

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

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ALESCO PREFERRED FUNDING VIII, LTD., ALESCO PREFERRED FUNDING XI, LTD., ALESCO PREFERRED FUNDING XII, LTD., ALESCO PREFERRED FUNDING XIII, LTD., ALESCO PREFERRED FUNDING XIV, LTD., HILDENE OPPORTUNITIES MASTER FUND II, LTD., NFC PARTNERS, LLC, NFC INSURANCE PARTNERS, LLC, WOLF RIVER OPPORTUNITY FUND LLC, WOLF RIVER PARTNER FUND, WT HOLDINGS, INC., PREFERRED TERM SECURITIES XVI, LTD., PREFERRED TERM SECURITIES XXIII, LTD., PREFERRED TERM SECURITIES XXIV, LTD., PREFERRED TERM SECURITIES XXVIII, LTD.,

INDEX NO. 655881/2017

MOTION DATE _____

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

Plaintiffs,

- v -

ACP RE, LTD., ACP RE HOLDINGS, LLC, AMTRUST FINANCIAL SERVICES, INC., CASTLEPOINT BERMUDA HOLDINGS, LTD., CASTLEPOINT MANAGEMENT CORP., INTEGON NATIONAL INSURANCE COMPANY, NATIONAL GENERAL HOLDINGS CORP., PRESERVER GROUP, INC., TECHNOLOGY INSURANCE COMPANY, INC., TOWER GROUP, INC., TOWER GROUP INTERNATIONAL, LTD., WILLIAM DOVE, WILLIAM FOX, WILLIAM HITSSELBERGER, MICHAEL LEE, HERBERT LEMMER, ELLIOT OROL, WILLIAM ROBBIE, JAMES ROBERTS, STEVEN SCHUSTER, ROBERT SMITH, JAN VAN GORDER, AUSTIN YOUNG, MEGHAN ZEIGLER, GEORGE KARFUNKEL, LEAH KARFUNKEL, ESTATE OF MICHAEL KARFUNKEL, BARRY ZYSKIND, MICHAEL KARFUNKEL FAMILY 2005 TRUST, MICHAEL KARFUNKEL 2005 GRANTOR RETAINED ANNUITY TRUST

Defendants.

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 293

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, the Defendants' motion to dismiss is granted solely to the extent of dismissing the direct breach of fiduciary duty claims and the cause of action for successor

liability because the Plaintiffs do not have standing to maintain those claims. The motions are however otherwise denied because (i) the well pled complaint grounds claims that are not barred by either the specific prohibitions contained in the June 2021 California Order (hereinafter defined) which solely barred claims that would conflict with the California insolvency proceeding or the general guidance provided in such June 2021 California Order, (ii) the “Solely Corporate Obligations” clause is not applicable to TGIL, ACP, and the Karfunkel Defendants, (iii) the Plaintiffs do not lack standing to bring these other causes of action and (iv) they are sufficiently pled at this stage of the litigation.

The June 2021 California Order is not written as a strict limitation on claims that can be pursued here in New York. This is what the California Superior Court did when it held that the only claim that could proceed was the breach of contract claim. This is not at all what the California Court of Appeal First Appellate District Division Five (**California Court of Appeal**) did when it modified the California Superior Court’s order. Instead, the California Court of Appeal modified the California Superior Court’s decision and, in sum and substance, bifurcated claims that belonged to the Castlepoint conservatorship, on the one hand which are barred by the Castlepoint conservatorship, and claims that otherwise are not part of the Castlepoint estate and could not otherwise be brought by the Commissioner in that proceeding, which are not barred on the other. To wit, the California Court of Appeal reviewed the gravamen of the Plaintiff’s claims and commented that they were predicated on (i) the alleged breach of so-called ‘successor obligor provisions’ and (ii) an alleged \$143 million payment from ACP Re, Ltd. (ACP) to shareholders of Tower Group International, Ltd. (Bermuda) (TGIL). Critically, the Court observed that the

TruPS were not part of the Castlepoint estate and could not be asserted by the Conservator (NYSCEF Doc. No. 268, at 19).

Additionally, the California Court of Appeal issued guidance as to the kinds of claims which could proceed and which claims could not:

Absent a substantial risk of interference with the Commissioner or the liquidation proceedings, if the claims are not asserted against CastlePoint and if the Commissioner could not have asserted the claims on behalf of CastlePoint, then they are not barred by the injunctions preventing interference with the Commissioner's possession or management of CastlePoint assets. A corollary is that the injunctions and releases do bar the New York Plaintiffs from asserting claims the Commissioner could have pursued as conservator of CastlePoint

(NYSCEF Doc. No. 268, at 15 [emphasis added]).

With this as a backdrop to its analysis, the California Court of Appeal commented that inasmuch as the claims at issue here in New York do not involve claims belonging to the CastlePoint estate or claims that could be brought by the Commissioner, it did not anticipate substantial involvement of the Commissioner in discovery in the New York action. This of course makes sense. The defendants' attempt to make more of this holding so as to bar any allegations involving conduct by the defendants that might involve looting of the CastlePoint estate as a predicate for claims properly brought in this Court not belonging to the CastlePoint estate or to otherwise eliminate claims based on discovery it anticipates that it might want to conduct fails.

The Relevant Facts and Circumstances

Reference is made to (i) the Decision and Order of this Court (the **Prior Decision**; NYSCEF Doc. No. 234), dated March 25, 2021, pursuant to which this Court (x) stayed and held in

abeyance all claims other than the causes of action for breach of contract, aiding and abetting breach of contract, and fraud, (y) dismissed the claims against defendants William A. Robbie, Robert S. Smith, Jan R. Van Gorder, Austin P. Young, William F. Dove, Herbert Lemmer, James E. Roberts, and Meghan Zeigler, and (z) dismissed the claims for breach of fiduciary duty and the claims for fraud except as to the Wolf River Plaintiffs¹, (ii) an order (Schulman, J.) of the Superior Court of the State of California (the **California Superior Court**) dated May 16, 2019 (the **May 2019 California Order**; NYSCEF Doc. No. 202), clarifying which of the Plaintiffs' claims in this action could and could not be pursued in light of the California Superior Court's injunctions, and (iii) an order (Seligman, J.) of the California Court of Appeal dated June 15, 2021 (the **June 2021 California Order**; NYSCEF Doc. No. 268), and as relevant, modifying the May 2019 California Order.

In the May 2019 California Order, the California Superior Court held that “all of [Plaintiffs'] claims, with the exception of the breach of contract claim against the TruPS Issuers, violate the terms of this Court's injunctions and court-approved releases, and may not be pursued by [Plaintiffs]” (NYSCEF Doc. No. 202, at 7). After that ruling was made, the Plaintiffs filed an **Amended Complaint** (NYSCEF Doc. No. 158).

Giving full faith and credit to the May 2019 California Order, and without addressing the merits of the claims, in the Prior Decision, this Court held that the breach of contract claim, the tortious interference claim and the fraud claim premised on purportedly fraudulent statements in the proxy statement by TGIL concerning the ACP Merger (as such claim was not addressed by the

¹ Any term not defined herein shall have the definition assigned to it in the Prior Decision.
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May 2019 California Order) were not prohibited by the May 2019 California Order. This Court further held that the claims sounding in breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent conveyance, conveyance made with intent to defraud, and quantum meruit were all barred (NYSCEF Doc. No. 234, at 16-17). At the time, the Plaintiffs indicated their intent to appeal the May 2019 California Order and that they intended to come back to this Court should the May 2019 California Order be modified which, as discussed, it now has been.

Subsequently, pursuant to the June 2021 California Order, the California Court of Appeal modified the May 2019 California Order and commented that the Plaintiffs' claims here in New York do not involve the claims that belong to Castlepoint conservatorship and instead appear to be predicated on "(i) the alleged breach of so-called 'successor obligor provisions'; and (ii) an alleged \$143 million payment from ACP Re, Ltd. (ACP) to shareholders of Tower Group International, Ltd. (Bermuda) (TGIL)" – *i.e.*, the claims are not that the CastlePoint estate were looted and that these defendants owe damages to the CastlePoint estate. Thus, the California Court of Appeal held that the claims that could proceed were not limited to breach of contract claims as the lower court in California had held. To be clear, and because the claims implicated the CastlePoint estate, the California Court of Appeal held that fraudulent conveyance and unjust enrichment claims were barred by the injunctions (*id.*, at 3).

As general guidance, the California Court of Appeal noted:

As neither the amended complaint nor this decision [*i.e.*, the Prior Decision] was part of the record below, we, on our own motion, take judicial notice of them. (*Doers v Golden Gate Bridge etc. Dist.* 1979 23 Cal.3d 180, 184, fn. 1 ["a reviewing court may take judicial notice of matters not before the trial court, including records of another court"]). Among other changes, the amended complaint adds a second breach of contract claim based on the payment of \$143

million to shareholders of TGIL, and a fraud claim based on an alleged misrepresentation in a proxy statement.

In its March 2021 decision, the New York court determined that the California injunctions do not bar the New York Plaintiffs' breach of contract claims or their tortious interference with contract claim because it is "also a claim relating to the alleged breach of contract," and it is not asserted against the insurance companies involved in the conservatorship. However, pending this appeal, the New York court accorded full faith and credit to the California trial court's determination that many of the tort claims asserted in the original complaint were barred.

Here, we offer additional guidance regarding the types of claims that the New York Plaintiffs can and cannot pursue as a result of the insolvency proceedings. Absent a substantial risk of interference with the Commissioner or the liquidation proceedings, if the claims are not asserted against CastlePoint, and if the Commissioner could not have asserted the claims on behalf of CastlePoint, then they are not barred by the injunctions preventing interference with the Commissioner's possession or management of CastlePoint assets. A corollary is that the injunctions and releases do bar the New York Plaintiffs from asserting claims that the Commissioner could have pursued as conservator of CastlePoint

(*id.*, at 15 [emphasis added]). To be clear, the Commissioner argued that the claims for alleged breach of the successor obligor provisions and the \$143 payment from ACP to TGIL shareholders were derivative of the alleged harms to the CastlePoint estate, and therefore the types of claims that should also be barred (*id.*, at 21). The California Court of Appeal disagreed, holding:

These claims may be factually related to the alleged stripping of assets from the underlying insurance companies, but they allege independent wrongful conduct. Even if there was nothing improper about the transfer of assets from the underlying insurance companies to AmTrust and National General in 2014, the New York Plaintiffs can still claim to have been harmed by the breach of the successor obligor provisions and the \$143 million payment to TGIL shareholders

(*id.* [emphasis added]). The defendants argue that, for any claim to proceed, it must only relate to the successor obligor provisions or the \$143 million payment to TGIL shareholders and must

be distinct from any allegations of improper transfers of CastlePoint assets. As discussed above, this misses the spirit, tone, and point of the June 2021 California Decision.

Specifically, the California Court of Appeal held that the California insolvency proceedings do not bar the Plaintiffs from asserting causes of action for (i) breach of contract against the TruPS issuers, TGIL, and ACP, (ii) tortious interference with contract against the Karfunkel Defendants, (iii) breach of fiduciary duty against ACP and various director and officer defendants, (iv) aiding and abetting breach of fiduciary duty against the Karfunkel Defendants, (v) alter ego liability against members of the Karfunkel family and ACP, and (vi) successor liability against the Karfunkel Defendants (*id.*, at 28). For these claims to proceed, the California Court of Appeal held that the Plaintiffs needed to make a binding election not to seek recovery from CastlePoint assets or assets distributed or to be distributed by the Commissioner as part of the liquidation plan. Additionally, the California Court of Appeal noted that discovery requests should be made informally to the Commissioner and should be minimal because the claims asserted in New York are separate and distinct from claims premised on improper transfers of CastlePoint assets (*id.*, at 27).

The claims specifically barred are claims which would belong to the CastlePoint estate – *i.e.*, claims predicated on (i) fraudulent conveyance against the Karfunkel Defendants and the Tower Group, (ii) conveyance made with intent to defraud against the Karfunkel Defendants and the Tower Group, (iii) conspiracy to commit fraudulent conveyance against the Karfunkel Defendants, the Tower TruPS issuers, and TGIL, and (iv) quantum meruit/unjust enrichment against the Karfunkel Defendants (*id.*).

Following the filing of the Amended Complaint and the June 2021 California Order, the defendants have filed the instant motions seeking an order (i) dismissing the causes of action for breach of contract (second cause of action), tortious interference with contract (third cause of action), fraud (fourth cause of action), aiding and abetting fraud (fifth cause of action), breach of fiduciary duty (sixth cause of action), aiding and abetting breach of fiduciary duty (seventh cause of action), fraudulent conveyance (eighth cause of action), conveyance made with intent to defraud (ninth cause of action), and alter ego liability (eleventh cause of action), in whole or in part, because they improperly rely on allegations of looting, asset-stripping, or mismanagement of the Insurance Companies, (ii) dismissing claims against TGIL, ACP, and the Karfunkel Defendants pursuant to the “Solely Corporate Obligations” clause, and (iii) dismissing the causes of action for breach of fiduciary duty (sixth cause of action), aiding and abetting breach of fiduciary duty (seventh cause of action), fraudulent conveyance (eighth cause of action), conveyance made with intent to defraud (ninth cause of action), alter ego liability (eleventh cause of action), and successor liability (twelfth cause of action) for lack of standing or failure to state a cause of action.

Discussion

On a motion to dismiss, the pleading is to be afforded a liberal construction, and the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Full faith and credit must be afforded to

the June 2021 California Order (*Givens v Kingsbridge Heights Care Ctr., Inc.*, 171 AD3d 569, 569-570 [1st Dept 2019]).

I. The Second through Ninth and the Eleventh Causes of Action Rely on Allegations Concerning Breaches of Successor Obligor Provisions and the \$143 Million Payment to TGIL Shareholders, And May Proceed Pursuant to the June 2021 California Order

The Defendants argue that the second through ninth and the eleventh causes of action are predicated on allegations of looting, asset-stripping, or management of the Insurance Companies and should therefore be dismissed because the Plaintiffs told the California Court of Appeal and this Court that their claims are not based on looting. The argument fails. These claims are not that the CastlePoint estate was looted and therefore damages are owed to the CastlePoint estate. These claims are grounded on alleged breaches of the successor obligor provisions or the \$143 million payment to TGIL shareholders and the effect on the holders of the TruPS. The claims do not violate the June 2021 California Order (NYSCEF Doc. No. 268, at 2) or any statement made to the California Court of Appeal or this Court.

The second cause of action alleges breach of the Indentures based on payments made or amounts incurred by the Issuers or their successors in connection with the Reinsurance Agreements and/or the Renewal Rights Agreements, and is asserted against the Issuers and their successors, TGIL, and ACP (NYSCEF Doc. No. 158, ¶¶ 250-253). As discussed above, the Defendants argue that this cause of action must be dismissed because it is based on allegations regarding looting, asset-stripping, and management of the Insurance Companies, which is prohibited by the June 2021 California Order. The argument fails. The California Court of Appeals specifically held that “allowing the contract-based claims to go forward against the TruPS issuers, TGIL, ACP, or the

Karfunkel defendants will not deplete the assets of the CastlePoint estate or disrupt an orderly distribution of those assets in the CastlePoint liquidation...For these reasons, the claims are not barred” (NYSCEF Doc. No. 268, at 22). It does not matter that the cause of action alleges improper payments made in connection with the Reinsurance Agreements and/or the Renewal Rights Agreements because the claim is not for or otherwise “concern the management, operations, business, or affairs of the underlying insurance companies” (*id.*).

The third cause of action alleges tortious interference with contract against the Karfunkel Defendants (NYSCEF Doc. No. 158, ¶¶ 254-264). As the Defendants acknowledge, the claims in this cause of action are substantially similar to the claims in the second cause of action for breach of contract. They may therefore proceed for the above reasons and the branch of the motion to dismiss the second and third causes of action must be denied.

The fourth cause of action for fraud (*id.*, ¶¶ 265-275) and the fifth cause of action for aiding and abetting fraud (*id.*, ¶¶ 276-284) are also based on the \$143 million payment to TGIL shareholders that the California Court of Appeal expressly indicated were permissible. Thus, dismissal of these claims based on the June 2021 California Order must be denied.

The sixth cause of action for breach of fiduciary duty (*id.*, ¶¶ 285-296) and the seventh cause of action for aiding and abetting breach of fiduciary duty (*id.*, ¶¶ 297-303) were also expressly addressed by the June 2021 California Order and the California Court of Appeal indicated that such claims were permissible because “these causes of action are not against CastlePoint, nor is there any indication the Commission could have pursued them on behalf of CastlePoint

(NYSCEF Doc. No. 268, at 22-23). Although, as the California Court of Appeal acknowledged, the \$143 million payment and the alleged looting of CastlePoint assets often intertwine, there is no necessary connection between the two (*id.*, at 23). These causes of action rely on allegations concerning the \$143 million payment and may therefore proceed, and the branch of the motion to dismiss the sixth and seventh causes of action based on the June 2021 California Order must be denied.

The eighth cause and ninth causes of action allege fraudulent conveyance and conveyance with intent to defraud regarding the \$143 million cash payment made to TGIL shareholders (NYSCEF Doc. No. 158, ¶¶ 304-327). These causes of action were not dismissed by this Court in its Prior Decision. These causes of action were held in abeyance pending the appeal in California. The California Court of Appeal held that causes of action for fraudulent conveyance and conveyance as set forth in the original complaint were barred by the California insolvency proceedings.

To be clear, the June 2021 California Order addressed the causes of action set forth in the complaint (the **Original Complaint**; NYSCEF Doc. No. 6), not the Amended Complaint. The Original Complaint predicated claims of fraudulent conveyance, conveyance with the intent to defraud, and conspiracy to commit fraudulent conveyance (NYSCEF Doc. No. 6, ¶¶ 299-312) on conveyances made by the Tower TruPS Issuers to the Karfunkel Defendants and conveyances made by the Karfunkel Defendants, Tower TruPS Issuers, and TGIL to ACP, AmTrust, and National General. The California Court of Appeals held that these claims are barred because they interfere with the Commissioner's possession and management of CastlePoint assets (NYSCEF Doc. No. 268, at 25).

The Amended Complaint, however, pleads causes of action for fraudulent conveyance and conveyance with the intent to defraud predicated based on the \$143 million payment to TGIL shareholders. This tortured attempt to avoid the June 2021 California Order (*id.*, at 2) also fails.

As a general rule, a claim for fraudulent conveyance must be brought by a creditor of the transferor (tr at 41, lines 8-9) and asserted against the transferor and recipient of the transfer (*id.*, lines 13-15). The Plaintiffs however were not creditors of the transferor (*id.*, lines 18-20). Therefore, the claim must be dismissed. The Plaintiffs argument that New York law permits judgment on a fraudulent transfer claim to be entered against a transferee or the person for whose benefit the transfer was made (NYDCL, § 277[b][1][i]) although true, does not provide support for the fraudulent conveyance claim asserted against ACP and the Karfunkel Defendants. It is true that the \$143 million payment facilitated the closing of the transaction so that the Karfunkel Defendants could take control of TGIL (tr at 56, lines 17-23). However, if in fact, this were a fraudulent transfer, *i.e.*, because the shares had no value as the Plaintiffs now allege, the claim for fraudulent transfer belongs to the Castlepoint estate and would be barred by the June 2021 California Order because owners of the TruPS are essentially strangers to that transaction.

The eleventh cause of action for alter ego liability fundamentally asserts wrongful conduct associated with breaches of successor obligor provisions and the \$143 million payment by ACP to TGIL shareholders (NYSCEF Doc. No. 158, ¶¶ 334-352). The June 2021 California Order explicitly states that to the extent the claims for alter ego and successor liability concern the successor obligor provisions and the \$143 million payment, there is no indication that allowing

those claims to proceed would deplete the assets of the CastlePoint estate or disrupt the liquidation plan (NYSCEF Doc. No. 268, at 27). Although the Amended Complaint has expanded the cause of action for alter ego liability from the Original Complaint, it has not fundamentally altered the claims, as the defendants allege. The branch of the motion to dismiss the eleventh cause of action is accordingly denied.

II. The defendants are not entitled to Dismissal of claims predicate on the “Solely Corporate Obligations” Clause

The defendants argue that the “solely corporate obligations” clause in the indentures other than those for the Wood River Plaintiffs bar claims brought against TGIL, ACP, and the Karfunkel Defendants as direct or indirect shareholders of the Issuers. The argument fails. The definition of the Company in Section 1.1 of the Indentures (*see, e.g.*, NYSCEF Doc. No. 17) includes “successors and assigns” such that by virtue of the stock sale they became the successor-in-interest to the obligors of TruPS. The Defendants’ argument that the sale of stock did not trigger Section 11.1 because it wasn’t a merger or consolidation and no such supplemental indenture was executed conflates a breach Section 11.1 with the definition of Company and their obligations as “successors” under the indenture. Thus, dismissal must be denied.

*III. **The Plaintiffs’ Direct Claims for Breach of Fiduciary Duty and Causes of Action for Fraudulent Conveyance Must Be Dismissed for Lack of Standing and the Plaintiffs’ Cause of Action for Successor Liability is Dismissed as a Separate Cause of Action***

The defendants argue that the causes of action for breach of fiduciary duty (sixth cause of action) and aiding and abetting breach of fiduciary duty (seventh cause of action) must be dismissed

because the Plaintiffs lack standing to bring these claims, whether directly or derivatively.² The defendants correctly argue that the Plaintiffs lack standing to bring breach of fiduciary duty claims directly. Under Delaware law, creditor-plaintiffs lack standing to assert breach of fiduciary duty claims even where the company is insolvent (*North Am. Catholic Educ. Programming Found., Inc. v Gheewalla*, 930 A2d 92, 94 [Del 2007]). This is also the case under Bermuda law as the defendants' expert Rod S. Attride-Sterling, affirmed (Affirmation of Rod S. Attride-Sterling, NYSCEF Doc. No. 82, ¶¶ 9-14, 18-22 [citing House of Lords cases]).

Under Delaware law, creditors may bring derivative claims where a company is insolvent because the creditors take the place of the shareholders (*North Am. Catholic*, 930 A2d at 94). This may well be the case under Bermuda law as well as Mr. Attride-Sterling attests that there are no cases prohibiting or authorizing creditor derivative actions (NYSCEF Doc. No. 82, ¶ 25). Given the absence of Bermuda law to the contrary, under Delaware law, the Plaintiffs have standing to bring its breach of fiduciary duty claims derivatively.

Although not clear whether alleging demand futility in the context of a creditor derivative action is required, to allege demand futility under Delaware law, a derivative plaintiff must make a threshold showing, alleging particularized facts, to create a reasonable doubt that (i) that the directors are disinterested and independent, or (ii) the challenged transaction was otherwise the product of a valid exercise of business judgment (*Rales v Blasband*, 634 A2d 927, 933 [Del

² TGIL and one Issuer are incorporated under the laws of Bermuda and the other Issuers are incorporated under the laws of Delaware. The Court will accordingly apply the laws of Bermuda and Delaware to the fiduciary duty claims (*Hart v General Motors Corp.*, 129 AD2d 179, 182-183 [1st Dept 1987]).

1993]). The Plaintiffs have more than met their burden here at this stage of the litigation (*see, e.g.*, NYSCEF Doc. No. 158, ¶¶ 204-223).

As discussed above, although not expressly prohibited by the June 2021 California Order, the causes of action sounding in fraudulent conveyance and conveyance with the intent to defraud pursuant to New York Debtor and Creditor Law (NYDCL) §§ 273-275, 276. must nonetheless be dismissed. The Plaintiffs nuanced argument that it does not matter that they are not creditors of ACP because NYDCL § 277 permits recovery against the person for whose benefit the transfer was made (*id.*, lines 9-12) is not only novel and without support in the law but is also clearly a repackaged argument of the very type of claim prohibited by the June 2021 California Order. The TruPS holders can not claim fraudulent transfers of assets out of the Castlepoint estate. These claims clearly belong to the Castlepoint estate and the Commissioner. Thus, these causes of action must therefore be dismissed.

The alter-ego and successor liability claims (eleventh and twelfth causes of action) may not be maintained as separate and distinct causes cause of action in New York (*see Ferro Fabricators, Inc. v 180-1811 Park Ave. Development Corp.*, 127 AD3d 479, 480 [1st Dept 2015]; *Corbin v K1 Inv. Management, LLC*, 2021 WL 513261, * 4 [Sup Ct, NY County 2021]). Although the plaintiffs have made sufficient allegations at this stage of the proceeding, liability predicated on these theories may proceed only based on the underlying causes of action. The claims for alter ego liability are predicated on, among other things, ACP and the Karfunkel Defendants' alleged domination of TGIL, treating TGIL and the Issuers has an instrumentality for their own business, and the diversion of fees from TGIL. The claims for successor liability are predicated on the

Karfunkel Defendants' express and implied assumption of the obligations of TGIL, including as TGIL's successor under the definition of the Company in the Indentures (NYSCEF Doc. No. 17, § 1.1). As the defendants argue, a new agreement is required under Section 11.1 of the Indentures upon a consolidation, merger, sale, conveyance, transfer, or other disposition. Failure to execute the supplemental indenture contemplated by Section 11.1 would constitute a breach, but liability for a successor to TGIL is not predicated on a supplemental indenture because a successor's liability is expressly included in the definition of Company in Section 1.1 of the Indentures.

It is hereby ORDERED that the Plaintiffs' breach of fiduciary duty claims are dismissed solely to the extent that they are brought directly on behalf of the Plaintiffs, and it is further

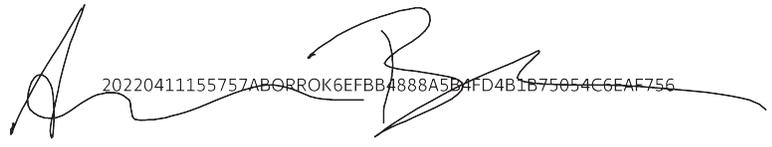
ORDERED that the causes of action for fraudulent conveyance and conveyance with the intent to defraud are dismissed; and it is further

ORDERED that the causes of action for alter ego liability and successor liability are dismissed as independent causes of action; and it is further

ORDERED that the balance of the Defendants' motion to dismiss is denied; and it is further

ORDERED that the parties are directed to appear for a status conference on April 27, 2022, at 9:30am.

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4/11/2022

DATE

ANDREW BORROK, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE