

**Andes Petroleum Ecuador Ltd. v Occidental  
Petroleum Corp.**

2022 NY Slip Op 31751(U)

June 1, 2022

Supreme Court, New York County

Docket Number: Index No. 655072/2021

Judge: Joel M. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X

ANDES PETROLEUM ECUADOR LTD.,  Plaintiff,  - v -  OCCIDENTAL PETROLEUM CORPORATION, OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY  Defendants.	INDEX NO. <u>655072/2021</u>  MOTION DATE <u>01/13/2022,</u> <u>01/13/2022</u>  MOTION SEQ. NO. <u>001 002</u>  <b>DECISION + ORDER ON                  MOTION</b>
--	---

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 22, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 146, 147, 148, 149, 150

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 71, 73

were read on this motion to COMPEL ARBITRATION.

In 2015, the Republic of Ecuador agreed to pay nearly \$1 billion to Defendant Occidental Exploration and Production Company (“OEPC”) and its parent, Defendant Occidental Petroleum Corporation (“OPC”), to settle claims arising out of an oil exploration project in the Amazon (Am. Compl. ¶¶ 2, 18 [NYSCEF 23]). This case is about what happened next. At Defendants’ direction, Ecuador paid the entire settlement amount into OPC’s bank account in New York (*id.* ¶¶ 19-20). OEPC, the subsidiary, received none of the proceeds (*id.* ¶ 21).

Plaintiff Andes Petroleum Ecuador Ltd. (“Andes”), meanwhile, claimed that it was entitled to 40% of OEPC’s interest in the settlement amount (*id.* ¶¶ 23, 44). Andes prevailed on

that claim in arbitration against OEPC in New York, and the arbitration award was then confirmed by the United States District Court for the Southern District of New York (*id.* ¶ 26). On December 2, 2021, judgment was entered in favor of Andes in the amount of \$558,577,380.56, plus costs and post-judgment interest (the “Final Judgment”) (*id.* ¶¶ 28-31). As a result, Andes is now a judgment creditor of OEPC.

At issue in this action is the transfer of OEPC’s interest in the settlement amount to OPC: that transfer, at Defendants’ direction, allegedly left OEPC insolvent and unable to satisfy the Final Judgment (*id.* ¶¶ 2, 72). According to Andes, the payment of money to OPC’s account amounted to a fraudulent conveyance under the New York Debtor and Creditor Law (“DCL”). Andes asserts four causes of action here, corresponding to DCL §§ 273-276, and seeks to levy execution upon the \$558,577,380.56 in OPC’s account or, alternatively, to set aside the conveyance to the extent necessary to satisfy the Final Judgment (*id.* at 19).

OPC moves to dismiss the amended complaint<sup>1</sup> on the ground that it is untimely or barred by Ecuadorian law. OEPC moves to compel arbitration of the claims asserted against it. For the reasons set forth below, OPC’s motion is **denied** and OEPC’s motion is **granted**.

## DISCUSSION

### I. OPC’S MOTION TO DISMISS (MS 001)

OPC’s motion to dismiss consists of three main arguments. *First*, OPC argues that Andes’s claims are time-barred under the Ecuadorian statute of limitations, applicable by virtue of New York’s borrowing statute (CPLR 202). *Second*, OPC argues that even if Andes’s claims

---

<sup>1</sup> Andes filed an amended complaint after Defendants filed their motions to dismiss the original complaint, but Defendants have elected to address their motions to the amended complaint (NYSCEF 29-30).

were timely, the constructive fraudulent transfer claims (DCL §§ 273-275) are still precluded as a matter of substantive Ecuadorian law, applicable by virtue of New York's choice-of-law principles. And *third*, OPC argues that even if Andes's claims were timely, the "actual intent to defraud claim" (DCL § 276) is insufficiently pled under New York law.

As discussed in further detail below, the Court rejects each of these three arguments.

#### **A. Andes's Claims are Timely.**

##### ***1. Andes's Claims Accrued in Ecuador For Purposes of CPLR 202.***

Under CPLR 202, "when a nonresident sues on a cause of action accruing outside of New York, the claim must be timely under the limitations period of both New York and the jurisdiction where the action accrued" (*In re Part 60 RMBS Put-Back Litig.*, 195 AD3d 40, 46-47 [1st Dept 2021]; CPLR 202). "This prevents nonresidents from shopping in New York for a favorable Statute of Limitations" (*Glob. Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]).

Andes's claims accrued in Ecuador, where its "principal place of business" is located (Am. Compl. ¶ 34). "[A] cause of action accrues at the time and in the place of the injury" (*id.* at 529). And "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (*id.*). For a corporate entity, "the place of injury" is often the "principal place of business," since that is "where [the entity's] alleged monetary damages would be felt" (*Brinckerhoff v JAC Holding Corp.*, 263 AD2d 352, 353 [1st Dept 1999] [holding under CPLR 202 that "the applicable Statute of Limitations is that of Georgia, since that is where Hoover had its principal office"]; *see, e.g., Kat House Productions, LLC v Paul, Hastings, Janofsky & Walker, LLP*, 71 AD3d 580, 581 [1st Dept 2010]; *Robb Evans & Assoc. LLC v Sun Am. Life Ins.*, 10 CIV. 5999 GBD, 2012 WL 488257, at

\*3 [SD NY Feb. 14, 2012] [“h[olding] that a business entity’s residence is determined by its principal place of business”]).

That Andes is “a corporation organized under the laws of Barbados” (Am. Compl. ¶ 34), without more, changes nothing. It is true, “the place of injury” does not always equate to a plaintiff’s principal place of business. Where “there is no evidence that [it has] a principal place of business in any one state,” for example, it is “reasonabl[e]” to designate the plaintiff’s residence as its “state of incorporation” (*Interventure 77 Hudson LLC v Falcon Real Estate Inv. Co., LP*, 172 AD3d 481 [1st Dept 2019]; see *Verizon Directories Corp. v Continuum Health Partners, Inc.*, 74 AD3d 416, 417 [1st Dept 2010] [applying Delaware statute of limitations under CPLR 202 to Delaware corporation that claimed residence in New York “by virtue of its authorization to do business and asserted extensive presence”]). And it is also possible an economic injury is sustained not where the plaintiff resides, but where the plaintiff “maintain[s] a separate financial base” (*Deutsche Bank Natl. Tr. Co. v Barclays Bank PLC*, 34 NY3d 327, 337 [2019], quoting *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421 [SD NY 1984]). But none of those principles avail Andes here.

Besides alleging the fact of its incorporation there, Andes alleges no facts connecting its injury to Barbados. And Andes cites no case in which a plaintiff’s place of incorporation trumps its principal place of business, for purposes of CPLR 202, under such circumstances (*compare with Portfolio Recovery Assocs. v King*, 14 NY3d 410, 416 [2010] [finding “that the contract causes of action accrued in Delaware,” where assignor was “a Delaware corporation with a principal place of business in Greenwood, Delaware”]; *Verizon*, 74 AD3d at 417 [holding that plaintiff’s “cause of action accrued in . . . Delaware, the state of its incorporation,” even though the plaintiff was “authoriz[ed] to do business and asserted extensive presence” in New York]; see

*Oxbow Calcining USA Inc. v Am. Indus. Partners*, 96 AD3d 646, 651 [1st Dept 2012] [clarifying that “Verizon did not claim that its principal office was in New York” in *Verizon, supra*]).

Therefore, Andes fails to viably allege that it “more acutely sustained the impact of its loss” in Barbados (*Glob. Fin. Corp.*, 93 NY2d 525, at 530).

Because Andes’s claims accrued in Ecuador, CPLR 202 mandates that Andes’s claims be timely both under New York’s statute of limitations and Ecuador’s (*In re Part 60*, 195 AD3d at 46-47). And because Andes’s claims are undisputedly timely under New York law (NYSCEF 149 at 14 [oral arg. tr.]), the focus here is on the applicable Ecuadorian limitations period.<sup>2</sup>

**2. OPC Does Not Meet Its Burden of Showing that Andes’s Claims are Untimely under Ecuadorian Law.**

Where a defendant moves to dismiss a cause of action as time-barred under CPLR 3211 [a] [5], it “must establish, prima facie, that the time within which to sue has expired” (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020]). Once that showing is made, “[t]he burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or raise an issue of fact as to whether the action was timely” (*MTGLQ Invs., LP v*

---

<sup>2</sup> Andes contends that its claims accrued in New York because the “specific settlement proceeds” at issue were transferred to and retained in a New York bank account (NYSCEF 42 at 7 [Andes mem. of law in opp. to mot. to dismiss]). Adopting this approach would mean that, for any fraudulent conveyance claim, application of the borrowing statute turns on the location of the transfer. Yet Andes cites no case law adopting that reasoning or applying CPLR 202 in that manner (*compare with, e.g., Sands Bros. Venture Capital II, LLC v Metro. Paper Recycling, Inc.*, 67 Misc 3d 1216(A), \*8 [Sup Ct, New York County 2020] [analyzing plaintiff’s “claims for fraudulent conveyance” under Connecticut law because “its principal place of business [is] in Connecticut”], *aff’d*, 201 AD3d 421 [1st Dept 2022]).

*Wozencraft*, 172 AD3d 644, 644–45 [1st Dept 2019] [citation omitted]; *see also Flintlock*, 188 AD3d at 531 [same]).

OPC does not meet its burden of showing that Andes’s claims are time-barred under Ecuadorian law. It is undisputed that Ecuador’s “default” statute of limitations for “ordinary actions” is ten years, unless a provision in the Ecuador Civil Code prescribes otherwise (Villalba Aff. ¶¶ 10 [k], 41; *see* NYSCEF 69 [“Generally, this period of time is five years for actions to collect and ten years for ordinary actions.”] [certified translation of Ecuador Civil Code, art. 2415]).<sup>3</sup> So, if Andes could bring its DCL claims in Ecuador, the default ten-year limitations period would apply to those claims unless the Civil Code specifically provides otherwise. And OPC fails to show that the Civil Code specifically provides otherwise.

OPC tries to shoehorn the DCL claims into an Ecuadorian cause of action called *delito civil*, which carries with it a four-year limitations period, but the comparison falters. To begin with, OPC’s foreign-law expert, Dr. Pérez, acknowledges “[t]here is no equivalent to DCL sections 273 to 275 under Ecuadorian law” (Pérez Aff. ¶ 15 [f]). Analogizing those statutory claims to *delito civil* is particularly inapt because an essential element of *delito civil* is malicious or fraudulent intent (Pérez Aff. 15 [b] [“For there to be a *delito civil*, there must be (1) malice or fraudulent intent; (2) harm; and (3) a causal relationship between the malice or fraudulent intent act and the harm.”]; *id.* ¶ 16 [“The Civil Code defines a *delito civil* as a wrongful act committed with the intent to harm”]; *see also* Villalba Aff. ¶¶ 10.a-b, 11, 14, 16). Andes’s claims under

---

<sup>3</sup> “Expert affidavits interpreting the relevant legal provisions can be a basis for constructing foreign law when accompanied by sufficient documentary evidence” (*Sea Trade Mar. Corp. v Coutsodontis*, 111 AD3d 483, 484–85 [1st Dept 2013]; CPLR 4511 [b]).

DCL §§ 273-275, on the other hand, do not require such intent.<sup>4</sup> For all of Andes’s claims, moreover, the statutory remedies under the DCL include setting aside the fraudulent transfer or levying execution on the property. The remedy for *delito civil* is merely money damages (Villalba Aff. ¶¶ 10.a, 10.c, 11, 15-16).<sup>5</sup> In light of these substantial differences, the Court declines to adopt the four-year limitations period applicable to *delito civil*.

Indeed, while both parties scour the Ecuador Civil Code in search of a cause of action analogous to Andes’s DCL claims, the existence of an exact Ecuadorian counterpart “is not necessary to effectuate th[e] purpose” of CPLR 202 (*Ins. Co. of N. Am. v ABB Power Generation, Inc.*, 91 NY2d 180, 186-87 [1997] [“hinging application of the borrowing statute on the existence of an available out-of-State forum is not necessary to effectuate that purpose”]). Rather, the relevant task under CPLR 202 is “to apply the limitations period that would apply if the action could be brought” in the foreign jurisdiction; “[a]pplication of the borrowing statute does not turn on whether suit *would* be possible” in that jurisdiction (*Merritt v Blumenthal*, 90 AD3d 514 [1st Dept 2011] [emphasis added]). In *Merritt*, the plaintiff brought a cause of action

---

<sup>4</sup> OPC recognizes, elsewhere in its briefing, that “there is an actual conflict between New York and Ecuadorian law” because Ecuadorian law does not permit claims for constructive fraudulent transfer (NYSCEF 12 at 10-11). Yet OPC argues that the “equivalent” of Andes’s claims “under Ecuadorian law is the *delito civil*” (*id.* at 9). That argument contradicts OPC’s own expert (Pérez Aff. 15 [f] [“There is no equivalent to DCL sections 273 to 275 under Ecuadorian law.”]), and it underscores that no genuine equivalent to Andes’s claims exist under Ecuadorian law. As a result, the 10-year default limitations period applies.

<sup>5</sup> In reply, Dr. Pérez states that money damages is “[t]he most common (but not the only) way to remedy a damage” under *delito civil* (Pérez Reply Aff. ¶ 10). But while Dr. Pérez opines that a “victim has full discretion . . . *to request* something else to repair the damage” (*id.* ¶ 14 [emphasis added]), he does not cite any example of an Ecuadorian court providing relief comparable to the DCL. In the “paradigmatic case” he does cite, an Ecuadorian court “ordered the construction of a series of civil infrastructure to remedy the damage caused to a group of people” (*id.* ¶ 15). That example fails to demonstrate the similarity between *delito civil* and the DCL.

under New York Judiciary Law § 487. Under CPLR 202, the court applied Pennsylvania’s two-year statute of limitations, even though Pennsylvania did not “ha[ve] an analogous statute” to the New York Judiciary Law (*id.*).<sup>6</sup>

If OPC could show that a claim Andes asserts here corresponds directly to a claim under Ecuadorian law, the Court could apply the Ecuadorian statute of limitations applicable to that claim. But OPC does not make that showing, so the default Ecuadorian statute of limitations applies. And, under that default limitations period, Andes’s claims are timely.

**B. Andes’s Claims for Constructive Fraudulent Transfer (DCL §§ 273-275) are Not Barred by Ecuadorian Law.**

Next, the Court must determine whether New York or Ecuadorian substantive law governs Andes’s claims for constructive fraudulent transfer under DCL §§ 273-275. “The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved” (*Matter of Allstate Ins. Co. (Stolarz–New Jersey Mfrs. Ins. Co.)*, 81 NY2d 219, 223 [1993]; *K.T. v Dash*, 37 AD3d 107, 111 [1st Dept 2006]).

Here, a conflict exists between New York and Ecuadorian law. New York law recognizes claims for constructive fraudulent transfer, which do not require proof of actual intent, while Ecuadorian law does not (DCL §§ 273-275; Pérez Aff. ¶ 28; *Atsco Ltd. v Swanson*, 29 AD3d 465, 465 [1st Dept 2006] [finding a conflict between “New York and Malaysian law in connection with the tort of fraudulent conveyance” because “Malaysian law imposes liability

---

<sup>6</sup> Pennsylvania’s two-year limitations period applies to any action “which is founded on negligent, intentional, or otherwise tortious conduct,” “including deceit or fraud,” subject to exceptions specified by the statute. And Judiciary Law § 487 penalizes “[a]n attorney or counselor who,” among other things, “[i]s guilty of any deceit or collusion . . . with intent to deceive the court or any party.”

under its National Land Code only where there is ‘actual fraud,’” whereas New York also imposes liability for “constructive fraud”). For its part, Andes contends that no actual conflict exists because a specific Ecuadorian cause of action, the *acción colusoria*, permits claims for constructive fraudulent transfer. But Prof. Villalba, Andes’s expert, fails to rebut the showing by Dr. Pérez, OPC’s expert, that *acción colusoria* applies exclusively to transactions involving real property (Second Pérez Aff. ¶¶ 38-42). As Dr. Pérez argues – and Prof. Villalba does not disprove – there are no Ecuadorian cases on record applying *acción colusoria* outside the realm of real property (*id.* ¶ 42; *see* Second Villalba Aff. ¶ 10).

Because a conflict of laws exists, the Court must look to New York choice-of-law principles to decide which jurisdiction’s law applies (*Padula v Lilarn Properties Corp.*, 84 NY2d 519, 521 [1994]). Fraudulent conveyances are torts for choice-of-law purposes (*Atsco*, 29 AD3d at 465-66), and “[i]n the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation” (*Wimbledon Fund, SPC v Weston Capital Partners Master Fund II, Ltd.*, 184 AD3d 448, 450 [1st Dept 2020]). “Given that fraudulent conveyance laws are ‘conduct regulating,’ the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders” (*Atsco*, 29 AD3d at 466). “[T]he locus jurisdiction’s interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct . . . assume critical importance” (*id.*). Where “the parties do not share a common domicile, and ‘the conflicting rules involve the appropriate standards of conduct’ rather than the allocation of losses, then ‘the law of the place of the tort ‘will usually have a predominant, if not exclusive, concern’” (*United Feature Syndicate, Inc. v Miller*

*Features Syndicate, Inc.*, 216 F Supp 2d 198, 215 [SD NY 2002], quoting *Padula*, 84 NY2d at 522).

The interest analysis here tilts in favor of New York, the jurisdiction where the alleged fraudulent conveyance occurred and whose judgments are allegedly being frustrated. The transfer at issue directed money to a New York bank account (Am. Compl. ¶ 68; *see Lyman Commerce Sols., Inc. v Lung*, 12-CV-4398, 2014 WL 476307, at \*4 [SD NY Feb. 6, 2014] [applying New York law to fraudulent conveyance claim because transfers were made to “defendants’ New York accounts”]). Andes’s claim to a share of that money relies on an agreement governed by New York law, an arbitration award obtained in a New York arbitration, and a judgment entered by a New York federal court (Am. Compl. ¶¶ 2, 25-26, 30-31; *see RCA Corp. v Tucker*, 696 F Supp 845, 856 [ED NY 1988] [“New York has an especially strong interest in applying its law . . . in ensuring that its judgments are not frustrated by wrongful acts of judgment debtors”]; *Atsco*, 29 AD3d at 466 [applying Malaysian law where transfer of assets involved “a Malaysian proceeding that resulted in a Malaysian judgment”]).<sup>7</sup> Because Andes’s claims revolve around events in New York, New York is the jurisdiction with the greatest interest in Andes’s claims.

To be sure, the domicile of the plaintiff can be relevant in undertaking the interest analysis, but it is not, as OPC suggests, determinative (*see, e.g., Padula v Lilarn Properties Corp.*, 84 NY2d 519, 521 [1994] [“reject[ing] plaintiff’s contention that New York law should

---

<sup>7</sup> To be clear, the presence of a New York bank account does not, by itself, mean that New York has the greatest interest in a claim concerning the fraudulent transfer of money into that account (*Wimbledon*, 184 AD3d at 451). As the case law demonstrates, no one variable controls the interest analysis. But here, the New York account, coupled with the New York arbitration award and the New York judgment, point to New York’s greater interest in the dispute.

apply” even though both parties were “domiciliaries of New York State”]; *Atsco*, 29 AD3d at 466 [applying Malaysian law even though judgment creditors were “a Japanese citizen and a Cayman Islands entity”]; *Licci ex rel. Licci v Lebanese Can. Bank, SAL*, 672 F3d 155, 158 [2d Cir 2012] [“Although the plaintiffs’ injuries occurred in Israel, and Israel is also the plaintiffs’ domicile, those factors do not govern where, as here, the conflict pertains to a conduct-regulating rule”)].<sup>8</sup> A rigid rule equating the location of the tort with the location of the parties would, in effect, collapse the distinction between conduct-regulating and loss-allocating claims (*see Krock v Lipsay*, 97 F3d 640, 646 [2d Cir 1996] [“Where the parties are domiciled in different states, the locus of the tort will almost always be determinative in cases involving conduct-regulating laws, whereas those cases concerning loss allocation will turn in significant part on the domiciles of the parties”]).

### C. Andes States a Claim under DCL § 276.

Because there is no conflict of laws in connection with Andes’s claim under DCL § 276, “the law of the forum state where the action is being tried should apply” (*SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004] [citations omitted]). Andes’s fourth cause of action, based on an “actual intent to defraud,” is therefore governed by New York law.

“To allege a claim under DCL section 276, the claimant must allege that (1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that the thing was transferred or disposed of by the debtor and (3) that the transfer was done with actual

---

<sup>8</sup> OPC’s citation to *Cortlandt St. Recovery Corp. v Bonderman* is not “instructive” because there “[t]he allegedly fraudulent transfers occurred in Europe,” not in New York (73 Misc 3d 1217(A), \*13 [Sup Ct, New York County 2021]).

intent to defraud” (*Tongyang, Inc. v Tong Yang Am., Inc.*, 2018 WL 6308663, 2018 NY Slip Op. 32959(U), at \*24 [Sup Ct, New York County 2018] [citations omitted]).

“Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on ‘badges of fraud’ to support [its] case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent” (*Wall Street Assocs v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [declining to dismiss complaint alleging badges of fraud]). “These ‘badges of fraud’ include a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; and retention of control of the property by the transferor after the conveyance” (*Tommy Lee Handbags Mfg. v 1948 Corp.*, 971 F Supp 2d 368, 382 [SD NY 2013]).

A claim under DCL § 276 must be pled “with sufficient particularity” under the heightened standards of CPLR 3016 [b] (*Avilon Automotive Group v Leontiev*, 194 AD3d 537, 539 [1st Dept 2021]). The particularity requirement applies to allegations about the transfer as well as allegations about the “badges of fraud” surrounding it (*id.*).

Here, Andes’s allegations in support of its DCL § 276 claim are sufficient for pleading purposes. *First*, Andes alleges “a close relationship between the parties to the alleged fraudulent transaction” (*Tommy Lee*, 971 F Supp 2d at 383). OPC is alleged to be the ultimate parent of OEPC (Am. Compl. ¶ 36). Indeed, OPC only had standing in the Ecuador Arbitration because it “owns and controls OEPC” (*id.* ¶¶ 10-11, 47-48). OPC acted as a single entity with OEPC throughout the Ecuador Arbitration, using the same counsel (including OPC’s in-house counsel), controlling OEPC’s legal strategy, and stating that OPC was liable for OEPC’s contractual obligations to Andes (*id.* ¶¶ 23, 49, 60-63, 66). *Second*, Andes alleges that OEPC received no

consideration for the transfer of its entire interest in the settlement to OPC (*see id.* ¶¶ 22, 70).

*Third*, Andes alleges that the billion-dollar transfer, made without any consideration, was not in the usual course of business (*id.* ¶ 19-22). And *fourth*, Andes alleges that OPC orchestrated the transfer to OPC, such that OPC always had, and continues to exercise, control over the funds (*id.* ¶ 75). Because Andes “has alleged [more than] several of these badges of fraud . . . it cannot be said that [Andes] does not allege actual fraudulent conveyance” (*Tommy Lee*, 971 F Supp 2d at 383).

The cases on which OPC relies are distinguishable. In *Lippe v Bairnco Corp.*, for example, the federal district court found, on a summary judgment record, that the close relationship between the transferor and transferee companies was “a weak” indicator of fraud because “the companies were, for the most part, independent corporations run by separate officers and management” (249 F Supp 2d 357, 382 [SD NY 2003], *affd*, 99 Fed Appx 274 [2d Cir 2004]). That is not the case alleged here (*see* Am. Compl. ¶¶ 23, 49, 60-63, 66; *see also Ray v Ray*, 108 AD3d 449, 451 [1st Dept 2013] [finding “there were no ‘badges of fraud’ because,” among other things, “there was no close relationship” transferor client and transferee law firm]). Unlike in *Bd. of Managers of Lore Condominium v Gateway IV LLC*, moreover, Andes alleges that Defendants were aware of its claim at the time of the transfer to OPC’s bank account (169 AD3d 617, 618 [1st Dept 2019]; Am. Compl. ¶ 66 [“Andes’ demand for payment was entirely unsurprising to Defendants, who had made representations to the panel throughout the Ecuador Arbitration that they would be required to pay 40% of any recovery to Andes.”]; *id.* ¶ 69 [“At the time of the Fraudulent Conveyance, both Defendants knew of Andes’ claim to 40% of the Settlement Amount.”]).

According Andes the benefit of every possible inference, and determining only whether the facts as alleged fit within any cognizable legal theory, at this stage the Court declines to dismiss the claim under DCL § 276.

## II. OEPC'S MOTION TO COMPEL ARBITRATION (MS 002)

OEPC's motion to compel arbitration is granted. "Arbitration is a matter of contract, 'grounded in agreement of the parties'" (*Matter of Belzberg v Verus Investments Holdings Inc.*, 21 NY3d 626, 630 [2013]). The "threshold question" is "whether there is a valid and binding arbitration agreement," and it "is a question for the Court to decide" (*Gol v TNJ Holdings, Inc.*, 68 Misc 3d 1216(A), \*4-5 [Sup Ct, New York County 2020]; *Henry Schein, Inc. v Archer and White Sales, Inc.*, 139 S Ct 524, 530 [2019] ["Before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."]). It is easily answered here. The parties undisputedly entered into a valid, binding arbitration agreement, known as the "Farmout Agreement," which broadly covered "any dispute or difference . . . in any way connected with" the parties' business relationship (NYSCEF 18 § 7.01 [Farmout Agreement]). Indeed, Andes previously relied on the Farmout Agreement to initiate AAA arbitration against OEPC and to confirm the resulting arbitration award in federal court (NYSCEF 20 at 3-4).

Since a valid arbitration agreement exists, the next question is whether the matter in dispute falls within the scope of that agreement (*Gol*, 68 Misc 3d 1216(A), \*5). "Whether a dispute is arbitrable is generally an issue for the court to decide ***unless the parties clearly and unmistakably provide otherwise***" (*Zachariou v Manios*, 68 AD3d 539, 539 [1st Dept 2009] [emphasis added]; see *Henry Schein*, 139 S Ct at 530 ["If a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue"]). And "[w]here there is a broad arbitration clause and the parties' agreement

specifically incorporates by reference the AAA rules providing that the arbitration panel shall have the power to rule on its own jurisdiction, courts will ‘leave the question of arbitrability to the arbitrators’” (*Zachariou*, 68 AD3d at 539).

That is the case here. The parties’ broad arbitration agreement expressly incorporates the AAA Rules (NYSCEF 18 § 7.01 [“any dispute or difference . . . shall be finally and exclusively referred to and settled by arbitration under the Commercial Arbitration Rules of the American Arbitration Association”]). Once incorporated into the contract, the AAA Rules “are not secondary interpretive aides that supplement our reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself” (*C & L Enterprises, Inc. v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411, 419 n.1 [2001]). And the AAA Rules in turn, provide that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim” (AAA Rule 7). As a result, “[p]enetrating definitive analysis of the scope of the agreement must be left to the arbitrators,” and “the court’s inquiry is ended” (*Nationwide Gen. Ins. Co. v Inv’rs Ins. Co. of Am.*, 37 NY2d 91, 96 [1975]).

Andes’s arguments in opposition are unavailing. It is true that incorporating the AAA rules into an arbitration agreement “does not, *per se*, demonstrate clear and unmistakable evidence of the parties’ intent to delegate threshold questions of arbitrability to the arbitrator *where other aspects of the contract create ambiguity as to the parties’ intent*” (*DDK Hotels, LLC v Williams-Sonoma, Inc.*, 6 F4th 308, 318 [2d Cir 2021] [emphasis added]). In *DDK*, for example, the arbitration agreement “d[id] not apply to ‘any controversy,’ ‘all claims,’ or ‘all disputes,’” but only to a defined subset of “Disputed Matters” (*id.* at 319-320). The Court found

that “[t]he limited scope of this provision create[d] ambiguity as to whether the parties clearly and unmistakably intended to delegate the question of arbitrability to the arbitrator” (*id.* at 320; *see also NASDAQ OMX Group, Inc. v UBS Sec., LLC*, 770 F3d 1010, 1031 [2d Cir 2014] [declining to find “clear and unmistakable” intent to delegate question of arbitrability “where a broad arbitration clause is subject to a qualifying provision that at least arguably covers the present dispute”]).

Here, by contrast, the arbitration agreement does not contain such limiting language. Andes construes section 3 [j] of the agreement as “provid[ing] for post-arbitration disputes related to recovery of amounts awarded in a completed arbitration to be heard in a judicial forum” (NYSCEF 71 at 21 [Andes’s mem. in opp.]). But that is not what section 3 [j] says. Rather, this provision states only that “judgment on an award may be entered by any court of competent jurisdiction” (NYSCEF 18 § 3 [j]). It does not carve out any types of dispute from the broad obligation to arbitrate. Andes agreed to arbitrate under the AAA Rules “any dispute . . . in any way connected with” the parties’ relationship, including any dispute about the “enforceability, performance, [or] non-performance” of the parties’ obligations under the agreements (NYSCEF 18 § 7.01). “[W]here the arbitration agreement is broad and expresses the intent to arbitrate all aspects of all disputes, this – coupled with incorporation of rules that expressly empower an arbitrator to decide issues of arbitrability – constitutes clear and unmistakable evidence of the parties’ intent to delegate the question of arbitrability to the arbitrator” (*DDK*, 6 F4th at 318-19).

\* \* \* \*

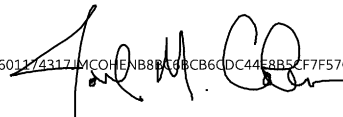
Accordingly, it is

**ORDERED** that OPC’s motion to dismiss is DENIED; it is further

**ORDERED** that OEPC’s motion to compel arbitration of the claims asserted against it is GRANTED, and those claims are hereby stayed; and it is further

**ORDERED** that the non-stayed parties appear for a preliminary conference on **June 21, 2022 at 11:30 a.m.**, with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference date.<sup>9</sup>

This constitutes the Decision and Order of the Court.

20220601174317JMC0HENB88A38CB6DC44E8B5CF7F57C782E4FF  
  
\_\_\_\_\_  
JOEL M. COHEN, J.S.C.

6/1/2022  
\_\_\_\_\_  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE

<sup>9</sup> If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.