Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P.
2015 NY Slip Op 32304(U)
December 4, 2015
Supreme Court, New York County
Docket Number: 651962/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ARROWHEAD CAPITAL FINANCE, LTD.,

Plaintiff,

-against-

Index No. 651962/2014

DECISION & ORDER

CHEYNE SPECIALTY FINANCE FUND L.P. and CHEYNE SPECIALTY FINANCE FUND GENERAL PARTNER aka CHEYNE SPECIALTY FINANCE GENERAL PARTNER, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Plaintiff, Arrowhead Capital Finance, Ltd. (Arrowhead or plaintiff), a judgment-creditor whose predecessor made a subordinated loan to non-party borrowers, brings this action against the former senior lender, Cheyne Specialty Finance Fund L.P. (Cheyne) and its general partner, Cheyne Specialty Finance Fund General Partner a/k/a Cheyne Specialty Finance General Partner, Inc. (Cheyne GP, with Cheyne, defendants). Essentially, Arrowhead alleges that Cheyne settled with the borrowers and, in breach of its contractual and fiduciary duties, assigned and/or turned over the collateral securing Arrowhead's subordinated note to one of the borrowers, thus depriving Arrowhead of its security for repayment.

Defendants moved to dismiss on the following grounds: 1) statute of limitations; 2) failure to state a claim; 3) documentary evidence; and 4) failure to plead breach of trust with particularity. CPLR 3211(a)(1), (5) and (7), and 3016(b). Although defendants raised lack of capacity to sue for the first time without court permission in their supplemental papers [CPLR 3211(a)(3)], it was addressed by plaintiff. Plaintiff opposes the motion to dismiss.

The complaint contains eight causes of action, numbered here as in the complaint: 1) accounting; 2) breach of trust; 3) aiding and abetting breaches of trust committed by the borrowers; 4) conspiracy with the borrowers to breach trust; 5) breach of fiduciary duty; 6) aiding and abetting breaches of fiduciary duty committed by the borrowers; 7) conspiracy with the borrowers to breach fiduciary duties; and 8) breach of contract. There is no difference between the allegations in the 2nd through 4th causes of action based on breach of trust and the 5th through 7th causes of action based on breach of fiduciary duty, other than that, the former use the nomenclature "breach of trust" and the latter "breach of fiduciary duty." As the New York common law tort is called breach of fiduciary duty, the duplicate 2nd through 4th causes of action for breach of trust, aiding and abetting it and conspiracy to commit it, are dismissed.

At oral argument, the parties were given leave to submit further papers concerning English law with respect to: 1) the statute of limitations, 2) the validity of §10, entitled "Limitation of the Security Agent's Liability," of a December 2008 Charge Over Shares Agreement (Pledge) between one of the borrowers, Seven Arts Pictures, Inc. (SAP) and defendant Cheyne. Tr 36-38, Dkt 85.[1] The Pledge is governed by English Law. Dkt 85, §25.1.

In a compliance conference order dated January 13, 2015, the parties were given permission to supplement the record of the motion solely with respect to documents received by plaintiff through post-submission discovery in London. Dkt 70, ¶1.[2]

I. Background

[1] References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts' Electronic Filing System.

[2] The parties were not given permission to file supplemental papers concerning plaintiff's legal capacity to sue. However, as both parties' supplemental papers addressed that issue, the court will consider it.

In a June 20, 2012 decision (Prior Decision), on an underlying action, this court granted a motion for summary judgment in Arrowhead's favor against the Borrowers on the Arrowhead Note.[3] The Prior Decision also granted summary judgment to Arrowhead permitting it to enforce the Collateral that secured the Arrowhead Note. The Borrowers, now judgment-debtors, were affiliated entities of a parent company, Seven Arts Pictures PLC (Seven Arts), all of which were controlled by an individual named Peter Hoffman. On September 12, 2012, this court granted judgment against the Borrowers, other than Seven Arts,[4] in the underlying action (Judgment). The Judgment was affirmed by the First Department on October 17, 2013. The reader's familiarity with the facts in the Underlying Action is assumed and will be repeated here only as necessary.

A. The Master Agreement & Arrowhead Note

Pursuant to a December 22, 2006 Master Agreement [Dkt 38], Cheyne and Arrowhead's predecessor in interest, ACG,[5] loaned the Borrowers $7,500,000 (Loan), of which Cheyne advanced $6,500,000 in exchange for the senior Cheyne Note, and Arrowhead advanced $1,000,000 in exchange for the subordinated Arrowhead Note [Dkt 37]. The Arrowhead Note and the Master Agreement provide that they are governed by New York law. Dkt 37 & 38. The Arrowhead Note recites that ACG is a Minnesota limited liability company. Dkt 37. Plaintiff is incorporated in Bermuda. Dkt 1, Complaint, p 1.

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[3] The underlying action is entitled *Arrowhead Capital Finance Ltd. v Seven Arts Pictures PLC*, Sup Ct NY Co Index No. 601199/2010 (Underlying Action). Terms defined in the Prior Decision have the same meaning in this opinion.

[4] Judgement could not be granted against Seven Arts due to a bankruptcy stay.

[5] By consent judgment entered on December 30, 2008, the Arrowhead Note was assigned to plaintiff, in an action entitled *Arrowhead Capital Finance, Ltd v Metro II LLC*, Sup Ct NY Co Index No. 600136/2008 (Herman Cahn, J.). Dkt 18.

The Arrowhead Note provided that it incorporated the Master Agreement and all exhibits thereto, was issued in connection with that Master Agreement, and further evidenced the obligation to pay the Loan and the benefits and security thereunder. Dkt 37. The Borrowers defaulted on the Loan on September 30, 2007. Prior Decision, p 7.

The Cheyne and Arrowhead Notes were secured by a continuing, first priority, perfected security interests in certain Collateral, a defined term in the Master Agreement. Dkt 38. The Collateral included distribution revenues from various motion Pictures, including *Pool Hall Prophets, Noise* and *Deal*, and all rights to exploit them, a subordinated security interest in a film library owned by FFI (not one of the Borrowers), and 8.1 million shares of Seven Arts' stock (Original Shares) owned by SAP, who was another Borrower, any other shares of Seven Arts' stock acquired by SAP (collectively with Original Shares, Shares), and the money the Shares threw off, such as dividends (collectively with Shares, Security Assets). Dkt 38. Section 2.7.4 of the Master Agreement explicitly incorporated the Pledge, a separate agreement between Cheyne and SAP, which was annexed as an exhibit, by which SAP pledged the Security Assets as Collateral. Dkt 38 & 39. The Arrowhead Note said that it was "entitled to all the benefits and security of" the Master Agreement, which was incorporated and made part of the Arrowhead Note, and was delivered pursuant to the Master Agreement, "together with all exhibits thereto." Dkt 37.

Thus, the effect of the consent judgment assigning the Arrowhead Note to plaintiff was to transfer to it all of ACG's rights under the Master Agreement and the Collateral securing it. This included the Security Assets that were the subject of the Pledge, an exhibit to the Master Agreement. Pursuant to the unambiguous language of the Arrowhead Note, which is governed by New York law, it incorporated the Master Agreement, its exhibits and ACG's rights to benefit

from the security thereunder, i.e., the Collateral and Pledge. Cheyne's English law expert, Richard Lester Millet, without reviewing the Arrowhead Note, opined that plaintiff does not have equitable or legal title to the rights secured by the Pledge. Dkt 95, 4/13/15 Millet Affirmation, ¶10 & Dkt 97, list of documents Millet reviewed. The court does not agree with Millet based upon the terms of the Arrowhead Note that he did not consider.[6] For convenience, in the remainder of this opinion, unless the context requires otherwise, ACG and Arrowhead will be referred to as Arrowhead or plaintiff.

The Master Agreement provided that Cheyne had obligations to protect Arrowhead's interest in the Collateral. It stated that "[u]pon payment in full of the Senior Debt held by Cheyne, Cheyne shall provide [Arrowhead] all the benefits of a secured party with respect to the Collateral." Dkt 38, §4.7. The Master Agreement further provided that so long as any balance remained due on the Senior Note, Cheyne would act not only for itself, but also as agent for Arrowhead. *Id*, §2.2.

In addition, Cheyne was obliged to deposit all proceeds from the Pictures into a "Collection Account", a term defined to mean an account that Cheyne "had established" at The

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[6] For the first time in reply, supplemental papers, Millet argues that, pursuant to English law, delivery of the Arrowhead Note was required to vest plaintiff with legal title to the Pledge. Dkt 251, pp 3-4. Millet admits that he does not know whether that had occurred, "I have not seen any evidence that ACG did in fact deliver possession of the Arrowhead Note to ACF." *Id.* Thus, Cheyne conclusively proved nothing with regard to delivery. In addition, under New York law, possession by defendant of an assignment is presumptive evidence of delivery. *Davin v Isman*, 228 NY 1, 8 (1920). Furthermore, Millet's opinion is based on English law, while the Arrowhead Note, and the consent judgment by which it was assigned to plaintiff, are governed by New York law, which does not in all circumstances require delivery of a note to effectuate an assignment. *Felin Associates, Inc. v Rogers*, 38 AD2d 6, 9 (1st Dept 1971)("... physical delivery of the original note is not mandatory since the mortgage assignment, when accepted and recorded, transfers the interest in the note and mortgage by operation of law."). Here, it would seem that a judgment entered in this court effected the assignment by operation of law without delivery. However, as Cheyne's papers make it unclear whether delivery occurred and Arrowhead had no opportunity to address that issue, the court will not rule on it.

Chase Manhattan Bank in New York. Dkt 38, Master Agreement, §5.1. The Borrowers were obligated to cause "all proceeds of the Pictures" payable to them to be deposited in the Collection Account and to instruct "any account debtor with respect to any of the Pictures" to wire or pay the Collection Account. *Id.* The Collection account was to be used for no other purpose. *Id.*

Cheyne was required to apply the funds received in the Collection Account monthly in the following order: 1) interest on the Cheyne Note; 2) principal on the Cheyne Note; 3) interest on the Arrowhead Note; 4) principal on the Arrowhead Note. *Id.* Cheyne agreed to provide Seven Arts, not Arrowhead, with "a statement" on the first day of each month showing deposits into and the application of monies received in the Collection Account. *Id.*

When the Cheyne Note was repaid, the Master Agreement directed Cheyne to pay all funds in the Collection Account to Arrowhead, if interest or principal on the Arrowhead Note was outstanding, and if not, to Seven Arts:

> At such time as the Cheyne Note has been repaid, Cheyne shall remit all funds therein to Arrowhead in payment of interest due, first, and then the unpaid principal balance of the Arrowhead Note, and ***if the Arrowhead Note has been repaid, to Seven Arts***.

Id [emphasis supplied]. Arrowhead's attorney interprets the word "shall" as meaning that after repayment of the Cheyne Note, Cheyne had a continuing obligation to remit to Arrowhead all monies received in the Collection Account. Cheyne interprets the quoted language to mean only that it had an obligation to pay to Arrowhead the money that was in the Collection at the moment the Cheyne Note was paid off, which it claims was on April 22, 2008. Cheyne says that the Collection Account had no money in it at that moment. Cheyne argues that after April 22, 2008, it was free to give to Seven Arts monies that distributors paid into the Collection Account, although Arrowhead remained unpaid.

Section 5.1 of the Master Agreement made anyone acting in concert with the Borrowers a constructive trustee for Arrowhead with regard to payments from the exploitation of the Pictures paid into the Collection Account. Dkt 38. It provided that if "anyone acting for or in concert with the Borrowers" receives "any monies, checks, notes, drafts or other payments relating to or as proceeds from the exploitation of any of the Pictures or other Collateral," then they "shall receive such items in trust for the Bank," which was defined as Arrowhead and Cheyne, and "immediately upon receipt thereof, remit the same (or cause the same to be remitted) in kind to the Collection Account." *Id.* This would include any money received by Cheyne acting in concert with Seven Arts. Further, it is not limited in time to the moment that the Cheyne Note was repaid.

On December 13, 2007, Cheyne sent the Borrowers a notice of default, with a copy to Arrowhead. Dkt 157. Arrowhead confirmed its receipt of the notice on December 26, 2007. Dkt 158. On January 17, 2008, ACG sent a notice of default to Seven Arts, SAP, SAFE and Hoffman. Dkt 162. Cheyne received a copy in February 2008. *Id.*

B. The Pledge

The Pledge was between SAP, defined as "the Chargor", and Cheyne, defined as "the 'Security Agent' acting as agent and trustee for itself and Arrowhead." Dkt 39. Arrowhead was not a signatory, although the copy of the Pledge filed by Arrowhead contains a space for Arrowhead to sign. Dkt 39. The Pledge is governed by English law. *Id.*, §25.1. It provided that terms not redefined in it had the meaning ascribed to them by the Master Agreement. The "Beneficiary" of the Pledge was defined as Arrowhead and Cheyne "whether as Security Agent or as a Lender under the Master Agreement." *Id.* Section 1.1.12 defined the "Secured Sums" as all monies owed by SAP under the Master Agreement, i.e., the Loan made thereunder. *Id.* Under

the Pledge, §§ 24.1 and 24.2, Cheyne could release the Security Assets to SAP, when all Secured Sums were satisfied and "irrevocably discharged." *Id.* The Secured Sums are still outstanding because the Arrowhead Note remains unpaid.

In §§ 1 and 2, of the Pledge, SAP gave or "charged" to Cheyne, to hold the Security Assets as security for the Loan. Dkt 39. The Original Shares, the Shares and the income they generated were defined in the Pledge as the "Security Assets". In §2.2, SAP gave Cheyne the Security Assets as a "first fixed charge as continuing security for the payment … of the Secured Sums." Section 19 permitted Cheyne to assign its "rights" under the Pledge "subject always to the provisions of the [Master Agreement]." Pledge, §19. Section 19 did not give Cheyne the right to assign its obligation to protect the Collateral it held for Arrowhead's benefit before the Secured Sums owed to Arrowhead were paid. Any assignment by Cheyne was "subject" to Arrowhead's rights under the Master Agreement, as well as Cheyne's obligation as Security Agent under the Pledge to hold the Security Assets in trust for Arrowhead, as Beneficiary. *Id.*

If there was a default by the Borrowers under the Master Agreement, two sections of the Pledge empowered Cheyne to transfer the Shares without SAP's help. Section 2.3 of the Pledge provided that, at the time the Pledge was executed, SAP was to give Cheyne the Shares and stock transfer forms executed in blank to enable Cheyne to perfect the security and transfer the Shares:

> The Chargor shall promptly deposit with the Security Agent, on the date of this deed or on later receipt, all certificates and documents of title relating to the Security Assets in certificated form and undated transfers executed in blank and such other documents as the Security Agent may require to perfect title to the Security Assets (duly executed by the registered holder) or for vesting or enabling it to vest the same in itself, its nominees or any purchaser. The Security Agent may at any time, without notice to the Chargor, complete such transfers and present them for registration.

Dkt 39. Hence, SAP was required to give Cheyne a stock transfer form (STF) for the Shares executed in blank, so that Cheyne, could transfer the Shares and present them for Registration without notice to SAP.

In §3.1 of the Pledge, SAP "by way of security irrevocably appointed" Cheyne as SAP's attorney with full power after a default under the Master Agreement, to execute documents for SAP that were required to transfer ownership of the Security Assets. *Id*, §3.1. Cheyne was empowered:

> ***at any time to execute***, deliver and perfect ***any document***, perform any act, or give any instructions ... required of the Chargor under this deed ... ***after the occurrence of an Event of Default***) that may be deemed by the attorney necessary or desirable for any purpose of this deed or ***to enhance or perfect the security intended to be constituted by it or to transfer legal ownership of any of the Security Assets.***

Id [emphasis supplied]. While Cheyne's English law expert, Richard Lester Millet, stated that §3.1 empowered ACG to fill out the STF, the power of attorney is limited to the Security Agent, Cheyne. Compare 5/28/15 Millet 2d Affirmation, Dkt 251, p 8, ¶20 and Pledge, Dkt 39, p 1 & §3.

> Section 10 of the Pledge [Exculpatory Clause] provides as follows:
>
> The Security Agent shall not be liable for any loss arising out of such sale or other disposal of any of the Security Assets or the exercise of or failure to exercise any of the Security Agent's powers under this deed, however caused and whether or not a better price could or might have been obtained by deferring or advancing the date of such sale or other disposal, and the Security Agent shall not be liable to account as mortgagee in possession for any of the Security Assets.

Dkt 39.

Finally, the Security Agent, Cheyne, had the power under §11 of the Pledge to require SAP to promptly "sign, seal, deliver and complete all documents" that Cheyne reasonably

required to "protect, or preserve its security" and that Cheyne required "for perfecting and improving its title to" the Security Assets in itself or its nominee." Dkt 39.

C. The 2008 Assignment Agreement

On April 15, 2008, Peter Hoffman wrote an email to Mikko Syrjanen and Inness Harding of Cheyne, and Elaine New, Finance Director of Seven Arts, with the subject line "Loan Payoff". In the email, Hoffman offered to draft an agreement "under which Cheyne signs the security in the pictures to Seven Arts in return for the payoff amount as agreed between Innes and Elaine." Dkt 14. Hoffman added:

> Obviously if Seven Arts just makes a payment without agreement on the assignment, this affects Seven Arts' rights vis à vis Arrowhead which is still to be negotiated. I would think under the circumstances that it is very definitely in Cheyne's interest to provide this simple document in order to assure payoff in light of the delays in the release of the pictures.

Id.

"As of April 22, 2008" (Assignment Date), Cheyne, the Borrowers, Hoffman and FFI entered into an Assignment Agreement (2008 Assignment Agreement). Dkt 40. Section 1.2 provided that the Closing Date, a defined term, would be the time of the "consummation of the transfer and assignment," which would occur on April 22, 2008, or such other date that the Seller and Purchaser agreed to in writing. *Id.*

Pursuant to the 2008 Assignment Agreement, Cheyne assigned the "Loan Documents"[7] and the "Loan Document Rights" under the Master Agreement to SAFE, one of the Borrowers,

[7] The Master Agreement, §1, recited that Cheyne and Arrowhead as Lenders, received an assignment of the Loan Documents relating to the financing of the three motion Pictures (*Noise*, *Deal*, and *Pool Hall Prophets*). Dkt 38. Section 2 of the Master Agreement provided that the Pool Hall Loan Documents were amended and the Noise and Deal Loan Documents were terminated. *Id.*

who purchased them for $6,458,272.47 (Assignment Price). *Id.* The 2008 Assignment Agreement was publicly filed with the United States Security and Exchange Commission (SEC) in May 2008. Dkt 62 & 63.[8]

Significantly, in §3.1 of the 2008 Assignment Agreement, Cheyne agreed to breach its obligations to Arrowhead under §5.1 of the Master Agreement. Specifically, Cheyne promised to deliver to SAFE, a Borrower,[9] monies Cheyne received in the Collection Account after the Closing, without regard to the outstanding Arrowhead Note:

> Remittance of Proceeds. ***If after the Closing, the Seller receives*** (i) any note or other obligation issued by the Borrower in substitution or replacement of any of the Loan Documents, or (ii) ***any cash, securities or property distributed or paid by the Borrower in connection with the obligations otherwise owing to the Seller in connection with the Loan Document Rights, including, without limitation, any amounts representing the proceeds of any of the collateral for the Loan deposited into any collection account maintained by the Seller for the Loan, then the Seller*** shall accept and hold the same in trust for such limited purpose on behalf and for the benefit of the Purchaser, and ***shall deliver the same promptly to the Purchaser*** in the same form received, with the Seller's endorsement (without recourse, representation or warranty) when necessary or appropriate, or to any other person of entity identified by the Purchaser.

Dkt 40, §3.1, p 3 [emphasis in original]. Thereby, Cheyne agreed to deliver monies in the Collection Account to SAFE instead of Arrowhead, in violation of the Master Agreement, which provided that Cheyne was to pay monies in the Collection Account to Arrowhead when the

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[8] Although Arrowhead complains that Cheyne did not give it notice of the 2008 Assignment Agreement, in breach of §4.5 of the Master Agreement, that clause reads, Cheyne "shall promptly give Arrowhead a copy of any written notice ***to the Borrowers*** of ... (c) the assignment of all or any portion of the Senior Debt (together with the name and address of the assignee)." [emphasis supplied] However, the 2008 Assignment Agreement was not a written notice to the Borrowers.

[9] The term "Borrower" is defined in the 2008 Assignment Agreement, §2.2.4, as the borrower under the Loan Documents, i.e. the judgment debtors.

Cheyne Note was repaid, as well as to hold monies it received in the Collection Account from the Pictures at any time "in trust" for Arrowhead.[10]

Arrowhead contends that the 2008 Assignment Agreement was backdated from June 30, 2008. In support, it presents a general journal excerpt from the books of an unnamed entity entitled "Cheyne Hedge Fund Loan" [Excerpt]. The affirmation of Arrowhead's attorney, Mr. Goldin, vaguely states that the Excerpt was "generated by Hoffman's Seven Arts Companies." This is insufficient to authenticate the Excerpt as a business record. Consequently, it is not evidence of anything, much less conclusive proof.

The Excerpt contains the following five-column entry appearing to reflect a debit of the Assignment Price on the Assignment Date:

04/22/2008 repayment of cheyne loan 3/08-388 Loan Payable-PLC-6,458,272.47.

Dkt 41 [Ex 25 to Goldin Affirmation (Goldin Aff)]. The amount debited was the Assignment Price. Following that entry, there appear to be entries involving debits for payments to Cheyne for the "w/off Cheyne Loan" on June 30, 2008, perhaps referring to write-offs. *Id.* There also are a number of debits on June 30, 2008 to Cheyne (or Cheyne followed by a hyphen and another name), with *Noise* and *Deal* in the column entitled "Class". Moreover, there is an entry of a credit in the amount of $786.30 for money received from Cheyne on June 19, 2008, and the notation "Loan Payable PLC," possibly a reference to Seven Arts Pictures Plc, the entity referred to in this opinion as Seven Arts.

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[10] In addition, it is unclear whether the language in the 2008 Assignment Agreement requiring Cheyne to deliver to SAFE "any cash securities or property distributed or paid by the Borrower in connection with the obligations otherwise owing to the Seller in connection with the Loan Document Rights" would encompass the Security Assets under the Pledge, which would be a violation of Cheyne's obligations as Security Agent and Trustee for Arrowhead.

The Excerpt creates factual issues as to when the 2008 Assignment Agreement closed. The Assignment Date is "as of" April 22, 2008. Arrowhead says that the Excerpt proves that the Cheyne Note was not paid off until June 30, 2008. Dkt 36, Goldin Aff, ¶19. Cheyne says it has proven that the 2008 Assignment Agreement closed in April 2008 because it was filed with the SEC in May 2008 and because the Assignment Price was debited in the Excerpt on the Assignment Date. However, the unauthenticated Excerpt shows payments to Cheyne concerning the Loan and possibly distribution payments to Cheyne relating to *Noise* and *Deal* through June 30, 2008. The SEC filing proves only that the 2008 Assignment Agreement had been signed by May 2008. It neither conclusively proves the Closing Date nor that the statements made in the filing were true. As previously noted, the Excerpt is not proof without authentication. The issue of when the 2008 Assignment Agreement Closing occurred would benefit from discovery.

Other evidence casts doubt on whether the 2008 Assignment Agreement closed on the Assignment Date. On April 21, 2008, Harding sent Hoffman and his daughter, Kate Hoffman,[11] two edited exhibits, which may have been proposed exhibits to the 2008 Assignment Agreement. On the Assignment Date, Kate objected that Cheyne's counsel "added Arrowhead as a signatory." Dkt 15. She wrote, "I am willing to work with you on the Directions to Pay after we've sent the money," but she wanted confirmation that Cheyne's lawyer was "happy to remove Arrowhead as a signatory to the Technicolor release letter and we will release the transfer." *Id.* Cheyne cooperated with the Hoffmans. On April 22, 2008, Harding sent the requested Technicolor letter to Hoffman, which omitted the space for Arrowhead's signature, with the comments, "We will only releasing [sic] the Assignment Agreement when we have

[11] Paragraph 41 of the complaint alleges that on April 22, 2008, Kate was CEO of "Seven Arts Pictures," but does not say of which Seven Arts entity.

confirmed receipt of the funds into our account. Let's hope the cash comes through as soon as possible tomorrow." Dkt 16. Tomorrow meant April 23, 2008, after the Assignment Date, another proof that it was not the Closing Date. Harding's email annexed the letter to be sent, dated "as of " April 22, 2008, from Seven Arts to Technicolor East Coast, Inc., and countersigned by Cheyne (Technicolor Letter), referring to an October 2006 "Laboratory Pledge Holder Agreement ...regarding the Picture NOISE." *Id.* The Technicolor Letter confirmed to Technicolor East that the Borrower's obligations to Cheyne under the Loan Documents had been paid and that Cheyne consented to "the materials being removed from the Laboratory into Borrower's possession." Dkt 16. Therefore, after the Assignment Date, Cheyne approved Seven Arts' statement that Technicolor could turn over to the Borrower materials relating to *Noise* that appear to have been part of the Collateral securing the Arrowhead Note. *Id.*[12]

D. Post 2008 Assignment Agreement Events

1. The Collection Account

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[12] It is not absolutely clear on this record that the materials held by Technicolor were Collateral securing the Arrowhead Note. The Laboratory Pledge Holder Agreements are referred to in §§ 4.2.7 and 5.10, and Schedule A of a May 16, 2006 Financing and Security Agreement between SAP and Arrowhead Target Fund Ltd. (Noise Loan Agreement). Dkt 10. Delivery of the Laboratory Pledge Agreements was a precondition to funding the loan made pursuant to the *Noise* Loan Agreement. *Id.* The *Noise* negatives, preprinting material and sound track materials were to be subject to laboratory pledge agreements. *Id*, §5.10. Schedule A of the *Noise* Loan Agreement provided that the Collateral included "all film, tape and sound elements of *Noise*. Pursuant to the Master Agreement, §§ 1.3 and 2.7, Cheyne and Arrowhead received an assignment of the *Noise* Loan Agreement and the *Noise* Loan Documents. Dkt 38. The Collateral under the Master Agreement included the collateral under the *Noise* Loan Documents. *Id.* The record is murky as to what are included in the *Noise* Loan Documents, i.e. whether it included the Laboratory Pledge Holder Agreements mentioned in the *Noise* Loan Agreement. However, the copyright mortgage for *Noise* incorporated the terms of the *Noise* Loan Agreement. Dkt 11. It was assigned by two of the Borrowers (SAP and Rectifier) to Arrowhead Target in May 2006 as collateral for the *Noise* Loan Agreement and then further assigned to Arrowhead and Cheyne, in October 2006, as part of the Collateral for the Loan under the Master Agreement. Dkt 11. This issue also would benefit from discovery.

The record suggests that Cheyne received money in the Collection Account after the Assignment Date and gave it to Seven Arts. As noted earlier, §3.1 of the 2008 Assignment Agreement provided that, after the Closing, Cheyne would turn over any Collateral it received in the Collection Account to SAFE. The Excerpt contains an entry for a credit for $768 received from Cheyne on June 19, 2008. This appears to have been a distribution from a Seven Arts film that was sent by a distributor to the Collection Account, which, in June 2008, was held by Cheyne at the Royal Bank of Scotland (RBS), not Chase. On June 12, 2008, Harding of Cheyne wrote to Elaine New, the Finance Director of Seven Arts, that Cheyne had received $768 from Weg India Pictures Pvt. Ltd. Compare Dkt 50 & 41. New responded that Weg was one of Seven Arts' distributors and asked Cheyne to send the money. *Id.* Harding asked for bank details for the transfer, adding "We will be closing this account so any future payments will be bounced back, have you managed to notify all distributors?" *Id.* New forwarded Harding's request for bank routing information to someone, who emailed Harding the name of an account at Coutts Bank in London held in Seven Arts' name. *Id.* On June 16, 2008, Harding sent a message to Emma Pearce, instructing her to transfer the money from "RBS (the old 7 Arts account)" to Coutts, "transfer the remaining balances to CSFF," (most likely meaning Cheyne Specialty Finance Fund), "leave the account empty for a short while and then close it." *Id.* The Excerpt shows a credit of $768 from Cheyne on June 19, 2008. Dkt 41.

On July 4, 2008, Cheyne closed the RBS Account and Harding so advised Seven Arts. Dkt 51 & 52. Harding sent an email with the subject line "7 Arts bank account letter" on July 4, 2008, addressed to several individuals, including Andrea Wheaton. Dkt 51. Harding wrote:

> As you may remember we were able to exit the film financing loan earlier in the spring and recoup all of the principal and most of the interest owed.

> As a gesture of good will we agreed to leave the account open for a brief period to allow any payments that are being processed to arrive in our account. This was while 7 Arts notified all the distributors of the new payment instructions. It has been a few weeks now, and we are comfortable we have fulfilled our agreement and forwarded the one and only payment that arrived.
>
> It is therefore our recommendation that the account is closed to reduce/remove any further administration and to stop any possibility of fraudulent activity.

Dkt 51. Wheaton replied the same day, "Please find the attached executed documents." The name of one attached document was: "08-07-03 CSF GP - 7 Arts Closing RBS acct signed.pdf." *Id.*

An inference can be made that Cheyne used the RBS Account as the Collection Account instead of the Chase account mentioned in the Master Agreement. Harding called the RBS Account "the old 7 Arts account". Harding told New that a distributor sent money to it, New confirmed it was a Seven Arts distributor, Harding told Pearce to send the money to Seven Arts and close the RBS Account, and Harding asked New if she had notified her distributors that the account was being closed.

Further, despite Cheyne's position that it had no obligation for the monies in the Collection Account after the Assignment Date, Cheyne kept it open to receive money from Seven Arts' distributors and received money in it. Harding admitted that "as a gesture of good will" the RBS Account was held open "to allow any payments being processed to arrive" in it. Clearly, the good will was for Seven Arts, to whom Cheyne sent the distribution check as required by §3 of the 2008 Assignment Agreement, not Arrowhead to whom Cheyne was obligated to provide "all the benefits of a secured party," pursuant to §4.7 of the Master Agreement, and for whom Cheyne had received the distribution "in trust" for Arrowhead,

pursuant to §5.1 of the Master Agreement. Harding also reminded Seven Arts to make sure the distributors got new payment instructions, cutting Arrowhead out of its Collateral. Dkt 50.

2. The Share Certificate

Arrowhead further claims that after the Assignment Date, Cheyne wrongfully failed to give it the certificate for the Original Shares (Share Certificate) that it was obligated to turn over pursuant to the Pledge. In July 2008, Peter Hoffman asked Cheyne to give him the Share Certificate, which Hoffman believed should have been returned when Cheyne was paid off. Dkt 54 & 55. On July 18, 2008, New wrote to John Bottomley (also of Seven Arts) that Cheyne had the Share Certificate "in deep storage" and would not turn it over without Arrowhead's permission. Dkt 138. On July 22, 2008, Harding emailed Michelle Palm of Arrowhead USA[13] to ask whether Seven Arts' debt to Arrowhead had been refinanced or repaid. Dkt 56. In the email, Harding admitted that Cheyne had "an existing role as Security Trustee in the Seven Arts lending facility" and that ***if Arrowhead had been paid***, "then our position as Security Trustee should have also expired." Dkt 56. The opposite is fairly implied, i.e., that Cheyne's position as Arrowhead's Security Agent was extant on July 22, 2008, if Arrowhead remained unpaid. The same day, Palm responded, "Innes, this debt has NOT been repaid or refinanced as of this date. ACG will indicate as much to you in writing." Dkt 56 [emphasis in original]. Accordingly, Cheyne knew on July 22, 2008, that it was still Arrowhead's Security Agent under the Pledge.

In November 2008, Palm wrote Harding that Arrowhead was likely to retain Ashurst, a London law firm, to collect the Arrowhead Note and asked if Cheyne had a copy of the Share Certificate and the stock transfer form (STF), which Ashurst had not found. Dkt 57. Cheyne argues that this was not a demand for return of the Security Assets because Arrowhead asked for

[13] Palm's email address was MPalm@ArrowHeadusa.com.

copies. Harding replied that Cheyne had sent both the Share Certificate and STF to Ashurst. Dkt 57. On December 10, 2008, Palm responded that Ashurst did not have them and again asked if Cheyne did. Dkt 57.

On December 15, 2008, Harding wrote to Palm that Cheyne's "internal team who help store all our documents in a secure location" would look for and forward the Share Certificate and STF to James Levy, Arrowhead's Ashurst lawyer, as soon as they were located. Dkt 57. Harding concealed the true facts from Palm. Indeed, a little over an hour after Harding represented that Cheyne was looking for the Share Certificate and STF, Harding admitted in an email to Cheyne's counsel that he had the Share Certificate, but could not find the STF executed in blank by SAP. Dkt 90. Harding asked Cheyne's attorney, Boris Ziser of Strook,[14] to look for the STF. Harding further stated that "Arrowhead has taken us up on our suggestion to transfer the Security Agent role from Cheyne to Arrowhead...," that Arrowhead's "UK legal counsel (Ashursts) [sic] needed" the Share Certificate and STF, and that Cheyne was "still very keen to have this role transferred." Thus, despite Cheyne's position on this motion that it had no obligation to Arrowhead after April 22, 2008, Harding believed in December 2008 that Cheyne still was acting as Security Agent for Arrowhead. Ziser responded that he would look, that the he would reach out to Ashurst, and that he remembered seeing an STF. Dkt 90.

Although Harding knew he had the Share Certificate, on December 16, 2008, he disingenuously wrote to Palm asking, "we would like to work with you to transfer the role of Security Agent to you/your funds. To that end apart from the copies of the 2 documents you have requested is there anything else we can help with?" Dkt 58. He hid that he had the Share

[14] The email was to Boris Ziser of the law firm of Strook & Strook & Lavan, LLP. Compare Dkt 92 & 128.

Certificate. Arrowhead sent a default notice to some of the Borrowers a day later, on December 17. Dkt 162.

On December 23, 2008, Eliza Dunn of Ashurst wrote to Palm stating that she had been in touch with Harding and that, due to a conflict of interest, Ashurst could not continue to represent Arrowhead (Conflict Letter). Dkt 129. Dunn ***advised Palm that Harding had the Share Certificate*** but that neither he nor Ashurst had the STF. Dkt 129. Dunn wrote that this "complicated" the enforcement of the security and that one way around would be for Arrowhead to become the Security Agent. Dkt 129. However, Dunn said that Ashurst could not advise Arrowhead about that because it "had already advised Cheyne on various associated issues." She added, Ashurst's "duty to keep matters confidential constrains my ability to say more." Dkt 129. She disclosed that Ashurst had advised Cheyne to take certain steps to protect itself including the appropriate terms of a substitution of Arrowhead as Security Agent, but that Ashurst might advise Arrowhead to take a contrary position. Dkt 129. She concluded that the conflict had arisen due to the absence of the STF, "the fact that Cheyne is still Security Agent," and that in the past Ashurst had advised Cheyne with respect to that role. Dkt 129.

In sum, Cheyne's counsel admitted on December 23, 2008, less than six years before this action was filed, that Cheyne was still Arrowhead's Security Agent under the Pledge, contrary to its position on this motion that it had no duty to Arrowhead after April 22, 2008. As previously noted, after a default, pursuant to the Pledge, §3, Cheyne had a power of attorney to sign an STF for SAP. This was never done. Instead, Ashurst told Arrowhead that it should get new counsel.

Subsequently, Cheyne gave Arrowhead what could be interpreted as cooperative signals and admitted that it still considered itself Arrowhead's Security Agent. On December 31, 2008, Palm emailed Harding that "[w]e did send the [sic] Seven Arts the demand letter you and Mikko

reviewed...." Dkt 159. The same day, Harding responded that "...we look forward to working together on this matter." Dkt 160. On January 15, 2009, plaintiff, Arrowhead's liquidator Woods, wrote to Cheyne's lawyer at Ashurst, Levy. Ashurst forwarded Woods the Conflict Letter and reiterated that Ashurst could not give advice. Dkt 179. Woods asked whether Cheyne had secured a payment from Seven Arts without an STF:

> My understanding was that Cheyne secured a payment without such a transfer form and that we could proceed against 7-Arts on the same basis, using you. If that is not the case, then could you suggest an alternative adviser and assist me to transfer the matter.

Id. Levy replied,

> At a very high level your understanding is correct. But the deal Cheyne struck was effected between principals ie [sic] we were not involved in that. We did advise on background issues... I am most sorry I can't take this further.

Id. On March 23, 2009, Harding admitted, in an email to Cheyne's attorneys at Strook and Ashurst, that he had told Palm of Arrowhead that "... we would continue to assist her Funds." Dkt 184.

Arrowhead recently obtained more information which allegedly evidences further failures by Cheyne to protect the Security Assets. Arrowhead presents a letter, dated March 31, 2015, from Peter Ronayne of Share Registrars Limited in London and the transcript of his deposition. Dkt 132 & 139. Ronayne said that Share Registrar's had indirect contact with Cheyne on December 22, 2006, i.e., the date of the Master Agreement, when Pershing Nominees Limited (Pershing) "withdrew a certificate for 8,095,000 ordinary shares of 5p from their CREST[15]

[15] Ronayne testified that CREST is the central securities depository in the United Kingdom, which Share Registrars' database links into. Dkt 139, pp 13-14. CREST holdings are electronic. *Id*, 23.

account into the name of Seven Arts Pictures PLC" and, on the instructions of John Bottomley of Seven Arts, a certificate numbered 924 (Certificate 924) was sent to Cheyne Capital Limited in London (not one of the Cheyne entities sued here). *Id.* Ronayne said that on January 22, 2007, at Pershing's request, Share Registrars sent a corrected Certificate 924 because it should have been "withdrawn" in the name of SAP, who owned them, not Seven Arts. *Id.* It is not clear whether Certificate 924 represented the Original Shares referred to in the Pledge because it was five fewer shares than 8,100,000. However, as previously noted, under the Pledge, §§ 2 and 2.2, SAP pledged any Shares of Seven Arts that it owned or acquired until the Secured Sums were paid, as well as all income they generated, which were collectively defined as the Security Assets. Certificate 924 was part of the Security Assets.

Ronayne says that Share Registrars was never told by Cheyne or anyone else that there were restrictions on the transfer of Certificate 924. *Id.* Also, he testified that sometimes a pledgee or chargee will have shares reissued in its name to protect its interest, or the interest of its beneficiary. Dkt 139, p 32. However, Shares Registrars does not get involved in that because it is "an arrangement between the parties." *Id.* Ronayne testified that there is no procedure to register shares as subject to a charge or pledge and that "no notice of any trust, whether express or implied, can be entered on the register of members of a company incorporated in England and Wales." *Id*, , p 30.

Ronayne's letter said that the Share Certificate 924 ceased to be valid and, between January and March 2009, it was consolidated and split several times and sent out on the instructions of Seven Arts and its finance director, New. Ronayne testified that this first occurred in accordance with the a vote of Seven Arts' directors that took place on December 31, 2008, i.e., eight days after the Conflict Letter, when Ashurst told Arrowhead that Harding had

the "share certificate"[16] but not the STF. *Id*, 33-37. The Seven Arts directors voted to consolidate the company's ordinary shares in a five to one exchange, i.e., five shares would become one share. Dkt 139, pp 22-23 & 38-39.

On January 5, 2009, Share Registrar's carried out the board's instructions and all of the existing certificates were canceled, including Certificate 924. *Id*, 39. On January 9, 2009, Share Registrars received instructions to split the Shares into seven certificates for 100,000 Shares numbered 411 to 417, with the balance in one certificate numbered 410 for 1,619,000 Shares to be held for SAP. *Id*, pp 44-48. The seven certificates for 700,000 Shares remained in SAP's name, but were pledged to "Apollo" and sent to "Olswang". *Id.* Ronayne said he initially was asked to hold the remaining certificate 410 of Seven Arts' Shares for SAP instead of sending them out to the address on the certificate, and on March 4, 2009, New asked Share Registrars to split it, keeping the owner as SAP, and send them out to two different destinations, neither of which was the registered address. *Id*, pp 24 & 42. Share Registrars split certificate 410 into two certificates of 350,000 Shares and one certificate for 919,000 Shares. *Id*, 48-49. On New's instructions, Share Registrars sent the 350,000 certificate to an attorney named Allan Migdall in Florida, and sent SAP the other two. *Id*, 49-50.

Cheyne did nothing to prevent the alienation of SAP's Shares in Seven Arts from the time it became Security Agent, such as putting the Shares in the name of Cheyne. After the 2008 Assignment Agreement closed, Cheyne did not put the Original Share Certificate or any of the Shares in the name of Arrowhead, at a time when it was obligated under the Master Agreement to provide Arrowhead with "all the benefits of a secured party with respect to the Collateral." Dkt 38, Master Agreement, §4.7. On January 5, 2009, less than six years before this action was

[16] Again, it is unclear whether Cheyne had the Original Share Certificate or Certificate 924.

filed, Certificate 924, part of the Security Assets under the Pledge, was cancelled and, subsequently, SAP's Shares of Seven Arts were pledged to someone else, although they remained registered in SAP's name. By that time, Cheyne had known, since July 22, 2008, that Arrowhead had not been paid. Between January and March 2009, certificates representing SAP's Shares in Seven Arts, which were subject to the Pledge, were sent to SAP, Olswang and Migdall.

In the Underlying Action, in opposition to the motion for summary judgment, the Borrowers argued that Cheyne still had rights to the Collateral securing the amounts they owed under Cheyne Note because Cheyne settled for less than it was owed.[17] On that basis, the Borrowers argued that Arrowhead was not entitled to enforce the Arrowhead Note or foreclose on the Collateral due to Cheyne's senior rights. This court rejected that argument, holding that once money was "no longer owed under the Cheyne Note, the benefits should inure to ACG." While the Prior Decision stated that SAFE, as Cheyne's assignee, had to afford Arrowhead "all the benefits of a secured party with respect to the Collateral" pursuant to the Master Agreement, §4.7, it did not say that Cheyne's obligations to Arrowhead with respect to the Collateral were discharged. In the 2008 Assignment Agreement, SAFE received an assignment of Cheyne's rights, but did not assume Cheyne's obligations to Arrowhead under the Pledge and Master Agreement.

Anything said by the court in the Prior Decision was *dicta* insofar as it related to Cheyne's obligations to Arrowhead. The court did not have before it a claim against Cheyne and made no ruling concerning Cheyne's obligations or liability to Arrowhead. Cheyne was not a

[17] The Prior Decision noted that the Borrowers sought to forestall foreclosure of the Collateral on the ground that Cheyne's rights to the Collateral under the Master Agreement were still enforceable by Cheyne, whose rights were senior to Arrowhead's.

party in the Underlying Action. Cheyne quotes statements made by Arrowhead out of context to prove that Arrowhead admitted in the Underlying Action that, after the 2008 Assignment Agreement, Cheyne had no obligations to Arrowhead. While Arrowhead said that Cheyne had no more obligations or was no longer bound under the Master Agreement, what it was trying to say, and did say in many other places, was that the Cheyne Note had been paid off, that Cheyne had no more rights that were senior to Arrowhead's, and that ***the Borrowers*** could not assert Cheyne's purported remaining rights to bar Arrowhead from collecting on its Note and enforcing the Collateral. These were the arguments upon which the court based the Prior Decision.[18]

II. Discussion

A. Standard of Review

On a motion to dismiss, the court must accept as true the facts alleged in the complaint, as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargo Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits and other

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[18] *See* Arrowhead's memoranda of law in the Underlying Action that Cheyne submitted in this action. "Until it was paid the Senior Debt, it had certain rights as a senior, secured lender. Cheyne, however, has no further rights...." Dkt 64, p 17. "Whatever side deals that Cheyne and Borrower Defendants purportedly entered into in the Assignment Agreement do not bind Arrowhead." Dkt 64, pp 17-18 "The reality is that if anything was "assigned to Borrower Defendants, it was the purported right to act as the senior lender, which of course, it cannot do as to Arrowhead, the subordinated lender." Dkt 65, p 10.

evidence submitted by the plaintiff, which shall be given their most favorable intendment. *Amaro*, 60 AD3d at 491; *Cron*, *supra*. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Failure to State a Claim for Breach of Fiduciary Duty & Failure to Particularize

The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) a showing that the breach was a substantial factor in causing an identifiable loss. *People v Grasso*, 50 AD3d 535 (1st Dept 2008), *affirmed* 11 NY3d 64 (2008); *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 (2005), citing *Restatement [Second] of Torts* §874, Comment (a).

The first element, the existence of a fiduciary duty, is admitted by Cheyne. Its English law expert, Millet, acknowledged that when the Cheyne Note was paid, it had a fiduciary duty to give the Security Assets it held under the Pledge to Arrowhead. Although, in its opening memorandum of law (MOL), Cheyne stated that, as a matter of law, nothing in the Master Agreement or Pledge Agreement "transformed Cheyne …into the trustee or fiduciary of Arrowhead" [Dkt 25, p 8], Millet conceded that the Pledge made Cheyne "both an agent and a trustee of the rights granted to it by SAP [under the Pledge] in favour of ACG." Dkt 95, 4/13/15

Millet Affirmation, §12(iii), p 4. Millet further opined that the "express terms of the trust" were contained in the Master Agreement and the Pledge. *Id.* He argued that Cheyne was a "bare trustee" with a duty to turn over the trust property when the Cheyne Note was paid, or a reasonable time thereafter. *Id*, ¶¶ 44, 48 and 51, pp 13 & 15; *see also*, 5/28/15 Millet 2d Affirmation, Dkt 251 (2d Millet Aff), pp 4-5 ("as trustee, upon payment of the Cheyne Note, it [Cheyne] had a duty as bare trustee to turn over the trust property ..."); 2d Millet Aff, Ex 16, *Lewin on Trusts*, ¶1-040, p 2 (trustee of a bare trust has duty to effect transfer of trust assets to beneficiary). Millet also stated that, upon being paid or a reasonable time thereafter, Cheyne had a fiduciary obligation to turn over monies in the Collection Account to Arrowhead. Dkt 95, ¶¶ 44 & 51, pp 13 & 15. Further, as under New York law, Millet confirmed that in English law, an agent has a fiduciary duty to its principal. 2d Millet Aff, Ex 11, *Bowstead & Reynolds on Agency*, 1-028, p 28. And, as under New York law, in English law, a trustee has a duty to give information to a beneficiary. Dkt 235, *Spread Trustee Company Limited v Hutcheson*, ¶18, Privy Council Decisions, Court of Appeal Guernsey 2011, Rubinstein Affirmation, Ex 22. Finally, Ashurst and Harding admitted in December 2008 and March 2009, that Cheyne still was Arrowhead's Security Agent. Dkt 129 & 184. Ergo, Cheyne's fiduciary duty is not just alleged, but admitted.

The second element, breach of duty, is properly pled. At the very least, Cheyne breached its fiduciary duty by not turning over the share certificate Harding had found and by concealing the fact that he had it. *Lewin on* Trusts, *supra*; *Spread Trustee Company Limited v Hutcheson*; *supra*. Millet acknowledged that §4.7 of the Master Agreement was an instruction to Cheyne to transfer the trust property upon being paid the Cheyne Note without the necessity of a demand. Dkt 251, 2d Millet Aff, p 6 ("The transfer obligation therefore arose at that stage and not only

when ACG demanded it."). Millet admitted that Cheyne committed a breach of fiduciary duty by failing to give Arrowhead the Security Assets within a reasonable time after it was paid pursuant to the 2008 Assignment Agreement:

> The breach of trust here occurred when Cheyne failed to assign the security interests under the Charge over Shares (or the Charge over Shares itself) to ACG on or about 22 April 2008. The obligation to assign arose at that moment and, subject to arguments that Cheyne should be afforded a reasonable time thereafter to tender a formal deed of assignment to ACG ....

Dkt 95, ¶51, p 16. Thus, Arrowhead alleges and Cheyne admits a breach because we know that Harding never gave the share certificate to Arrowhead and hid the fact that he had it.

The third element, that Cheyne's breach was a substantial factor in causing an identifiable loss, also is sufficiently set forth. Cheyne argues that it was Arrowhead's own fault that it did not demand the share certificate. However, as previously noted, Millet opined that a demand was unnecessary. Dkt 251, 2d Millet Aff, p 6. Arrowhead was trying to find the Share Certificate in November and asked Cheyne, its Security Agent and trustee, to look for it. Ronayne's testimony suggests that Cheyne could have put the share certificate Harding had in Cheyne's name, or, after it was paid, in the name of Arrowhead. This court finds that Cheyne had a power of attorney to execute the STF for SAP, pursuant to §3 of the Pledge.

A straw argument set up by Millet is that there was no loss causation because ACG could have stepped in, as principal, and sued SAP to enforce the Pledge and sell the Shares. Millet argued that, as a bare trustee, Cheyne had no ongoing duty to protect ACG's rights, to enforce the Pledge against SAP, or to obtain the value of the Shares "by realisation," i.e., sale. Dkt 95, ¶¶ 44, 48 and 51, pp 13 & 15; *see also*, 5/28/15 Millet 2d Affirmation, Dkt 251 (2d Millet Aff), pp 4-5 ("as trustee, upon payment of the Cheyne Note, it [Cheyne] had a duty as bare trustee to

turn over the trust property, ... but no ongoing obligation to protect ACG's rights by enforcing the Charge over Shares against SAP.").

First off, Arrowhead's contention is not that Cheyne should have sued SAP or sold the Shares. The parties are in agreement that after the Cheyne Note was paid, Cheyne was bound by the Pledge and Master Agreement to transfer the Security Assets and the money in the Collection Account to Arrowhead. Arrowhead's claim is that Cheyne failed to do that.

Next Millet postulates that there was no loss causation because ACG failed to sue SAP or force SAP to sign an STF. However, Arrowhead was entitled to have Cheyne perform its duty as agent and trustee to turn over the share certificate and fill out an STF. Arrowhead should not have had to commence a lawsuit against SAP to achieve what Cheyne was required to do.

Finally, Millet maintains that the share certificate was not necessary to put ownership of the share certificate Harding found in ACG's name, ***if*** the articles of association of Seven Arts did not require it, or if the board of Seven Arts exercised its discretion to transfer them without an STF. Dkt 251, Miller Aff, ¶17, p 7. The record has no conclusive evidence authorizing a transfer of Seven Arts' shares without a certificate, and Millet's argument raising those possibilities was mentioned for the first time in a supplemental reply.

In any event, Cheyne gave Arrowhead neither the share certificate nor an STF, although Cheyne had the former and, pursuant to §3 of the Pledge, had a power of attorney to execute an STF for SAP after a default on the Loan. Dkt 39. Perhaps Cheyne did not do so because it had contracted in the 2008 Assignment Agreement to give the Collateral to SAFE. Dkt 40, §3.1. Millet says that, pursuant to §§3 and 11 of the Pledge, ACG could have required SAP to execute an STF. Dkt 251, 2d Millet Aff, ¶19, p 7. However, both sections says that the Security Agent,

Cheyne, had those powers, not the Beneficiary, Arrowhead, and it is no answer that Arrowhead should have relied on someone other than its agent and trustee.[19]

It cannot be said as a matter of law that Arrowhead was not harmed as a result of Cheyne's breach. The Shares comprising the Collateral were freely transferrable by SAP; Seven Arts voted to cancel Certificate 924 on December 31, 2008; it was cancelled in January 2009; and other Shares comprising the Security Assets were transferred in January and March 2009. Further, the record reflects that Cheyne either lost or never obtained the STF, which was needed to fulfill its duties as Security Agent and trustee. It then concealed that fact until December 23, 2008, and then failed to fill out an STF using its power of attorney under §3 of the Pledge. These facts state a claim that Cheyne's breach of its duty as trustee under the Pledge was a substantial factor in causing a loss of the share certificate Harding had found, part of Arrowhead's Collateral. It can be inferred that if Cheyne had fulfilled its duty by transferring the share certificate and filling out an STF, Arrowhead could have obtained some of the Collateral without the burden of commencing a lawsuit against SAP.

Lastly, Millet argues that, under English Law, the Exculpatory Clause contained in §10 of the Pledge immunizes Cheyne from any liability to Arrowhead for failing to transfer the Security Assets. The court is persuaded by the authorities cited by Arrowhead's English law expert, John Stanley Yerbury Rubinstein, that the Exculpatory Clause could not immunize Cheyne from

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[19] The United Kingdom 2006 Companies Act, Part 21, §768, provides that a share certificate under company seal is prima facie proof of title to shares. Section 775, which governs transfer of shares, requires a certification that a share certificate showing title in the transferor has been produced to the company. In addition, a certification for transfer must bear the words "certificate lodged" or words to that effect signed by the company or "a body corporate so authorised." *Id*, §775. "Lodged" is apparently a legal Briticism for producing the certificate to the company. Arrowhead could not certify for Seven Arts that a share certificate had been produced.

failing to fulfill its fiduciary duty to transfer the share certificate to Arrowhead upon being paid because: 1) it would defeat the purpose of the Pledge; and 2) a fiduciary cannot be exculpated from acting dishonestly, recklessly or against the interests of its beneficiary and principal. Under English law, a trustee cannot be absolved for omitting to do an act which amounts to a breach of his duty, whether his failure to do it is deliberate, reckless, careless, or dishonest. *Armitage v Nurse* (1997), Rubinstein Affirmation, Ex 23, Dkt 236. Dishonesty by a trustee is defined in English law as pursuing a course of action knowing that it is contrary to the interests of the beneficiary, or recklessly indifferent as to whether it is contrary the beneficiary's interest. *Id.* Nothing may relieve a trustee of liability for fraud or willful misconduct. *Spread Trustee Company Limited v Hutcheson*, ¶21, Privy Council Decisions, Court of Appeal Guernsey 2011, Rubinstein Affirmation, Ex 22, Dkt 235. As previously noted, a trustee has a duty to give information to the beneficiary. *Id*, ¶18. None of these English legal propositions is opposed by Millet. Dkt 251.

Here, it cannot be said that the Exculpatory Clause requires dismissal of Arrowhead's claim for breach of fiduciary duty. Cheyne admits that even as a bare trustee, it had a duty to transfer the share certificate found by Harding. It cannot be said that Cheyne's decision not to give the certificate to Arrowhead in December 2008 was done in Arrowhead's interest. Then too, there is evidence from which it can be inferred that Cheyne was dishonest with Arrowhead when Harding wrote on December 15, 2008 that Cheyne was looking for the share certificate. Finally, failure to disclose that Cheyne had the certificate was a denial of information, i.e., a breach of duty. This conduct, at a minimum, raises issues of fact as to whether Cheyne committed acts that cannot be absolved because they amounted to refusal to perform its duty and dishonesty.

Arrowhead has satisfied the heightened pleading requirements for breach of fiduciary duty. CPLR 3016 requires that "the circumstances constituting the wrong shall be stated in detail." The purpose of the rule "is to inform a defendant with respect to the incidents complained of." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008). The provision requires only that the misconduct be stated in sufficient detail to clearly inform the defendant of the alleged misconduct, and should not be interpreted to prevent the assertion of a claim where it would be impossible to state in detail the circumstances, such as where the information is peculiarly in the defendant's knowledge. *Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320-321 (1st Dept 1997), citing *Jered Contr. Corp. v NYC Tr. Auth.*, 22 NY2d 187, 194 (1968). Here, the facts in the complaint, coupled with the record, have apprised Cheyne of its alleged wrongdoing.

C. Statute of Limitations

A party moving to dismiss on the ground of the statute of limitations has the initial burden of presenting *prima facie* proof that the time to sue has expired. *Gravel v Cicola*, 297 AD2d 620 (2d Dept 2002); *Stanley v Morgan Guaranty Trust Co.*, 173 AD2d 390 (1st Dept 1991). Under the New York borrowing statute, CPLR 202, an action based on a cause of action accruing without the state must be timely under New York law and the place where it accrued. The place where a non-resident plaintiff resides and sustains injury is where the cause of action accrues for purposes of the borrowing statute, whether the claim is for tort or breach of contract. *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 (1999).

Choice of law analysis does not come into play when applying CPLR 202. *Id.* Choice of law applies with respect to substantive rights, but not to the statute of limitations. *Portfolio Recovery Assocs., LLC v King*, 14 NY3d 410, 415-417 (2010). Moreover, where the plaintiff is

an assignee, it is not entitled to a better statute of limitations outcome than its assignor would have had based on the assignor's residence. *Id.*

Plaintiff, a Bermuda corporation with its principal place of business there, commenced this action on June 27, 2014. It obtained an assignment of the Arrowhead Note on December 30, 2008, from ACG, a Minnesota corporation. Giving the plaintiff the benefit of every favorable inference, the 2008 Assignment Agreement closed on June 30, 2008; Cheyne failed to give Arrowhead a share certificate and to use its power of attorney to fill out an STF on or after December 15, 2008; Cheyne transferred $764 in the Collection Account and gave it to Seven Arts on June 19, 2008; and Cheyne concealed that Harding had a share certificate and pretended it was looking for it in December, 2008. Consequently, the court must accept that the alleged acts occurred before ACG's assignment, and the court must borrow Minnesota's statute of limitation if it is shorter than New York's. *Portfolio Recovery Assocs., LLC*, *supra.* Defendants have not argued that Minnesota has shorter statutes of limitation for plaintiff's claims than New York, and the court's independent research has found that it does not.

In New York, the statute of limitations for breach of contract is six years and runs from the time of the breach. CPLR 213(2); *Gonzalez v Anchor Bank Corp.*, 245 AD2d 132 (1st Dept 1997).[20] A cause of action for breach of fiduciary duty based on allegations of actual fraud, similarly, is subject to a six-year statute of limitations. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009); *Kaufman v Cohen*, 307 AD2d 113, 119 (1st Dept 2003; CPLR 213(8).[21] It runs from the time of the breach, or two years from the time a litigant knew or with

[20] In Minnesota, the six-year statute of limitations for breach of contract also runs from the date of the breach. MN Stat. §541.05; *Park Nicollet Clinic v Hamann*, 808 NW2d 828, 833 (MN Sup Ct 2011)

[21] In Minnesota the statute of limitations for fraud and breach of fiduciary duty is six years. MN Stat. §541.05. The statute of limitations for fraud begins to run when a plaintiff knows or

reasonable diligence could have discovered it, if that is later than six years from the breach. *Kaufman*; *supra*; CPLR 213(8) & 203(g). As with other torts in which damage is an essential element, a claim for breach of fiduciary duty is not enforceable and does not accrue until damages are sustained. *IDT Corp*, *supra*; *Kaufman*; *supra*.[22] In New York, a cause of action for breach of fiduciary duty not involving fraud is three years. *Kaufman*, *supra*.

The New York two-year discovery rule, CPLR 203(g), does not apply to Arrowhead's breach of fiduciary duty claim because it would afford plaintiff less time than the six years from the alleged breaches. Hoffman sent Arrowhead a copy of the 2008 Assignment Agreement on May 27, 2010 and Arrowhead was advised by Ashurst that Cheyne had a stock certificate on December 23, 2008.

1. Breach of Contract Statute of Limitations

Cheyne's motion to dismiss the breach of contract claim is denied because it is a question of fact as to whether the alleged breach of contract occurred on or before June 27, 2008. Cheyne argues that breach occurred on April 22, 2008 or a reasonable time thereafter, when Cheyne failed to deliver the share certificate and other Collateral. However, it is a question of fact

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reasonably should have known that a fraud has been committed, without a two year limit from discovery. *Toombs v Daniels*, 361 NW2d 801, 809 (Sup Ct MN 1985). Under Minnesota law, the discovery rule affords more time than New York. With respect to a fiduciary, delay in discovery of fraud is excused entirely. *Id.* For breach of fiduciary duty, the statute of limitations accrues when a fiduciary repudiates the trust or damages the beneficiary by failing to make a distribution. *Id*, at 810; *see also*, *Koob v Koob*, 2014 Minn. App. Unpub. LEXIS 1202 (Minn. Ct. App. Nov 24, 2014). Here, Cheyne did not repudiate until, at the earliest, December 23, 2008, when Ashurst advised that Cheyne had a share certificate and disclosed a conflict of interest regarding the STF.

[22] *Access Point Med., LLC v Mandell*, 106 AD3d 40, 44-45 (1st Dept 2013), cited by defendants, stands for the proposition that repudiation of trust commences the running of the statute, but the statute also begins to run when the fiduciary relationship ends. Here, the earliest repudiation occurred with the Conflict Letter in December 2008, and Cheyne admitted that it was still Arrowhead's Security Agent as late as March 2009. Dkt 129 & 184.

whether the "as of" Assignment Date was earlier than June 30, 2008, less than six years before the action was filed on June 27, 2014. Giving Arrowhead the benefit of every favorable inference, Cheyne breached the Master Agreement on or after June 27, 2008, when it 1) failed to give Arrowhead all the benefits of a secured party; 2) agreed in the 2008 Assignment Agreement to give the monies in the Collection Account to SAFE, and 3) gave money in the Collection Account to, and acted in concert with, Seven Arts before the Arrowhead Note was paid, in violation of §§4.7 and 5.1 of the Master Agreement. Whether the 2008 Assignment Agreement Closing took place before June 27, 2008 raises a question of fact that cannot be resolved on a motion to dismiss.

2. Breach of Fiduciary Duty Statute of Limitations

Giving the plaintiff the benefit of every favorable inference, damaging, fraudulent acts of Cheyne in breach of its fiduciary duty did occur after June 27, 2008. In December 2008, Harding said that Cheyne was looking for the share certificate and concealed that he already had it. Also, in early January 2009, less than six years after this action was filed, Certificate 924 ceased to exist, which is when Arrowhead first suffered any damage as a result of the breach.

It cannot be ruled as a matter of law that Cheyne's breach of fiduciary duty was not fraudulent and, therefore, a six year statute of limitations may apply. The elements of a fraud claim are a misrepresentation or a material omission of fact, which was false, known to be false by defendant, made for the purpose of inducing plaintiff to rely upon it, justifiable reliance on the misrepresentation or material omission, and injury. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011); *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). Where a fiduciary relationship exists, the failure to disclose facts which one is required to disclose constitutes actual fraud, if the fiduciary has intent to deceive. *Kaufman v Cohen*, 307

AD2d 113, 120 (1st Dept 2003); *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 459 (1st Dept 2009). Generally, intent to commit fraud is a question of fact that cannot be resolved on a motion to dismiss. *ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 131 AD3d 427, 428 (1st Dept 2015). Here, given that Cheyne got paid, concealed that it had the share certificate and agreed to give the money in the Collection Account and other Collateral to SAFE, intent is at least a question of fact. Further, scienter can be inferred from Palm's statement in July 2008 that Cheyne refused to turn over the share certificate without Arrowhead's consent. Dkt 138.

As previously noted, the record reflects that the date of the 2008 Assignment Agreement could have been as late as June 30, 2008. Further, Millet's conclusion, that Arrowhead's duty ended on April 22, 2008, is undermined by Cheyne's admissions that it was still the Security Agent in December 2008 and March 2009. Dkt 129 & 184.

D. Aiding & Abetting & Conspiracy to Breach Fiduciary Duty – Failure to State a Claim

1. Aiding & Abetting

Where a breach of fiduciary duty is established, third parties who have knowingly participated in the breach may be held accountable. *Executease Corp. v Jacobs*, 188 AD2d 580 (2d Dept 1992). Aiding and abetting means providing substantial assistance to the primary violator, which occurs when the defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. *Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003).

The claim for aiding and abetting breach of fiduciary duty against Cheyne is dismissed. The complaint alleges that Cheyne aided and abetted breaches of fiduciary duty by the Hoffman affiliated companies. Generally, there is no fiduciary obligation arising from a contractual arm's length relationship between a debtor and a note-holding creditor. *Oddo Asset Mgt. v Barclays*

Bank PLC, 19 NY3d 584, 593 (2012). Consequently, the Hoffman affiliates had no fiduciary duty to Arrowhead for Cheyne to aid and abet. *Genger v Genger*, 121 AD3d 270 (1st Dept 2014).

Nonetheless, Arrowhead relies, in part, on §5.1 of the Master Agreement, pursuant to which anyone acting in concert with the Borrowers or their affiliates who received assets or proceeds from the Pictures or Collateral, would hold them "in trust" for Arrowhead, i.e., as constructive trustee. However, this clause did not turn the Hoffman affiliates into Arrowhead's fiduciaries. A constructive trust is imposed to prevent unjust enrichment. *Id.* But an unjust enrichment claim would duplicate Arrowhead's breach of contract claim against Cheyne based on §5.1 of the Master Agreement. Unjust enrichment does not lie when there is a written contract between the parties governing the same subject matter. *Morales v Grand Cru Assoc.*, 305 AD2d 647 (2d Dept 2003), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). The balance of the allegations of aiding and abetting are entirely conclusory. Accordingly, Arrowhead's claim that Cheyne aided and abetted the Hoffman affiliates' breach of fiduciary duty is dismissed for failure to state a claim.

2. Conspiracy

New York does not recognize a separate claim for civil conspiracy. *American Baptist Church v Galloway*, 271 AD2d 92, 101 (1st Dept 2000). Conspiracy lies to connect separate defendants who might escape liability with defendants who commit an actionable tort, but should be dismissed as redundant when the conspiracy is among defendants who committed or aided and abetted the tortfeasors. *Id.* Here, with respect to Cheyne, it is a direct tortfeasor so conspiracy is redundant.

E. Motion to Dismiss Cheyne GP

The motion to dismiss Cheyne GP as a defendant is granted. Arrowhead's opposition rests upon a Cayman Islands statute that makes a general partner of an exempted limited partnership liable for its debts or obligations "in the event that the assets of the exempted limited partnership are inadequate..." Dkt 59. Cheyne moves to dismiss on the ground that the Cheyne GP is not alleged in the complaint to have committed any act that violated plaintiff's rights. There is no factual allegation that Cheyne GP breached a contractual or fiduciary duty to plaintiff, or committed any act in violation of plaintiff's rights. Further, there is no showing that Cheyne's assets are inadequate to pay any debt or obligation. Therefore, the compliant is dismissed against Cheyne GP.

F. Accounting

The accounting claim is dismissed. To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law. *Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568 (1st Dept 2011). Here, Arrowhead can be fully compensated with damages for Cheyne's alleged breaches of fiduciary duty and contract. Accordingly, it is

ORDERED that the motion by CHEYNE SPECIALTY FINANCE FUND L.P. and CHEYNE SPECIALTY FINANCE FUND GENERAL PARTNER a/k/a CHEYNE SPECIALTY FINANCE GENERAL PARTNER, INC., is granted to the extent of dismissing the first through fourth, sixth and seventh causes of action, and all claims against CHEYNE SPECIALTY FINANCE FUND GENERAL PARTNER a/k/a CHEYNE SPECIALTY FINANCE GENERAL PARTNER, INC., and the motion is otherwise denied.

Dated: December 4, 2015

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.