SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

WILMINGTON TRUST COMPANY, as Trustee,

Plaintiff,

-against-

DAVID BONDERMAN, et al.,

Defendants.

Index No. 653357/2011

Mot. Seq. No. 18

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN OPPOSITION TO: (I) MOVANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION; AND (II) DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT ON GROUNDS OTHER THAN LACK OF PERSONAL JURISDICTION

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Plaintiff Wilmington Trust Company, as indenture trustee ("WTC" or "Trustee"), submits this memorandum of law in opposition (the "Opposition")[1] to (i) Movants'[2] motion to dismiss for lack of personal jurisdiction ("PJ") [Doc. Nos. 504, 531] and (ii) Defendants' Motion to dismiss on grounds other than PJ ("Non-PJ") [Doc. Nos. 504, 533] (together, the "Motions").

PRELIMINARY STATEMENT

As alleged in the Amended Complaint [Doc. No. 491] ("AC"), Defendants, global private equity groups TPG Capital, L.P. ("TPG") and Apax Partners LLP ("Apax"), and their affiliated firms, limited general partners, managers, funds and individual principals, used their shell-entity alter egos, Hellas Telecommunications I, S.á.r.l ("Hellas I") and Hellas Telecommunications Finance, S.C.A. ("Hellas Finance"), now judgment debtors ("Judgment Debtors"), and other shell companies Defendants controlled (collectively, with Judgment Debtors, "Hellas Entities"), as instruments to borrow, and then fraudulently transfer, more than €200 million to themselves, stripping Judgment Debtors' cash, leaving them insolvent and unable to satisfy their debts under the subject PIK Notes ("Notes") and PIK Notes Indenture ("Indenture"). The actions perpetrated by this group of intertwined entities were part of an integrated, highly-coordinated transaction that included the: (i) formation of the Hellas Entities to acquire TIM (defined below); (ii) issuance and guarantee in New York of the Notes by Judgment Debtors, which were used to pay themselves by funding an improper redemption of CPECs (securities issued to insiders as defined below); (iii) improper redemption of CPECs with the Notes' proceeds, dressed up as a "refinancing," rendering Judgment Debtors unable to satisfy their creditors, and (iv) fraudulent transfer of the Notes' proceeds to Defendants and their affiliates (collectively, the "Global Transaction") – all of which violated the

[1] WTC also submits the affirmation of Douglas E. Spelfogel ("Aff.") in support of the Opposition.

[2] Only 14 of the 26 moving defendants ("Defendants") in the above-captioned action ("Action") move to dismiss based on personal jurisdiction grounds – eight Entities and six Individuals (collectively, "Movants"). The remaining Defendants concede personal jurisdiction, including the TPG-related Defendants. PJ at 3 n.4. Indeed, nine Defendants previously consented to jurisdiction in this case by affirmation. *Id.*; Aff. Ex. 106 at ¶ 5.

underlying offering documents, CPECs and New York Debtor Creditor Law ("DCL").

New York has the most significant ties to the Global Transaction: without the funds borrowed under New York law, no illegal transfer of the more than €200 million to Defendants could have occurred. Defendants, through their alter ego and closely-related Judgment Debtors, deliberately issued the Notes, creating debt and the Trustee as creditor, under New York law pursuant to a New York forum selection clause ("Forum Clause"). As a result, upon default under the Notes, the Trustee obtained a judgment (in excess of $565 million) ("Judgment") in this Court against Judgment Debtors, over which the Court maintains jurisdiction. The Trustee may now enforce its claims and remedies as a New York creditor, including the Judgment, under the New York Indenture, against Defendants arising from their scheme. Each purported basis for dismissal fails.

First, this Court has jurisdiction over Movants based on, *inter alia*, their alter ego relationship with Judgment Debtors. Significantly, the Court of Appeals confirmed that WTC states an alter ego claim here against Defendants ("Decision on Appeal"),[3] which is law of the case and dispositive as to WTC's allegations of alter ego jurisdiction. Ignoring the Decision on Appeal, Movants erroneously argue that a prior federal decision by the District Court (the "FA")[4] involving different facts, standards and circumstances, somehow trumps the Court of Appeals' later mandate (which this Court correctly recognized is controlling) and purportedly controls the issue of this Court's personal jurisdiction. Yet the non-binding and inapposite FA cannot supplant the controlling Decision on Appeal in *this case* – which is now supported by overwhelming evidence.[5]

Second, Defendants falsely assert that WTC seeks a double recovery by purportedly

[3] Aff. Ex. 1.

[4] *Wilmington Trust Co. v. Hellas Telecomms.*, No. 12-CV-8686 (JPO), 2016 WL 7339112 (S.D.N.Y. Aug. 4, 2016).

[5] Besides alter ego jurisdiction, WTC has properly pled facts that make a sufficient start in demonstrating Movants are also subject to this Court's "close-relationship," specific (CPLR 302(a)(1)) and general (CPLR 301) jurisdiction.

pursuing what they call "notes-based" and "judgment-based" claims. However, *as alleged*, WTC seeks a *single* recovery in satisfaction of the amounts due under the Notes, as liquidated by the Judgment, against Defendants where Judgment Debtors are their alter egos. Further, Defendants' so-called "merger" argument is baseless where WTC does not seek to relitigate its breach of contract claims against Judgment Debtors, but seeks amounts due under the Notes, as liquidated by the Judgment, from Defendants, who controlled Judgment Debtors as alter egos and profited from this.

Third, WTC's first and third causes of action for alter ego liability are well-pled – *as the Decision on Appeal confirms* – and are not barred by either the Indenture's no recourse clause [§ 14.07] ("NRC") or irrelevant Luxembourg law. First, the NRC does not protect *any* Defendant who now stands in the shoes of its alter ego Judgment Debtors used to perpetrate the subject malfeasance. Further, the alter ego claims, which the New York-formed Trustee brings as a New York creditor under the New York based Notes and Indenture with a New York choice of law provision, are *not* governed by Luxembourg law (but in any case, Defendants are judicially estopped from raising *and* waived). Moreover, no conflict of law exists as confirmed by *both* parties' experts.

Fourth, Defendants' *forum non conveniens* argument fails. The doctrine does not apply to the nine Defendants who previously submitted to this Court's jurisdiction. *See* n. 2, *supra*. In addition, New York's General Obligations Law ("GOL") precludes *forum non conveniens*. Moreover, by being closely related to Judgment Debtors (their alter egos), Defendants are separately bound by the Forum Clause and no factor considered by courts supports overriding the Forum Clause here.

Finally, WTC adequately pleads its remaining causes of action (for fraudulent conveyance under the DCL, improper distribution under the BCL,[6] conversion and unjust enrichment) which must be accepted as true for purposes of the Motions. The AC includes specific factual allegations

[6] New York Business Corporation Law.

setting forth Defendants' misconduct regarding the Global Transaction through which they used their alter ego Judgment Debtors to issue the Notes and then fraudulently transfer the proceeds of the Notes to Defendants, stripping Judgment Debtors of all cash, rendering Judgment Debtors hopelessly insolvent and unable to satisfy their creditors.

Defendants have not satisfied their burden and the Motions should be denied.

BACKGROUND

A. Overview of the Global Transaction that Defrauded Noteholders

In 2005, TPG and Apax, joined together as a consortium ("Consortium") and formed the Hellas Entities to acquire TIM Hellas ("TIM"), a Greek telecommunications company.[7] On the advice of their joint tax advisor, KPMG, TPG/Apax caused the Hellas Entities to issue financial instruments known as "convertible preferred equity certificates" ("CPECs").[8] In April 2006, TPG/Apax did a first recapitalization under which they issued €500,000,000 floating rate PIK notes, the proceeds of which were used to redeem CPECs (valued at par – €1/CPEC) which returned 97% of their investment amount, and thus made their investors nearly whole.[9] Shortly thereafter, following failed efforts to sell TIM, the Consortium decided to overleverage the Hellas Entities to pay themselves their desired returns through a second recapitalization.[10] Specifically, the Notes were issued, and over KPMG's advice to seek an outside valuation, the Consortium valued the CPECs themselves, assigning a value per CPEC of €35.28 – ***a 3,582%, 35 times, increase over their value just eight months before***[11] – and used this fatally flawed valuation to support a €973 million dividend to itself. This unprecedented dividend, which was funded with the Notes' proceeds and other loans, came at a time when the Hellas Entities had no profits, retained earnings or

[7] AC ¶¶99-101; Aff. Ex. 2; Deposition of David Prestwich dated April 5, 2019, Aff. Ex. 3 at 85-86; Aff. Ex. 4.
[8] Aff. Exs. 17-18.
[9] AC ¶111; Aff. Ex. 3; Aff. Ex. 28; Aff. Ex. 7 at 94-96.
[10] AC ¶¶117-18; Aff. Ex. 5.
[11] AC ¶132; Aff. Ex.8.

distributable reserves that could lawfully permit a dividend payment, effectively committing business suicide, bleeding the Judgment Debtors dry, and rendering them hopelessly insolvent and unable to repay the money borrowed under the Notes, resulting in the Judgment.[12]

B. The Consortium's Structured Control Over the Hellas Entities

Apax and TPG each operates as a single business worldwide, including in New York.[13] While Defendants erroneously try to suggest that neither firm had control over the Hellas Entities, *e.g.*, Doc. No. 521, ¶17,[14] here, TPG and Apax ran as a Consortium, a unified entity where the firms were "true partners," each firm having an equal say, acting jointly with a common purpose and in turn, exercising complete domination over the Hellas Entities. *See* § I.B.2.b., *infra.* [15]

C. The Shell Structure Is Created to Enjoy U.S. Tax Benefits

From the beginning, TPG/Apax, based on KPMG's advice, elected to use the Luxembourg shell structure so as to ensure that distributions to investors would be treated as equity under U.S law – and thereby enjoy certain tax advantages – because numerous investors were in the U.S.[16] The CPECs were issued because they are an instrument which would be considered equity in the U.S (and other countries).[17] The CPECs create no obligation of repayment, the essential quality making

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[12] AC ¶¶9, 91, 108, 113, 117, 123, 155, 161. *See generally* Expert Report of Ian Ratner ("Ratner Report"), Aff. Ex. 9, and Rebuttal Report of Ian Ratner ("Ratner Rebuttal"), Aff. Ex. 10.

[13] AC ¶16; *see generally* Expert Report of Michael Spindler ("Spindler Report") Aff. Ex. 11, and Rebuttal Report of Michael Spindler ("Spindler Rebuttal"), Aff. Ex. 12.

[14] Parties can jointly control an alter ego without each having control by itself. *See, e.g.*, *MK Invs. Servs. Ltd. v. Montague Morgan Slade Ltd.*, 2012 Misc. LEXIS 6252, 2012 NY Slip Op. 33285(U) (Sup. Ct., N.Y. Cty. 2012) (plaintiff adequately pleaded that foreign individuals and entities jointly controlled investment firm which defrauded plaintiff as alter ego)

[15] AC ¶13; Aff. Ex. 13; Aff. Ex. 3 at 85-86; Aff. Ex. 14 at APAX00105187; Aff. Ex. 16; Aff. Ex. 12, ¶28. Defendants' relationship with the Hellas Entities, including Judgment Debtors, is further established through the Third Amended and Restated Shareholders Agreement Relating to Hellas Telecommunication ("Shareholders Agreement") dated December 2005 by and among, multiple Defendants and Judgment Debtor Hellas I and Hellas II – showing the Global Transaction was carried out under the backdrop of Defendants' utter domination and control over Judgment Debtors, Dep Ex. 4 (Third Am. Shareholders Agreement), Aff. Ex. 111.

[16] Aff. Ex. 17; Aff. Ex. 18: Aff. Ex. 3 at pp. 34, 57-58, 62, 77-80.

[17] [redacted]

an instrument "debt" under American law (and indeed, contrary to Defendants' assertion, Luxembourg law).[18] The Consortium retained a New York-based law firm – Cleary, Gottlieb – to provide tax and transactional advice regarding the consequences of the Hellas Entities' structure, which confirmed the CPECs would be treated as equity under U.S law.[19]

In particular, as shells, the Hellas Entities were a "conduit" under which the same amount of money distributed from the payment of CPECs (the so-called "Redemption") at the highest level of the Hellas Entity structure would come out the bottom.[20] The Hellas Entities had no business of their own[21] and depended on TIM's operations for revenue, including to pay their debts.[22]

D. Defendants Bleed Judgment Debtors Dry to Pay Themselves

Only months after the first recapitalization in April 2006, TPG/Apax decided to explore an early exit from the TIM investment desiring a specific return on investment irrespective of the carnage it would cause the Hellas Entities and their creditors. This scheme required that the Hellas Entities have an enterprise value of at least €3.4 billion, which was not achievable.[23] One means they explored for such an exit was to sell their interests through a formal auction, but this resulted in no binding offers.[24] The auction's failure came at the same time TIM's business faced new challenges, including a tightening competitive environment.[25]

In December 2006, after the failed sale efforts, the Consortium decided instead to achieve

[18] [redacted]

[19] Aff. Ex. 17-18; Aff. Ex. 3 at pp. 104-109. In *Fischbarg v. Doucet*, 9 N.Y.3d 375, 379, cited by Defendants (P.J. at 10), the Court held that Defendants were answerable in a New York action brought by their New York attorney because, like here, they regularly communicated with him there.

[20] Aff. Ex. 3 at 44.

[21] Aff. Ex. 2; Aff. Ex. 14; *See, also e.g.,* Letter from W. Groll to D. Duchovny dated Sept. 27, 2005 (the "Duchovny Letter"), Aff. Ex. 21.

[22] See Deposition Transcript of Karim Nasr, Aff. Ex. 22 at pp. 78.

[23] AC ¶¶116-17; Aff. Ex. 5.

[24] AC ¶115.

[25] AC ¶129; Morelli Dep., Aff. Ex. 23, at pp. 156-57,165; Aff. Ex. 24.

their desired returns by overleveraging the Hellas Entities through a second recapitalization.[26] To facilitate this, the CPECs were required to be valued based on an arm's length equity valuation. KPMG advised the Consortium to seek an outside valuation, in particular, by Ernst & Young, which was already familiar with TIM's operations and the Hellas Entities.[27] Rejecting KPMG's advice, however, the Consortium valued the CPECs itself.[28] To do so, it relied on its own, fatally flawed projections. These recklessly assumed that the future would only be rosy, with TIM and therefore, the Hellas Entities, doing better every year (and not being overleveraged and ultimately filing for bankruptcy).[29] Using such result-driven projections and valuation, the Consortium grossly overvalued the CPECs at ***35 times*** their value just months earlier and again 10 days later.[30] Nothing in the business justified this explosion in value.[31] The fatally flawed valuation was used to improperly support an intended distribution of €973 million (including the Notes' proceeds) to the Consortium.[32] The alter ego relationship between Judgment Debtors and Defendants was essential to this; an independent board would not have rejected an independent valuation, redeemed CPECs absent any obligation or strip all cash out of the Hellas Entities, and the resulting business suicide and bleed-out could not have happened.

On December 21, 2006, Hellas Finance issued the Notes (which Hellas I guaranteed) to raise €200 million ("Note Issuance").[33] The Note Issuance was governed by the Indenture and an

[26] AC ¶¶117-18; Aff. Ex. 5.

[27] AC ¶135. Ernst & Young had done an appraisal of Hellas as of December 18, 2006 which would have valued the CPECs at approximately 10 cents. *See* AC ¶139; Aff. Ex. 50 (E&Y Opinion); Aff. Ex. 26 (E&Y willing to value); Dep Ex. 10; Aff. Ex. 3; Aff. Ex. 28.

[28] AC ¶136; Aff. Ex. 29; Aff. Ex. 30.

[29] See generally Expert Report of Harold Furchtgott-Roth ("HFR Report"), Aff. Ex. 31, and Rebuttal Report of Harold Furchtgott-Roth ("HFR Rebuttal"), Aff. Ex. 32.

[30] AC ¶132; Aff. Ex. 8.

[31] See Aff. Exs. 31-32.

[32] AC ¶122; Aff. Ex. 33; Aff. Ex. 34; Aff. Ex 35; Aff. Ex. 36; Aff. Ex. 8.

[33] AC ¶¶16, 93, 119, 121

accompanying Offering Memorandum ("OM").[34] Because of foreseeable effects in the U.S., the Consortium chose New York law to control this bond offering (including Notes and Indenture).[35]

As Defendants repeatedly acknowledge in internal communications, the €973,000,000 distribution (including the Notes' proceeds) was to be a dividend to the Consortium,[36] yet the OM mischaracterizes it as a "refinancing" of existing debt.[37] The OM omits that Defendants picked the number they wanted to pay themselves as redemptions and that no outside, independent expert verified the chosen value.[38] It says nothing about the projections used to support that valuation, which Defendants prepared. Instead, the OM states that the Redemption would repay "deeply subordinated shareholder loans," even though the Consortium knew that the Redemption violated the underlying transaction documents and under New York and U.S law (and Luxembourg law), these were not shareholder loans but rather, an equity investment by these shareholders.[39]

Through the Redemption, the majority of the loan proceeds from the Notes did not repay debt, but instead were paid to Apax, TPG, and their affiliates/investors, including Defendants, as an unprecedented dividend, rendering the Hellas Entities (including Judgment Debtors) insolvent and unable to repay the money borrowed under the Notes.[40] TPG/Apax acknowledged this was the largest dividend recap in European History.[41] The dividend repaid four times investors' investment in 18 months.[42] Leaving TPG and Apax understandably giddy with enthusiasm.[43] Members of the

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[34] AC ¶¶16, 119

[35] Notes; Indenture, Aff .Ex. 38.

[36] See Aff. Exs. 39, 40, 41, 203, 83, 24, 43, 44.

[37] *See generally* Expert Report of Dr. John Finnerty, Aff. Ex. 60 and Rebuttal Expert Report of Dr. John Finnerty ("Finnerty Rebuttal"), Aff. Ex. 113.

[38] A [redacted]

[39] Aff. Exs. 39, 41, 42, 47, 43, and 44; Aff. Ex. 20 at pp. 21-22 (debt in Luxembourg requires repayment obligation); Aff. 19 at pp. 59, 161-62 (same); Aff. Ex. 113.

[40] AC ¶¶9, 91, 108, 113, 117, 123, 155, 161. *See generally* Aff. Exs. 9-10.

[41] AC ¶120; See Aff. Ex. 24 & 39-44.

[42] Aff. Ex. 5; Aff. Ex. 48; Calice Dep., Aff. Ex. 49 at pp. 40-42.

[43] *See, e.g.,* Aff. Ex. 40.

deal teams described themselves as [redacted][44] Documents evidencing the flow of funds from the "recap" show that funds then went to numerous recipients in New York.[45]

E. The Global Transaction Leaves Hellas Hopelessly Insolvent

Defendants argue that the Hellas Entities were somehow solvent based upon a later deal in February 2007 with Weather Investments ("Weather"). Not only contested (and contrary to the AC's allegations), Defendants cannot reasonably controvert that the Global Transaction left the Hellas Entities hopelessly overleveraged and unable to pay their debts as due – an independent basis for establishing insolvency, as alleged in the AC. *See* AC ¶ 165. Further Defendants misdescribe the Weather deal (see § VI.C., *infra*).

In particular, Weather was a strategic buyer which had offered the same deal in August 2005 (which was rejected), directly after the Consortium first bought TIM,[46] because Weather, with holdings in the Middle East and Africa, wanted to increase its European footprint.[47] The Consortium presented Weather with a "take it or leave it deal," which Weather accepted.[48] Weather agreed to do no commercial due diligence before the deal, and there was no independent valuation or fairness opinion supporting the sale, which if done, would have revealed the overleveraging which ultimately led to the bankruptcy filing of Hellas II.[49] [redacted][51] Even

[44] AC ¶119: Aff. Ex. 50.

[45] AC ¶¶ 74, 82-83; Aff. Exs. 51-53. WTC attaches a list of entities located in New York identified in the flow of funds as receiving monies as Ex. 54 hereto.

[46] Aff. Ex. 55; Osborne Dep. at 234-35.

[47] Aff. Ex. 22 at pp. 148.

[48] AC ¶142; Aff. Ex. 56.

[49] Aff. Ex. 22 at pp. 58, 195-96.

[50] Aff. Ex. 22 at pp. 199-200.

[51] Aff. Ex. 22 at p. 200. Part of the consideration Weather provided was allocated to purchase of the remaining CPECs which for this purpose were again valued at par (as they had been in April 2006), although just two months before they were valued at 35 times this. See AC ¶140.

this was misleading, however, because Weather also [redacted][52] Weather thus obtained the benefits of this new ownership while TIM bore the staggering debt burden and risk it would not be repaid. Moreover, in June 2008, Apax invested €500 million in Weather for a 5% stake in the company, the exact amount Weather paid for the Hellas Entities' equity,[53] suggesting a possible quid pro quo arrangement – or at a minimum, raises serious red flags.

Thereafter, the Hellas Entities proved unable to pay their debts, including the Notes, and defaulted, ultimately filing for bankruptcy.[54] While Defendants blame this default on a global recession, of 150 telecoms, only TIM and two others (much smaller entities and also private equity owned) proved unable to meet their obligations.[55]

F. The Judgment and Related Proceedings

Following Judgment Debtors' default under the Notes and Indenture, this Court exercised jurisdiction over Judgment Debtors under the Forum Clause and entered Judgment in favor of WTC in excess of $565 million.[56] This Action was filed simultaneously by WTC, as indenture trustee, against Defendants to recover the assets looted from the Judgment Debtors and, now, to recover on the Notes as liquidated by the Judgment.

By order entered September 17, 2014 [Doc. No. 199] ("Sept. 2014 Order"), this Court granted Defendants' motion to dismiss this Action. Aff. Ex. 110. The Court held that the Indenture fails to authorize the Trustee to prosecute the causes pled in the complaint and dismissed the fourth cause, alter ego, for failure to state a claim, believing the allegations were insufficient. *Id.* at 29-30, fn. 12. On appeal, the First Department reversed the dismissal, finding that WTC had standing under

[52] Aff. Ex. 22 at pp. 200-202.
[53] AC ¶144; the investment was already in formation by August 2007, Aff. Ex. 107; See also Exhibit 112.
[54] AC ¶¶4, 94, 165
[55] Aff. Ex. at pp. 104-105, 115.
[56] AC ¶97.

the Indenture and holding that WTC adequately pleaded alter ego ("First Department Decision"). *Id.* Ex. 59 at 21-23. The Court of Appeals affirmed, holding in the Decision on Appeal:

> Defendants argue that the complaint is inadequate because it fails to plead with specificity the conduct alleged against each defendant that would support alter ego liability. While the complaint refers to the "Private Equity Defendants" throughout, the complaint also alleges various details about Apax- and TPG-affiliated entities, as well as the individuals that manage the funds that owned Hellas, which suggests a strong suspicion of fraud. It points to various individuals and entities tasked with directing Apax and TPG's day-to-day activities at the time of the fraudulent conveyances, it lists their titles and management positions, and it also identifies specific transferees of the fraudulent conveyance proceeds. It would be unreasonable to require greater detail from WTC as to each individual's daily conduct and involvement in the fraud at this pre-answer, pre-discovery stage. *Id.* Ex. 1 at 22.

Following the Decision on Appeal, on June 23, 2018, WTC moved to amend complaint and add parties [Doc. Nos. 381, 382] ("MTA") through which it sought to, *inter alia*, add Defendants Apax and TPG and add a cause of action to enforce the Judgment. On April 24, 2019, the Court entered its Decision and Order granting the MTA [Doc. No. 489] ("MTA Order"). WTC then filed the AC, through which it seeks to collect amounts due under the Notes and Indenture, as liquidated by the Judgment – $717,000,000 (the Judgment plus interest and subsequent fees and costs).

ARGUMENT

I. WTC Sufficiently Demonstrates Personal Jurisdiction Over Movants[57]

A. WTC Need Only Set Forth a "Sufficient Start" In Demonstrating Jurisdiction

On a motion to dismiss for lack of personal jurisdiction under CPLR 3211(a)(8), the court must accept as true all facts alleged in the non-movant's claims and draw inferences in its favor. *See Wilson v. Dantas*, 128 A.D.3d 176, 182 (1st Dep't 2015). The non-movant "need not present definitive proof of personal jurisdiction, but only make a 'sufficient start' in demonstrating such jurisdiction by reference to pleadings, affidavits, and other suitable documentation." *Avilon Auto Grp.*

[57] Notably, as described above, only 14 of the 26 Defendants are Movants challenging jurisdiction. *See* n. 2, *supra.*

v. Leontiev, 168 A.D.3d 78, 89 (1st Dep't 2019) (reversing grant of motion to dismiss for lack of personal jurisdiction) (citation omitted). This standard applies specifically to alter ego jurisdiction. *See 265 W. 34th St., LLC v. Chung*, 47 Misc. 3d 1219(A), 2015 N.Y. Slip Op. 50704(U), *4 (Sup. Ct., N.Y. Cnty. 2015). New York courts have denied motions to dismiss challenging alter ego jurisdiction based on complaint allegations alone, especially when supported by documentation. *See*, *e.g., Gowen v. Helly Nahmad Gallery, Inc.*, 60 Misc. 3d 963, 974-76 (Sup. Ct., N.Y. Cnty. 2018); *265 W 34th St., LLC*, 47 Misc.3d at *4 ("Here, *the complaint sets forth myriad examples*" of plaintiff's alter ego allegations.") (emphasis added). Moreover, where, as here, the same evidence demonstrates both liability and jurisdiction, the ultimate decision as to personal jurisdiction should be left for the jury to decide. *See All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006).[58]

B. WTC Sufficiently Demonstrates Alter Ego Jurisdiction Over Movants

Critically, the Decision on Appeal is dispositive as to this Court's alter ego jurisdiction over Movants. Specifically, the Court of Appeals held that at the pre-answer, pre-discovery phase, WTC provided sufficient detail to plead alter ego liability (Aff. Ex. 1 at 22) – which this Court recognized as controlling. *See* MTA Order at 3 ("Significantly also, the Court of Appeals has expressly held that the alter ego allegations against the already named entities were sufficiently pleaded."). This holding is determinative as to alter ego jurisdiction:

> Since the Court finds that [shareholder defendants] are alter egos [of defendant] for purpose of veil-piercing, [ ] it follows, *a fortiori*, that they are alter egos for purposes of personal jurisdiction … [because] … the standard for finding a [defendant] to be an alter ego for purposes of personal jurisdiction is 'a less stringent standard than that necessary to pierce the corporate veil for purposes of liability.'

Telenor Mobile Commc'ns AS, 587 F. Supp. 2d 594, 619 (S.D.N.Y. 2008)(quoting *Storm LLC v. Telenor Mobile Commc'ns AS*, No. 06 CIV. 13157 GEL, 2006 WL 3735657, at *13, n.8 (S.D.N.Y. Dec. 15,

[58] The standard also governs WTC's other pleaded bases for personal jurisdiction over Defendants. *See Robins v. Procure Treatment Centers, Inc.*, 157 A.D.3d 606, 607, 70 N.Y.S.3d 457, 458 (1st Dep't 2018) ("Plaintiff made a 'sufficient start' in establishing that New York courts have jurisdiction over [defendant] under CPLR 301 and 302(a)(1).").

2006) (further citation omitted).

Ignoring this controlling decision, *and citing nothing*, Movants ask the Court to disregard the Decision on Appeal (and law of the case) because it addressed alter ego *liability* rather than *jurisdiction*, which they claim is subject to a different legal standard. PJ at 14. However, *Telenor*, holds the exact opposite – that a finding of alter ego liability is determinative as to alter ego jurisdiction, which is subject to "a less stringent standard than that necessary to pierce the corporate veil for purposes of liability." *Telenor*, 587 F. Supp. 2d at 619; *see also D. Klein & Sons, Inc. v. Good Decision, Inc.*, 147 Fed. Appx. 195, 196 (2d Cir. 2005) (holding personal jurisdiction over alleged alter egos followed from adequately pled allegations of alter ego liability.).[59]

Accordingly, the Court of Appeals' Decision encompasses alter ego jurisdiction and is now law of the case, which binds this Court and Movants cannot relitigate. *See J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, 809 (2d Dep't 2007) (where appellate court resolves an issue in prior appeal, it binds Supreme Court).[60]

Moreover, even apart from the Decision on Appeal, WTC clearly meets the test for alter ego jurisdiction under New York law. Alter egos are treated as one entity for jurisdictional purposes. *See Holme v. Global Minerals & Metals Corp.*, 63 A.D.3d 417, 417-18 (2009). To find personal jurisdiction over Movants based on their alter ego relationship with Judgment Debtors, the Court must find that (1) it has personal jurisdiction over Judgment Debtors; and (2) Judgment Debtors are Movants' alter

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[59] Defendants – *citing nothing* – argue erroneously that due process requires proving alter ego jurisdiction on an individualized basis. PJ 14, n.15. Instead, *Packer v. TDI Sys., Inc.*, 959 F. Supp. 192, 203 (S.D.N.Y. 1997), holds that"[d]ue process concerns are not implicated by such an exercise of personal jurisdiction [over parties sufficiently alleged to be alter egos of party who has consented to jurisdiction through forum clause] because consent to jurisdiction in a given forum obviates the necessity of a minimum contacts analysis…."

[60] The Decision on Appeal moots Defendants' argument about an alter ego jurisdiction "test set forth in *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120-22 (2d Cir. 1984))" (PJ at 13-14) which they also misstate. The Court of Appeals has already determined that WTC's "complaint [as to alter ego liability] is sufficient and survives defendants' motion to dismiss." (Aff. Ex. 1, at 20.) Yet "[w]hen applying the *Beech* test, establishing the exercise of personal jurisdiction over an alleged alter ego requires application of **a less stringent standard than that necessary to pierce the corporate veil for purposes of liability**."); *see also Paysys Int'l v. Atos SE*, No. 14 CIV. 10105 SAS, 2015 WL 4533141, at *3 n.28 (S.D.N.Y. July 24, 2015) (same).

egos. *Glencore AG v. Bharat Aluminum Co.*, No. 10 Civ. 5251 (SAS), 2010 WL 4323264, at *6 (S.D.N.Y. Nov. 1, 2010). WTC amply meets both elements.

1. This Court Has Personal Jurisdiction Over Judgment Debtors

To obtain the Judgment, WTC already established personal jurisdiction over Judgment Debtors. That jurisdiction continues for two reasons: (i) this Court has continuing jurisdiction to enforce the Judgment; and (ii) the Forum Clause establishes continuing jurisdiction.

First, this Court has continuing jurisdiction over Judgment Debtors to enforce the Judgment and ensure its satisfaction. *See In re Residential Capital, LLC,* No. 14-cv-4950, 2014 WL 4652664, at *2 (S.D.N.Y. Sept. 10, 2014) (internal quotation marks omitted) (holding that "all courts retain the jurisdiction to interpret and enforce their own orders."). ***Undisputed,*** *this alone establishes the first requirement for alter ego jurisdiction.*

Second, this Court separately retains jurisdiction under the Forum Clause through which it previously assumed jurisdiction over Judgment Debtors. Movants incorrectly argue that the Forum Clause "merged" into the Judgment and is no longer operative. PJ at 12-13. This erroneously confuses merger of a *claim/cause of action* with merger of a *contract and its provisions* and defies well-established New York law. *See NML Capital, Ltd. v. Republic of Argentina*, No. 11 Civ. 4908 (TPG), 2015 WL 3542535, at *4 (S.D.N.Y. June 5, 2015) ("The 'merger' of the contract debt with the judgment debt does not extinguish the underlying contract itself. This would inappropriately 'weaken rights or destroy identities which the prevailing party had in his original cause.'") (citations omitted). Indeed, elsewhere Movants tacitly acknowledge that the Indenture's clauses remain viable, as they attempt (unsuccessfully) to rely on its "NRC." Non-PJ at 6-10. However, if Movants' erroneous "merger" arguments were correct, *all Indenture terms* would now be inoperative.[61]

[61] None of Movants' cases hold that forum clauses are inoperative post-judgment *See FCS Advisors, Inc. v. Fair Fin. Co., Inc.* 605 F.3d 144, 148-49 (2d Cir. 2010) (holding only that a contractual choice-of-law provision does not apply to the post-judgment interest rate calculation in derogation of federal law); *Amaprop Ltd. v. Indiabulls Fin. Servs., Ltd.*, No. 10-civ-

Further, well-established law holds that where, as here, a forum selection clause expressly extends to all claims "relating to" a contract, this includes disputes beyond those for breach of contract, such as post-judgment claims, even absent specific language itemizing those disputes. *Absolute Activist Master Value Fund, Ltd. v. Ficeto*, No. 09 CIV. 8862 GBD, 2013 WL 1286170, at *18 (S.D.N.Y. Mar. 28, 2013) ("When forum selection clauses contain 'relating to' or 'arising under' language, courts are inclined to interpret those clauses broadly to cover disputes beyond those for breach of contract."). Here, WTC seeks to hold Movants "liable to pay the amounts due under the Notes as liquidated pursuant to the Judgment" and seeks payment "in satisfaction of the amounts due under the Notes and Judgment." AC ¶ 194. Accordingly, WTC's claims seek to collect the Judgment, which in turn arise from the failure to pay the Notes as the Indenture requires, and therefore "relate to" the Notes and Indenture, and fall squarely within the Forum Clause.

To avoid this fact, Movants *incorrectly* assert that WTC "conceded the point in the [FA]" because it declined to press the argument that the Forum Clause created jurisdiction in that case. PJ at 11. Movants ignore that the District Court in the FA held the *opposite*: "[t]he New York Supreme Court *has* continuing jurisdiction [based on the Judgment], having already assumed jurisdiction over the Judgment Debtors through a forum selection clause." 2016 WL 7339112, at *8.

Movants also assert, *incorrectly*, that the Forum Clause does not apply because it "says nothing about judgments." PJ at 11. Yet *no* case holds that a forum selection clause must expressly reference judgment enforcement claims in order to apply to them,[62] and Movants' cases do not address the relevant issue of whether a judgment creditor plaintiff may pursue a post-judgment action against

1853(PGG)(JCF), 2012 WL 4801452, *5 (S.D.N.Y. Oct. 5, 2012) (relying on *FCS Advisors* to hold that a choice of law provision does not govern the inapposite question of post-judgment interest); *In re Palermo*, No. 05-25081 (ASH), 2007 WL 4276831, *2 (Bankr. S.D.N.Y. Dec. 3, 2007) (limited holding denying plaintiff attorneys' fees in a judgment enforcement action because it waived fees under the judgment's terms).

[62] Movants cite *AIP Asset Mgmt. Inc. v. Ascension Tech. Grp., Ltd.,* 2017 WL 3209526, at *1 (S.D.N.Y. 2017), because the forum clause there contained language specifically including judgment enforcement claims. PJ at 12. However, *AIP* did not address jurisdiction over a post-judgment enforcement claim or the forum clause's applicability, *and does not hold* that such language in a forum clause is required. *AIP Asset Mgmt. Inc.,* 2017 WL 3209526, at *1-*2.

defendants in the court both where the judgment was entered and where the contract's forum clause giving rise to the judgment prescribes that litigation should proceed, as WTC does here.[63]

Accordingly, the Forum Clause remains fully operational and applicable to this Action and provides a ***second*** *basis* for this Court's continuing jurisdiction over Judgment Debtors.

2. The Judgment Debtors Are Alter Egos of Movants

a. The Decision On Appeal Controls Alter Ego

As described in detail above, the Court of Appeals already found that at the pre-answer, pre-discovery phase, WTC provided sufficient detail to plead alter ego liability (Aff. Ex. 1 at 22) and that holding is law of the case and determinative as to alter ego jurisdiction. *See,* § I.B, *supra.*

b. Evidence Obtained to Date Demonstrates Alter Ego

While the Decision on Appeal establishes that WTC's allegations and accompanying exhibits sufficiently demonstrate alter ego jurisdiction, so does evidence discovered to date by WTC. As discussed herein, the Spindler Report and Rebuttal, admissions by Defendants' own attorneys, including in SEC filings and substantial other evidence, clearly establishes that Defendants jointly created Judgment Debtors and related entities as shells to strip Judgment Debtors' cash, divert the assets to themselves and their investors, including in New York – resulting in business suicide for the Hellas Entities – while leaving Judgment Debtors hopelessly insolvent and unable to pay their debts. To accomplish this, they issued New York Notes, under a New York Indenture, through a

[63] *See Batbrothers LLC v. Paushok,* 60 Misc.3d 1205(A) (Sup. Ct., N.Y. Cnty. 2018), *aff'd*, 172 A.D.3d 529 (1st Dep't 2019) (The court had no opportunity to decide whether a judgment creditor plaintiff could invoke a forum clause in the underlying contract (narrower than the Forum Clause at issue) to hale the defendant into the designated forum for a judgment enforcement action); *Herr Indus. Inc. v. CTI Sys.*, 112 F. Supp. 3d 1174 (D. Kan. 2015) (court did not hold that the forum designated by the subject forum clause somehow loses jurisdiction post-judgment); *Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366 (S.D.N.Y. 2003) (same, and retaining jurisdiction, notwithstanding a Sweden forum clause, because "defendants merely hope to forestall the resolution of these judgment enforcement claims" and "[i]t is only when it appears that the judgment creditor may be at the door that the defendants attempt to flee to arbitration in Sweden."); *Figueiredo Ferraz Consultoria v. Republic of Peru,* 865 F. Supp. 2d 476, 477 (S.D.N.Y. 2012) (rejecting application of choice of law provision in defendant's action for attorneys' fees following dismissal of previous action, solely because the plaintiff's claims in the dismissed action were not asserted under the contract containing the choice of law provision).

New York-based Trustee. They then obtained the funds through the Notes which they then jointly diverted to themselves and to myriad New York investors.

(i) Entity Defendants Used Judgment Debtors As Alter Egos

As noted above, all WTC must allege is a "sufficient start" in order to survive a motion to dismiss, but the evidence showing an alter ego relationship is definitive and inculpating even before discovery has closed.[64]

There are 18 TPG and Apax Entity Defendants. Two – Apax Partners, LP d/b/a Apax Partners of New York and TPG Capital-NY LLP – are each entities based in New York.[65] The other 16 were part of intentionally byzantine ownership chains that controlled Judgment Debtors.[66] As WTC's expert on corporate control, Michael Spindler, makes clear in his Report and Rebuttal, control was exercised through four ascending levels as follows:

- In the first, Judgment Debtors were owned by Hellas Telecommunications S.à.r.l. – the "Hellas Topco."[67]
- In the second, Hellas Topco was owned by two Apax-related entities, two TPG-related entities, two TCW-related entities, one entity for the co-investors and one for employees (together, the "Sponsors") – all shell entities controlled by TPG/Apax as a Consortium.[68] The two Apax-related ownership entities are Troy L.P, Inc. and Apax WW Nominees Ltd. The two TPG-related ownership entities are T3 Troy LLC and TPG Troy LLC.[69]
- In the third level TPG/Apax, through their respective investment managers, controlled investment decisions and actions, including creating and controlling special purpose entities for the Global Transaction. For sponsor Troy LP, Inc. (an Apax entity), the investor funds were invested through Defendants Apax Europe VI-A LP and Apax Europe VI-I LP. For Sponsor T3 Troy LLC (a TPG entity), investor funds were invested through T3 Partners II, LP and T3 Parallel II, LP. For Sponsor TPG Troy LLC (another TPG entity) investor funds were invested through TPG Partners IV, LP.[70]
- In the fourth level, the funding entities were controlled by their general partners and investment

[64] Discovery has continued since the AC was filed but, as discussed in the Spindler Report and Rebuttal, Defendants objected to production of bank statements and tax returns and failed to produce formation and governance documents.

[65] AC ¶¶18, 23; Aff. Ex. 12 ¶45; see also Aff. Ex. 62; Aff. Ex. 13 [redacted]

[66] AC ¶¶2,5,11,45,145-46,149 (Defendants controlled Judgment Debtors as alter egos); Aff. Ex. 12 ¶46; Aff. Ex. 13.

[67] Aff. Ex. 12 ¶47.

[68] Aff. Ex. 67; Aff. Ex. 12 ¶48.

[69] Aff. Ex. 67; Aff. Ex.12 ¶¶49-50.

[70] AC ¶¶36-37; Aff. Ex. 12 ¶51.

> managers, which comprise the final seven Entity Defendants. For Sponsor Troy LP, Inc. (the Apax entity), the investor funds were invested through Apax Europe VI-A LP and Apax Europe VI-I LP. Each had no role in management or operation of the business of the Entities. Their general partner – Apax Europe VI GP Co. Ltd – had the management function. It, in turn, delegated the investment function elements of managing the portfolio to Apax Partners Europe Managers Ltd ("APEM").[71] For Sponsor T3 Troy LLC, investor funds were invested through T3 Partners II, LP and T3 Parallel II, LP. The general partner of these funds was T3 GenPar II, LP and its general partner was TPG Advisors II, Inc. For Sponsor TPG Troy LLC, investor funds were invested through TPG Partners IV, LP. The general partner of this investor fund was TPG GenPar IV, LP and that entity's general partner was TPG Advisors IV, Inc.[72]

TPG and Apax had "deal teams" (which Defendants Calice (TPG) and Aliberti (Apax) served on) which implemented the TIM investment and oversaw the Hellas Entities and TIM.[73] Moreover, the facts show that TPG and Apax sat atop and controlled this structure. *See* Decision on Appeal at 2 (Defendants on appeal "are private equity investment funds and their individual partners … who are part of a consortium controlled by the private equity groups Apax Partners L.L.P ("Apax") and TPG Capital Management ("TPG")."). TPG, of course, concedes jurisdiction here, while Apax employed its deal team.[74] Apax also advised APEM of opportunities and APEM decided whether to pass these opportunities onto the various funds it controlled.[75]

TPG and Apax and the advisory entities were, in turn, run by individual Defendants Bonderman and Coulter for TPG and Halusa and Megrue for Apax.[76] In joint SEC filings, TPG and Apax acknowledged that, through this structure, they had both voting and dispositive control over

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[71] AC ¶¶36-37; Aff. Ex. 12 ¶52. *See also* Nathoo Dep., Aff. Ex. 68, at pp. 29-30; Aff. Ex. 7 12, 30-32.

[72] AC ¶¶36-37; Aff. Ex. 12 ¶¶53-54. *See, also e.g.,* Aff. Ex. 21 at 2; *see also*, Aff. Ex. 69 at Apax00239549) ("The Luxembourg holding companies have not engaged in any activities other than those incident to their formation and such transactions). Accordingly, the Luxembourg holding companies are merely shell companies that have no business activity or purpose beyond effecting the transactions described …. Further, the Luxembourg holding companies are controlled by the Apax Entities and the TPG Entities and are not independent from these controlling entities. … The Apax shareholders and the TPG shareholders have not been included as filing persons of the Schedule 13E3 because these entities are not acting independently or directly in these transactions. They are private equity investment funds with no officers or directors. They act through ad are controlled by the Apax entities and the TPG Entities respectively [the Apax entities are Apax Partners Europe Managers Limited and Apax Europe VI GP Co. Ltd. The TPG Entities are TPG Advisors IV, Inc. and T3 Advisors II"); Aff. Ex. 14 at Apax00165224-25).

[73] AC ¶¶33-34, 37, 46, 54; Doc. 521, ¶¶ 7-8; Doc. 527, ¶3; Aff. Ex. 12 ¶¶37-44

[74] Aff. Ex. 7 at pp. 10, 12, 44-45; Ehmer Dep., Aff. Ex. 72, at p. 181.

[75] Aff. Ex. 7; Aff. Ex. 72 at pp. 17-19.

[76] AC ¶¶25-30, 71, 84-85; Aff. Ex. 12 ¶38; Bonderman Dep., Aff. Ex. 61, at 12-14, 85-86, 98, 109-10 & Exs. 353, 356, 362, 364.

the Hellas Entities and that Individual Defendants were controlling persons.[77]

(ii) Individuals Directed the TPG/Apax Entities and Profited

When individuals orchestrate and profit through an alter ego transaction, they are also answerable in the jurisdiction where the alter ego entity engaged in wrongdoing. *See Gowen*, 2018 WL 2123915 at *6 (finding alter ego jurisdiction alleged as to individuals and rejecting motion to dismiss). Movants ignore jurisdictional facts establishing their involvement in the wrongdoing in New York. Here, Bonderman, Coulter, Halusa and Megrue, in self-serving and compromised attestations[78] stated that they had nothing to do with Judgment Debtors or the Redemption (Doc. No. 528 ¶¶ 3-5; Doc. No. 529 ¶¶ 3-5; Doc. No. 524 ¶¶5-10; Doc. No. 525 ¶¶ 5-8), but ignore facts showing their central involvement in Judgment Debtors' business, formation of the Hellas Entities, borrowing, loans, and transfer of assets and the Redemption. By contrast, the affidavits of Calice (Doc. No. 527) and Aliberti (Doc. No. 521) concede their central involvement in both the business in general and the Redemption specifically, while sidestepping the facts showing that their conduct was intended to and did have effects in New York. The following are among the significant record facts further establishing personal jurisdiction over these Individuals:

(a) David Bonderman and James Coulter

- **Bonderman and Coulter Control TPG and All Its Entities**. They were founders and heads of TPG (Bonderman Aff. ¶1; Coulter Aff. ¶1). In 2005, Bonderman had the largest ownership percentage and total share of the firm.[79]
- **Bonderman And Coulter Oversee TPG Investment Decisions, Including In TIM**. Bonderman and Coulter were members of TPG's Investment Review Committee ("IRC"), which decided on substantially all investment recommendations. Bonderman had veto power over an investment and if he had been opposed to it, it is unlikely to have gone forward.[80] Bonderman participated in the IRC's review of TPG's initial investment in TIM through Hellas and signed necessary papers.[81] A

[77] Aff. Exs. 2, 14; Aff. Ex. 21; Aff. Ex. 12 ¶¶22, 24.

[78] *See Ginty v. American Funds Service Co.*, 121 A.D.3d 1452, 1453 (3d Dep't 2014) (self-serving affidavits cannot overcome prior testimony or documentary evidence).

[79] Aff. Ex. 61 at 19.

[80] Aff. Ex. 61 at pp. 27-30

[81] Aff. Ex. 73; Aff. Ex. 62 at pp 83-34, 94; Aff. Ex. 74.

large recap would also likely have gone to the IRC.[82]

- **Bonderman and Coulter Run Defendant Advisory Entities and Investment Funds**. Bonderman and Coulter were directors and officers of TPG Advisors IV and Bonderman was its Chair and President.[83] They played equivalent roles in T3 Advisors II, Inc.[84] TPG's Advisory Entities made decisions for managing investments and TPG's limited partnership entities generally have no say in which investments the Fund makes and lack discretion about investments.[85] As the Duchovny Letter noted, these Advisory Entities controlled the other TPG Entities, which in turn controlled the Hellas Entities, which each were shells.

- **Bonderman and Coulter Consult On the Recap And Hellas**. Both Bonderman and Coulter consulted on Hellas's business.[86] Further, contrary to their representations, they specifically consulted on the December 2006 "recap."[87] On December 8, 2006, Hellas Deal Team member, Philippe Costeletos, answered Bonderman's questions about the recap and told him that it would distribute $900 million to shareholders.[88] On December 18, 2006, Bonderman congratulated the Deal Team on the recap. The email was in response to an email which noted that the recap resulted [redacted][89]

- **Bonderman and Coulter Raised Money In New York**. While Bonderman and Coulter state that they did not approve raising money in New York to invest in Hellas specifically (Bonderman Aff. 5; Coulter Aff. 5), they do not deny raising money in New York generally for the TPG funds (which would include TPG Partners IV and T3 Partners II and T3 Parallel II, among others), nor that these and other TPG entities used such funds to invest in Hellas.

- **Bonderman and Coulter Profited From The Redemption**. Flow of funds documents show that [redacted] also received distributions.[90]

(b) Martin Halusa and John Megrue

- **Halusa and Megrue Ran Apax**. They were two of four members of the Global Executive Committee of Apax Partners Worldwide L.P., which ran the firm and was responsible for raising money from investors[91] and oversaw the investments and strategy of all Apax entities.[92]

- **Halusa also was the CEO of Apax Partners LLP**.[93] And he and Megrue served on Apax Partners

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[82] Aff. Ex. 62 at pp. 74.

[83] Aff. Ex. 71; Aff. Ex. 61 at pp. 85-86.

[84] Aff. Ex. 71; Aff. Ex. 61 at 98.

[85] Aff. Ex. 61 at pp. 34-38; Aff. Ex.14 at APAX00165225.

[86] Aff. Exs. 44 & 77-80.

[87] Aff. Ex. 79; Aff. Ex. 61 at 191-9; Aff. Exs. 79, 80(Coulter)).

[88] Aff. Ex. 61 at p. 191; Aff. Ex. 94.

[89] Aff. Ex. 61 at 192-93; Aff. Ex. 97.

[90] Each of these distributions is shown in Aff. Ex. 61.

[91] Aff. Ex. 81 at Apax00142944-47 (also showing Halusa as Apax's Chair); Aff. Ex. 82 atApax00126640-86; Aff. Ex. 83 Apax000065556-99 at 565; Aff. Ex. 68 at p. 28.

[92] Aff. Ex. 83 at Apax00065556-79

[93] Aff. Ex. 72 at pp. 26-27; Aff. Ex. 68 at p. 26; Aff. Ex. 82 at Apax00126643.

LLP's Board.[94] Halusa was also an Apax's Investment, Approval, and Exit Committees, which respectively evaluate and approve the making and divesting of investments.[95] He was a director of APEM.[96]

- **Halusa and Megrue Were Two Of Apax's Largest Equity Owners**. As of January 1, 2008, they were two of 20 Apax equity partners worldwide.[97] Halusa held 10.7% of Apax LLP's units, making him its largest holder. Megrue held 5.9%, making him Apax's fourth largest holder.[98]
- **Megrue Ran Apax's New York Operations**. Megrue was based in New York and was Chairman of U.S investment and the Approval Committee.[99]
- **Megrue and Halusa Were Involved In Running AEVI Generally and the Recap Specifically**. While Megrue states that he played no role in the recap (Megrue Aff. ¶7), Megrue was part of the team that oversaw AEVI, including reviewing monthly reports of the performance of AEVI's investment in TIM.[100] Regarding the purported recapitalization, Megrue attended the critical meeting of AEVI on December 4, 2006 that discussed the issuance of the Notes and distribution to AEVI and recommended divestment of the Hellas investment.[101]
- **Megrue Was Advised of the Sale of Hellas that Followed the Dividend**.[102] He and Halusa both congratulated the deal team for this.[103]

(c) Matthias Calice and Giancarlo Aliberti

- **Calice and Aliberti Ran the Deals**. As they acknowledge, each was part of the deal team for TIM's acquisition through the Judgment Debtors. Doc. No. 521, ¶¶7-8; Doc. No. 527, ¶ 3.
- **Calice and Aliberti Held Leadership Positions Throughout the Ownership Chain**. Each was a member of TIM's Board.[104] Each was a director of the HT-TCW Co-Investment entities.[105] Additionally, Calice admits he was on the Board of Managers of Hellas Topco., which was the General Partner and Manager of Hellas Finance. Doc. No. 527, No. ¶). Calice also was Corporate Secretary of Hellas I,[106] and Vice President of TPG Troy LLC[107] and T3 Troy LLC.[108]
- **Calice and Aliberti Were Responsible for the Redemption Documents**. Calice admits that Hellas' Board of Managers (on which he served) caused Hellas to authorize Hellas Finance to issue the PIK Notes and participate in the refinancing. Doc. No. 527, ¶6. Each signed the Indenture.[109]

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[94] Aff. Ex. 85 at Apax00062620.
[95] Aff. Ex. 72 at pp. 24-25, 31, 37; Aff. Ex. 68; Apax00126643.
[96] Form SEC 13(e)-3; Aff. Ex. 2 at APAX00165224
[97] Aff. Ex. 83 at Apax0065565.
[98] Sp. Proc. Ex. 44 (no bates number)).
[99] Aff. Ex. 82 at Apax00126643; Aff. Ex. 72 at pp 29.
[100] Aff. Ex. 89 at p. 24; Aff. Ex. 90.
[101] Aff. Ex. 91.
[102] Aff. Ex. 93.
[103] Aff. Exs. 95-96.
[104] Aff. Ex. 49 at 38-40
[105] Dep Exs. 16, 19, 20
[106] Aff. Ex. 29.
[107] Aff. Ex. 101
[108] Aff. Ex. 102 at TPG000286053.
[109] Aff. Ex. 38. Calice admits he signed the Notes as well. Doc. No. 527 ¶7.

Each signed the Terms and Conditions for the CPECs which were redeemed.[110] Calice and Aliberti agreed on issuing a U.S dollar tranche of the TIM PIK Notes.[111] Each signed the relevant Redemption Agreements.[112]

- **Calice and Aliberti Targeted New York**. Calice incorrectly states that he did not transact business in New York regarding the Notes and recap. Doc. No. 527, ¶18. By signing the Notes and Indenture governed by New York law, they intentionally involved New York in the transaction. They knew that the dividend would lead money to go to the U.S., including $470 million to TPG. Calice and Aliberti caused Hellas to send €400,396,781.50 to TPG Troy LLC and T3 Troy LLC for redemption of Hellas CPECs through JPMorgan Chase in New York.[113]
- **Calice and Aliberti Profited From the Redemption**. Calice personally received $400,000 in proceeds from the December 2006 CPEC Redemption.[114] Aliberti held 3.2% of the units of Apax Partners LLP.[115] Sp. Proc. Ex. 44 (no bates number).

Accordingly, as the Decision on Appeal establishes, and abundant evidence confirms, Judgment Debtors are Movants' alter egos and WTC satisfactorily pleads alter ego jurisdiction.

C. The Close Relationship Separately Demonstrates Jurisdiction

Judgment Debtors are also closely related to Defendants such that, under settled New York law, the Forum Clause may be enforced against Defendants as non-signatories. *Universal Inv. Advisory SA v. Bakrie Telecom PTE, Ltd.*, 154 A.D.3d 171, 179, 62 N.Y.S.3d 1 (1st Dep't 2017).

While Movants challenge the constitutionality of New York's "close-relationship" test, the First Department recently rejected a similar argument in *Borden LP v. TPG Sixth St. Partners*, 173 A.D.3d 442 (1st Dep't 2019). In *Borden*, third-party defendants argued that it would offend due process to use the "closely related" doctrine as a means to bind them to a forum selection clause. *See* Reply Memorandum in *Borden LP v. TPG Sixth St. Partners*, No. 657398/2017, available at 2018 WL 6985814. Rejecting this, the First Department held that "[t]he third-party complaint alleges facts sufficient to support a finding that third-party defendants [] had a sufficiently close relationship with the signatories of the subject agreement to confer on the court personal jurisdiction over them

[110] Aff. Ex. 103; Aff. Ex. 104.
[111] Aff. Ex. 42.
[112] Aff. Exs. 58, 36, 35.
[113] Aff. Ex. 51.
[114] Aff. Ex. 49 at 162.
[115] Aff. Ex. 86.

pursuant to the agreement's jurisdiction clause." *Borden LP*, 2019 WL 2375093 at *1.[116] Here, as alleged, Movants created and controlled Judgment Debtors in order to fraudulently transfer millions of dollars of proceeds to themselves and their investors, at Noteholders' expense.[117]

D. Movants' Transactions In New York Support CPLR 302(a)(1) Jurisdiction

Besides the above, a further basis[118] for this Court's personal jurisdiction over Movants is "specific" jurisdiction under CPLR 302(a)(1) where "[p]roof of one transaction in New York is sufficient to invoke jurisdiction even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *New Media Holding Co. LLC v. Kagalovsky*, 97 A.D.3d 463, 464 (1st Dep't 2012) (quoting *Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 467 (1988)). Movants' Global Transaction necessarily constitutes the "transaction of business" in New York sufficient to establish

[116] Movants' cases are inapplicable. *See Williams v. Beemiller, Inc.*, No. 25, 2019 WL 2030257 (N.Y. May 9, 2019) (does not address "close relationship" test or apply a forum selection clause to non-signatories); *Arcadia Biosciences, Inc. v. Vilmorin & Cie*, 356 F. Supp. 3d 379, 395 (S.D.N.Y. 2019) (noting that alter ego could be bound to agreement but finding that there was no showing that when competitor signed non-disclosure agreement it acted as alter ego or agent of entity plaintiff was trying to bind.)

[117] Indeed, this is the very type of situation where courts apply forum selection clauses to closely-related entities in order to prevent injustice. *See Tate & Lyle Ingredients Americas, Inc. v. Whitefox Techs. USA, Inc.*, 98 A.D.3d 401, 402 (1st Dep't 2012) ("[I]t would be inconsistent with [public] policy to allow the entities through which [a nonsignatory] chooses to act to escape the forum selection clause.") (internal quotations marks and citation omitted). Movants' authority does not hold differently and confirms that the close relationship test is satisfied here, where WTC has alleged facts regarding Movants' close relationship to Judgment Debtors and active involvement in the Global Transaction. *See Universal,* 154 A.D.3d at 182 (reversing dismissal of non-signatory defendants who objected to personal jurisdiction where they were closely-related to defendants who signed contract with forum selection clause); *L-3 Commc'ns Corp. v. Channel Tech, Inc.*, 291 A.D.2d 276, 276 (1st Dep't 2002) (noting "the absence of any factual predicate" showing that movants bore a close relation to defendant and the contract).

[118] *In addition* to alter ego, close-relationship and specific jurisdiction, this Court has "general" jurisdiction under CPLR 301. Specifically, Movants Apax and TPG are subject to general jurisdiction in New York where their contacts are so continuous and systematic that they are "at home" in New York for purposes of personal jurisdiction pursuant to CPLR 301. Both maintain offices in Manhattan: Apax at 601 Lexington Ave. and TPG at 888 7th Ave. Apax's New York office is currently its second largest, employing over 36% of its professional workforce, and which, in 2006, raised $856 million. Aff. Ex. 8. Moreover, it is reasonable to infer that Apax makes key business decisions in New York because several of its top executives and board members, including its co-CEO, Mitch Truwit, operate from the New York office. *Id.*; *see Explorers Club, Inc. v. Diageo PLC*, 45 Misc. 3d 434, 442-43 (Sup. Ct., N.Y. Cnty. 2014) (quoting *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 537 (1967)) (where foreign defendant owned local subsidiaries and was directly involved with their marketing and operational policies, and its CEO selected subsidiaries' management, evidence "belies the contention that [foreign defendant] is merely a holding company, and in fact suggests that [foreign defendant] is at the helm of a highly integrated enterprise"). Accordingly, because Apax and TPG are amenable to general jurisdiction in New York, their European shell funds and sponsors (the remaining Movants) are subject to jurisdiction as alter egos.

personal jurisdiction over Movants under New York's long-arm statute. *See* AC ¶¶ 74, 79-83.[119]

To hide their New York contacts, Defendants mischaracterize the Global Transaction and falsely argue that it and the resulting transfers at issue only occurred in Europe. PJ at 16-18. However, as pled – and overwhelmingly confirmed through discovery – the Global Transaction cannot be limited to any single transaction, but rather, involved the borrowing of funds pursuant to the New York Notes and Indenture, and subsequent diversion of such funds, including *numerous* transactions impacting New York. *See, e.g.*, AC ¶¶ 74, 76, 79-90; *Atwal v. Atwal*, 24 A.D.3d 1297, 1298, 807 N.Y.S.2d 776, 777 (4th Dep't 2005) (in fraudulent transfer suit, holding foreign defendant subject to jurisdiction per CPLR 302(a)(1) for acquiring interest in New York LLC). WTC's alleged facts satisfy the legal standard: For personal jurisdiction under CPLR 302(a)(1), "[n]o single event or contact connecting defendant to the forum state need be demonstrated; rather, the totality of all defendant's contacts with the forum state must indicate that the exercise of jurisdiction would be proper." *City of New York v. Hatu*, No. 18 CIV. 848 (PAE), 2019 WL 2325902, at *5 (S.D.N.Y. May 31, 2019) (citation omitted); *see also Lancaster v. Zufle*, 165 F.R.D. 38, 41 (S.D.N.Y. 1996) (rejecting defendant's attempt to split transaction into ones occurring out of state as "a wooden approach of exalting form over substance to defeat the purpose of C.P.L.R. § 302(a)(1)") (citations omitted). Here, it would be the exact "wooden approach" New York law frowns upon to consider any single transfer in assessing specific jurisdiction.[120]

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[119] This "transaction of business" also authorizes WTC's second cause of action under the BCL, contrary to Defendants' argument otherwise (Non-PJ at 20). *See*, *e.g.*, AC ¶¶ 49-51, 74, 76, 79-90, 180; *Seghers v. Thompson*, No. 06-civ-308(RMB)(KNF), 2006 WL 2807203, at *6 (S.D.N.Y. Sept. 27, 2006); N.Y. Bus. Corp. L. § 1317 (A plaintiff "may proceed with a cause of action [against a foreign entity] under section 720 [of the BCL] if it established that [the entity was] doing business in New York."). Further, for the reasons described below (*infra*, § VI.A.), WTC's BCL claim does not "seek an impermissible extraterritorial application of New York law" (Non-PJ at 20) where, *inter alia*, the transfers stem from the New York Indenture and Notes and defrauded New York creditors.

[120] By contrast, Movants' cases bear no relevance to the issue at hand. For instance, *Deutsche Bank AG v. Vik*, 163 A.D.3d 414, 81 N.Y.S.3d 18 (1st Dep't 2018), does not reference CPLR 302(a)(1) but instead scrutinizes 302(a)(3). Although *Poms v Dominion Diamond Corp.*, No. 655733/2017, 2019 WL 2106090 (Sup. Ct., N.Y. Cnty. May 15, 2019), considers CPLR 302(a)(1), the forum clause through which plaintiff argued the court had specific jurisdiction was "not at all related to the causes of action alleged" – unlike here, where the Forum Clause squarely relates to WTC's claims.

This Court also has specific jurisdiction over Movants by virtue of the agency relationships with Apax NY and TPG NY. *See* AC ¶¶ 55-64. "Under well-established New York law, a court of New York may assert jurisdiction over a foreign corporation when it affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (citing *Frummer,* 19 N.Y.2d at 537) (activities of affiliated reservations service established jurisdiction over foreign hotel chain)). An agency relationship is easily satisfied here because, both as pled and confirmed through discovery, if Apax NY and TPG NY did not exist in New York, Apax and TPG would need to engage in raising capital and servicing investors, limited partners and customers themselves.[121] *See* AC ¶¶ 59, 62, 66, 69-70, 72-74.[122]

E. Movants' Reliance On The FA Is Entirely Misplaced[123]

Defendants' claim that WTC's argument is "identical" to *Hosking v. TPG Capital Mgmt., L.P.,* ("*Hosking I*") 524 B.R. 488, 519-20 (Bankr. S.D.N.Y. 2015) is nonsense. That case *did not* involve a New York creditor enforcing a New York Judgment but instead UK liquidators asserting English law pursuing an actions against the same defendants it was suing in the UK.

[121] Defendants cannot credibly contend that Apax and TPG – two of the world's largest private equity firms in a marketplace in which a third of all private equity funds raised are raised in New York (AC ¶¶ 69-73) would not need to perform equivalent services in New York to those provided by their New York agents.

[122] Based on the above, notwithstanding Defendants' brief argument (PJ at 18), the Court's exercise of personal jurisdiction over Defendants satisfies due process. *See Yousef v. Al Jazeera Media Network*, No. 16-CV-6416(CM), 2018 WL 1665239, at *14 (S.D.N.Y., Mar. 22, 2018) ("because I have already found that [first defendant] was operating as [second defendant]'s agent, I conclude that the exercise of specific jurisdiction over [second defendant] comports with due process requirements"); *Lancaster*, 165 F.R.D. at 41-42 (where defendant signed note payable to New York party with New York choice-of-law clause "the defendant could reasonably have anticipated being haled into court in New York").

[123] Defendants also try to make use of decisions that have been decided against the UK liquidators for the Hellas Entities, including a Luxembourg, U.K., and S.D.N.Y Bankruptcy Court decision. Fischler Aff., Exs. B, C, E; PJ 4-5; Non-PJ 17. Defendants acknowledge these cases have no collateral estoppel effect but gallingly suggest they should have persuasive effect. WTC was not a party to these cases and none adjudicated creditors' rights; they have no application to WTC. Moreover, the UK decision was not a decision on the merits, has nothing to do with jurisdiction or creditors' remedies relating to the New York Notes and Indenture, and castigated the UK Liquidators' unilateral decision to drop their case on the eve of trial. *Id.* at 4, 18. Similarly, the Luxembourg decision does not implicate creditor claims, is limited to interpreting redemption of CPECs under Luxembourg law as between equity holders and is not an interpretation of the Notes or Indenture. *Id.* Ex. B. Notably, the UK Court rejected the Luxembourg Court's findings, holding that the decision under Luxembourg law *did not adjudicate the claims before the UK Court under UK law*, and was not outcome-determinative of the success of the Liquidators' claims in the UK action. This is overwhelmingly clear here where WTC

Faced with the foregoing, Movants fallaciously argue that WTC is somehow collaterally estopped from asserting personal jurisdiction, including alter ego jurisdiction, over *eight* Movants in this Action based on the District Court's decision in the FA that it lacked personal jurisdiction over *one* Movant (Apax WW Nominees Ltd. "Nominees")). PJ 7-8. Movants' argument ignores dispositive differences in facts, theories and law between this Action and the FA which bars application of collateral estoppel. At the outset, Movants improperly attempt to supplant the Decision on Appeal *in this Action* which, as detailed above, is determinative of the question of personal jurisdiction, with the FA, an inapplicable federal decision decided on *different* allegations and law.

Movants' collateral estoppel argument also fails because the personal jurisdiction issue in this Action is distinct from the one decided in the FA. Under New York law, collateral estoppel only applies where the issues in both proceedings *are identical. Conason v. Megan Holding, LLC,* 25 N.Y.3d 1, 17 (2015). In the context of personal jurisdiction, New York law holds that issues are not identical and collateral estoppel does not apply where, *inter alia*, "the plaintiff alleges new material facts that could not have been previously discovered in the exercise of due diligence." *Deitrick v. Cibolo Capital Partners I, LLC,* No. 17 CIV. 04165 (ER), 2018 WL 1603869, at *4 (S.D.N.Y. Mar. 28, 2018) (citation omitted); *see also Sea Trade Mar. Corp. v. Coutsodontis*, No. 09-civ-488(BSJ)(HBP), 2012 WL 13070391, at *3 (S.D.N.Y. Nov. 5, 2012) (rejecting collateral estoppel because, where plaintiffs asserted personal jurisdiction under different theories and different allegations in second action, there was not "an identical issue of personal jurisdiction").[124]

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brings claims as a creditor under New York law and implicates documents and transactions governed by New York law, as well as the New York Judgment. Meanwhile, the Bankruptcy Court drew a distinction between the plaintiffs there – foreign representatives of the Hellas Entities – who, it found, would not have standing to challenge the sale of the sub notes at issue, "as opposed to the Trustee under the note indenture or note holders" who would. *In re Hellas Telecommunications (Luxembourg) II*, 524 B.R. 488, 511 (Bankr. S.D.N.Y 2015).

[124] Defendants' cases do not hold differently. None address the impact of additional factual allegations or theories on a collateral estoppel analysis, let alone as to a personal jurisdiction determination. PJ 7-10. Moreover, *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 501 (1984), notes that the "availability of new evidence" is a relevant factor in determining the second

Significantly, at the time the FA was decided, this Court had dismissed WTC's alter ego claims and the First Department had yet to reverse that ruling. Aff. Ex. 110 at 30, fn. 12. Therefore, the District Court was proceeding on the belief that WTC could not state an alter ego claim on the merits. The Court of Appeals has now ruled definitively that WTC does. This is a dispositive new fact that had not occurred when the FA was decided, and in this case, is determinative as to alter ego jurisdiction, as described above. *See, e.g.,* AC ¶ 190.[125]

In addition, through extensive and ongoing fact and expert discovery in this Action since the FA was decided, WTC has uncovered overwhelming facts establishing alter ego jurisdiction which now further underpin its alter ego allegations in the AC, showing the case is not even close to identical to the FA. *Compare, e.g.,* AC ¶¶ 39-64, *with* Fischler Aff. Ex. F ¶¶ 5-7. Furthermore, where, as here, the earlier court applies a higher pleading standard than governs in the second case[126] issues differ for purposes of collateral estoppel. *See Music Sales Corp. v. Morris*, 73 F. Supp. 2d 364, 378 (S.D.N.Y. 1999) (citation omitted) ("*Issues are not identical where* the statutes, legal principles, or *legal standards governing them differ* – even when the different issues rest on the same facts." (emphasis added)). Thus, Movants cannot satisfy the "identity" prong of collateral estoppel, which alone precludes this argument as to all Defendants.

Moreover, even assuming, *arguendo*, that the personal jurisdiction issues in this Action and the FA were identical (and the other elements for collateral estoppel were established, all of which is disputed), collateral estoppel would apply only to Nominees – the sole Movant to which the FA

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step of a collateral estoppel analysis – *i.e.*, whether, if issues are identical (unlike here), the party against whom collateral estoppel is asserted had a "full and fair opportunity" to litigate the issue. 62 N.Y.2d at 501. While it is unnecessary to reach this second analytical step here because the issues are not identical, ample new evidence exists for WTC's jurisdictional allegations collected in the years of discovery post-dating the FA which provides independent reason to reject Defendants' collateral estoppel argument.

[125] Relatedly, New York courts do not apply collateral estoppel where circumstances have changed. *See R.G. Barry Corp. v. Mushroom Makers, Inc.*, 85 A.D.2d 544, 545(1st Dep't 1981) (holding a change in circumstances as well as a change in theory barred application of collateral estoppel).

[126] *Compare* FA, 2016 WL 7339112, at *7 (plaintiff must make "prima facie showing that jurisdiction exists"), *with Am. BankNote Corp.*, 45 A.D.3d at 340 (plaintiff must only state facts demonstrating "sufficient start" that jurisdiction exists).

applied. PJ at 8. As to Movants who were parties to the FA but against whom no personal jurisdiction determination was made (*see* PJ at 7-8), the FA is of no consequence. They were dismissed on subject matter jurisdiction grounds, while the FA expressly found that this Court is the proper court to enforce the Judgment, 2016 WL 7339112 at *8, and, contrary to Movants' suggestion, no personal jurisdiction determination was "necessarily decided." PJ at 8.; *See DirecTV Latin Am., LLC v. Pratola*, 94 A.D.3d 628, 628-29 (1st Dep't 2012) (affirming that prior personal jurisdiction ruling as to related defendants was not collateral estoppel as to defendant to whom no personal jurisdiction determination had been made, but against whom claims were previously dismissed for lack of subject matter jurisdiction).[127]

Similarly, the FA has no bearing on Movants who were not parties to the FA under so-called "nonparty issue preclusion." (PJ at 8-10). First, Movants absurdly argue that WTC should be estopped from enforcing its Judgment against Movants here because it purportedly omitted Movants from the FA for "tactical reasons"; this ignores the fact that WTC named the Movants *in this Action*, *well before the FA was filed.*[128] Second, Movants' argument that for purposes of collateral estoppel they should be seen as a "single business entity" directly contradicts Movants' repeated argument that each Movant's jurisdiction must be addressed individually (*see, e.g.,* PJ at 11-12)[129] and they should not now be allowed to argue the opposite.

Further, denying collateral estoppel application of the FA presents *no* risk of conflicting judgments. PJ at 9-10. Indeed, to apply the doctrine on that basis would result in such a judgment

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[127] "Customarily, a federal court first resolves any doubts about its jurisdiction over the subject matter of a case before reaching the merits or otherwise disposing of the case" *Cantor Fitzgerald, L.P, v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996), and that is how the federal court proceeded in the FA.

[128] Movants' other cases *do not* hold that a defendant is permitted to invoke collateral estoppel to bar consideration of personal jurisdiction where, in an earlier action, a different court found it lacked jurisdiction over a *different* defendant. This is not surprising, because "***when, as is often the case, the identity of the defendant is central to the jurisdictional dismissal*** – as when there is no personal jurisdiction over the party… – ***issue preclusion does not bar suit against a third party.***" *Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agr.*, 378 F.3d 1132, 1138 (10th Cir. 2004).

[129] In any case, Defendants' argument would appear to concede their alter ego status with Judgment Debtors, and, as such would subject them to this Court's exercise of personal jurisdiction by operation of the Forum Clause.

being inconsistent with the Decision on Appeal, which controls and has already established that WTC may proceed against Defendants who used Judgment Debtors as alter egos.[130]

II. WTC Seeks One Recovery Of Amounts Due As Liquidated By the Judgment

As WTC *repeatedly* confirmed to Defendants – and even offered to stipulate (which Defendants rejected): WTC seeks a ***single recovery*** of the amounts due under the Notes as liquidated through the Judgment. As an initial matter, this Court previously rejected any concern over duplication when it granted the MTA.[131] Nonetheless, Defendants attempt to create a false distinction between so-called "notes-based" and judgment-based" claims and falsely assert that WTC is seeking a double recovery. Non-PJ at 4. Yet Defendants well know that the AC does not "seek[] *separate* judgments on the Notes and the Judgment for the *same* alleged losses," as they disingenuously contend. *Id.* (emphasis in original). As the AC unequivocally alleges, WTC seeks ***one recovery*** – "the amounts due under the Notes as liquidated pursuant to the Judgment … totaling $717,000,000 [the Judgment plus interest, fees and costs] … in satisfaction of the amounts due under the Notes and Judgment." *See, e.g.,* AC ¶ 194.

Moreover, this same *false* premise that WTC seeks a separate judgment on the Notes *and* Judgment, underpins Defendants' (incorrect) argument that WTC's so-called "Notes-based claims" are barred by the "merger doctrine." PJ at 4-5. The AC makes no such distinction. Further, Defendants cite cases standing for the unremarkable proposition that a cause of action previously prosecuted to judgment merges into the judgment and cannot be relitigated. PJ at 5. Significantly, however, WTC does not seek to relitigate its breach of contract claims against Judgment Debtors,

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[130] Finally, even if the standards for collateral estoppel were otherwise met – and they most assuredly are not – New York courts do not apply the doctrine where, as here, it would lead to an unjust result. Thus, in *Halyakar v. Board of Regents*, 72 N.Y.2d 261, 268-69 (1988), the Court of Appeals stated "[c]ollateral estoppel is a doctrine based on general notions of fairness involving a practical inquiry into the realities of the litigation…it should never be rigidly or mechanically applied…" *Id.* (citations omitted).

[131] "Any duplication of claims will be avoided as WTC represented on the record that it would withdraw the Judgment Enforcement Action in the event leave to amend were granted in this action." MTA Order at 3.

but rather, seeks to collect amounts due under the Notes, as liquidated by the Judgment, *from Defendants* – based on their misuse of Judgment Debtors as alter egos to strip all of the cash for themselves, and their receipt of fraudulent conveyances.[132] In such case, New York courts make clear that entry of judgment does not bar claims related to the conduct that gave rise to the judgment against third parties other than the judgment debtor. *See, e.g., Am. Federated Title Corp. v. GFI Mgmt. Servs., Inc.*, 39 F.Supp.3d 516, 523 (S.D.N.Y. 2014) (holding a contractual claim previously litigated "involved issues distinct from whether Defendants are liable on a veil-piercing theory).[133] The same applies to other tort claims. Here, WTC pursues a *single* recovery under various causes of action against Defendants (*not* Judgment Debtors) primarily based upon alter ego and fraudulent transfer. Under these circumstances, the merger doctrine is inapplicable.

Notwithstanding, even assuming, *arguendo*, that the merger doctrine somehow applies (which it does not), WTC unquestionably maintains a claim to enforce the Judgment itself against Defendants, as Defendants concede. *See* PJ at 5 (citing *Brown,* 76 A.D.2d 721, 735 (notwithstanding merger, "the plaintiff may bring an action on the judgment") and *Burberry v. Horowitz*, 534 Fed. Appx. 41, 46 (2d Cir. 2013) (plaintiff was free to pursue a 'veil-piercing action' to enforce the judgment)). Here, WTC's AC (as authorized by the MTA Order) does exactly that, as each cause of action seeks satisfaction of the amounts due under the Judgment. AC ¶¶ 176, 186-94, 206, 216, 225, 235, 245, 253, 259.[134]

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[132] Significantly, WTC has recovered *nothing* from Judgment Debtors who are mere shell companies owned and controlled – *and bled dry* – by Defendants.

[133] The Court of Appeals decision in *Parker v. Hoefer*, 2 N.Y.2d 612 (1957), cited by Defendants, is analogous and confirms the merger doctrine does not apply. In *Parker*, the plaintiff/judgment creditor obtained a judgment against the judgment debtor in Vermont and brought a separate action in New York to collect and enforce that judgment. *Id.* at 614. The judgment debtor argued in defense that the tort for which the judgment was obtained in Vermont was statutorily barred in New York as against public policy. *Id.* at 614-15. The Court of Appeals held that "the present suit [to collect and enforce the judgment] … is upon an entirely different cause of action from that merged in the judgment" and affirmed the decision striking the judgment debtor's defense. *Id.* at 617. Similarly here, this action, by which WTC seeks to collect and enforce the Judgment, is entirely different than its breach of contract action against Judgment Debtors.

[134] Defendants erroneously argue that this case "is indistinguishable from *Craven*." Non-PJ at 6 n. 3 (referencing *Craven v. Rigas*, 85 A.D.3d 1524 (3d Dep't 2011)). This case *is* distinguishable because, unlike here, the plaintiff in *Craven* brought

Accordingly, while WTC seeks a single recovery against Defendants, and the merger doctrine is inapplicable, irrespective, as alleged, Defendants are liable to satisfy the Notes, as liquidated by the Judgment, because Judgment Debtors are their alter egos and Defendants directed the fraudulent transfers that stripped Judgment Debtors' assets to the detriment of WTC and Noteholders.

III. Defendants Cannot Escape Liability Through the Indenture's No Recourse Clause

Similarly, Defendants erroneously argue that the NRC bars WTC's first and third causes of action against Defendants based on alter ego liability. Non-PJ at 6-10. As an initial matter, this argument is entirely inconsistent with their so-called "merger" argument regarding the Forum Clause, where they argue (erroneously) that the Indenture's Forum Clause was extinguished upon Judgment (Non-PJ at 12-13) (which would also mean the NRC was extinguished).

Notwithstanding, the NRC *does not* insulate any of the Defendants who, as alleged, used their alter egos – Judgment Debtors – to issue the Notes and Indenture (the subject contract), and then fraudulently conveyed the Notes proceeds to themselves. AC ¶¶1, 8, 10, 98-259 & Prayer for Relief. To so hold would infringe on the Court's authority to adjudicate alter ego and fraud claims; rather, courts have stressed that a no recourse clause does not bar such ***tort-based*** claims. *See LaSalle Nat'l Bank v. Perelman*, 141 F. Supp. 2d 451 (D. Del. 2001) (applying New York law and holding that indenture's no recourse provision barred only contract claims);[135] *Small v. Sullivan*, 245 N.Y. 343, 355-356 (1927) (holding that similar no-recourse clause "did not and could not cover the future

a post-judgment action to enforce its rights on the same note (against the same judgment debtor). In addition, *Craven* held that plaintiff's recourse is an action to enforce the prior judgment – which is *exactly* what WTC brings through the AC. *See* 85 A.D.3d at 1527.

[135] That Defendants attack on *LaSalle* (Non-PJ at 7, n.4) is baseless is best demonstrated by the fact that *LaSalle* is cited prominently and approvingly in a 2019 case Defendants rely upon in the same argument section (*see id.* at 9 (citing *Hildene Opportunities Master Fund, Ltd. v. Holata Micco, LLC*, No. 18 CV 1758, 2019 WL 1125798 (N.D. Ill. Mar. 12, 2019)). *Hildene* cites *LaSalle* for the proposition that "Courts applying New York law have found similarly worded no-recourse provisions to bar only contract claims." 2019 WL 1125798 at *3. Moreover, Defendants' only cite for their proposition is another District Court of Delaware case, which simply disagrees with the longstanding Delaware state court authority *LaSalle* relied upon, which remains good law. *See Geyser v. Ingersoll Publ'ns Co.*, 621 A.2d 784 (Del. Ch. 1992); *Mabon, Nugent & Co., v. Tex. Am Energy Corp.*, 1988 WL 5492, *1 (Del. Ch., Jan. 27 1988).

fraudulent acts of the directors").[136] Accordingly, the NRC does not bar WTC's alter ego claims.[137]

Further, Defendants speciously argue that excluding alter ego claims "would render the [NRC] meaningless – and of no value to the third parties it is intended to protect" (including Defendants). Non-PJ at 8. However, Defendants, who used Judgment Debtors as their alter egos to commit the asserted malfeasance and fraud here, are *not* "non-parties" to a contract, but stand in Judgment Debtors' shoes and are liable under the Indenture as if they were signatories. *See*, *Packer*, 959 F. Supp. at 203 (original emphasis) (contractual provisions apply to non-signatory alter egos of signatory corporation, because where the "[signatory] was [non-signatory's] *alter ego,* then the corporation's acts must be deemed to be [non-signatory's] own.").

Moreover, while Defendants argue about whether Defendants' claims are characterized as legal or equitable (Non PJ 8-9), the NRC does not assist them either way. As described above, the NRC was not intended to protect Defendants who used Judgment Debtors as alter egos, as Defendants stand in Judgment Debtors' shoes and are liable under the Notes and Indenture as if they were actual signatories. Indeed, the theory of alter ego liability is intended to prevent exactly what Defendants attempt to do here – reap the benefits of a contract (in this case, by defrauding creditors and pocketing the loan proceeds themselves) while escaping any liability thereunder.[138]

IV. WTC's Alter Ego Claims Are Not Governed By Luxembourg Law

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[136] Similarly, the NRC does not protect anyone against claims of intentional wrongdoing which victimized innocent third parties, as Defendants' own authority recognizes. *See MyPlayCity, Inc. v. Conduit Ltd.*, No. 10 Civ. 1615(CM), 2011 WL 3273487 (S.D.N.Y. 2011) (quoting *Kalisch–Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 385 (N.Y.1983) (noting that "an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing.").

[137] Defendants cite no case holding that a no recourse clause bars alter ego claims. Their only case that even mentions veil piercing (Non-PJ at 8) notes that the argument "is raised for the first time on appeal and thus may not be considered." *Caplan v. Unimax Holdings Corp.*, 188 A.D.2d 325, 325 (1st Dep't 1992).

[138] Defendants err in asserting that enforcing the NRC would contravene state public policy. Non-PJ at 9-10; *See Mackay & Somps Civ. Eng'rs, Inc. v. Dunmore,* No. C079173, 2017 Cal. App. Unpub. LEXIS 5910 (Aug. 28, 2017) (noting contractual exculpatory clause does not prevent application of alter ego, and, therefore, defendant should not be allowed to evade contractual obligations on alter ego theory.). Again, New York public policy is to prevent those who control an entity from misusing its corporate form to injure innocent third parties.

Defendants erroneously argue for the first time that Luxembourg law somehow governs WTC's first and third causes of action based on alter ego liability. Non-PJ at 10-11. Specifically, relying on a disputed affirmation from a purported expert, and ignoring the well-pled allegations *and* controlling Decision on Appeal as to alter ego in this Action, Defendants claim that (i) there is a conflict of law because Luxembourg purportedly does not recognize equitable remedies, including alter ego;[139] and (ii) under New York choice of law principles, Luxembourg has a greater interest in WTC's alter ego claims and its law applies, barring WTC's claims. Both arguments are wrong.

As an initial matter, as this Court recognized in the MTA Order, "the Court of Appeals has expressly held that the alter ego allegations against the already named entities were sufficiently pleaded." MTA at 3. Defendants cannot deny the Court of Appeals' decision on alter ego liability necessarily resolved the choice of law issue.[140] Accordingly, the issue of whether alter ego liability is pleaded may not be relitigated by Defendants.

Moreover, even assuming, *arguendo*, that the Court of Appeals' alter ego ruling were not dispositive (it is), judicial estoppel (and relatedly, waiver) bars Defendants' from taking an inconsistent position on choice of law for WTC's alter ego claims now.[141]

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[139] Significantly, above, Defendants (incorrectly) argue that "the mere fact that [the first and third causes of action] are based on an alter ego theory does *not* render them equitable claims." Non-PJ at 9. Yet here, Defendants concede the exact opposite – that the first and third causes *are* equitable claims.

[140] *See, e.g., In re Lyondell Chem. Co.*, 543 B.R. 127, 139 (Bankr. S.D.N.Y. 2016) (original emphasis) (citing *Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC,* 975 F.Supp.2d 392, 401 (S.D.N.Y.2013)) ("When a plaintiff asserts an alter ego theory of *liability*," choice-of-law analysis is "required."); *In re Bernard L. Madoff Inv. Sec. LLC*, 583 B.R. 829, 845-49 (Bankr. S.D.N.Y. 2018) (same, holding allegations sufficient to state claim for alter ego liability under New York law only after deciding choice of law issue).

[141] *See, e.g., Tesla Wall Sys., LLC v. Related Companies, L.P.*, No. 17-CV-5966 (JSR), 2018 WL 4360777, at *3 (S.D.N.Y. Aug. 15, 2018) (judicial estoppel barred party from raising choice of law issue "because this Court has repeatedly applied New York law to [party's] state law claims in reliance on [party's] representations). Here, Defendants previously argued that New York law applies to WTC's alter ego claims in the Court of Appeals (*see, e.g.,* Aff. Ex. 1 at 25), and the Court of Appeals adopted that position and relied on Defendants' representations in its ruling (*see, e.g.,* Aff. Ex. 1 at 20). In addition to estoppel, Defendants waived this issue by only arguing it for the first time now and assuming in their prior briefings, including to the Court of Appeals, that New York law applies to WTC's alter ego claims. *See, e.g.,* Aff. Ex. 1 at 25-27; *see also*, *Cromer Fin. Ltd. v. Berger*, No. 00 CIV.2284 DLC, 2003 WL 21436164, at *11 (S.D.N.Y. June 23, 2003) (where defendant alleged that Bermuda law applied to negligence claim for the first time through affidavits of foreign law experts only after defendant had already twice moved to dismiss complaint, court held **"[i]t is simply too late in this litigation to raise the choice of law issues again based on new affidavits of foreign law**." (emphasis added)).

Irrespective of the foregoing, Defendants also fail to establish a conflict of law, or at a minimum, the issue is disputed and may not be decided on a motion to dismiss. Defendants are simply misleading in suggesting Luxembourg does not recognize alter ego principles. Indeed, both parties' experts on Luxembourg law agreed that, while Luxembourg law does not use the terms "alter ego" or "pierce the veil," there are multiple theories under Luxembourg law under which managers, officers, directors and shareholders may be held personally liable for a company's wrongs. As Defendants' purported expert, Prof. Andre Prum, explained:

[redacted] (Prum Dep., Aff. Ex. 19 at p. 151).[142]

Rather, as WTC's expert, Marc Thewes, explained, there are at least three principles similar to alter ego under Luxembourg law.[143]

Moreover, even if a conflict of law does exist (which it does not), New York law makes clear that the state of incorporation of a shell entity is not dispositive as to which jurisdiction has the greatest interest in determining a veil-piercing claim, as Defendants wrongly suggest. Non-PJ at 11.[144] Not surprisingly, no case they cite resolves a choice of law issue concerning alter ego on that

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Indeed, insofar as Defendants ever purported to reserve some aspect of an argument about Luxembourg law (*see* Doc. No. 258, n.7), they have waived it. *See In re MF Glob. Holdings Ltd.*, 571 B.R. 80, 84, n.6 (Bankr. S.D.N.Y.), *leave to appeal denied*, 296 F. Supp. 3d 662 (S.D.N.Y. 2017) (where defendant "purport[ed] to reserve its arguments regarding [issue, but defendant] expressly declined to press the issue [on appeal], although it clearly had an opportunity to do so," court held that defendant "waived its right to contest" the issue in subsequent stage of proceedings).

[142] And even if Luxembourg law allowed shareholders, managers and parent entities to evade liability for wrongs they committed by misusing a corporation, U.S courts would not apply it as offending U.S public policy. Where a choice of law analysis might otherwise support application of foreign law, New York courts need not do so if it would "violate some fundamental principle of justice, some prevalent concept of good morals [or] some deep rooted tradition of the common weal." *See Begley v. City of New York*, 15 Misc.3d 1107(A), 2007 N.Y. Slip Op. 50530(U), *3 (Sup. Ct., Richmond Cnty. 2007), *aff'd* 62 A.D.3d 739 (2d Dep't 2009)(internal quotation marks omitted).

[143] *See* Aff. Ex. 20 at pp. 122-24; Aff. Ex. 84 ¶¶157-59; Aff. 19 at pp. 79-80, 83, 149-51; Aff. Ex. 111 at n. 44.

[144] To avoid any doubt, WTC notes that "[a]lter ego liability and the related doctrine of piercing the corporate veil involve the abuse of the corporate form to the detriment of third parties and do not implicate the corporation's internal affairs." *UBS Sec. LLC v. Highland Capital Mgt., L.P.*, 30 Misc.3d 1230(A), 2011 N.Y. Slip Op. 50297(U), *3 (Sup. Ct., N.Y. Cnty. 2011), *aff'd in relevant part* 93 A.D.3d 489 (1st Dep't 2012) (citing *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140–141 (1993)). "As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation.... Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue.... To give conclusive effect to the law of the chartering

basis. *See* PJ at 11. Nor is Defendants' citation to the Bankruptcy Court's decision in *Hosking I*, 524 B.R. at 519-20, apposite. *Hosking I* did not involve a New York creditor enforcing a New York Judgment under a New York Indenture and Notes containing a New York Forum Clause, as here.[145]

Furthermore, Defendants are simply incorrect that no relevant events occurred in New York. Non-PJ at 11. Specifically, and as determined by the Court of Appeals, the pleadings clearly allege that Defendants, through their alter ego Judgment Debtors, used the New York Notes and Indenture (which included the New York Forum Clause and choice-of-law provision),[146] and subsequent Redemption, to bleed Judgment Debtors dry and defraud the Trustee, and its Noteholders. Defendants then sent a substantial portion of their ill-gotten gains to themselves through New York banks and to investors in New York. AC ¶50[147]; Court of Appeals Decision at 21-23. Indeed, through this Action, WTC is seeking to enforce *this Court's* Judgment stemming from this conduct. Accordingly, New York has a clear, *and superior*, interest in punishing such wrongdoing. *See UBS*, 30 Misc.3d 1230(A), *3 ("New York law governs [alter ego] issue" rather than Cayman Islands law, where "***the contracts***… were negotiated through counsel in New York and, by their

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state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." *In re Bernard L. Madoff Inv. Sec. LLC*, 583 B.R. 829, 847 (Bankr. S.D.N.Y. 2018) (quoting *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621-22 (1983) (emphasis in original). Thus, in *UBS* for instance, the court held "New York law governs" with respect to plaintiff's alter ego claim, rather than the law of defendant's state of incorporation, because "[t]he determination of whether one corporation is another corporation's alter ego does not involve consideration of corporate internal affairs." 2011 WL 781481, *3.

[145] Further, that proceeding was brought by the foreign liquidators, who, unlike WTC, lacked standing to bring DCL and any other creditor-based claims, as they stood in the Hellas Entities' shoes and not creditors'. *Hosking I*, 524 B.R. at 522-523 (dismissing the liquidators' actual fraudulent transfer claims under DCL and finding that "[Liquidators], as foreign representatives in [Hellas II's] chapter 15 proceeding, do not have standing to assert [fraudulent transfer claims under DCL] . . . because section 1521(a)(7) of the Bankruptcy Code does not permit a foreign representative to utilize section 544 to gain standing in a chapter 15 case.").

[146] Defendants' are incorrect that the Indenture's New York choice-of-law clause "does not impact" the choice of law analysis or apply to Defendants as alter egos. Non-PJ at 11, n.5. Indeed, their own case specifically acknowledges that "courts may force non-signatories to adhere to choice-of-law clauses." *Blue Whale Corp. v. Grand China Shipping Dev. Co.,* 722 F.3d 488, 492 (2d Cir. 2013); *see also Packer*, 959 F. Supp. at 203 (original emphasis) (contractual provisions apply to non-signatory alter egos of signatory corporation, because where the "[signatory] was [non-signatory's] *alter ego,* then the corporation's acts must be deemed to be [non-signatory's] own.").

[147] *See also* Aff. Exs 51-52.

terms, ***are governed by the law of New York***[,]" and where "[o]ther than being incorporated in the Cayman Islands, [defendant] has no obvious ties to that jurisdiction").

V. *Forum Non Conveniens* Does Not Apply

A. Certain Defendants' Consent to Jurisdiction In New York

Importantly, the consent by nine Defendants by affirmation to jurisdiction in this Court (*see* n. 2, *supra*.) precludes their *forum non conveniens* argument. *See CP Energy Grp., Inc. v. Windy Point Partners, LLC,* 29 Misc. 3d 1207(A), 2, 2010 NY Slip. Op 51739(U) (Sup. Ct., N.Y. Cnty. 2010) ("[W]here a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on *forum non conveniens* grounds.") (citations omitted).

B. New York Law Precludes Defendants' Forum Challenge

Pursuant to GOL § 5-1402 and CPLR 327(b), this Action is properly brought in New York and may not be dismissed for *forum non conveniens*. GOL § 5-1402 provides that a party may maintain an action in New York against a foreign corporation where, as here, the agreement: (i) contains a New York forum selection clause; (ii) contains a New York choice-of-law provision; and (iii) involves a transaction over $1 million. CPLR 327(b) provides that where an action arises out of an agreement to which § 5-1402 applies, "the court shall not stay or dismiss any action on the ground of inconvenient forum…." CPLR 327(b) (emphasis added).[148] As described herein, Defendants stand in the shoes of their alter ego Judgment Debtors and are equally bound by the Indenture and its New York Forum Clause and choice-of-law provision.

Moreover, even assuming, *arguendo*, that the above does not apply, a motion to dismiss based

[148] *See GE Oil & Gas, Inc. v. Turbine Generation Servs., LLC*, 140 A.D.3d 582, 583 (1st Dep't 2016); *Credit Suisse Int'l v. URBI, Desarrollos Urbanos, S.A.B. de C.V.*, 41 Misc.3d 601, 604 (Sup. Ct., N.Y. Cnty. 2013)("the application of [GOL] §5-1402 in conjunction with CPLR 327(b) 'prevents a party that has agreed to jurisdiction in New York from later asserting that the New York courts are inconvenient or that they lack jurisdiction.'")(citations omitted).

on *forum non conveniens* should be granted only if the court determines, "in the interest of substantial justice the action should be heard in another forum." *World Point Trading PTE. v. Credito Italiano*, 225 A.D.2d 153, 158 (1st Dep't 1996) (quotation marks omitted). "[P]laintiff's choice of forum should rarely be disturbed." *Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc.*, 131 A.D.3d 431, 432 (1st Dep't 2015). New York Courts consider three factors in assessing whether New York is a convenient forum: (1) the burden on New York's courts; (2) potential hardships to the respective parties; and (3) the availability of a suitable alternative forum. *Id.* at 432. Defendants face a "heavy burden," *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.,* 26 A.D.3d 286, 287 (2006), "to demonstrate relevant private or public interest factors which militate against accepting the litigation." *World Point*, 225 A.D.2d at 158 (quotation marks omitted). They *cannot* meet this burden.

1. <u>There Is No Burden to the Court</u>

Defendants argue burden based on the erroneous contention that "this case involves multiple claims governed by foreign law." Non-PJ at 24. Rather, under the controlling Decision on Appeal, New York law governs WTC's alter ego claims which have been sufficiently pled. Further, the DCL applies to WTC's creditor-based fraudulent transfer claims arising under the Indenture and Notes governed by New York law. Accordingly, the Court will not need to apply foreign law to the alter ego or fraudulent conveyance analyses (or any other cause of action in the AC).[149]

2. <u>Defendants Will Suffer No Hardship By Litigating In New York</u>

Defendants are each sophisticated, with counsel and/or offices in New York, and fully able to defend themselves in New York.[150] Throughout this litigation, Defendants have had New York

[149] Notwithstanding, New York courts routinely interpret foreign law, and this does not support dismissal for *forum non conveniens*. *See Intertec Contracting A/S v. Turner Steiner Int'l, S.A.*, 6 A.D.3d 1, 6 (1st Dep't 2004) (so holding).

[150] While certain Defendants and witnesses may be located overseas, "any hardship in bringing witnesses or documents to New York would be minimal, since [the] parties consist ... of multinational corporations with ample resources." *Mionis*, 9 A.D.3d at 282 (reversing dismissal of action based on f*orum non conveniens* where foreign defendant asserted that most witnesses were located in Greece). *See also Hosking v. TPG Capital Mgmt., L.P.*, 535 B.R. 543, 592 (Bankr. S.D.N.Y. 2015) ("*Hosking II*") (J. Glenn denying motion for *forum non conveniens* and noting that, because witnesses are spread across the world, there is no "single forum that appears to obviate the issue regarding witness availability" and because

counsel, produced some 80,000 documents in New York and participated in multiple depositions in New York. *See Intertec Contracting A/S*, 6 A.D. 3d at 5 (discovery having taken place in New York in a related federal case was a factor weighing against dismissal on *forum non conveniens* grounds).

Further, the facts demonstrate a substantial nexus to New York. In particular, WTC, as Trustee and creditor formed under New York law through the Indenture, brings claims to enforce and collect on the Notes, as liquidated by the Judgment issued by this Court for default under the Indenture and Notes (both subject to the Forum Clause and New York law), against Defendants who used Judgment Debtors' as their alter egos to perpetrate the Global Transaction. Defendants rely on cases which involved no discernable connections to New York.[151]

3. No Equivalent Alternative Forum Exists

Contrary to Defendants' assertion, Luxembourg is a patently inappropriate forum to adjudicate WTC's claims regarding Defendants' fraud orchestrated within New York and committed through their alter egos (Judgment Debtors), especially where this Court's Judgment and the Indenture's creditor protections are grounded under New York law and may not apply in a different forum (such as constructive fraudulent transfer). No forum is more appropriate than New York to adjudicate these claims. *See* n. 123, *supra*.

VI. WTC Adequately Pleads New York Fraudulent Conveyance Claims

Defendants cannot reasonably dispute that WTC adequately pleads its fraudulent conveyance claims, which pleadings must be accepted as true on a motion to dismiss (and in particular, on claims brought by a fiduciary, which at the time, had not completed full discovery). As

defendants are "sophisticated global financial institutions . . .producing documents or witnesses in any forum poses no special inconvenience…").

[151] *Hbouss v. Bank of Montreal*, 23 A.D. 3d 152, 152 (1st Dep't 2005) (case "ha[d] no discernible connection to New York" where dispute under Canadian law [arose "out of a credit agreement negotiated in Canada between Canadian companies"); *Shin-Etsu Chem. Co. v. ICICI Bank Ltd.,* 9 A.D.3d 171, 176-77 (1st Dep't 2004) and *Globalvest Mgmt. Co. L.P. v. Citibank, N.A.*, 7 Misc. 3d 1023(A), 5 (Sup. Ct., N.Y. Cnty. 2005), *judgment entered*, No. 603386/2004, 2005 WL 6932241 (Sup. Ct. 2005)(application of foreign law was one of multiple factors considered and is not dispositive by itself).

alleged, the subject transfers are part of the Global Transaction, pursuant to which Judgment Debtors, directed by Defendants, borrowed €200,000,000 pursuant to the Notes and Indenture, and used those proceeds to fund illegal distributions to Defendants. AC ¶¶ 2-5, 91, 99-126, 145-64. In particular, the proceeds were transferred to Defendants, who used Judgment Debtors as alter egos, leaving Judgment Debtors insolvent and unable to satisfy the Notes. *Id.* ¶¶ 2-3, 91, 108-114, 118-126, 195-245. *Significantly*, the Court of Appeals acknowledged the sufficiency of WTC's pleadings:

> These factual allegations, along with the reasonable inferences to be drawn therefrom, support a cause of action that [the Judgment Debtors] defaulted on payment to the noteholders because [Defendants] used their control of the corporate form for the unlawful purpose of intentionally divesting the corporate assets *through fraudulent conveyances*, under the guise of dividends and redemptions, which in turn rendered these companies insolvent and unable to pay their creditors. (Aff. Ex. 1 at 21-22) (emphasis added).

A. New York Law Applies

Ignoring the Court of Appeals, Defendants argue that New York law does not apply to WTC's fraudulent conveyance claims because (i) under New York choice of law rules, Luxembourg and the U.K. have a greater interest than New York in this action (Non-PJ 15-16) and (ii) the subject transfers are beyond the reach of New York's DCL (Non-PJ 12-15). Both arguments fail.[152]

First, even assuming a conflict exists between constructive fraudulent conveyance claims in New York and either Luxembourg or the U.K., under New York's choice of law rules, New York's interest greatly exceeds that of these other countries in enforcing the New York Judgment, Notes and Indenture. *Taberna Preferred Funding II, Ltd. v. Advance Realty Grp. LLC,* 45 Misc. 3d 1204(A), 10-11, 2014 N.Y. Slip Op. 51461(U) (Sup. Ct., N.Y. Cnty. 2014) ("Proper interest analysis in a fraudulent conveyance claim . . . is conduct regulating … To deter [foreign defendants] from committing fraud, the law of the state in which those [defendants] reasonably expect to be held

[152] New York, "as a primary financial center and clearinghouse of international transactions" has a "strong interest in maintaining its preeminent financial position and in protecting the justifiable expectation of the parties who choose New York law as the governing law of a [financial document]." *Hemlock Semiconductor Pte. Ltd. v. Jinglong Indus. & Commerce Grp. Co., Ltd.*, 56 Misc.3d 324, 336 (Sup. Ct. N.Y. Cnty. 2017).

accountable ought to apply.") (internal citations omitted). As further described above, *Hosking I* has no relevance here where, among other things, WTC, as representative of all creditors (with standing confirmed by the Court of Appeals), brings this action as a New York creditor under the New York Notes and Indenture. *See* ns. 123,145, *supra*.

Second, extraterritorial application of the DCL is unnecessary here as the subject transfers were not "manifestly foreign" but instead stemmed from the New York Indenture and Notes and defrauded New York creditors. Defendants' reliance on *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85 (2d Cir. 2019) ("*Madoff*") is misplaced. Non-PJ 13-14. For the fraudulent transfer claims in *Madoff*, the Second Circuit held "the transactions here were domestic" and rejected the need for any extraterritorial application of the relevant fraudulent transfer laws, *even though certain transfers occurred outside New York*. *Madoff,* 917 F.3d at 95, n.6, 100. *Madoff* supports domestic application of the DCL here even if some aspects of the transfers are foreign.

Moreover, the *Madoff* court recognized that extraterritoriality analysis requires considering the focus of a statute, which is "the conduct it seeks to regulate, as well as the parties whose interests it seeks to protect." *Id.* at 97. Here, such consideration supports extraterritorial application of the DCL even if the subject transfers were foreign in nature (which is disputed). The DCL seeks "to aid specific creditors who have been defrauded by the transfer of a debtor's property." *Advanced Portfolio Techs., Inc. v. Advanced Portfolio Techs. Ltd.*, No. 94 Civ. 5620 (JFK), 1999 WL 64283, at *5-6 (S.D.N.Y. Feb. 8, 1999) (applying DCL to transfers occurring in England, because, like here, the parties' contract had New York forum selection and choice of law clauses). As alleged, WTC, a creditor created under New York law seeks to collect its New York Notes and Judgment for hundreds of millions of dollars of debt issued under New York law, from Defendants who used Judgment Debtors as their alter egos to fraudulently transfer proceeds of the New York Notes and Indenture to themselves. WTC has the rights/remedies afforded a creditor *under New York law*.

B. WTC and Noteholders Did Not Consent To Be Defrauded

Indefensibly, Defendants argue that *disclosures* in the OM and "other related communications" constituted *consent* by the Noteholder victims to the Redemption and related transfers, and precludes fraudulent conveyance claims. Non-PJ at 16-17. To so argue, Defendants improperly rely on false and/or misleading disclosures and ignore relevant OM provisions which expressly barred the transfers at issue. Specifically, Defendants argue that based on such purported disclosures, Noteholders knew that the proceeds of their loans would be used to fund distributions to Defendants. However, the OM omitted key facts relating to the improper distribution of proceeds from the Notes and Redemption. In particular, the OM omits that the Notes' proceeds would be used to make improper dividends to Defendants based on an enterprise valuation made by TPG/Apax themselves and not at fair market value, and that this would render Judgment Debtors insolvent and unable to pay their debts when due.

Further, Defendants ignore OM provisions that expressly bar distributions without paying senior debt (here, the Notes) or which would leave Judgment Debtors insolvent. The OM describes the circumstances under which CPECs can be redeemed: "[o]nce the Company *does not have any other debt liability to pay or to provide for*, …" AC Ex D at p. F-20, 7(b) (emphasis added). Further, the CPECs' terms provide a similar prohibition on the Redemption without providing for payment of senior debt, as here.[153] Accordingly, the OM provides no credence to Defendants' waiver arguments, but rather, further supports WTC's fraudulent conveyance claims in at least two material ways – it omits material facts related to restrictions on the use of proceeds under the Notes and Redemption

[153] As provided under the "Terms and Conditions" of the CPECs, a "Conversion Event" (the occasion of which was required for an optional redemption of the CPECs prior to maturity) could only occur "after payment of or provision for other obligations of the Company" and if "the Company will not be insolvent after payment of aggregate Optional redemption Price of the CPECs." AC Ex. I at 3. Further, an Optional Redemption could only occur "to the extent the Company will have sufficient funds available to settle its liabilities to all other … senior or subordinate creditors … after any such redemption." *Id.* at p. 5 (section 3.2(a)).

and confirms that the Redemption was barred because of Judgment Debtors' other senior liabilities, including the Notes and it mislabels the dividend as repayment of "deeply subordinated shareholder loans" when the company's own IFRS accounts refer to the CPECs as equity.[154]

In addition, Defendants' consent argument is contrary to New York law, which defines ratification as "the act of *knowingly* giving sanction or affirmance to an act which would otherwise be unauthorized and not binding." 57 N.Y.Jur.2d Estoppel, Ratification and Waiver § 87 (2007) (emphasis added). Accordingly, a creditor cannot "ratify" or "consent to" conduct without full knowledge of the surrounding material facts. *See, e.g., ASARCO LLC v. Ams. Mining Corp.*, 396 B.R. 278, 427 (S.D. Tex. 2008) (noteholders could not have ratified a transaction where they purchased notes in reliance on fraudulent financial statements, without "full knowledge of all material facts").

Indeed, Defendants' case law confirms that, unlike WTC and the Noteholders on whose behalf it acts, only a person intimately involved or participating in a fraudulent conveyance is barred from avoiding the conveyance as fraudulent.[155] Here, as outside investors who did not facilitate the Global Transaction and, in fact, relied on the false and misleading OM, Noteholders were in no way involved participants, but rather, innocent victims.

C. WTC Adequately Alleges Insolvency

Defendants further dispute whether WTC has adequately alleged insolvency as DCL sections

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[154] The OM also states that the funds raised through the Notes will be used to repay "deeply subordinated shareholder loans" but the CPECs are indisputably equity for purposes of U.S law (Aff. Ex. 18) and do not meet the test for a loan under Luxembourg law either, because their Terms and Conditions did not obligate Hellas II to repay these. *See* Aff. Ex. 20 at pp. 20-22,102-103; Aff. Ex. 104; Aff. Ex. 113.

[155] *E.W. Bliss Co. v. Progressive Smelting & Metal Corp.,* 208 A.D. 346, 351-52 (1st Dep't 1924) (transfer not fraudulent as to judgment creditor colluding with judgment debtor regarding a transfer of property); *Pinnacle Consultants, Ltd. v. Leucadia Nat. Corp.*, 261 A.D.2d 164, 164-65 (1st Dep't 1999) (shareholder who received a proxy statement providing, in detail, accurate information discussing a merger and advising that failure to vote was a vote in favor of the transaction, lacked standing to bring a later derivative action where he was not misinformed); *Weisfelner v. Fund 1* (*In re Lyondell Chem. Co.*), 503 B.R. 348, 385 (Bankr. S.D.N.Y. 2014), *as corrected* (Jan. 16, 2014), *abrogated by In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) (lenders in an LBO knew the purpose of their loans and had a unique position, particular insights into, and participation in, the subject transaction); *In re Adelphia Recovery Tr.*, 634 F.3d 678, 681 (2d Cir. 2011) (debtor who participated in the sale process could not bring fraudulent transfer claims against three banks that facilitated the sale of the debtor's assets); *In re Tribune*, 818 F.3d at 124 (dismissing complaint on preemption grounds and explicitly "resolv[ing] no issues regarding the rights of creditors to bring state law, fraudulent conveyance claims").

273 and 277 require (WTC's fourth and eighth causes of action).[156] Importantly, Defendants do not contest that WTC has alleged insolvency – it plainly has.[157] Instead, they argue that "the fair saleable value" of the Hellas Entities was established by a stock sale to Weather "for €500 million *in excess* of the Hellas [Entities'] debt soon after the Recap" and therefore, WTC's allegations are inadequate. Non-PJ at 17. However, not only is the assertion erroneous, misdescribing the Weather deal (*see* p. 9-10, *supra*) – but irrespective, this is as best a contested fact subject to trial and fails to address the other two solvency tests (which establish insolvency). Rather, on a motion to dismiss, WTC's factual allegations must be accepted as true and when, as here, solvency is a factual issue, it is not properly disposed of on a motion to dismiss. *In re Marketxt Holdings Corp.*, 361 B.R. 369, 405 (Bankr. S.D.N.Y. 2007) (where a complaint raised factual issues as to debtor's insolvency, the court could not decide the issue on a motion to dismiss). Further, it is incontrovertible that the Hellas Entities were saddled with liabilities exceeding their assets notwithstanding any sale of equity, and were undercapitalized and unable to pay debts when due. AC ¶¶ 108-110, 123.[158] Moreover, WTC's experts have concluded that the Hellas Entities, including Judgment Debtors, were insolvent, undercapitalized and unable to pay their debts as due.

VII. WTC Adequately Pleads Conversion

In the AC, WTC alleges that Defendants received at least €200,000,000 in proceeds from the Notes as an improper dividend, under the guise of "refinancing" the Hellas Entities which sufficiently demonstrates that, by the Judgment, it has a superior right of possession to these specific funds. WTC attached a chart to the AC identifying specific funds that flowed from the recipient of

[156] Defendants do not dispute (nor could they) that WTC has sufficiently pled the elements of its other fraudulent conveyance claims – causes of action five, six and seven.

[157] And WTC has submitted detailed expert opinion supporting this claim. *See* Aff. Exs. 9-10.

[158] Nor can Defendants rely on the sale to Weather to establish solvency. *See* p. 9-10, *supra*. As the Ratner Report and Rebuttal show, the Hellas Entities were still unable to meet their debts as they came due at that time and irrespective of this, separately failed the capital adequacy and balance sheet tests for solvency. *See e.g.*, Aff. Ex. 9 pp. 75-128.

the Notes' proceeds to specific and identifiable accounts of specific entities, including Defendants. AC Ex. F. As the Court of Appeals has determined, these allegations plead a particular and specific sum of money that was fraudulently diverted to Defendants. Aff. Ex. 1 p 21 ("The complaint sets forth the alleged fraudulent conveyances, providing the dates and amounts of the PIK note proceeds and Certificate redemptions distributed to the Private Equity Defendants and their principals. These factual allegations along with the reasonable inferences to be drawn therefrom, support a cause of action...").[159]

Further, even if Notes' proceeds were commingled with other funds (as Defendants assert),[160] commingling between alter egos is immaterial where the commingled account balance equals or exceeds the amount of the proceeds.[161] Moreover, at the pleading stage and where fraud or illegality are likely involved, transactions should be evaluated with a "common sense view to the realities of normal life." *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 385, 626 N.Y.S.2d 472 (1995) (combination of direct and circumstantial evidence sufficiently established prima facie conversion claim).

VIII. WTC Adequately Pleads Claims for Unjust Enrichment and Constructive Trust

Defendants argue WTC's unjust enrichment claim should be dismissed because it duplicates WTC's other claims. Non-PJ at 18-19. Yet unjust enrichment claims are properly pled in tandem

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[159] A particular and definite sum need not be exact, so long as the amount is identifiable. *In re BC Funding, LLC*, 519 B.R. 394 (Bankr. E.D.N.Y. 2014) (denying motion to dismiss where plaintiff alleged that at least certain specific amounts were received from a debtor's bank accounts, which the court found to be identifiable funds supporting a claim for conversion). Here, the AC demonstrates that Noteholders funded specific amounts through the Notes to Judgment Debtors, who then transferred proceeds in specific amounts to Defendants and related entities, as in *BC Funding, LLC*.

[160] In *McBride v. KPMG Int'l*, 135 A.D.3d 576, 577 (N.Y. App. Div. 2016), which Defendants cite for their so-called tracing argument, plaintiff sent money to a financial management company that sent it to a third-party—Madoff—who deposited it in a bank. The court held that the funds were no longer identifiable by the time of that deposit and that plaintiff had no possessory right or interest in the property when it was legally transferred to BLMIS. *Id.* at 580. Here, by contrast, the Notes proceeds were not legally transferred to Defendants, who were unjustly enriched when they funneled money up the byzantine shell corporate structure they created, and distributed it to themselves.

[161] *See United States v. Prevezon Holdings Ltd.*, 122 F. Supp. 3d 57, 68 (S.D.N.Y. 2015)(quotation marks omitted) (noting the "lowest intermediate balance rule" states that "as long as the balance in an account where illicit proceeds are deposited remains higher than the amount of the proceeds deposited, the government can trace funds equal to that amount").

with other claims based on the same circumstances. *See Taberna Preferred Funding II, Ltd.*, 45 Misc. 3d at 1204(A) (unjust enrichment/DCL claims survive motion to dismiss despite duplication).[162] Defendants also argue that there is no unjust enrichment because the Noteholders consented to the transfers to them, yet Defendants' consent arguments overwhelmingly fail (*see supra*, § VI.B.).[163]

IX. Defendants Cannot Evade Liability Through Dissolution

Defendants assert that because three Defendants are dissolved they cannot be sued for unpaid liabilities. Non-PJ at 20-22.[164] Rather, the long-standing rule is that a corporation may not shield itself from liability through dissolution. *See Meriwether v. Garrett*, 102 U.S. 472, 529 (1880) (court of equity may enforce obligations of dissolved entity made while it existed survive); *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 698 (Del. 2013) (company's dissolution did not foreclose liability). This is true in both Delaware and Guernsey, where the subject entities were allegedly incorporated.[165] Defendants cite no authority that allows a company, partnership or otherwise, to use dissolution to avoid its debts.[166]

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[162] Defendants' cases do not discuss unjust enrichment as duplicative of a fraudulent transfer claim. Non-PJ at 19.

[163] Defendants cite *LaSalle Nat. Bank v. Perelman*, 82 F. Supp. 2d 279, 295 (D. Del 2000), which interprets Delaware law, and thus does not apply to this case.

[164] One entity, Troy L.P., received approximately €400 million through the Redemption, and with it having no other business purpose than being a shell company for the ownership of TIM (*see* Aff. Ex. 21), it seems especially suspicious that by 2010 it was dissolved with no provision made for paying possible debts.

[165] *See* 6 *Del. C.* § 18-803(b) (an LLC must provide compensation for claims); The Companies (Guernsey Law), 2007 Part XXII Voluntary Winding Up sections 395, 397, and Part XXVI Fraudulent and Wrongful Trading sections 432 and 433 (providing that the powers and duties of a liquidator that is appointed upon the dissolution of a Guernsey company include providing civil liability for any business of the company that was carried on with the intent to defraud creditors or for any fraudulent purpose, including in the winding up of a company).

[166] Defendants' reliance on *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, No. 10 Civ. 1391 (LTS)(JCF), 2012 WL 209110, at *13 (S.D.N.Y. Jan. 24, 2012) is misplaced. The dissolved LLC in *Soroof*, did not have assets to provide for its liabilities and therefore did not violate the Delaware LLC Act. By contrast, here, the three dissolved companies received €800 million in Redemption proceeds (from PIK and sub note issuances).

CONCLUSION

For all of the foregoing reasons, Defendants' Motions should be denied in their entirety.[167]

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New York, New York

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[167] If the Court concludes there are any defects or deficiencies in the AC, WTC requests the opportunity to amend.