made without adequate consideration because such a questionable transfer leads to a presumption of insolvency and fraudulent transfer (Pl. Br. at 15; *Battlefield Freedom Wash, LLC v Song Yan Zhuom*, 148 AD3d 969, 971 [2d Dept 2017]; *see also United States v Carlin*, 948 F Supp 271, 277 [SDNY 1996]). Plaintiffs have alleged that transfers from the Borrowers to Wonderworks, and from Wonderworks to Legion Trust, were not made with fair consideration and left the parties insolvent (Compl. ¶¶ 78–80). Although defendants argue that plaintiffs have failed to sufficiently allege the details of the consideration provided for the conveyances, plaintiffs are not required to allege fair consideration with particularity. They have plainly alleged that the transfers left defendants Sergey Leontiev and Wonderworks insolvent (Pl.

Br. at 15–16; Sergey Br. at 20; *see Bd. of Managers of 14 Hope St. Condo*, 2013 WL 3814672, at *7; *see also Samuel L. Hagan II, P.C. v J. P. Morgan Chase Bank, N.A.*, 2011 WL 4975311, at *12 [Sup Ct Kings County 2011]). Having sufficiently alleged a lack of consideration for the transfers, it becomes defendants’ burden to establish their solvency and, in this regard, defendants Sergey Leontiev’s and Legion Trust’s insolvency arguments fail (Pl. Br. at 16). Defendants’ argument, that plaintiffs have contradicted their own allegations of Sergey’s and Wonderworks’ insolvency, fails because (i) the relevant question is whether the transfers rendered them insolvent at the time of the transfer, making the allegation that Wonderworks held over \$175 million in August irrelevant, and (ii) whether Sergey or Wonderworks possessed certain funds does not determine whether they were insolvent as insolvency is not determined by the value of one’s assets alone but by assets relative to liabilities (*id.* at 16–17; Compl. ¶ 1; *see DCL* § 271(1)).

Plaintiffs next argue that defendants’ conveyances were conducted with intent to defraud and consequently, are fraudulent under DCL § 276 (Pl. Br. at 17). Creditors may rely on “badges of fraud” to establish an inference of fraudulent intent because direct proof of intent to hinder, delay, or defraud creditors is rare (*see UBS Sec. LLC*, 2011 WL 781481, at *7). Badges of fraud are circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent (*see 172 Van Duzer Realty Corp. v 878 Educ., LLC*, 142 AD3d 814, 818 [1st Dept 2016]). Badges of fraud include: (i) a close relationship between the parties to an alleged fraudulent transaction, (ii) a questionable transfer not in the usual course of business, (iii) inadequacy of the consideration, (iv) the transferor’s knowledge of the creditor’s claim and the inability to pay it, (v) retention of control of the property by the transferor after the conveyance, and (vi) the amount of time between an event alerting the debtor that the creditor may claim the property and the allegedly fraudulent conveyance (*see Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]; *3 W. 16th St., LLC v Ancona*, 2013 WL 5459456, at *5 [Sup Ct New York County 2013]). Nearly all of these badges of fraud are present. They include:

- (i) the absence of consideration for the conveyance and the transferor’s resulting insolvency;
- (ii) close relationships between defendants Sergey and Wonderworks, and between Sergey and the beneficiaries and Protector of the transferee Trust, i.e. Sergey’s immediate relatives;

- (iii) a transfer to a notorious asset-protecting jurisdiction;
- (iv) trust provisions designed to frustrate the enforcement of judgments;
- (v) a secret transfer concurrent with Sergey's promises to repay creditors; and
- (vi) Sergey's continued control and use of the assets.

See Compl. ¶¶ 73–97

These specific allegations are sufficient to plead a fraudulent conveyance claim under DCL § 276 (see, e.g., *2406-12 Amsterdam Assocs. LLC v Alianza LLC*, 136 AD3d 512, 513 [1st Dept 2016]; see also *Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004]).

Plaintiffs next argue that they have successfully stated a breach of contract claim against defendant Sergey Leontiev rooted in the allegations that, at the August 2015 London meeting, Sergey acknowledged that he controlled the Loaned Funds and personally promised to pay the Debt to plaintiffs, creating a binding promise (Pl. Br. at 19; Compl. ¶¶ 128–31). Plaintiffs argue that Sergey's arguments in opposition (that no agreement was reached at the London meeting, if an agreement was reached it was not with plaintiffs, and if an agreement was reached with plaintiffs it is barred by Statute of Frauds) are each meritless. The London meeting transcript (which is appended to the compliant) evidences a binding, specific, and unequivocal agreement by Sergey to repay the Debt (Pl. Br. at 20; Compl. ¶¶ 9, 62–66, 69, 129–30). Sergey's argument, that the transcript does not suggest the reaching of a binding agreement, is premature at the motion to dismiss stage and is plainly incorrect (see also *Geraci v Creative Leasing Concepts, Inc.*, 219 AD2d 497 [1st Dept 1995]). Sergey's assertion, that the transcript at most can only suggest an agreement between Sergey and Varshavsky personally, is incorrect as it was clear to all attendees to the meeting that Varshavsky was acting as a representative of both Aviron and Avagumyan (Pl. Br. at 21; Compl. ¶ 9). The Statute of Frauds cannot be a defense here as the agreement plaintiffs are suing on is not a special promise to answer for the debt of another person but, instead, an independent obligation of the promisor to which Statute of Frauds does not apply (Pl. Br. at 21; N.Y. Gen. Oblig. Law 5-701(a)(2); see *Slavenburg Corp. v Rudes*, 86 AD2d 517, 518 [1st Dept 1982; see also Statute of Frauds, Ch. 3 § 4 [1677]; *Actionstrength Ltd. (t/a Vital Res.) v Int'l Glass Eng'g IN.GLEN SpA*, [2001] EWCA Civ 1477 ¶ 34). The complaint plainly alleges that Sergey did not promise to conditionally pay the Borrowers' debt but, instead, directly promised to make

the payments on his own and that a trial is necessary to determine the nature of the alleged promise (Compl. ¶¶ 62–68; *Slavenburg*, 86 AD2d at 518).

Plaintiffs next argue they stated a deceit (fraud) claim against defendant Sergey Leontiev under English law, which, plaintiffs assert, is similar the law governing fraud claims in New York in requiring a showing of dishonest and false representation intended to be relied on and such reliance (Pl. Br. at 22; *Simon v Philip Morris, Inc.*, 86 FSupp2d 95, 134 [EDNY 2000]; *AIC Ltd. v ITS Testing Servs. (UK) Ltd.*, [2006] EWCA Civ. 1601). Plaintiffs argue that the complaint alleges Sergey's promise to repay the Debt at the London meeting was a knowing misrepresentation that plaintiffs reasonably relied on (Compl. ¶¶ 133–139). Despite Sergey's assertion that his promise to pay is not actionable because it was an unfulfilled promissory statement, unfulfilled promises are actionable as fraud where the defendant had no intention of fulfilling the promise when it was given (Pl. Br. at 23; *Braddock v Braddock*, 60 AD3d 84, 89 [1st Dept 2009]). A present intention not to fulfill a promise is inferred from surrounding circumstances as people do not typically acknowledge when they are lying (*id.*). The circumstances here, particularly Sergey's establishment of an asset-protecting trust and movement of the Loaned Funds to that trust, make it likely that Sergey intentionally lied about paying plaintiffs back in full (Pl. Br. at 23). Sergey's argument, that it was unreasonable for plaintiffs to rely on his word, is meritless because reasonable reliance is not an element of an English law deceit claim and plaintiffs relied on more than "a word and a handshake" (*id.*; Sergey Br. at 16–17). Sergey's promise came at a "high-level" and recorded meeting at which Sergey repeatedly represented he would pay plaintiffs the Loaned Funds (Compl. Ex. B at 29). Plaintiffs further argue that it would be premature to assess the reasonableness of plaintiffs' reliance at this stage (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015]).

Plaintiffs next argue that they have successfully alleged that defendants Sergey Leontiev, Kolotnikov, and Wonderworks engaged in a conspiracy in violation of English and New York law (Pl. Br. at 24). Defendants' argument, that no conspiracy could exist as they were each part of the same corporate family, has no application here because plaintiffs have alleged that the conspirators were pursuing personal interests separate from their shared involvement in the corporation (*see Reich v Lopez*, 38 FSupp3d 436, 456 [SDNY 2014]). Defendants' argument, that plaintiffs did not plead an underlying wrongful act, is similarly without merit as it ignores plaintiffs' valid fraud and fraudulent conveyance claims (*see generally, Neilson v Sale Mortorano, Inc.*, 36 AD2d 325, 326

[2d Dept 1971]). Defendants' argument, that plaintiffs failed to plead intent to injure as required by English law, also fails because the complaint alleges both that Sergey intended to injure plaintiffs and that Kolotnikov was fully aware of Sergey's fraudulent conduct and engaged in his own wrongful conduct to further the scheme (Compl. ¶ 76; *see Aviron Auto. Grp.*, 168 AD3d at 89). Wonderworks' intent "can . . . be imputed to Leontiev" (Pl. Br. at 24–25). Defendants' argument, that plaintiffs were damaged by the pre-existing loans that were not fully repaid and not by the alleged conspiracy, fails because plaintiffs have alleged that conspirator's concerted effort ensured that the loans would failure (*id.* at 25).

Finally, this court has personal jurisdiction over defendants Legion Trust and Leonid Leontiev (Pl. Br. at 25). As to the Legion Trust, it is Sergey Leontiev's alter ego, over whom this court has jurisdiction (Compl. ¶¶ 11, 12, 77, 88, 91–92). Courts have found entities to be alter egos of a principal based on conduct similar to Sergey's (*see, e.g., USB Sec. LLC*, 30 Misc3d 1230(A); *see also New Media Holding Co. v Kagalovsky*, 118 AD3d 68, 79–80 [2014]; *Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc3d 1217(A) at *6 [New York Sup 2014]). Sergey's relationship to Legion mirrored his relationship to Wonderworks because he used Legion's corporate form to advance his scheme to control the loan proceeds and place them beyond plaintiff creditors' reach (*see Aviron Auto. Grp.*, 168 AD3d at 89). Legion's assertion, that exercising personal jurisdiction under CPLR § 302(a)(2) violates constitutional due process, is unavailing (*see Transasia Comm. Ltd.*, 45 Misc3d 1217(A), at *6). This court also has jurisdiction over Leonid Leontiev under CPLR § 302(a)(1) because he has conducted sufficient activities to have transacted business in the state and claims here plainly arise from such transactions (Pl. Br. at 27; *Al Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]). Leonid transacted business in the state by regularly receiving payments from Sergey in a New York bank account, an activity that courts have held is sufficient to establish business transactions in the state for personal jurisdiction purposes (*see, e.g., Ga-Pac. Corp. v Multimark's Int'l, Ltd.*, 265 AD2d 109, 111–12 [1st Dept 2000]; *First Manhattan Energy Corp. v Meyer*, 150 AD3d 521, 522 [1st Dept 2017]). Courts have exercised personal jurisdiction over defendants for more attenuated relationships to the state than here (*see, e.g., Windsor United Indus., LLC v Healey*, 28 Misc3d 1202(A), at *1 [Sup Ct New York County 2010]). Plaintiffs have specifically alleged that the payments transferred included those in connection with Sergey's parents' roles as beneficiaries and Protectors of the trust (Compl. ¶ 90). Leonid's transacting business in New York establishes that he has minimum contacts with the state

such that exercising long-arm jurisdiction over him would satisfy constitutional due process (*see, e.g., D&R Glob. Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 299 [2017]).

C. Defendants' Consolidated Reply Memorandum

Defendants submit a consolidated memorandum in reply to plaintiffs' opposition (Def. Reply [NYSCEF Doc. No. 382]). Defendants begin by arguing that each of plaintiffs' claims fail as a matter of law, beginning with the unjust enrichment claims (*id.* at 2). Quasi-contract is an obligation created in the absence of an agreement and that the existence here of a contract covering the subject at issue precludes plaintiffs' quasi-contract recovery, even against defendants who are third parties to the loan agreements (*id.*; *Miller v Schloss*, 218 NY 400, 407 [1916]; *see, e.g., Melcher*, 105 AD3d at 27–28). Defendants argue that plaintiffs do not dispute the existence of enforceable contracts here, that the loans are governed by terms formalized with the Borrowers, and that quasi-contractual relief is being sought to recover millions of dollars loaned pursuant to those contracts (Compl. ¶¶ 1, 35). Plaintiffs improperly rely on a misreading of *Sergeants Benevolent* to support their argument in opposition when, in fact, the case holds that the plaintiff there could proceed with its claim *after* finding that an independent, legally binding duty beyond the agreement's scope existed (*see* 19 AD3d at 111). Plaintiffs' assertion, that no case analogous to the facts here exists, is incorrect, (*see Anwar v Fairfield Greenwich Ltd.*, in a footnote (831 FSupp2d 787, 796–97 [SDNY 2011]). Plaintiffs cannot plead any duty owed to them by defendant Sergey Leontiev as the complaint's allegations offer no basis to extend the obligations that were created contractually to anyone not party to the loan agreements between plaintiffs and the Borrowers (Def. Reply at 3; Compl. ¶¶ 34–35, 38–50, 73–75, 77–84, 88–91; *McBeth v Porges*, 171 FSupp3d 216, 231 [SDNY 2016]; *see also Buffalo Emergency Assocs, LLP v Aetna Health, Inc.*, 1676 AD3d 461, 462 [1st Dept 2018]). Plaintiffs are sophisticated investors. If the Borrowers breached the loan agreements, plaintiffs would have a valid contractual claim against them. Plaintiff Avilon acknowledged as much in a statement of claim in Moscow State Commercial Court but chose not to pursue (Def. Reply at 3–4; Letter/Correspondence to the Judge on May 6, 2019 at 1 [NYSCEF Doc. No. 276]). Defendants argue that plaintiffs' assertions of “wrongful diversion of funds” beyond the loan agreements' subject matter do not create a personal guarantee from Sergey Leontiev as claims of extra-contractual diversions of funds to contractual non-parties have been rejected as insufficient to state quasi-contract claims (*see e.g., Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003]); *Chambers*, 2014 WL 4276910, at *3, *13).

Defendants next argue that plaintiffs' unjust enrichment claims fail to state a claim (Def. Reply at 4; *id.*, at *8, *10, *13). Defendants argue that the complaint alleges no facts showing that any defendant was enriched by orchestrating a transfer of plaintiffs' money and that, at most, plaintiffs allege that Sergey received benefits from transfers of unidentified funds which is insufficient to maintain an unjust enrichment claim (*see Goel v Ramachandran*, 1121 AD3d 783, 791 [2d Dept 2013]; *Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983, 988 [3d Dept 2006]). Plaintiffs' misrepresentations about what Sergey "admitted" or "confirmed" are unsupported by the complaint or the London meeting transcript it incorporates as nothing Sergey said suggested his possession of the Alleged Loan Funds (Def. Reply at 5; Compl. Ex. B at 4, 18). Defendants further argue that these "admissions" were also not confirmed by the alleged \$7 million payment Sergey made to Aviron the following month. These assertions "distort [plaintiffs'] complaint" which alleges that non-party Valkera paid a non-party Aviron affiliate (Compl. ¶¶ 35, 69). Sergey's statement in settlement negotiations, that any settlement would have to be funded by him and not Mr. Zhelzenyak, merely showed that Sergey had personal assets and that Mr. Zheleznyak was forced to flee Russia with few assets (Def. Reply at 5; Compl. Ex. B at 3:25–4:16, 18:16–24). Statements indicating Sergey's possession of personal funds cannot cure plaintiffs' failure to identify any improper benefit bestowed on Sergey (*see CDR Creances S.A. v Euro-Am. Lodging Corp.*, 40 AD3d 421, 422 [1st Dept 2007]). Plaintiffs fail to allege that any payments to defendant Leonid Leontiev came from the Alleged Loan Funds (Leonid Br. at 15–19; *see Chambers*, 2014 WL 4276910, at *8). Plaintiffs' sole allegation of defendant Kolotnikov's receipt of salary from Wonderworks also cannot sustain an unjust enrichment claim, and no authority is cited for the "exception" plaintiffs purport to invoke (Def Reply at 6; Kolotnikov Br. at 5–6; Pl. Br. at 7 n4).

Plaintiffs' arguments only confirm their failure to plead any prior relationship with defendants, let alone one that could cause inducement or reliance, as the complaint does not allege that Sergey had any knowledge or dealings with plaintiffs prior to August 2015 (*see, e.g., Joseph P. Carroll Ltd. v Ping-Shen*, 140 AD3d 544 [1st Dept 2016]). Plaintiffs' allegations, that Sergey induced reliance on plaintiffs' friendship with Mr. Zheleznyak, are bare legal conclusions which are not entitled to be taken as true (*see, e.g., Tal v Malekan*, 305 AD2d 281 [1st Dept 2003]; *McDonough v Monaco*, 37 AD3d 560, 561 [2d Dept 2007]). Plaintiffs' assertion, that the remaining defendants alleged role in the scheme is sufficient to demonstrate a relationship, is

incorrect (Def. Reply at 6–7; *see Chambers*, 2014 WL 4276910, at *10). Plaintiffs’ assertion, that the London meeting is indicative of a relationship between plaintiffs and Sergey Leontiev, is nonsensical because by that time, plaintiffs allege that Sergey had already been unjustly enriched (*compare* Pl. Br. at 11 *with* Compl. ¶¶ 62, 64). Further, plaintiffs’ assertion, that “equity and good conscience require defendants to pay,” represents a misunderstanding of quasi-contract because plaintiffs had an opportunity to seek additional guarantees, did not do so, and can now choose to seek contractual damages from the Borrowers but have not (Def. Reply at 7). Plaintiffs are not entitled to shift the risk they accepted by imposing a non-existent obligation on defendants based on loans made to the non-party Borrowers (*see Dragon Inc. Co. II LLC v Shanahan*, 49 AD3d 403, 405 [1st Dept 2008]).

Plaintiffs have failed to adequately state the existence of an agreement at the London meeting between themselves and Sergey Leontiev (*see, e.g., Estate of Spitz v Pokoik*, 78 AD3d 402, 403 [1st Dept 2010]; *Express Indus. & Terminal Corp. v New York State Dep’t of Transp.*, 93 NY2d 584, 586, 589–90 [1999]). Contrary to plaintiffs’ assertions, the London meeting transcript does not evidence an unequivocal agreement by Sergey to assume a personal obligation to pay plaintiffs the Alleged Loaned Funds on specific terms (Def. Reply at 8). Plaintiffs do not dispute facts that defeat their claim, including that: (i) neither Sergey nor Varshavsky expressed an intent to be bound by the discussions at the London meeting, (ii) Sergey repeatedly insisted that any eventual agreement be contingent on further discussions between the parties’ lawyers, and (iii) Varshavsky testified that no agreement was reached in London (Compl. Ex. B at 24–25, 28, 41; Weigel Aff. Ex.7 at 104:10–18, 105:03–13 [Transcript of Excerpts of Alexander Varshavsky’s Deposition] [NYSCEF Doc. No. 350]). Plaintiffs make no effort to explain how their allegation of an agreement can be reconciled with their allegation of a first payment of \$17 million by non-party Valkera in September of 2015 (Compl. ¶¶ 36, 69). Defendants reiterate that no agreement could have been reached between Sergey and plaintiffs because plaintiffs were absent from the London meeting, a fact which, defendants argue, is supported by the complaint’s failure to allege that Sergey knew Varshavsky was acting as a representative of plaintiffs (Def. Reply at 9; Compl. ¶ 9; *see Brasseur v Speranza*, 21 AD3d 299 [1st Dept 2005]). Even if a valid agreement was reached at the London meeting between plaintiffs and Sergey, it would be barred by the Statute of Frauds because plaintiffs fail to argue that an independent obligation existed here. Plaintiffs’ case law does not support its assertion that the Statute of Frauds does not apply, and any promise by Sergey

to answer for the debts of another would have to be in writing to be valid (*see* Statute of Frauds 1677 c.3 s.4; NY Gen. Oblig. Law § 5-701(a)(2); *Actionstrength Ltd. (v/a Vital Res.) v Int'l Glass Eng'g IN.GL.EN S.P.A.*, [2001] EWCA Civ 1477 ¶ 35, 43; *Slavenburg Corp.*, 86 AD2d at 518; *Philip F. Alba, P.C. v Lindenmann*, 289 AD2d 550 [2d Dept 2001]; *Abed v Azar*, 2010 WL 103867, at *5 [SDNY 2010]).

Defendants next argue that plaintiffs have failed to satisfy the heightened particularity requirement for its deceit (fraud) claim under CPLR § 3016(b) as the complaint does not contain facts sufficient to plead an intent to deceive or justifiable reliance (Def. Reply at 10). Plaintiffs fraud claim is based on the London meeting which they did not attend and, even if they had attended, claims based on statements of future intention must allege facts to show that the defendant, when the promissory representation was made, never intended to honor or act on his statement (*see Cronos Grp. Ltd. v XComIP, LLC*, 156 AD3d 54, 72 [1st Dept 2017]). Plaintiffs rely only on alleged events that occurred months after the alleged promise with the complaint failing to allege any facts as to Sergey Leontiev's present intention in London (Pl. Br. at 23; *see also Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821, 822 [2d Dept 1989] [dismissing a complaint devoid of allegations that defendants knew, at the time the statement was uttered, that they were false and had the present intent to deceive]). Speculation based on the fact that the expectation of performance was not realized cannot sustain plaintiffs' burden of showing that Sergey lied about his intentions (*id.*; *see also Lipman v Slazer Enters., LLC*, 2013 WL 1951230, at *7–8 [Sup Ct New York County 2013]). Plaintiffs' tactical decision to assert a deceit claim under English law, which does not require reasonable reliance, does not relieve plaintiffs' burden to state a cognizable claim (Def. Reply at 11). Plaintiffs failed to provide sufficient information concerning the foreign law at issue and, as a result their fraud claim should be reviewed under New York law (*see Minovici v Belkin BV*, 109 AD3d 520, 525 [2d Dept 2013]; *Mediexposure Ltd. v Omnireliant Holdings, Inc.*, 2010 WL 4225939, at *8 [Sup Ct New York County 2010]). Plaintiffs cannot establish justifiable reliance because they are sophisticated investors "who could not have believed" Sergey's oral representations, especially after requiring complicated writings for the smaller, compartmentalized Loaned Funds (Compl. Ex. B at 48:02 [telling Mr. Leontiev "we don't trust you"]; *Marine Midland Bank v Green*, 261 AD2d 340, 341 [1st Dept 1999]; *see also Unique Goals Int'l, Ltd. v Finskiy*, 2018 WL 5634326, at *7 [Sup Ct New York County 2018]).

Defendants next argue that plaintiffs have failed to state a claim for conspiracy and cannot evade the intra-corporate conspiracy doctrine (Def. Reply at 12–13). Plaintiffs’ argument, that choice-of-law analysis should not be conducted at this stage, is misplaced as no factual inquiry is necessary (Pl. Br. at 24 n14; *See, e.g., K.T. v Dash*, 37 AD3d 107, 110 [1st Dept 2006]; *Hill v Citicorp*, 215 AD2d 117, 118 [1st Dept 1995]; *Oberlander v Monarch Life Ins. Co.*, 274 AD2d 563, 564 [2d Dept 2000]). In response to plaintiffs’ argument that defendants ignore the fraud and fraudulent conveyance claims, defendants reiterate that the fraud claim alleged cannot support plaintiffs’ conspiracy claim and that the complaint does not plead a conspiracy to affect a fraudulent transfer (Pl. Br. at 24; Kolotnikov Br. at 11–12; Compl. ¶¶ 27, 140–47). Plaintiffs do not dispute that New York law does not recognize a conspiracy claim for breach of contract (Def. Reply at 13 n15; Kolotnikov Br. at 10–11). Plaintiffs admit they allege a conspiracy among members of the same corporate family (Wonderworks, its shareholder Sergey Leontiev, and its officer Kolotnikov), which triggers the intra-corporate conspiracy doctrine in which members of a single entity cannot be found to have conspired together (*see Smith v City of New York*, 290 FSupp2d 317, 321 n4 [EDNY 2003]). The “personal interest” exception on which plaintiffs rely, applies only when a plaintiff adequately alleges that conspirators are motivated by an improper personal interest separate from that of their principal and here, the complaint contains no such allegations but, in fact, pleads that Kolotnikov acted on Sergey Leontiev’s instruction in his capacity as director of Wonderworks (Compl. ¶¶ 51, 75; *Nollah v New York City*, 2018 WL 4636847, at *5 [SDNY 2018]; *see Lucas v Meier*, 2013 WL 1309622, at *8 [SDNY 2013]). As an alleged “conduit” for transfers to Legion Trust, Wonderworks could not have had an interest or motivation separate from Sergey Leontiev (Compl. ¶ 39). The conspiracy claim here is essentially a single act by one corporation exclusively through its directors, officers, and agents and, consequently, legally deficient (*see Herrman v Moore*, 576 F2d 453, 459 [2d Cir 1978]).

Defendants next argue that plaintiffs’ fraudulent conveyance claim fails as plaintiffs lack standing and the complaint fails to state a fraudulent conveyance claim (Def. Reply at 14). Plaintiffs cannot establish that they are defendants’ creditors as required to bring this claim under Debtor and Creditor Law (*see DCL §§ 270, 273, 276*). Because plaintiffs’ unjust enrichment claims fail as a matter of law, they cannot establish that they are defendants’ creditors and consequently, lack standing (*see Zorse v Gitter*, 134 AD3d 408, 409 [1st Dept 2015]; *Refco Grp. Ltd, LLC v Cantor Fitzgerald, L.P.*, 2014 WL 2610608, at *42 [SDNY 2014]). Plaintiffs’

conclusory assertion, that Sergey's conduct makes plain plaintiffs are his creditors, is unsupported by undisputed facts and must be disregarded (*see Valens U.S. SPVI, LLC v Hopkins Capital Partners, Inc.*, 2010 WL 118230, at *2 [Sup Ct New York County 2010]). The London transcript does not mention plaintiffs or the amount of money defined as the Loaned Funds and, even accepting plaintiffs' allegations, the complaint pleads an unenforceable oral agreement to assume Zheleznyak's moral obligations (*see, e.g.*, Compl. Ex. B. at 3:22–4:02; *see also* Compl. ¶ 63). Plaintiffs' reliance on veil-piercing fails as the complaint does not plead any veil-piercing claims under the requisite foreign law applicable to the Borrowers (*see* CPLR § 3016[e]; *Panam Mgmt. Grp., Inc. v Pena*, 2011 WL 3423338, at *6 [EDNY 2011]).

Defendants further argue that even if plaintiffs had standing, their complaint still fails to plead any fraudulent transfer (Def. Reply at 15). The complaint fails to identify the transferor or transferee of the challenged transfers and, although plaintiffs argue they alleged transfers from Borrowers to Wonderworks and from Wonderworks to Legion, the complaint does not allege fraudulent conveyance based on transfers from the Borrowers to Wonderworks (Compl. ¶ 124; *see Syllman v Calleo Dev. Corp.*, 290 AD2d 209, 210 [1st Dept 2002]). Plaintiffs fail to respond to precedent establishing that a DCL § 276 claim is inadequately pleaded when supported by allegations made only on information and belief (Def. Reply at 16; Sergey Br. at 20). Plaintiffs' complaint fails to even allege an actionable conveyance (*see Mid-Hudson Valley Fed. Credit Union v Quartararo & Lois*, 31 NY3d 1090, 1091 [2018]). Plaintiffs are not entitled to now ask the court to speculate as to their claims as the complaint does not plausibly allege that any defendant acted with actual intent (*see Refco Grp. Ltd.*, 2014 WL 2610608, at *43–44). Plaintiffs' badges of fraud allegations, *sans* factual support, is not sufficient to maintain the claim (*see, e.g., id.*; *Ray v Ray*, 108 AD3d 449, 451–52 [1st Dept 2013]; *Tongyang, Inc. v Tong Yang Am., Inc.*, 2018 WL 6308663, at *17 [Sup Ct New York County 2018]). Plaintiffs' attempt to "shoehorn" defendants Leonid and Kolotnikov into fraudulent conveyance claims must be rejected, incorporating through reference defendants' previous arguments (Def. Reply at 17; Leonid Br. at 19–21; Kolotnikov Br. at 7–8). Plaintiffs have failed to plead fraudulent conveyance under DCL § 273 because the complaint alleges that the transfer "rendered [defendant Sergey] *and/or* Wonderworks insolvent," but pleads no facts about either defendants' insolvency and contradicting other allegations in the complaint (Def. Reply at 17; Compl ¶ 80 [emphasis in Reply Br.]; *see* Wonderworks Br. at 10; *Wildman & Bernhardt Const., Inc. v BPM Assocs., LP*, 173

AD2d 38, 39 [1st Dept 2000]). Plaintiffs' complaint merely alleges that interest rates on certain transfers were lower than rates on others, without showing why the consideration given was inadequate (*see IDC (Queens) Corp. v Illuminating Experiences, Inc.*, 220 AD2d 337 [1st Dept 1995]; *see* Compl. ¶¶ 39, 124–25). Plaintiffs failed to allege what assets were transferred through Wonderworks to Legion and allegations about unidentified transfer was made without fair consideration is conclusory and insufficient (Def. Reply at 18; *see* Compl. ¶¶ 78–80; *see also Alexander Condo v E. 49th St. Dev. II, LLC*, 60 Misc3d 1232(A), at *7–8 [Sup Ct New York County 2018]).

Defendants next argue that plaintiffs lack personal jurisdiction over defendants Legion and Leonid Leontiev (Def. Reply at 18). As to defendant Legion, plaintiffs do not dispute Legion has no contacts with New York and has never conducted business in New York (Pl. Br. at 25–26). Plaintiffs' argument, made for the first time in their opposition papers that this court has personal jurisdiction over Legion because it is Sergey Leontiev alter ego, should be rejected because the allegations on which plaintiffs rely are either pleaded on information and belief or wholly conclusory (*id.*; Compl. ¶¶ 12, 88, 91–92; *see, e.g., Hantman & Assocs. v Fla. Family Office LLC*, 2015 WL 1938756, at *3 [Sup Ct New York County 2015]). The complaint contains no factual allegations to support plaintiffs' newly minted theory, nor does it contain factual allegations that Sergey Leontiev performed any act regarding Legion in New York (*see Walkovszky v Carlton*, 18 NY2d 414, 420 [1966]; *Bd. of Managers of Gansevoort Condo. v 325 W. 13th, LLC*, 121 AD3d 554 [1st Dept 2014]; *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v Eagle Equip. Tr.*, 221 AD2d 212–13 [1st Dept 1995]). In a footnote, defendants argue that the trust deed itself contradicts plaintiffs' claim that Sergey dominated and controlled Legion (Def. Reply at 19, n20; *see* Compl. Ex. C at 1, ¶ 6.1(a)–(b), 7.2, 9.1, 9.3, 10.1, 13.1(a)–(b), 22.1–22.4, 29.1–29.9 & First Schedule [establishing management by independent professional trustee company]; *see also Genger v Genger*, 121 AD3d 180, 280 [1st Dept 2014]). Cook Islands law, not New York law, governs whether Legion is Sergey's alter ego and whether the form of trust can be disregarded, and plaintiffs' failure to plead it here is fatal to their argument (CPLR § 3016(e); *see Fletcher v Atex, Inc.*, 68 F3d 1451, 1456 [2d Cir 1995]). Further, plaintiffs also never acquired jurisdiction over Legion based on service under BCL § 307 because once jurisdiction and service of process are questioned, plaintiffs must prove satisfaction of statutory and due process prerequisites (*see Stewart v Volkswagen of Am.*, 81 NY2d 203, 207 [1993]). Plaintiffs' argument, that service was

proper because Sergey conducts business in New York and because Legion is “dominated by [Sergey],” fails (Def. Reply at 20–21).

Finally, plaintiffs’ allegations on information and belief that Sergey Leontiev made payments to Leonid into New York bank accounts in connection with Leonid’s alleged role as protector of a foreign trust (Compl. ¶¶ 22, 24, 90) is insufficient to confer jurisdiction of New York courts over Leonid. Plaintiffs have failed to show the required substantial relationship between the payments alleged and their causes of action (*see Johnson v Ward*, 4 NY3d 516, 519 [2005]). Further, the complaint does not allege that Leonid was paid any money from the Alleged Loaned Funds (Def. Reply at 21; Compl. ¶¶ 78–79, 110). When, as here, the allegations involve transfers from a foreign entity to non-domiciliaries, and the alleged payments in and out of a New York bank account could have been made anywhere without changing the nature of plaintiffs’ allegations, the use of a New York bank account fails to establish jurisdiction (*see DirecTV Latin Am., LLC v Park 610, LLC*, 691 FSupp2d 405, 423–24 [SDNY 2010]). Defendants argue that plaintiffs fail to show how Sergey’s alleged payment into New York accounts establishes that Leonid transacted purposeful business in New York (*see Pramer S.C.A. v Abaplus Int’l Corp.*, 76 AD3d 89, 96–97 [1st Dept 2010]).

IV. DISCUSSION

A. Unjust Enrichment

“Unjust enrichment is a quasi contract theory of recovery, and ‘is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned’” (*Georgia Malone & Co., Inc.*, 86 AD3d at 408). In order to plead a claim for unjust enrichment, the “plaintiff must demonstrate that the services were performed for the defendants resulting in its unjust enrichment. It is not enough for the defendants to have received a benefit from the activities of the plaintiffs” *Joan Hansen & Co.*, 296 AD2d at 108 (emphasis in original; internal citations omitted). Plaintiffs must allege “that the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Georgia Malone & Co.*, 86 AD3d at 408 [internal quotation marks omitted]).

1. As against Sergey Leontiev

In his brief, defendant Sergey Leontiev plaintiffs cannot bring a claim where there is a valid and enforceable contract governs the subject matter of the claim, even against a third party

such as Sergey (see *Melcher*, 105 AD3d at 27-28) contract (*Clark-Fitzpatrick*, 70 NY2d at 388); *Maor v Blu Sand Int'l Inc.*, 143 AD3d 579 [1st Dept 2016]). It is undisputed that plaintiffs who are sophisticated business entities and non-party entities entered into multiple one-year contracts over a period of years governing the subject matter of plaintiffs' claims. The loans which formalized through loan agreements and promissory notes (Compl. ¶ 4), were "regularly rolled over at the end of their one-year terms" (*id.* ¶ 35). The complaint describes a loan by Avilon in the amount of \$19.9 million to non-party Ambika in 2008 which loan along with another \$6.625 million made in 2011 was regularly rolled over until in 2014 the 2008 loan was discharged and principal and interest were rolled into the 2011 loan (*id.*). These appear to have been profitable albeit risky transactions. Plaintiffs understood proceeds of the loans would be invested by Sergey using a "highly successful and reliable proprietary trading methodology" (*id.*). The investments yielded plaintiffs high interest rates of between 12-14% (*id.* ¶ 39). Plaintiffs do not allege a relationship with Sergey. Instead, plaintiffs assert a relationship with non-party Alexander Zheleznyak who, plaintiffs allege, is an "agent" of Sergey (*id.* ¶ 4). The facts alleged here are unlike those alleged in *Sergeants Benevolent Assn* where, in the context of an existing fiduciary relationship it was alleged that the principals of money managers for a union pension fund overcharged for commissions and retained for their own benefit, portions of commissions that were to be refunded to the plaintiff (see *Sergeants Benevolent Assn.*, 19 AD3d at 108).

Defendants also assert correctly that the unjust enrichment allegations in the complaint are conclusory and fail to plead a sufficiently close relationship (Compl. ¶¶ 99-100; *Georgia Malone & Co., Inc.*, 19 NY3d at 516-18). The complaint does not allege that plaintiffs loaned money to Sergey or performed any services for him resulting in Sergey's unjust enrichment. It is not enough for Sergey to have received a benefit from actions of plaintiffs (see *Joan Hansen & Co.*, 296 AD2d at 108).

The connection between the parties is too attenuated to maintain the unjust enrichment claim (see *Mandarin Trading*, 16 NY3d 173; *Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]). Consequently, plaintiffs' unjust enrichment claim against Sergey Leontiev must be dismissed.

2. As against Wonderworks and the Trust

The analysis addressed above as to Sergey applies to Wonderworks and the Trust with even greater force. Accordingly, to the complaint, Wonderworks and the Trust were enriched at plaintiffs' expense by Sergey's scheme as they are controlled by him and he directed the fraudulent

transfers through them (Compl. ¶ 48-52; 104-105 [“Wonderworks benefitted from its possession of the Loaned Funds”]; 110 [Legion “benefitted from [its] possession of the Loaned Funds”]). These allegations are insufficient because (1) the Loaned Funds are the subjects of binding contracts with the non-party Borrowers, the relationship between plaintiffs and Wonderworks and the Trust are too attenuated as there was no relationship between plaintiffs and these parties (see *Mandarin Trading*, 16 NY3d at 182-83).

Plaintiffs’ claim that Wonderworks’ and the Trust’s conduct went beyond the scope of the loan agreements is entirely baseless as the only conduct alleged is possession of funds now claimed by plaintiffs. Such claims are insufficient. As, the court in *Joan Hansen & Co.* held, to recover from a defendant on grounds of unjust enrichment, a plaintiff must demonstrate that services were performed for the defendant, resulting in defendant’s enrichment (296 AD2d 103, 108 [1st Dept]). It is not enough as here that the defendant received a benefit from the activities plaintiff provided for others (*id.*). Here, there are no indication of an enrichment that was unjust as the pleadings fail to indicate a relationship between the parties that could have caused reliance or inducement (see *Mandarin Trading Ltd.*, 16 NY3d at 182). Plaintiffs do not allege to have performed any service for defendant and plaintiffs do not allege any connection between themselves and Wonderworks or the Trust. Consequently, plaintiffs’ unjust enrichment claim against Wonderworks and the Trust¹ shall be dismissed.

3. As Against Leonid Leontiev

Similar to above, the complaint does not suggest that Leonid was serviced by plaintiffs and that a connection exists between plaintiffs and Leonid sufficient to maintain this action.

4. As Against Vadim Kolotnikov

Similar to above, the complaint does not allege that Kolotnikov was serviced by plaintiffs and that a connection exists between plaintiffs and Kolotnikov sufficient to maintain this action. Further, the mere receipt of compensation by an employer, here Wonderworks, cannot form the basis for an unjust enrichment claim against an agent (see *Bilinski Crafts Corp. v Capitolo di San Pietro in Vaticano*, 331 FSupp2d 247, 256 [SDNY 2004]). Plaintiffs’ unjust enrichment claim against Vadim Kolotnikov must be dismissed.

¹ Because the claim against the Trust shall be dismissed, the court need not address whether it has jurisdiction over the Trust.

B. Fraudulent Conveyance

New York Debtor and Creditor Law section 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.”

Plaintiffs are not creditors under Debtor and Creditor Law, a requirement to have standing to bring a DCL § 276 claim. Although plaintiffs argue that a plaintiff with a civil cause of action for damages becomes a defendant’s “pre-judgment creditor” when a cause of action accrues, plaintiffs have no valid cause of action as to any defendant. Consequently, plaintiffs’ fraudulent conveyance claim as to defendants Sergey Leontiev, Wonderworks, Leonid Leontiev, Vadim Kolotnikov, and the Trust shall be dismissed.

Plaintiff’s fraudulent conveyance claim as to defendant Sergey Leontiev must be dismissed for the additional reason that plaintiffs’ have failed to make allegations with sufficient particularity as required by CPLR § 3016(b). The allegations plaintiffs’ cite (Compl. ¶¶ 78–80) are all made on information and belief. Although plaintiffs argue that they are not required to allege the details of the consideration provided for the conveyances (*see Bd. of Managers of 14 Hope St. Condo*, 2013 WL 3814672), plaintiffs’ complaint not only fails to plead consideration with particularity, also the actual transfers themselves (Compl. ¶¶ 78–79). The fraudulent conveyance complaint against defendant Sergey Leontiev shall be dismissed.

C. Breach of Contract

A breach of contract claim is alleged against Sergey only. To sustain a breach of contract cause of action, plaintiffs must show: (1) an agreement; (2) plaintiff’s performance; (3) defendant’s breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). “The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every

provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The complaint against defendant Sergey Leontiev does not allege that a valid and enforceable agreement was reached at the London meeting because Sergey's promise to answer for Zheleznyak's debt was a "special promise to answer[] for the debt . . . of another" to which the Statute of Frauds applies and, here, the agreement was never papered (*PSI Int'l, Inc. Ottimo*, 272 AD2d 279, 280 [1st Dept 2000]). Plaintiffs argue that the Statute of Frauds does not apply because the transcript of the meeting evidences a binding agreement and the agreement was not a special promise to answer for another's debt but instead an independent obligation (*see Slavenburg Corp.*, 86 AD2d at 518). In *Slavenburg Corp.* the court stated that "[t]he distinction between a promise to answer for the debt of another which is within the statute [of frauds] and an independent obligation of the promisor . . . is elusive." However, "the liability of the promisor must be determined by the nature of the promise, whether it was to answer for the debt of a third person or whether it was to answer for his own debt" (*id.*). According to the transcript of the London meeting, when asked about obligations relating to the Loaned Funds, defendant Sergey Leontiev states, without challenge, "One more time, I accept Alexander [Zheleznyak]'s obligation as my own to pay you" (Compl. Ex. B at 10). Sergey's declaration as to the Debt was not a promise to pay an independent obligation as plaintiffs suggest but, instead, an explicit promise to answer for another's debt. Consequently, plaintiffs' breach of contract claim shall be dismissed.

D. Fraud

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], *lv. denied* 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]).

Sergey argues that plaintiffs have failed to plead they reasonably relied on his promise, made at the London meeting, because they were not present and, further, that the complaint fails to allege an intent to lie (*see Johnson v Cestone*, 162 AD3d 526–27 [1st Dept 2018]; *Zannett Lombardier, Ltd. v Maslow*, 29 AD3d 495–96 [1st Dept 2016]). Plaintiffs responds that they are stating an English law claim for deceit, and that the complaint alleges Sergey was dishonest at the

London meeting as evidenced by establishing a trust and moving the Loaned Funds to it (*see AIC Ltd. v ITS Testing Servs. (UK) Ltd.*, [2006] EWCA Civ. 1601 [available at NYSCEF Doc. No. 293]). To state a claim relying on the law of a foreign country, the substance of the foreign law must be stated (CPLR § 3016(e); *see Ponnambalam v Ponnambalam*, 35 AD3d 571, 574 [2d Dept 2006]). Plaintiffs state that deceit under English law is similar to an American fraud claim and requires a showing of a dishonest and false representation that it was intended to be relied on and was relied on. The only meaningful difference is the lack of reasonable reliance (*see AIC Ltd.*, [2006] EWCA Civ. 1601). The distinction is of no moment because plaintiffs have not alleged that Sergey lied at the time of the London meeting. Under New York law, an allegation of fraud based on a statement of future intention must allege facts showing that the party, at the time of the representation, never intended to honor his statement (*see Boylan v Morrow Co.*, 63 NY2d 616 [1984]; *Pope v New York Prop. Ins. Underwriting Assn.*, 112 AD2d 984, 985 [2d Dept 1985]). Plaintiffs argue that Sergey's establishment of a trust and transfer of the funds evidenced his intent in the London meeting but their complaint alleges on information and belief that Sergey did not begin researching means to settle a trust and transfer funds until September 2015, two full months after the London meeting and one full month after the alleged \$17 million payment (Compl. ¶¶ 69, 75). Where the trust was formed months after the London meeting plaintiffs cannot show that Sergey lied at the London meeting. The failure to plead an essential element of both fraud or deceit requires dismissal of the claim of deceit.

E. Civil Conspiracy

“[U]nder New York law, to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury” (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). “New York does not recognize an independent cause of action for conspiracy to commit a civil tort” (*id.*). “[A] cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort” (*Romano v Romano*, 2 AD3d 430, 432 [2d Dept 2003]).

Plaintiffs' civil conspiracy claim must be dismissed as against all defendants because no claim survives as to Sergey, Wonderworks or Kolotnikov and, as stated above, New York does

not recognize an independent cause of action for conspiracy without an underlying tort. Plaintiffs' conspiracy claim must be dismissed.

V. CONCLUSION

For the foregoing reasons, the motions to dismiss of defendants, Sergey Leontiev, Wonderworks, Legion Trust, Leonid Leontiev, and Vadim Kolotnikov are dismissed in their entirety and the second amended complaint shall be dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss of the defendants to dismiss the second amended complaint (Motion Sequence Numbers 015-019) are **GRANTED** in their entirety and the second cause of action is hereby **DISMISSED**; and it is further

ORDERED that the clerk of the court is directed to enter judgment against plaintiffs, Ailon Automotive Group and Karen Avagumyan and in favor of defendants, Sergey Leontiev, Wonderworks Investments Limited, Legion Trust, and Southpac Trust International Inc. as Trustee of Legion Trust, together with taxation of costs in an amount to be fixed by the clerk upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: March 17, 2020

ENTER,


O. PETER SHERWOOD J.S.C.