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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 DOLLAR TREE STORES INC.,

No. C 10-0325 SI; Related Case No. C 11-2696 SI

9 Plaintiff,

10 v.

**ORDER GRANTING PLAINTIFF'S
MOTION TO CONSOLIDATE;
DENYING DEFENDANTS' MOTIONS
TO DISMISS**

11 TOYAMA PARTNERS LLC,

12 Defendant.
13 _____/

14 On July 29, 2011, the Court held a hearing on plaintiff's motion to consolidate cases and
15 defendants' motions to dismiss *Dollar Tree v. Pau et al.*, C 11-2696 SI. For the reasons set forth below,
16 the Court GRANTS plaintiff's motion to consolidate cases, and DENIES defendants' motions to dismiss
17 C 11-2696 SI.

18
19 **BACKGROUND**

20 The factual background of *Dollar Tree v. Toyama et al.*, C 10-325 SI has been set forth in detail
21 in numerous prior orders and is hereby incorporated by reference. As relevant to the instant motions,
22 Dollar Tree has amended the 10-325 SI complaint three times, most recently on April 5, 2011, pursuant
23 to a stipulation by the parties. The third amended complaint added successor liability claims against
24 defendant Capella-Mowry LLC ("Capella"), based upon Capella's acquisition of the Shopping Center.

25 The parties dispute when defendants Toyama and Pau disclosed to Dollar Tree that the Shopping
26 Center would be sold to Capella, as well as when defendants produced the documents related to the sale
27 to Dollar Tree. According to the complaint filed in *Dollar Tree v. Pau et al.*, C 11-2696 SI, Toyama
28 entered into the Sale Agreement agreeing to sell the Shopping Center to Capella on January 18, 2011.

1 Compl. ¶ 32. The complaint alleges that the Sale Agreement was signed by defendant Peter Pau, on
2 behalf of Toyama, and by Peter Pau, on behalf of Capella. *Id.* ¶ 33. Pau is both the manager of Toyama
3 and the manager of Capella, and the complaint alleges that Pau “had complete control over the
4 management and decision-making authority of both entities.” *Id.*

5 The complaint alleges that the Sale Agreement (i) affirmatively obligated Toyama to settle
6 Dollar Tree’s claims and (ii) affirmatively obligated Capella to construct a store in the Shopping Center
7 for Dollar Tree, secured by a Letter of Credit. *Id.* ¶ 38. Paragraph 7.3(b) of the Sale Agreement states,

8 **Dollar Claims.** Seller shall enter into a full settlement with Dollar Tree and shall make
9 such cash payments required thereunder as may be required by Dollar Tree; however,
10 it is currently contemplated that Dollar Tree will require (i) construction of its leased
11 premises, and (ii) the posting of Letter of Credit in favor of Dollar Tree in the amount
12 of [REDACTED], as security for such construction obligation; and upon Closing Buyer
13 shall assume such obligations.

14 Compl. ¶ 38 & Ex. 2 (Sale Agreement ¶ 7.3(b)). Pursuant to Paragraphs 6.3.1(2) and 6.3.2(2) of the
15 Sale Agreement, Toyama and Capella were required at closing to deliver an executed Assignment and
16 Bill of Sale attached to the Sale Agreement, attached as Exhibit B to the Sale Agreement. Compl. ¶ 38
17 & Sale Agreement, Ex. B. The Assignment and Bill of Sale provided in part that:

18 [Toyama] assigns, transfers, sets over and conveys to [Capella] all of [Toyama’s] right,
19 title and interest in, to and under . . . [t]he existing leases of any of the Land or
20 improvements thereon (“Leases”) . . .

21 Sale Agreement, Ex. B ¶ 1(1). The Assignment and Bill of Sale also provided that “[Capella] accepts
22 the Leases” and “assumes all obligations under the Leases,” which included Dollar Tree’s Amended
23 Lease. Sale Agreement, Ex. B ¶ 2.

24 Section R of Dollar Tree’s Amended Lease provides in relevant part that “any successor to
25 Landlord’s interest in the Premises . . . shall, so long as Tenant [Dollar Tree] is not in material default
26 under this Lease is beyond applicable notice and cure periods, recognize and accept this Lease and all
27 terms, conditions, and obligations of Landlord contained herein.” Compl. ¶ 41. The Amended Lease
28 also states in relevant part, “This Lease and all of the covenants, provisions, and conditions herein
contained shall inure to the benefit of and be binding upon the heirs, personal representatives,
successors, and assigns, respectively, of the parties hereto . . .” Compl. ¶ 21 (Amended Lease ¶ W(16)).

In addition, in Paragraph 8.3 of the Sale Agreement, Toyama represented and warranted that, as of the

1 Effective Date of the Sale Agreement, “The execution, delivery and performance of this Agreement and
2 the Closing hereunder will not conflict with any agreement, contract or law applicable to [Toyama] nor
3 constitute a default under any agreement or instrument to which [Toyama] is a party or by which
4 [Toyama] or the Property are bound.” Sale Agreement ¶ 8.3.

5 On January 24, 2011, Toyama and Capella entered into a First Amendment to the Sale
6 Agreement (“First Amendment”) in which they reduced the purchase price of the Shopping Center.
7 Compl. ¶ 45 & Ex. 3. The First Amendment did not modify Toyama’s assignment of Leases to Capella,
8 nor did it modify Capella’s assumption of all obligations under the Leases. Compl. ¶ 47 & Ex. 3. The
9 First Amendment was signed by Peter Pau on behalf of both Toyama and Capella. Compl. ¶ 48 & Ex.
10 3.

11 On February 15, 2011, Toyama and Capella entered into a Second Amendment to the Sale
12 Agreement. Compl. ¶ 49 & Ex. 4. The complaint alleges that “[t]he sole purpose of the Second
13 Amendment was to revoke Toyama’s obligation to settle Dollar Tree’s claims and revoke Capella’s
14 obligations to construct the Replacement Premises and accept and assume Dollar Tree’s Amended
15 Lease.” Compl. ¶ 49. Peter Pau signed the Second Amendment on behalf of both Toyama and Capella.
16 Compl. ¶ 50 & Ex. 4. The complaint alleges,

17 While Section 7.3(b) of the Sale Agreement stated that Toyama “*shall* enter into a full
18 settlement with Dollar Tree,” the Second Amendment, without consideration, provided
19 that Toyama “*may, but shall not be required,* to enter into a full settlement with Dollar
20 Tree within a reasonable time after Closing.”

21 *Id.* ¶ 51 (emphasis in original, quoting Sale Agreement ¶ 7.3(b) and Second Amendment).

22 The Second Amendment also revised the Assignment and Bill of Sale to state that Toyama
23 would assign to Capella all of Toyama’s “right, title, and interest” in “[t]he existing leases of any of the
24 Land or improvements thereon . . . but specifically excluding the Dollar Tree Lease (‘Leases’).” Compl.
25 Ex. 4, Ex. B ¶ 1(1). The Second Amendment provided in the Assignment and Bill of Sale that Capella
26 would accept the Leases, but also stated, “As set forth above, the Leases specifically exclude the Dollar
27 Tree Lease, and Buyer does not accept or assume the Dollar Tree Lease.” *Id.* ¶ 2.

28 The complaint alleges that “[b]y executing the Second Amendment on behalf of Toyama and
Capella, Pau (i) breached Toyama’s obligations in Sections R and W(16) of the Amended Lease to

1 ensure that any successor to the Shopping Center would accept and assume all of Toyama’s obligations
2 under the Amended Lease and (ii) breached Toyama’s representation and warranty to Capella in Section
3 8.3 of the Sale Agreement that the transaction would not breach any agreement by which Toyama or the
4 Property was bound.” Compl. ¶ 54.

5 The complaint also alleges that “[a]t and prior to the time of closing, Toyama was unable to pay
6 its debts as they became due in the normal course of business and was insolvent under one or more of
7 the generally-accepted financial accounting tests.” *Id.* ¶ 56. The complaint alleges that Toyama paid
8 the majority of the proceeds from the sale fo the Shopping Center to its mortgagor, Comerica. *Id.* ¶ 57.
9 “From the remaining proceeds of the sale of the Shopping Center, Pau (i) repaid himself [the money]
10 that he purportedly loaned to Toyama and (ii) paid claims to other creditors of Toyama.” *Id.*

11 On June 3, 2011, Dollar Tree filed the complaint in C 11-2696 SI. The complaint alleges two
12 claims: (1) fraudulent conveyance under California’s Uniform Fraudulent Transfer Act, Cal. Civ. Code
13 § 3439 *et seq.*, against Pau, Toyama and Capella, and (2) breach of fiduciary duty, against Pau.

14
15 **DISCUSSION**

16 Now before the Court are three interrelated motions: (1) plaintiffs’ motion to consolidate 10-325
17 SI and 11-2696 SI, (2) defendants’ motion to dismiss 11-2696 SI as improperly filed, and (3)
18 defendant’s motion to dismiss 11-2696 SI pursuant to Rule 12(b)(6). Defendants oppose consolidation
19 of the two cases, and argue that plaintiff never should have filed the second action and instead should
20 have sought leave to amend the complaint in the first action. Defendants also contend that plaintiff has
21 failed to state claims for fraudulent conveyance and breach of fiduciary duty in the second action.

22 Plaintiff responds that it could not seek to amend the complaint in the first action because, *inter*
23 *alia*, the documents related to the sale, such as the January 18, 2011 Sale Agreement, the January 24,
24 2011 First Amendment, and the February 15, 2011 Second Amendment, were not provided to plaintiff
25 until April 22, 2011, after the deadline for amending the pleadings in 10-325 SI.

26 The parties devote much of their voluminous briefing to *ad hominem* attacks that do not aid the
27 Court in its determination of these motions. The parties also hotly dispute the facts regarding when
28 defendants disclosed the fact of, and the details regarding, the sale of the Shopping Center; for purposes

1 of these motions, the Court finds it unnecessary to resolve these factual disputes. The Court agrees with
2 defendants that plaintiff should have sought leave to amend the complaint in the first action, even if such
3 motion was filed after the deadline for amending the complaint, rather than filing a second case.
4 However, given the fact that plaintiff filed a second action, the Court finds that the most efficient course
5 is to determine whether plaintiff has stated claims in the second action, and if so, to consolidate the two
6 cases, rather than dismissing the second action and requiring plaintiff to file a motion to amend the
7 complaint in the first case.

8
9 **I. Fraudulent conveyance**

10 Dollar Tree alleges a claim of fraudulent conveyance under the Uniform Fraudulent Transfer Act
11 (“UFTA”), California Civil Code § 3439 *et seq.*, against defendants Pau, Toyama, and Capella-Mowry.
12 “The UFTA permits defrauded creditors to reach property in the hands of a transferee.” *Mejia v. Reed*,
13 31 Cal. 4th 657, 663 (2003). “Under the UFTA, a transfer is fraudulent, both as to present and future
14 creditors, if it is made ‘[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.’ (Civ.
15 Code, § 3439.04, subd. (a).)” *Id.* at 664.

16 The complaint alleges that “[t]he Second Amendment was a mode of disposing of or parting with
17 an interest in an asset and therefore constitutes a ‘transfer’ within the meaning of [the statute].” Compl.
18 ¶ 60. The complaint alleges,

19 Pau entered into the Second Amendment on behalf of both Toyama and Capella with the
20 intent to hinder, delay and/or defraud Dollar Tree with regard to, *inter alia*, (i) Toyama’s
21 obligation to settle with Dollar Tree, (ii) Capella’s obligations to construct a retail store
22 for Dollar Tree and post a . . . letter of credit as security, (iii) Capella’s obligation to
accept and assume Dollar Tree’s Amended Lease, and (iv) Dollar Tree’s ability to
execute upon the Shopping Center in order to obtain money damages and/or injunctive
relief from Toyama.

23 *Id.* ¶ 61. The complaint also alleges that defendants’ fraudulent intent is demonstrated by the following
24 “badges of fraud”:

- 25 (a) The Second Amendment was executed by Pau as an insider of both Toyama and
26 Capella;
- 27 (b) Pau controlled the Shopping Center as manager of Toyama and Capella both
28 before and after the Second Amendment;

- 1 (c) Neither Toyama, Capella, nor Pau disclosed the sale of the Shopping Center,
2 including without limitation the Second Amendment, to Dollar Tree prior to the
3 closing;
4 (d) Pau executed the Second Amendment well after Dollar Tree filed its lawsuit
5 against Toyama;
6 (e) The Second Amendment facilitated the closing on the Shopping Center, which
7 disposed of substantially all of Toyama’s assets;
8 (f) Pau, Capella, and Toyama refused to provide Dollar Tree with documents or
9 information regarding the sale of the Shopping Center, including without
10 limitation the Second Amendment; and
11 (g) Toyama was insolvent prior to and at the time that it entered into the Second
12 Amendment and closed on the sale of the Shopping Center.

13 *Id.* ¶ 62.

14 **A. “Transfer”**

15 Defendants contend that Dollar Tree has not alleged a “transfer” under the UFTA because the
16 Second Amendment is only an isolated provision of the sales contract, and not the sales contract itself.
17 Dollar Tree responds that the Second Amendment is part of the Sale Agreement, as the Second
18 Amendment states that the Sale Agreement “is incorporated herein by reference,” and that “Buyer and
19 Seller amend the Original [Sale] Agreement as follows[.]” Compl. Ex. 4. Dollar Tree argues that all
20 provisions of a contract must be considered as a whole, *see* Cal. Civ. Code § 1641, and that it has
21 focused on the Second Amendment because that is where defendants’ fraud is manifested.

22 Dollar Tree contends that the UFTA has a very broad definition of “transfer,” and that the
23 Second Amendment (and the incorporated Sale Agreement) fall within the statutory definition. The
24 UFTA defines “transfer” as follows:

25 “Transfer” means every mode, direct or indirect, absolute or conditional, voluntary or
26 involuntary, of disposing of or parting with an asset or an interest in an asset, and
27 includes payment of money, release, lease, and creation of a lien or other encumbrance.

28 Cal. Civ. Code § 3439.01(i). Dollar Tree contends that the sales documents, which include the Second
Amendment, were the direct and/or indirect mode that Pau used to part with Toyama’s interest in the
Shopping Center. Compl. ¶¶ 49-54. Dollar Tree asserts, “Defendants want this Court to believe that,
if there was no fraud in the Grant Deed itself, the UFTA cannot apply. . . . The UFTA defines a transfer

1 more broadly – every direct and/or indirect mode of parting with an interest in an asset – and that
2 broader definition must be applied here. Moreover, since the substantive terms of the sale are contained
3 in the Sale Agreement and its amendments, to limit consideration of the transaction to the simple
4 language of the Grant Deed would make a mockery of the UFTA and encourage the type of fraud in
5 which Defendants have engaged here.” Opp’n at 9:16-25.

6 Defendants contend that by admitting that the transfer at issue was the sale of the Shopping
7 Center pursuant to the Sale Agreement, of which the Second Amendment was only a part, Dollar Tree
8 is “essentially seeking to rewrite the Sales Agreement rather than to set aside any fraudulent transfer.”
9 Reply at 3:21-23, 4:10-11. Defendants argue that Dollar Tree’s claim is not a proper UFTA claim
10 because Dollar Tree does not seek to set aside the sale of the Shopping Center, but instead to rewrite
11 the contract of sale.

12 Dollar Tree contends that defendants ignore the plain language of the UFTA, which provide for
13 broad remedies to ameliorate fraudulent transfers. Dollar Tree notes that Section 3439.07 provides that
14 “In an action for relief against a transfer or obligation under this chapter, a creditor . . . may obtain . .
15 .

- 16 (1) avoidance of the transfer or obligation *to the extent necessary* to satisfy the creditor’s
17 claim.
- 18 (2) An attachment or other provisional remedy against the asset transferred or its
19 proceeds
- 20 (3) Subject to applicable principles of equity and in accordance with applicable rules of
21 civil procedure, the following:
 - 22 (A) An injunction against further disposition by the debtor or a
23 transferee, or both, of the asset transferred or its proceeds.
 - 24 (B) Appointment of a receiver to take charge of the asset transferred or
25 its proceeds.
 - 26 (C) *Any other relief the circumstances may require.*

27 Cal. Civ. Code § 3439.07(a) (emphasis added). Dollar Tree argues that the UFTA specifically
28 authorizes avoidance of the Second Amendment because it permits “avoidance of the transfer . . . to the
extent necessary” and authorizes “any other relief the circumstances may require.”

1 The Court agrees with Dollar Tree that it has properly alleged that it seeks to avoid a fraudulent
2 transfer. *Annod Corporation v. Hamilton & Samuels*, 100 Cal. App. 4th 1286 (2002), relied upon by
3 defendants, is distinguishable. In *Annod*, a landlord sued the individual partners in a defunct law firm
4 for nonpayment of rent. The landlord claimed that the law firm partners had drained the law firm of its
5 assets by taking partnership draws instead of paying overdue rent. *Id.* at 1291. The trial court granted
6 the defendants’ motions for summary judgment, finding that there were no material disputes regarding
7 whether the partnership draws were made in good faith and for reasonably equivalent value. *Id.* The
8 Court of Appeal affirmed. Defendants cite *Annod* for the proposition that the UFTA does not provide
9 for the rewriting of contracts relating to transfers. However, in the portion of *Annod* that defendants
10 cite, the court simply stated that the landlord “knowingly accepted as part and parcel of the lease
11 agreement” the risk that partners would receive partnership draws while failing to pay their rent. *Id.* at
12 1300.

13 The lease contained reciprocal waivers. The landlord agreed not to “seek recourse
14 against the individual partners, directors, officers or shareholders of [the tenant] or any
15 of their personal asserts for satisfaction of any liability with respect to [the lease]” and
16 the tenant agreed not to “seek recourse against the individual partners, directors, officers
17 or shareholder[s] of [the landlord] or any of their personal asserts for satisfaction of any
18 liability with respect to [the lease].” The lease provided a bargained-for two-way release
19 of liability. Applied in retrospect, it may have been a bad deal for the landlord, but that
20 was the risk the landlord took and we will not rewrite the lease to delete the nonrecourse
21 provision.

22 *Id.*

23 *Annod* is distinguishable in numerous respects. First, as plaintiff notes, *Annod* was decided on
24 summary judgment, and not on a demurrer. More importantly, the landlord in *Annod* did not claim that
25 the lease provision enabled the fraudulent transfer, whereas here, Dollar Tree claims that the Second
26 Amendment was the “direct and/or indirect mode” of “disposing of or parting with an interest in an
27 asset.” *Annod* does not stand for the proposition that the UFTA does not permit the rewriting of a
28 contract. In any event, the Court does not view the relief sought here as rewriting a contract. Rather,
Dollar Tree seeks to void the transfer – as set forth in the Second Amendment – “to the extent
necessary.”

1 **B. Intent to defraud**

2 Defendants also argue that Dollar Tree has failed to sufficiently allege “intent to defraud” under
3 Section 3439.04(a)(1). The Court disagrees. Section 3439.04(b) provides eleven different factors that
4 may be considered as evidence of intent to defraud:

5 (b) In determining actual intent under paragraph (1) of subdivision (a), consideration
6 may be given, among other factors, to any or all of the following:

- 7 (1) Whether the transfer or obligation was to an insider.
- 8 (2) Whether the debtor retained possession or control of the property
9 transferred after the transfer.
- 10 (3) Whether the transfer or obligation was disclosed or concealed.
- 11 (4) Whether before the transfer was made or obligation was incurred, the
12 debtor had been sued or threatened with suit.
- 13 (5) Whether the transfer was of substantially all the debtor’s assets.
- 14 (6) Whether the debtor absconded.
- 15 (7) Whether the debtor removed or concealed assets.
- 16 (8) Whether the value of the consideration received by the debtor was
17 reasonably equivalent to the value of the asset transferred or the amount
18 of the obligation incurred.
- 19 (9) Whether the debtor was insolvent or became insolvent shortly after
20 the transfer was made or the obligation was incurred.
- 21 (10) Whether the transfer occurred shortly before or shortly after a
22 substantial debt was incurred.
- 23 (11) Whether the debtor transferred the essential assets of the business to
24 a lienholder who transferred the assets to an insider of the debtor.

25 Cal. Civ. Code § 3439.04(b)(1)-(11).

26 Defendants concede that the complaint alleges at least three of these factors – the debtor’s
27 insolvency, the transfer of substantially all of the debtor’s assets, and that the transfer was made after
28 the filing of a lawsuit. Defs’ 12(b)(6) Motion at 9:25-28; Reply at 7:4-7. Defendants assert that “these
[factors] alone do not indicate fraudulent intent,” Reply at 7:6-7, and that Dollar Tree “does not even
try to allege” some of the other statutory factors. *Id.* at 7:16.

 Defendants’ arguments are flawed in several respects. As an initial matter, the California Court
of Appeal has held that the Section 3439.04(b) “factors do not create a mathematical formula to

1 establish actual intent. There is no minimum number of factors that must be present before the scales
2 tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the
3 trial court, not compel a finding one way or the other.” *Filip v. Bucurenciu*, 129 Cal. App. 4th 825, 834
4 (2005). Thus, contrary to defendants’ assertions, a plaintiff may prove actual intent to fraud based on
5 three factors (or less). More importantly, on a motion to dismiss, the Court’s review is limited to the
6 sufficiency of the allegations. Here, the complaint alleges at least three of the badges of fraud, and
7 arguably more. This is adequate to state a claim.¹

8
9 **II. Breach of fiduciary duty**

10 Dollar Tree alleges a claim for breach of fiduciary duty against Pau only. The complaint alleges
11 that by virtue of Toyama’s insolvency, Pau owed a fiduciary duty to Toyama’s creditors, including
12 Dollar Tree, to manage Toyama’s assets in trust for the benefit of all creditors. Compl. ¶ 66. The
13 complaint alleges that Pau “had an irreconcilable conflict of interest in entering into the Second
14 Amendment as manager of both Toyama and Capella.” *Id.* The complaint alleges that “Pau breached
15 his fiduciary duties to Dollar Tree by distributing proceeds from the sale of the Shopping Center to
16 himself and thereby engaging in self dealing,” and “by distributing proceeds . . . to other creditors to the
17 exclusion of Dollar Tree, thereby preferring certain creditors over Dollar Tree.” *Id.* ¶¶ 67-68.

18 Defendants move to dismiss this claim, relying primarily on *Berg & Berg Enterprises, LLC v.*
19 *Boyle*, 178 Cal. App. 4th 1020 (2009). In *Berg*, Berg & Berg Enterprises was the largest creditor of a
20 failed company, Pluris, Inc. Berg alleged that the individual directors of Pluris owed a fiduciary duty
21 to Berg and Pluris’s other creditors when Pluris either became insolvent or entered into a “zone of
22 insolvency.” *Id.* at 1024. Berg alleged that Pluris breached its fiduciary duty by entering into an

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25 _____
26 ¹ Defendants also assert, confusingly, that plaintiff’s claim for fraudulent conveyance is really
27 a claim for third party beneficiary status under the Sale Agreement, or a breach of contract claim under
28 the Amended Lease. As the Court has concluded that plaintiff has stated a claim under the UFTA, the
Court finds it unnecessary to address these arguments.

29 Defendants also assert that Dollar Tree’s successor liability theory against Capella defeats, rather
than supports, the UFTA claim. This argument is without merit, as plaintiff is permitted to plead
alternative theories of liability. Fed. R. Civ. Proc. 8(d)(2).

1 assignment for the benefit of creditors under Cal. Civ. Code §§ 493.010 and 1802,² “thereby
2 extinguishing Berg’s plan to use the corporation’s alleged \$50 million of net operating losses through
3 a chapter 11 bankruptcy reorganization that, according to Berg, would have benefitted it and the other
4 creditors by deriving value from the losses.” *Id.* at 1025.

5 Defendants contend that under *Berg*, Dollar Tree lacks standing to bring a breach of fiduciary
6 duty claim; that the scope of the fiduciary duty recognized in *Berg* is extremely limited and does not
7 apply to the facts alleged here; and that in any event, the business judgment rule bars Dollar Tree’s
8 claim. Dollar Tree, in turn, asserts that it has properly alleged a claim under *Berg*.

9
10 **A. Standing**

11 The parties first dispute whether Dollar Tree has standing to bring a breach of fiduciary duty
12 claim. Defendants contend that Dollar Tree must bring this claim as a derivative action because Dollar
13 Tree did not suffer an injury unique to it. Defendants rely on *Berg*, where the trial court sustained a
14 demurrer to the original complaint on standing grounds.³ The Court of Appeal described the ruling as
15 follows:

16 The court (Judge C. Randall Schneider) sustained the demurrers with leave to amend.
17 The basis of the order was, in essence, lack of standing—Berg’s claim of injury was not
18 unique to itself or to a particular class of creditors but rather incidental to injury that all
19 of Pluris’s creditors might have suffered as a result of the assignment for the benefit of
20 creditors. Therefore, the claim was not direct and particular to Berg but rather derivative
21 and assertable only on behalf of all of Pluris’s creditors.

22 *Berg*, 174 Cal. App. 4th at 1027.

23 Defendants contend that Dollar Tree lacks standing because “it is clear from [Dollar Tree’s]
24 allegations that the payments to Comerica and other creditors prevented Toyama from paying all other
25 creditors, not just [Dollar Tree].” Reply at 10: 2-4. To the contrary, the complaint does not contain any
26 such allegations showing that Dollar Tree is similarly situated to other creditors. Instead, the complaint

27 ² The *Berg* court explained that “[a]n assignment for the benefit of creditors is a recognized but
28 less than comprehensive statutory procedure that is an alternative to liquidation in bankruptcy.” *Id.* at
1025 n.1.

³ After this ruling, the plaintiff in *Berg* amended the complaint several more times. On appeal,
the Court of Appeal reviewed the trial court’s dismissal of the third amended complaint without leave
to amend. *Berg*, 174 Cal. App. 4th at 1029.

1 alleges that Pau used the proceeds of the sale to pay Comerica, himself, and other creditors, and more
2 importantly, that Pau executed the Second Amendment specifically to shield Toyama’s assets from
3 Dollar Tree. As such, Dollar Tree has alleged an injury “direct and particular” to itself, and thus has
4 standing to allege a breach of fiduciary duty claim.

5
6
7 **B. Scope of duty**

8 After analyzing the case law on the duty owed by an insolvent corporation to its creditors, the
9 *Berg* court stated, “we conclude that under the current state of California law, there is no broad,
10 paramount fiduciary duty of due care or loyalty that directors of an insolvent corporation owe the
11 corporation’s creditors solely because of a state of insolvency” *Berg*, 178 Cal. App. 4th at 1041.⁴
12 The court held that “the scope of any extra-contractual duty owed by corporate directors to the insolvent
13 corporation’s creditors is limited in California, consistently with the trust-fund doctrine, *to the*
14 *avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used*
15 *to pay creditors claims*. This would include acts that involve self-dealing or the preferential treatment
16 of creditors.” *Id.* (emphasis in original). The appellate court in *Berg* sustained the demurrer because
17 the thrust of *Berg*’s claim – that “the directors effected the assignment for the benefit of creditors, a
18 recognized statutory alternative to liquidation through bankruptcy, rather than investigating, exploring
19 or pursuing a bankruptcy reorganization through which *Berg* theoretically could have maximized the
20 value of *Pluris*’s accumulated net operating losses and the other creditors could have benefitted from
21 *Berg*’s reorganization plan,” – “do not involve self dealing or prohibited preferential treatment of
22 creditors and further do not constitute the actual diversion, dissipation, or undue risking of *Pluris*’s
23 assets that were otherwise available to pay creditors’ claims.” *Id.* at 1042-43 (internal citations omitted).
24 Instead, “[a]t most, and contrary to *Berg*’s contentions on appeal, these facts allege that another course
25 of action, if explored and pursued, might have offered more value in the end or that beneficial,
26 maximum, or more valuable use could thereby have been made of *Pluris*’s net operating losses,

27 ⁴ Not relevant here, the *Berg* court also held that “there is no fiduciary duty prescribed under
28 California law that is owed to creditors by directors of a corporation solely by virtue of its operating in
the ‘zone’ or ‘vicinity’ of insolvency.” *Berg*, 178 Cal. App. 4th at 1041.

1 assuming that the many contingencies required to successfully do so all would have transpired
2 favorably.” *Id.* at 1043.

3 Here, contrary to the allegations in *Berg*, Dollar Tree has alleged that Pau engaged in self-
4 dealing and preferential treatment of creditors. Pau contends that these allegations are insufficient
5 because Dollar Tree’s claim is unliquidated, unsecured, and hotly disputed, and it is undisputed that
6 Comerica was the senior secured creditor whose foreclosure sale is what prompted the sale to Capella
7 in the first place.⁵ Pau contends that his decision to pay sales proceeds to Comerica was not only proper,
8 it was legally required. Pau also argues that the complaint does not allege that the other creditors of
9 Toyama who were paid, including Pau, were not real creditors of Toyama.

10 The Court concludes that Dollar Tree has alleged facts sufficient to state a claim. The Court
11 agrees with defendants that the allegations regarding the payment to Comerica, on its own, would not
12 state a claim for breach of fiduciary duty. However, the complaint also alleges that Pau engaged in self-
13 dealing by executing the Second Amendment on behalf of both Toyama and Capella, and paying himself
14 out of the proceeds of the sale. Although the complaint does not contain detailed allegations regarding
15 the payments to the other creditors, the complaint alleges that Pau made payments to other creditors and
16 preferred those creditors over Dollar Tree.

17
18 **C. Business judgment rule**

19 Finally, defendants contend that the breach of fiduciary duty claim is barred by the business
20 judgment rule. “The [business judgment] rule establishes a presumption that directors’ decisions are
21 based on sound business judgment, and it prohibits courts from interfering in business decisions made
22 by the directors in good faith and in the absence of a conflict of interest.” *Berg*, 178 Cal. App. 4th at
23 1045. In response to plaintiff’s argument that the business judgment rule does not apply because the
24 complaint alleges that Pau had a conflict of interest, defendants assert that the alleged conflict “has
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26 ⁵ This point is actually disputed, though it is not alleged in the complaint. Dollar Tree asserts
27 – and the emails between Pau and Dollar Tree prior to the sale provide some support – that the primary
28 motivation for the sale was that Capella faced a February 16, 2011 deadline under Section 1031 of the
Internal Revenue Code, 26 U.S.C. § 1031, by which to purchase a property in order to defer recognition
of capital gains on an exchange of business properties. *See* Abramowich Decl. in Support of Opposition
to Motion to Dismiss Action ¶ 6; Pau Decl. Ex. A (emails).

1 nothing to do with how creditor claims were paid.” Reply at 13:5-7. Defendants continue, “It cannot
2 be said that Mr. Pau breached his fiduciary duty or violated the Business Judgment Rule by paying other
3 creditors, including himself, before he had Toyama pay DT on its disputed and unliquidated claims.”
4 *Id.* at 13:21-23.

5 Defendants’ arguments lack merit. Whether Pau breached his fiduciary duty or violated the
6 Business Judgment Rule is a factual question that cannot be resolved on the pleadings. The complaint
7 alleges that Pau had a conflict of interest in his dual role as manager of both Toyama and Capella, and
8 by paying himself out of the proceeds of the sale. It may be that it was proper for Pau to pay himself
9 out of those proceeds. That, however, is a question for the fact finder on summary judgment or at trial,
10 and is not appropriate for resolution on a motion to dismiss under Rule 12(b)(6).


11
12 **CONCLUSION**

13 For the foregoing reasons, the Court GRANTS plaintiff’s motion for consolidation, DENIES
14 defendants’ motion to dismiss 11-2696 SI, and DENIES defendants’ motion to dismiss 11-2696 SI for
15 failure to state a claim. Docket No. 228 in C 10-325 SI and Docket Nos. 15 & 18 in C 11-2696 SI.

16 At the Case Management Conference following the hearing on these motions, counsel discussed
17 how and whether a single amended, consolidated complaint may be used for the balance of this
18 litigation. The parties are directed to file an amended consolidated complaint, or alternatively, a plan
19 of coordination, no later than **August 12, 2011**.

20
21 **IT IS SO ORDERED.**

22
23 Dated: August 1, 2011

24 
25 _____
26 SUSAN ILLSTON
27 United States District Judge
28