Chung Tai Print. (China) Co Ltd. v Florence Paper Corp.

2024 NY Slip Op 32503(U)

July 16, 2024

Supreme Court, New York County

Docket Number: Index No. 651101/2019

Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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CHUNG TAI PRINTING (CHINA) CO LTD.,

Plaintiff,

- v -

FLORENCE PAPER CORP., STEVEN SHAMAH, VIVIAN SHAMAH, RONALD SHAMAH, SARI SHAMAH, DAVID SHAMAH, ALAN SHAMAH, MICHAEL HARARY, JERRY HARARY, ZVI BEN-HAIM, LEON C. HARARY, EDGE 2 EDGE PACKAGING, LLC

Defendant.

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INDEX NO. 651101/2019

MOTION DATE 12/28/2023, 12/28/2023, 12/29/2023

MOTION SEQ. NO. 011 012 013

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 438, 441, 447, 448, 451, 452

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 439, 442, 443, 444, 445, 446, 453

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 429, 430, 431, 432, 433, 434, 435, 436, 437, 440, 449, 450

were read on this motion to/for JUDGMENT - SUMMARY.

The gravamen of the undisputed facts is that the individual defendants rendered Florence Paper Corp. (**FPC**) insolvent by abusing the corporate form, dominating it by using corporate funds to directly pay their own personal expenses, and otherwise using corporate assets to fund their lifestyles.

Based primarily on *Vos v Lee* (2009 WL 10640615, at *11 [EDNY Dec. 23, 2009]), David Shamah, Alan Shamah, Michael Harary, Jerry Harary, Leon Harary, Zvi Ben-Haim, and Edge2Edge Packaging, LLC (**E2E**) (hereinafter, collectively, the **E2E Defendants**) (Mtn. Seq. No. 011) and Steven Shamah, Vivian Shamah, Ronald Shamah, and Sari Shamah (collectively, hereinafter, the **FPC Individuals**), and FPC (collectively with the FPC Individuals, the **FPC Defendants**) collectively move (Mtn. Seq. No. 013) for dismissal of all of the claims asserted against them arguing in sum and substance that Chung Tai Printing (China) Co Ltd. (**Chung Tai**) did not have equity in the purchase orders at issue and therefore lacks standing. They are incorrect. As an initial matter, and as discussed below, the defendants did not assert the defense of standing based on facts which were always in their possession and which were not learned through discovery during this case such that their defense of standing is waived (CPLR 3211 [a][3]; [e]; *Dougherty v Rye*, 63 NY2d 989, 992 [1984]; *Sec. Pac. Nat. Bank v Evans*, 31 AD3d 278 [1st Dept 2006]). More importantly, however, because the senior creditor Merchant Factors Corp. (**Merchant**)'s security interest was in fact released in the relevant purchase orders, deposits, and inventory at the time of the transfer at issue, the defendants do not meet their burden of coming forward with sufficient evidence to demonstrate their entitlement to summary judgment based on their argument that Chung Tai had no equity in the collateral and therefore were not prejudiced by the transfer at issue (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Even accounting for Merchant's interest and based on Michael Stanley (E2E's own expert)'s testimony, the accounts receivable had approximately $584,379 in excess equity that Chung Tai at all times had an interest in such that factual issues preclude the defendants' entitlement to summary judgment. As such, these claims must proceed to trial.

Beyond addressing standing in connection with the fraudulent conveyances at issue in that case, the *Vos* court granted the plaintiff's motion for summary judgment as to its veil piercing based claims as against certain of the individual defendants because it was clear that the defendants abused the corporate form and dominated Sun, the corporation at issue in that case:

> [] the undisputed evidence establishes that Lee and Santi, Sun's sole shareholders, completely dominated Sun. During the three years of Sun's operation from 2002 to 2005, Lee and Santi did not maintain any corporate minutes, nor, during that period, did Sun file its corporate taxes or New York Biennial statement as required by law. Further, during the discovery period, Lee and Santi produced only a handful of corporate documents, and notably did not produce any copies of issued shares or any record of officer elections or actions.
>
> Lee and Santi's failure to respect the separate corporate identity of Sun is further evident in Sun's financial dealings. Lee and Santi, who exercised sole discretion over Sun's finances, executed numerous checks on behalf of Sun made payable to "cash," which cash was drawn by Lee and Santi on an as-needed basis. Santi marked a number of the aforesaid checks as personal savings for a future mortgage down payment. Further, Sun directly paid Lee and Santi's personal expenses, including $88,500 in rent for their residence and $13,099 in childcare costs. Sun also made payments to a Citibank account and for a car lease, both in Santi's individual name.

(*id.*, at *6 [footnote and internal citations omitted]). Thus, and for the reasons set forth below, based on the conduct of the defendants in this case, under *Vos*, dismissal of the veil piercing claims against certain of the E2E Defendants and the FPC Defendants is not appropriate. (*Id.*; *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). To the contrary, as discussed below, the plaintiff has made out a *prima facie* case for summary judgment for veil piercing as against certain of these individuals.

The Relevant Facts and Circumstances

FPC was in the business of selling packaging products. It is owned by Steven Shamah and his brother, Ronald Shamah. David Shamah and Alan Shamah, both sons of Steven Shamah, were

FPC salesmen, and they at some point created and ran a subdivision of FPC, Marks & Bleeds (NYSCEF Doc. No. 394, ¶¶ 4-5). David Shamah was authorized to sign checks on FPC's behalf, managed sales accounts and also managed two employees (NYSCEF Doc. No. 398, pages 165-167, lines 3-3), including Stacy Camacho, who was a "do-it-all" employee at FPC but not officially a manager (NYSCEF Doc. No. 413, page 80, lines 5-14). Alan Shamah had authority to sign new customers. (NYSCEF Doc. No. 451, at 13; NYSCEF Doc. No. 448, pages 3-4, 18-19). The Second Amended Complaint (the **SAC**; NYSCEF Doc. No. 168) alleges that:

> 30. Upon information and belief, prior to and during the time FPC was dealing with Plaintiff; Steven Shamah's sons, David Shamah and Alan Shamah, were officers of FPC and helped the Shamahs to run FPC's day-to-day operations.

(*id.*, ¶ 30).

The fully developed record before the Court establishes that it is undisputed that **FPC observed practically no corporate formalities**. To wit, **FPC did not hold official corporate meetings. FPC further failed to record corporate minutes**. And, in fact, FPC held only one official vote: a resolution to terminate someone. (NYSCEF Doc. No. 413, pages 31-32, lines 12-21; NYSCEF Doc. No. 416, pages 80-81, lines 9-4.)

Indeed, FPC was a family personal office. It **leased automobiles for several members of the Shamah family's personal use**: one each for Steven Shamah and Alan Shamah, and two cars each for David Shamah and Ronald Shamah – the second car was for use by David Shamah's and Ronald Shamah's respective wives, **who were not in any way involved in the management of FPC** (NYSCEF Doc. No. 413, page 72-75, lines 11-22). FPC has not produced any records relating to its leasing of cars (NYSCEF Doc. No. 449, ⁋ 50 [Attorney Affirmation]).

Steven Shamah indicated in deposition testimony that he was not aware of any FPC policy governing the retention of corporate records (NYSCEF Doc. No. 413, pages 66-67, lines 18-15). In fact, at times, **Steven Shamah used his personal credit card for FPC's business expenses and caused FCP to pay his corresponding credit card bills** (NYSCEF Doc. No. 413, page 152, lines 7-17). Steven Shamah further distributed FPC funds directly from FPC accounts to make payments on his own, Ronald Shamah's, and their mother's personal mortgages – he booked these distributions for accounting purposes as repayments of their personal loans to FPC (NYSCEF Doc. No. 259, pages 95-96, lines 4-19).

Merchant was FPC's lender and had a perfected first-priority security interest over FPC's assets as a part of their financing arrangement by which Merchant advanced certain sums against FPC's accounts receivable, which was reflected in a certain Discount Factoring Agreement, dated as of October 29, 2015 (the **Factoring Agreement**; NYSCEF Doc. No. 385, § 9; NYSCEF Doc. No. 386).

Under the Factoring Agreement, Merchant agreed to make advances against receivables "in an amount not exceeding 85% of the amount thereof" (*id.*, § 4). A certain Amendment No. 1, dated as of December 8, 2016, reflected an additional advance of $2 million to FPC, secured by a mortgage on real estate owned by Steven Shamah and Vivian Shamah, to be payable upon the termination of the Factoring Agreement (NYSCEF Doc. No. 386, at 13). As a part of the Factoring Agreement, the E2E Individuals personally, irrevocably and unconditionally guaranteed the debts of FPC (Index No. 532194/2021, NYSCEF Doc. No. 42). Finally, and

significantly, under FPC's arrangement with Merchant, Merchant held a mortgage on the FPC Individuals' homes (*see, e.g.*, Index No. 532194/2021, NYSCEF Doc. Nos. 43-49).

In 2018, FPC encountered increasing financial difficulties (although the cause is contested). According to Steven Shamah, nothing was changed during this time as it related to his own compensation or the number of cars leased for family members (NYSCEF Doc. No. 413, pages 77-78 lines 7-18). On August 7, 2018, Shenzhen Huibao Paper Products Co., Ltd. (**Shenzhen**), one of FPC's suppliers, filed suit to recover an alleged $2,979,461 balance owed (NYSCEF Doc. No. 419, ¶ 11 [FPC's answer disputing this number]; *see* NYSCEF Doc. No. 418). FPC wound down its business and ultimately closed its doors in late December of 2018 (NYSCEF Doc. No. 413, pages 52-53, lines 19-19; NYSCEF Doc. No. 416, pages 31-32, lines 14-4).

It is against this backdrop that E2E was hatched. The SAC alleges that E2E was a new entity created with the express purpose of continuing FPC's business uninterrupted while avoiding its indebtedness to numerous creditors, including Chung Tai:

> 36. Upon information and belief, E2B assumed certain of FPC's liabilities necessary for E2E's uninterrupted continuation of FP C's business, and under the Shamahs direction and control E2E did in fact continue FPC's business concurrently with FPC being shut down and ceasing operation.
>
> 37. Upon information and belief, E2E and FPC share common directors, officers, management and employees.
>
> …
>
> 82. FPC's former owners and officers, including but not limited to Steven Shamah, Ronald Shamah, David Shamah, and Alan Shamah, directly or indirectly own, manage, and/or work for E2E.

> 83. Upon information and belief the Shamahs own a direct and/or indirect interest in E2E, control E2E, and directly or indirectly receive income and benefits from B2E and/or share in E2E's profits.

(NYSCEF Doc. No. 168, ¶¶ 36-37, 82-83). E2E's formation application was filed on November 30, 2018, with Michael Harary paying the filing fees (NYSCEF Doc. No. 375). E2E was officially formed as of December 4, 2018, and E2E's operating agreement went into effect on December 27, 2018. Initially, E2E consisted of the following members: Ben Hur E2E, LLC (**Ben Hur**)[1] (50%), Alan Shamah (25%), and Everchelle LLC (an LLC owned by David Shamah and Alan Shamah) (25%) (NYSCEF Doc. No. 377, § 3.1). In discussing the advent of E2E, Steven Shamah indicated that he was fond of the type of packaging he was selling at FPC and, rather than working for a competitor who dealt in different packaging styles, he wanted to continue to sell the same type of packaging that he previously did at FPC (NYSCEF Doc. No. 413, pages 51-55, lines 18-24), which is in broad strokes what E2E did. Indeed, servicing FCP's former customers **was** E2E's business plan: when David Shamah initially approached Mr. Zvi BenHaim about launching E2E, David Shamah presented a business plan that was based off of purchase orders that he was hopeful he could acquire from FPC and grow into customer relationships (NYSCEF Doc. No. 415, pages 98-100, lines 6-25).

The instant suit was initiated by the filing of a Summons and Verified Complaint on February 22, 2019, by Chung Tai, another of FPC's suppliers (NYSCEF Doc. No. 1). On March 19, 2019 (*i.e.*, during the pendency of this suit and the one initiated by Shenzhen), E2E and FPC entered into a certain letter agreement (the **PO Agreement**; NYSCEF Doc. No. 383). Schedule A to the

[1] Ben Hur is owned by Jerry Harary (30%), Michael Harary (30%), and Zvi BenHaim (40%) (NYSCEF Doc. No. 376). Steven Shamah and Zvi BenHaim are close personal friends, having met in 1973 during high school (NYSCEF Doc. No. 414, page 14, lines 6-24; NYSCEF Doc. No. 413, page 43, lines 5-21).

PO Agreement listed the FCP purchase orders that E2E received in exchange for 5% of their face amount (*i.e.*, $158,279.80) and the customer deposits that were assigned outright to E2E (*id*.). Further, Schedule A listed specific pieces of inventory that E2E had the right to purchase for $25,475 (*id*.; *see id*., § 3).

Simultaneously with the PO Agreement, Merchant executed a certain Consent to Sale and Partial Release by which **Merchant released the FPC collateral underlying the PO Agreement** (NYSCEF Doc. No. 387), **and a UCC-3 Termination Statement was filed reflecting the same** (NYSCEF Doc. No. 437). Thus, as of this time, Merchant had no interest at all in the accounts receivable that were transferred from FPC to E2E, which Chung Tai claims was a fraudulent transfer, and Merchant looked only to the other collateral securing its loan (*i.e.*, the personal guaranties and mortgages of personal residences). Thereafter, E2E filled the purchase orders (and continues to operate until this day).

On May 22, 2019, a federal court sitting in the Southern District of New York entered judgment against FPC in favor of Shenzhen in the amount of $3,480,129.97 (NYSCEF Doc. No. 45).

The E2E Operating Agreement was amended and restated on April 1, 2021 (NYSCEF Doc. No. 379), with Dash Brothers, LLC and Ben Hur each being listed as 50% members (*id*., § 3.1). David Shamah and Alan Shamah are each 50% members of Dash Brothers, LLC (NYSCEF Doc. No. 378, § 5). On or about this time (the second quarter of 2021), FPC ceased paying health insurance premiums for David Shamah and his family (*see* NYSCEF Doc. No. 415, pages 78-79, lines 9-19).

By Decision and Order dated July 30, 2021, this Court granted partial summary judgment in favor of Chung Tai on its claims for breach of contract and account stated (NYSCEF Doc. No. 160, at 1), and on August 9, 2021, judgment was entered against FPC in the amount of $2,225,975.31 (NYSCEF Doc. No. 166),[2] which judgment has not been satisfied.

On December 17, 2021, Merchant initiated suit against the FPC Defendants to recover various sums owing, which amounted at that time to $3,531,407.47 by seeking foreclosure of the individual FPC Defendants' interest in certain real estate (the **Foreclosure Action**; Index No. 532194/2021, NYSCEF Doc. No. 1, ¶ 25). To wit, Merchant did not and could not look to FPC's assets conveyed by the PO Agreement because at that time, and as discussed above, they had previously released their interest in the FPC assets that are at issue in this case. Of the sum owing to Merchant, $2 million was advanced on or about December 8, 2016, and an additional $1 million was advanced on or about June 20, 2018 (Index No. 532194/2021, NYSCEF Doc. No. 1, ¶¶ 11-16).

In the Foreclosure Action, summary judgment was granted in favor of Merchant (Index No. 532194/2021, NYSCEF Doc. No. 76), and the court-appointed referee calculated a balance due and owing to Merchant of $3,984,442.20 as of July 27, 2023 (Index No. 532194/2021, NYSCEF Doc. No. 83, Schedule A). The referee's report indicated that none of the $3 million loan had been satisfied as of that date (*id.*). The Foreclosure Action was discontinued with prejudice as a

[2] By Decision and Order dated June 7, 2022, this Court dismissed the fraud cause of action as against Steven Shamah and David Shamah (the **2022 Decision**; NYSCEF Doc. No. 299).

result of a settlement agreement on June 24, 2024 (Index No. 532194/2021, NYSCEF Doc. No. 102). FPC is still in existence but is only a shell, conducting no business (NYSCEF Doc. No. 410, at 20).

All parties now move for summary judgment. In sum and substance, the allegations are that the E2E Defendants and the FPC Defendants, both prior to and during this lawsuit, conspired to strip FPC of its remaining assets before it became completely insolvent and to defraud FPC's creditors (including Chung Tai), asserting that the PO Agreement was part of the asset stripping process. Chung Tai seeks to have the PO Agreement set aside as a fraudulent conveyance, to hold certain individuals of the Shamah family liable as having dominated FPC, and to hold E2E liable for FPC's debts under theories sounding in successor liability.

DISCUSSION

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

I. The Defendants waived their Right to Challenge Standing by not raising it at the appropriate Time (Mtn. Seq. Nos. 011 & 013).

To challenge a conveyance as fraudulent under the New York Uniform Fraudulent Conveyance Act, codified at New York Debtor & Creditor Law (**DCL**) §§ 270–281,[3] a plaintiff must suffer

[3] New York enacted a version of the Uniform Voidable Transactions Act (**UVTA**) on April 4, 2020, which replaced the Debtor and Creditor Law cited herein (*see* Voidable Transactions Act, N.Y. Laws 2019, ch. 580, sec. 2, §§ 270-281, eff. April 4, 2020). The UVTA is not retroactive, however, so the transactions in this case are governed by the

prejudice or injury as a result of the conveyance at issue to maintain standing. If plaintiff (an unsecured creditor) has no equity interest in any of the defendant's assets, it can not be prejudiced by any disputed transactions, and therefore lacks standing (*Chemtex, LLC v St. Anthony Enterprises, Inc.*, 490 F Supp 2d 536, 542 [SDNY 2007]; *Vos v Lee*, 2009 WL 10640615, at *11 [EDNY Dec. 23, 2009]). The plaintiff must prove that some portion of the debtor's assets would have been available to satisfy the unsecured creditor's claims had there been no conveyance (*Chemtex, LLC v St. Anthony Enterprises, Inc*., 490 F Supp 2d 536, 542 [SDNY 2007]).[4]

The E2E Defendants (Mtn. Seq. No. 011) and the FPC Defendants (Mtn. Seq. No. 013) argue that the DCL claims must be dismissed because Chung Tai lacks standing to bring these claims. More specifically, the defendants argue that Chung Tai had no equity in the assets transferred if the PO Agreement were set aside as a fraudulent conveyance because of Merchant's secured interest in such assets. The argument fails.

This is the first time that this defense has been asserted in this litigation which has been pending for almost five years. The failure to state standing as a defense in an answer or a pre-answer motion to dismiss constitutes waiver of the defense (CPLR 3211 [a][3]; [e]; *Dougherty v Rye*, 63

DCL in effect prior to April 4, 2020 (*Geo-Group Communications, Inc. v Chopra*, 2023 WL 6235160, at *3, n.2 [SDNY Sept. 26, 2023]).

[4] *See also Miller v Forge Mench Partnership Ltd*., 2005 WL 267551, at *2, 4-5 (SDNY Feb. 2, 2005) (the plaintiff had no standing where the merchant's factor was owed approximately $4 million versus the $2.5 million value of all assets);
Bank of Am., N.A. v TemPay LLC, 2021 WL 1602123 (WDNY Mar. 22, 2021), *report and recommendation adopted*, 2021 WL 1600544 (WDNY Apr. 22, 2021) (no standing on DCL claims because the secured debt far exceeded the value of the assets);
A/S Kreditt-Finans v Cia Venetico De Navegacion S.A. of Panama, 560 F Supp 705, 711-712(ED Pa 1983) (no DCL standing where ship was encumbered by mortgages exceeding fair value by $1 million).

NY2d 989, 992 [1984]; *Sec. Pac. Nat. Bank v Evans*, 31 AD3d 278 [1st Dept 2006]; *Klein v Garfinkle*, 12 AD3d 604, 605 [2d Dept 2004]; *Gilman v Abagnale*, 235 AD2d 989, 990-991 [3d Dept 1997]). The court notes further:

> "[t]he question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it". Because New York's Supreme Court "is a court of original, unlimited and unqualified jurisdiction", it is competent to entertain all causes of action, including mortgage foreclosure actions.
>
> While it is true that subject matter jurisdiction may not come into being through waiver or estoppel, that rule applies only where a court never had power to hear a particular type of proceeding in the first place, such as where a tribunal vested with civil jurisdiction attempts to convict a citizen of a crime. In this case, the Supreme Court always had the power to hear the foreclosure action, including any issues regarding the defense of lack of capacity or standing and waiver, had those issues been timely raised.

(*Sec. Pac. Nat. Bank v Evans*, 31 AD3d 278, 279-81 [1st Dept 2006] [internal citations omitted]; *see Kagen v Kagen*, 21 NY2d 532, 537 [1968]; NY CLS Const Art VI, § 7). It is precisely for this reason that an abundance of case law holds that standing can indeed be waived if not asserted at the appropriate time:

> [i]n any event, the dissent is incorrect to argue that the defense of lack of standing may not be waived. The Court of Appeals and lower appellate courts of this state have consistently held that pursuant to CPLR 3211 (e), the failure to raise the defense of lack of standing in a motion to dismiss or answer results in a waiver of such defense.

(*Sec. Pac. Nat. Bank v Evans*, 31 AD3d 278, 279-81 [1st Dept 2006] [internal citations omitted]).

The cases cited by the defendants to suggest otherwise are simply inapposite (*see, e.g., Stark v Goldberg*, 297 AD2d 203, 204 [1st Dept 2002]; *Frankel v Bd. of Managers of the 392 Cent. Park W. Condominium*, 2023 N.Y. Slip Op. 30403[U], 1 [N.Y. Sup Ct, New York County 2023]; *Rao v Cameron*, 2022 N.Y. Slip Op. 30449[U], 16 [N.Y. Sup Ct, New York County 2022]; *Saratoga*

County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801, 815 [2003]). Thus, the argument fails, and the motion must be denied.

Even assuming that the defendants had in fact preserved the defense of standing (which they did not as nothing alleged here amounts to facts learned during discovery), they have not adduced sufficient evidence to meet their burden to demonstrate entitlement to summary judgment (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]) **because the collateral in the PO Agreement was released by Merchant simultaneously with the PO Agreement** (NYSCEF Doc. Nos. 387 & 437). Thus, even if the PO Agreement were set aside as fraudulent, Merchant had no interest in the collateral at the moment of transfer such that their loan can not be counted for the purpose of determining whether Chung Tai had equity in the collateral or whether Chung Tai was prejudiced by the transfer. Thus, the argument fails, and the motion must be denied for this reason as well.

Putting both of those critical problems aside, the defendants do not adduce a valuation expert who was qualified to testify as to whether Chung Tai was prejudiced by virtue of the transfer because it continued to have equity in collateral. Their expert, Mr. Stanley, indicated that he was not so qualified:

> Q Are you a valuation professional?
> A No.
> Q Do you have any valuation credentials?
> A No.
> Q Do you have any background in valuations?
> A It's a very broad question.
> Q Do you have any professional experience in valuation of assets or businesses?
> A In what regard?

> Q I mean, as a professional, have you been retained to give an opinion on the valuation of assets or businesses?
> A To specifically -- to give an opinion, no.

(NYSCEF Doc. No. 402, pages 9-10, lines 11-4). Instead, he was an expert in factoring agreements:

> Q On the report it says that you were retained by Wachtel Missry as an expert in the areas of factoring and asset acquisition, disposition, and divestiture; is that correct?
> A Yes.

(*id.*, page 8, lines 18-23).

Putting that too aside, Mr. Stanley (E2E's expert)'s testimony suggests that even accounting for Merchant, FPC still had approximately $584,379 of equity in the accounts receivable at issue. To wit, he testifies that Merchant's spreadsheet (the **Spreadsheet**; NYSCEF Doc. No. 405) showed approximately $6.7 million of accounts receivable as of December 31, 2018. More specifically the Spreadsheet details (i) the value of total accounts receivable, (ii) the amount Merchant had advanced against those receivables, (iii) certain additional advances, and finally (iv) a net figure reflecting that accounts receivable exceeded total advances by $584,379 at that time (*id.*).

Mr. Stanley insists that this spreadsheet tells the story of a "sick" company that is "in trauma" and that, despite the fact that the total accounts receivable is higher than the advances, there was an "over-advance" by Merchant of approximately $400,000 such that Merchant was not fully secured (NYSCEF Doc. No. 402, pages 51-56, lines 15-13). According to Mr. Stanley, even if the PO Agreement were reversed, Chung Tai would have no equity interest because "the proceeds of the sale of these assets would have gone at that time to improve the position of the

secured creditor" (*id*., pages 86-87, lines 23-6). Pursuant to the terms of the Factoring Agreement, Merchant agreed to make advances against receivables "in an amount not exceeding 85% of the amount thereof" (NYSCEF Doc. No. 385, § 4). This according to Mr. Stanley would mean that Merchant agreed to loan up to approximately $5.7 million (85% of the total accounts receivable). He then explained in his testimony that Merchant in fact loaned $6.1 million and were therefore "undercollateralized" by approximately $400,000 (NYSCEF Doc. No. 402, pages 51-56, lines 15-13). This "over-advance" identified by Mr. Stanley only applies if one looks to the Factoring Agreement loan formula where Merchant agreed to advance funds only up to 85% of the value of the receivables (NYSCEF Doc. No. 385, § 4). Being out of sync with the loan formula by loaning more than 85% of the receivables' value means only however that Merchant's advances were not secured by as great a buffer as they would have liked. It does not mean they were not fully collateralized. Despite being out of sync with the lending formula, the Spreadsheet in fact reflects that Merchant ***was*** fully collateralized as of December 31, 2018, and in fact had $584,379 ***more*** collateral than their total advances. Thus, Mr. Stanley's analysis does not mean that Chung Tai had no equity in the collateral even accounting for all of Merchant's positions and without accounting for Merchant's other collateral. In other words, even taking Mr. Stanley's testimony as true, Chung Tai would still be able to look to the difference between the $6,700,000 of accounts receivable and the total aggregate advance of approximately $6,100,000 – or $584,379.

Furthermore, Mr. Stanley's analysis simply does not account for Merchant's other collateral. This collateral included the personal homes of Steven Shamah and Ronald Shamah. And this collateral (i) must have been significant and (ii) must have been the real security for Merchant's

loan because Merchant released its interest in the accounts receivable and received nothing in return. Thus, the defendants do not meet their burden of coming forward with sufficient evidence to demonstrate their entitlement to summary judgment as a matter of law, and the motion must be denied for this reason as well.

II. Chung Tai has failed to meet its Burden for Summary Judgment on its DCL §§ 273, 273-a, & 276 Claims (Mtn. Seq. No. 012).

A. There are Issues of Fact in connection with Chung Tai's DCL 273 Constructive Fraudulent Conveyance Claim.

DCL Section 273 governs constructive fraudulent transfers, which do not turn on the intent of the transferor:

> 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 to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

(Debtor and Creditor Law § 273). "Fair consideration" is defined by the DCL as:

> Fair consideration is given for property, or obligation,
>
> > a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
> >
> > b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

(Debtor and Creditor Law § 272). Fair consideration thus requires both (a) an exchange of "fair equivalent" value and (b) "good faith" [5] (*Chemtex, LLC v St. Anthony Enterprises, Inc*., 490 F

[5] The requirement of "good faith" refers solely to "whether the grantee knew, or should have known, that he was not trading normally, but that ... the purpose of the trade, so far as the debtor was concerned, was the defrauding of his creditors (*HBE Leasing Corp. v Frank*, 48 F3d 623, 636 [2d Cir 1995]).

Supp 2d 536, 545 [SDNY 2007]). The burden of proving these elements is upon the party challenging the conveyance (*Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003]).

Fairness of the consideration is generally a question of fact (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). A conveyance between family members is subject to enhanced scrutiny (*id.*; *E. Concrete Materials, Inc. v DeRosa Tennis Contractors, Inc.*, 139 AD3d 510, 511-12 [1st Dept 2016]). The requirement of good faith is imposed on both the transferor and the transferee (*Sardis v Frankel*, 113 AD3d 135, 141-42 [1st Dept 2014]). Good faith "is lacking where there is a failure to deal honestly, fairly, and openly" (*Sardis v Frankel*, 113 AD3d 135, 143 [1st Dept 2014]). For example, where the transferor has knowledge of a judgment, the transfer of funds available to satisfy the judgment made at the judgment debtor's direction will be set aside as lacking in good faith. Where the transferee is aware of an impending enforceable judgment against the transferor, the conveyance also will be generally set aside as constructively fraudulent. (*Id.*, at 142.)

In the fraudulent conveyance context, it is well established that successive transactions may under appropriate circumstances be "collapsed" and treated as phases of a single transaction for analysis under the DCL (*HBE Leasing Corp. v Frank*, 48 F3d 623, 635 [2d Cir 1995]). The paradigmatic example is where one transferee gives fair value to the debtor in exchange for the debtor's property, and the debtor then gratuitously transfers the proceeds of the first exchange to a second transferee – the first transferee thereby receives the debtor's property, and the second transferee receives the consideration, while the debtor retains nothing (as opposed to retaining the proceeds from the first exchange, reconveying them for fair consideration, or using them for

some other legitimate purpose) (*id.*). Under such a paradigm, the transferee in the step of the transaction for inadequate consideration must have actual or constructive knowledge (*i.e.*, awareness of the circumstances that should have led them to inquire further into the circumstances of the transaction, but who failed to make such inquiry) of the entire scheme that renders the exchange with the debtor fraudulent (*id.*, at 636).

HBE Leasing Corp. v Frank (48 F3d 623, 629 [2d Cir 1995]) is instructive. In that case, the debtor corporation had taken mortgages on its real property, receiving in exchange a sum from one of the corporation's directors. The corporation subsequently and improperly transferred the proceeds to the director's son, who was a majority shareholder, for inadequate consideration. (*Id.*, at 630). Though the court found that the first step of the transaction (the mortgage) was for fair consideration, the subsequent transfer outside of the corporation for less than fair value vitiated the collapsed transaction (*id.*).

As an initial matter, **there is no evidence in the record to indicate or even suggest that this was a good faith transfer**. Importantly, a question of fact remains as to whether the 5% of gross purchase order figure was fair consideration under the circumstances, given the documentary evidence indicating that the gross profit on purchase orders varied from year to year (with some indication that it could be closer to 30% [NYSCEF Doc. No. 217, at 3, *see also* NYSCEF Doc. No. 218]). The fact that this transaction involved close family members on both sides of the deal further underscores the uncertainty (*E. Concrete Materials, Inc. v DeRosa Tennis Contractors, Inc.*, 139 AD3d 510, 511-12 [1st Dept 2016]).

Expert testimony does not resolve this factual issue. Although Mr. Stanley's expert report asserts that this was fair consideration under the circumstances, *i.e.*, that FPC was in dire financial straits and could not fulfill their outstanding purchase orders (which fact is vigorously disputed) (NYSCEF Doc. No. 401, at 1, 3-4), Mr. Stanley himself admitted at deposition that he is not a valuation expert (NYSCEF Doc. No. 402, page 81, lines 4-13). As such, he simply is not qualified to opine on the financial condition of FPC or whether the consideration was fair. More importantly, Chung Tai's rebuttal expert, John D. Agogliati III, assails virtually every fact, assumption, and conclusion in Mr. Stanley's report as inadequately supported (NYSCEF Doc. No. 403, ¶¶ 11, 18). One of the flaws in Mr. Stanley's fairness opinion is that he opines that the transaction was fair because Merchant agreed to release the collateral without getting anything in exchange. This makes little sense for at least two reasons. First of all, Merchant's loan to value was by its terms not 100%. It was 85%, so even if Merchant had received consideration in exchange for its release, it does not mean that the transaction was fair because Mr. Stanley fails to account for the other creditors. Second, Mr. Stanley's opinion is not based on any facts. He neither spoke with anyone at Merchant nor saw any evidence of any kind that Merchant conducted an analysis relating to the PO Order pricing (NYSCEF Doc. No. 402, pages 46-48, lines 6-25.) In addition, it is clear that Merchant's approval merely reflected that Merchant was looking to other collateral to satisfy FPC's outstanding balance, *i.e.*, the personal homes of Ronald Shamah and Steven Shamah and the personal guaranties made by the FPC Individuals. This was borne out in the Foreclosure Action where Merchant looked to that collateral and not the collateral at issue in this case.

Finally, even if the 5% figure were fair consideration, there are issues of fact as to the ultimate disposition of the proceeds of the PO Agreement such that if the proceeds were immediately funneled to the Shamah family or FPC's profit sharing plan for no or inadequate consideration, collapsing the entire transaction under *HBE Leasing Corp*. and finding it a fraudulent conveyance may well be appropriate (48 F3d at 629).

B. Issues of Fact as to Fair Consideration preclude Summary Judgment on Chung Tai's DCL 273-a Cause of Action.

The DCL also provides for setting aside a defendant's conveyances for other than fair consideration during the pendency of an action if the defendant does not satisfy the judgment:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment

(Debtor and Creditor Law § 273-a).

The instant suit was initiated by the filing of a Summons and Verified Complaint on February 22, 2019 (NYSCEF Doc. No. 1), the PO Agreement was entered into on March 19, 2019 (NYSCEF Doc. No. 383), judgment against FPC was entered on August 9, 2021 (NYSCEF Doc. No. 166), and there is no dispute that that judgment has not been satisfied. Because, as discussed above, there are issues of fact as to whether the conveyance was made without fair consideration, this claim must also proceed to trial.

C. Issues of Fact preclude Summary Judgment on Chung Tai's DCL 276 Claim for Intentional Fraudulent Transfer.

DCL § 276 addresses intentional fraudulent transfers:

> Every 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.

(Debtor and Creditor Law § 276).

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 his case, *i.e.*, circumstances so commonly associated with fraudulent transfers the presence of which gives rise to an inference of intent (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528-29 [1st Dept 1999]). Among such badges of fraud are: (i) a close relationship between the parties to the 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) and retention of control of the property by the transferor after the conveyance (*id.*). In the case of intentional fraudulent transfers, a complaint must plead with particularity, under CPLR § 3016(b), the defendants' intent to hinder, delay or defraud present or future creditors to properly assert a cause of action for intentional fraudulent conveyance (*RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]; *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]). Actual fraudulent intent must be proven by clear and convincing evidence, but it may be inferred from the circumstances surrounding the transaction (*HBE Leasing Corp. v Frank*, 48 F3d 623, 639 [2d Cir 1995]).

In the instant case, there is certainly a close relationship between the various parties to the PO Agreement (particularly the familial relationship among the Shamah family), there is little doubt that liquidation of FPC was not in the ordinary course, and badges of fraud are present.

However, there is no indication that FPC retained control over the property after the transfer (instead, the record indicates that ARS Ventures LLC purchased most of FPC's inventory [NYSCEF Doc. No. 224] and that E2E filled the purchase orders), but there are issues of fact as to the fairness of the consideration and there are issues of fact as to whether David Shamah and Alan Shamah knew (i) how deep the financial distress of FPC was at the time of the PO Agreement (*i.e.*, March 19, 2019) (NYSCEF Doc. No. 400, page 76, lines 6-14) or (ii) of the various creditor claims against FPC at that time, including the Shenzhen lawsuit filed against FPC some seven months prior (*see* NYSCEF Doc. No. 372, ¶¶ 16, 47). Thus, summary judgment is simply not appropriate on the DCL 276 claim.

III. The Defendants have failed to demonstrate that DCL 278 mandates Dismissal of Chung Tai's DCL Claims (Mtn. Seq. Nos. 011 & 013).

The DCL contains a safe harbor provision whereby a fraudulent conveyance may not be voided if a transferee (i) paid fair consideration and (ii) did not have actual or constructive knowledge of such intent at the time of the purchase (DCL § 278; *HBE Leasing Corp. v Frank*, 48 F3d 623, 639 [2d Cir 1995]).

The E2E Defendants argue that they were a purchaser for fair consideration without knowledge of the alleged fraud under DCL 278. However, as discussed at length above, there are issues of

fact as to whether fair consideration was paid and whether the transfer was in good faith (*e.g.* whether David Shamah and Alan Shamah knew of the alleged financial distress of FPC at the time of the PO Agreement [NYSCEF Doc. No. 400, page 76, lines 6-14] or of the Shenzhen lawsuit [*see* NYSCEF Doc. No. 372, ¶¶ 16, 47]). As such, the E2E Defendants have not met their burden for dismissal (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]).

IV. Veil-Piercing as to Steven Shamah and Ronald Shamah is appropriate if a Fraudulent Conveyance occurred. Whether Veil-Piercing is appropriate as to Vivian Shamah, Sari Shamah, Alan Shamah, and David Shamah must be determined at Trial. (Mtn. Seq. No. 012.)

Piercing the corporate veil, although not a separate cause of action in New York (*245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 605 [1st Dept 2024]), requires a showing that: (i) the owners exercised complete domination of the corporation in respect of the transaction attacked; and (ii) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). There are no issues of fact that, although the case can not proceed with veil piercing as a separate cause of action, veil piercing as to Steven Shamah and Ronald Shamah is appropriate if in fact there was a fraudulent conveyance.

A. Complete Domination.

In determining whether to pierce the corporate veil, courts consider a multitude of factors, including the failure to observe corporate formalities; undercapitalization of the corporation; intermingling of corporate and personal funds; siphoning of corporate funds by the dominant shareholder; the amount of business discretion displayed by the allegedly dominated corporation;

and whether the dealings between the individuals and the entity were at arm's length (*Vos v Lee*, 2009 WL 10640615, at *6 [EDNY Dec. 23, 2009]). It is particularly probative where shareholders use the corporate accounts as their own by making direct payments for their expenses unrelated to the business of the entity, rather than first making payments to the shareholders, who could then dispose of their compensation as they saw fit (id., at *7).

Vos v Lee is instructive. There, the magistrate judge found that the individual owners of Sun dominated and disregarded its separate corporate structure in that (i) there were no corporate minutes, (ii) there were scarce corporate documents (no copies of issued shares or records of officer elections or actions taken), (iii) they exercised sole discretion over Sun's finances, which they abused by writing numerous checks payable to "cash" that the owners then drew on an as-needed basis for their own personal uses (some checks were denoted as future personal mortgage down payments), and (iv) they caused Sun to directly pay their own personal expenses (rent for their residences, childcare costs, and a car leased in one owner's individual name) (*Vos v Lee*, 2009 WL 10640615, at *6 [EDNY Dec. 23, 2009])).

The record in this case reflects the same exact kind of corporate domination, and appropriation of corporate assets for personal use. Steven Shamah and Ronald Shamah, among other things, dominated the corporation by: (i) holding no official corporate meetings, (ii) recording no corporate minutes (NYSCEF Doc. No. 413, pages 31-32, lines 12-21; NYSCEF Doc. No. 416, pages 80-81, lines 9-4), (iii) maintaining no policy for the retention of corporate records (NYSCEF Doc. No. 413, pages 66-67, lines 18-15), (iv) leasing on FPC's dime numerous automobiles for members of the Shamah family, including two for individuals who had no

relationship to FPC (aside from being part of the Shamah family) (NYSCEF Doc. No. 413, page 72-75, lines 11-22), (v) Steven Shamah using his personal credit card for business expenses and paying that card's statement with FPC funds (NYSCEF Doc. No. 413, page 152, lines 7-17), and (vi) distributing FPC funds directly from corporate accounts to make payments on Steven Shamah's, Ronald Shamah's, and their mother's personal mortgages (allegedly booking these distributions for accounting purposes as repayments of their personal loans to FPC) (NYSCEF Doc. No. 259, pages 95-96, lines 4-19). These are quintessential hallmarks of corporate domination (*see Vos v Lee*, 2009 WL 10640615, at *7). It is of particular note that Steven and Ronald used corporate accounts as their own by making **direct payments** for their personal expenses unrelated to the business of the entity, rather than first making payments to themselves as shareholders, who could then of course dispose of their compensation as they saw fit (presumably after the payment of taxes) (*id.*).

B. Chung Tai's Injury.

The second inquiry is whether the defendants' domination of the corporation proximately caused plaintiff's underlying injury, namely, the corporation's breach of contract and/or its failure to subsequently satisfy a judgment against it (*id.*). Where a company is treated as a mere shell by its shareholders and those shareholders strip it of its assets, leaving insufficient assets to cover claimed damages, piercing the corporate veil is appropriate (*Godwin Realty Assoc. v CATV Enterprises, Inc.*, 275 AD2d 269, 270 [1st Dept 2000]).

In *Vos*, the court found injury to the plaintiff where the individual defendants continued to withdraw funds at will from the company, Sun, at a time when Sun had taken out substantial

loans and was struggling to collect receivables, and the defendants did not raise an issue of fact necessitating trial by belatedly producing purported corporate work papers and unauthenticated spreadsheets (*Vos v Lee*, 2009 WL 10640615, at *8).

In the instant case, as discussed above, the Shamahs used FPC's accounts to fund their lifestyles, including car payments, personal mortgage payments, and also paying health insurance premiums for approximately 6 months after the business officially closed (NYSCEF Doc. No. 415, pages 78-79, lines 9-19). Further, as in *Vos*, the Shamahs did not change anything about this compensation (including the number of cars leased for family members) even when FPC faced strong financial headwinds in 2018 (NYSCEF Doc. No. 413, pages 77-78, lines 7-18). As such, there are no issues of fact that the Shamahs looted FPC. Having done so and having set up a new company to carry on the same business, Steven Shamah and Ronald Shamah can not ring fence their liability to Chung Tai by hiding behind an empty shell of a corporation that they created to avoid paying FPC's debts to Chung Tai and other creditors.

The record does not establish that David Shamah, Alan Shamah, Vivian Shamah, and Shari Shamah were actual owners of FPC, but this does not preclude the relief plaintiff seeks (*Guilder v Corinth Const. Corp.*, 235 AD2d 619, 619-20 [3d Dept 1997]; *M & A Oasis, Inc. v MTM Assoc., L.P*, 307 AD2d 872, 874 [1st Dept 2003]). Even if not legal owners, the record suggests that they may have dominated and controlled the corporation to such an extent that they should be treated as equitable owners and should be liable for fraudulent transfer (*id.*). The defendants claim that FPC's arrangement with Merchant was merely a business loan, but it is uncontroverted that FPC's loans were not only supported by FPC's assets but also by the E2E

Individuals' personal guaranties and personal assets, including the assets of individuals in the Shamah family who had no role at the company whatsoever. These individuals of the Shamah family received benefits from FPC, though, including cars and health insurance despite them having no official ownership interest in FPC.

Inasmuch as the record could support differing conclusions with respect to whether David Shamah, Alan Shamah, Vivian Shamah, and Shari Shamah abused their power over the corporation to commit fraud or other wrongdoing to Chung Tai's detriment, however, the resolution of those issues involves unresolved questions of credibility and intent, and as such the matter should proceed to trial (*see id*.).

V. The De Facto Merger Claim is dismissed. The Successor Liability Claim sounding in Fraud must proceed to Trial. (Mtn. Seq. Nos. 011 & 013.)

A corporation may be held liable for the torts of its predecessor if (i) it expressly or impliedly assumed the predecessor's tort liability, (ii) there was a consolidation or merger of seller and purchaser (or a de facto merger), (iii) the purchasing corporation was a mere continuation of the selling corporation, or (iv) the transaction is entered into fraudulently to escape such obligations (*Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 245 [1983]).

A. De Facto Merger.

A transaction structured as a purchase-of-assets may be deemed to fall within the de facto merger exception so as to make the successor liable for the pre-existing liabilities of the acquired corporation, even if the parties chose not to effect a formal merger, if the following factors are

present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation (*Fitzgerald v Fahnestock & Co., Inc*., 286 AD2d 573, 575 [1st Dept 2001]); *see In re New York City Asbestos Litig*., 15 AD3d 254, 256 [1st Dept 2005]; *Sweatland v Park Corp*., 181 AD2d 243, 245-246 [1992]). A de facto merger finding does not necessarily require the presence of each of these factors (*In re New York City Asbestos Litig*., 15 AD3d 254, 256 [1st Dept 2005]). The dissolution criterion for a de facto merger may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity "is shorn of its assets and has become, in essence, a shell" (*In re New York City Asbestos Litig*., 15 AD3d 254, 257 [1st Dept 2005]).

The first criterion, continuity of ownership, exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction. Stated otherwise, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each. (*Id.*, at 256.) This element is decidedly lacking in the instant case. It is undisputed that none of David Shamah, Alan Shamah, or the Ben Hur Partners ever had an ownership interest in FPC. As such, the de facto merger doctrine does not apply.

To the extent Chung Tai asserts claims on a mere continuation theory, such claims are also dismissed. The mere continuation exception applies when a corporation's purported transfer of assets is essentially a corporate reorganization, but the predecessor corporation cannot survive in any form, even as a shell entity (*Vos v Lee*, 2009 WL 10640615, at *15 [EDNY Dec. 23, 2009]). It is undisputed that FPC still exists as a mere shell and that much of FPC's inventory went to a separate entity, ARS Ventures LLC.

B. The Fraud Exception.

When a party has alleged facts to show that a fraudulent conveyance may have taken place, it can be inferred that the transaction was undertaken to defraud creditors and the second exception for imposing successor liability applies (*Silverman Partners LP v Verox Group*, 2010 WL 2899438, at *6 [SDNY July 19, 2010]). This includes fraudulent conveyances under the DCL (*id*.). As discussed above, the defendants have not met their burden in securing dismissal of the DCL claims because (i) there are issues of fact as to the fairness of the consideration and (ii) the experts disagree as to whether a fraudulent conveyance occurred. Accordingly, the application of the fraud exception ultimately depends on resolution of those issues at trial.

VI. The Claims for aiding and abetting Fraudulent Conveyance as against Jerry Harary, Michael Harary, and Zvi BenHaim are dismissed.

Previously, in the 2022 Decision, this Court allowed these claims to proceed under *Fed. Deposit Ins. Corp. v Porco* (75 NY2d 840, 842 [1990]) because Chung Tai alleged in sum and substance that they participated in and directly benefited from the fraudulent conveyance of FPC's assets by beneficially receiving FPC's assets (NYSCEF Doc. No. 299, at 9-11). However, at this stage

of the litigation, Chung Tai has not adduced evidence implicating any of Jerry Harary, Michael Harary, or Zvi BenHaim in this scheme. The record reflects only that they provided financing for E2E and filed documents with the Secretary of State to set up E2E. This does not raise an issue of fact for trial. Thus, the claims against them must be dismissed.

For the sake of completeness, the conversion claim is not dismissed as duplicative of the breach of contract claim that this Court has already entered judgment on (*see* NYSCEF Doc. No. 58, at 12-13).

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the claims for aiding and abetting fraudulent conveyance as against Jerry Harary, Michael Harary, and Zvi BenHaim are dismissed; and it is further

ORDERED that the de facto merger and mere continuation claims are dismissed; and it is further

ORDERED that the parties shall appear for a conference via the Microsoft Teams platform on October 1, 2024, at 12:30pm to discuss trial.

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7/16/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**