

Capital One Equip. Fin. Corp. v OSG Corp.
2017 NY Slip Op 33251(U)
April 19, 2017
Supreme Court, Nassau County
Docket Number: 600749-17
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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CAPITAL ONE EQUIPMENT FINANCE CORP.,

Plaintiff,

**TRIAL/IAS PART: 12
NASSAU COUNTY**

-against-

**Index No: 600749-17
Motion Seq. No. 1
Submission Date: 4/10/17**

THE OSG CORP., TRIGLOBAL FINANCIAL SERVICES, INC., SYMON GARBER, VALENTINA ZUBOK, GALINA GARBER-SHEININ, ROMAN SAPINO, RUBEN GIAZOMOZZI, EDWARD ZUBOK, THE EDWARD ZUBOK QUALIFIED PERSONAL RESIDENCE TRUST, EDWARD SHEININ, GEMORA #2, LLC, THE ROMAN SAPINO 2015 QUALIFIED PERSONAL RESIDENCE TRUST, CHICAGO ELITE CAB CORP., MAYA ZUBOK, IRENE GANS, BORIS VOLFMAN, EZVZ FAMILY HOLDINGS #1 LLC, EZVA FAMILY HOLDINGS #2 LLC, EZVZ FAMILY HOLDINGS #3 LLC, EZVZ FAMILY HOLDINGS #4 LLC, GEMORA IN CHICAGO LLC, RACHEL SHEININ, MONICA SHEININ, DANIEL BRATSHPIS, LINA GARBER and 3210 101 WARREN STREET LLC,

Defendants.

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Papers Read on this Motion:

- Ex Parte Order to Show Cause with Temporary Restraints.....X**
- Affirmation of C. Farley in Support.....X**
- Initial Affidavit of J. O’Gorman in Support and Exhibits.....X**
- Second Affidavit of J. O’Gorman in Support and Exhibits.....X**
- Affidavit of H. Miller in Support and Exhibit.....X**
- Affirmation of D. Burke in Support and Exhibits.....X**

Papers Read (cont.)

Memorandum of Law in Support and Exhibits.....X
Summons.....X
Complaint with Exhibits.....X
Proposed Order for Attachment and Other Relief.....X
Proposed Order Granting Application to File Documents Under Seal.....X¹
T. Fleming Affirmation in Opposition and Exhibits.....X
V. Zubok Affidavit in Opposition.....X
D. Itin Affidavit in Opposition and Exhibits.....X
S. Garber Affidavit in Opposition.....X
G. Garber-Sheinin Affidavit in Opposition.....X
R. Sapino Affidavit in Opposition and Exhibits.....X²
R. Giacomozzi Affidavit in Opposition and Exhibits.....X
Cole Schotz P.C. Memorandum of Law in Opposition.....X
Olsham Frome Wolosky LLP Memorandum of Law in Opposition.....X
D. Burke Supplemental Affirmation in Further Support and Exhibit.....X
Reply Memorandum of Law in Further Support and Exhibits.....X
Notice of Appearance and Joinder dated March 17, 2017.....X
Notice of Appearance and Joinder dated April 4, 2017.....X

This matter is before the court on the motion by Plaintiff Capital One Equipment Finance

¹ On February 3, 2017, on the record, the Court granted Plaintiff’s application to seal the Second Affidavit of John P. O’Gorman in Support, all exhibits attached to the Second O’Gorman Affidavit, and Full Point II of Plaintiff’s Brief in Support. As outlined by the Court on the record on February 3, 2017, the Court granted Plaintiff’s sealing application based on the Court’s conclusion that the documents contained personal financial statements of various Defendants, and that the public’s interest in reviewing or viewing those documents was outweighed by Defendants’ privacy concerns, and in further consideration of the fact that it was not opposed by any of the other parties.

² By letter to the Court dated February 27, 2017, counsel for the parties submitted a stipulation dated February 27, 2017 regarding the sealing of future documents containing personal information of the parties, executed by counsel for the parties, which they requested the Court to so-order, which did not specify the documents to be sealed pursuant to that stipulation. The Court declines to so-order that stipulation. The Court does, however, grant the application set forth in the February 28, 2017 letter to the Court from Cole Schotz P.C., counsel for Defendants The OSG Corp., Roman Sapino and Ruben Giacomozzi, to seal the affidavits in opposition of Mr. Sapino and Mr. Giacomozzi to the extent that the Court will seal 1) Exhibit L to the Affidavit in Opposition of Roman Sapino, and 2) Exhibits A and B to the Affidavit in Opposition of Ruben Giacomozzi, and the Court will issue a separate sealing order with respect to those submissions.

Corp., formerly known as All Points Capital Corp. and doing business as Capital One Tax Medallion Finance (“Plaintiff” or “COTMF”) filed February 1, 2017 and submitted April 10, 2017, following oral argument before the Court. For the reasons set forth below, the Court denies the motion and vacates the temporary restraining order issued by the Court on February 3, 2017, except that the directive that all files, documents and records related to the subject Loans to the Underlying Borrowers and Underlying Related Borrowers shall remain in their current state and shall not be altered or modified in any way shall remain in effect, pending further court order. Based on the Court’s conclusion that this directive does not constitute injunctive relief, the Court will not require Plaintiff to post a bond as a condition of this relief. The Court is also issuing a separate Sealing Order with respect to 1) Exhibit L to the Affidavit in Opposition of Roman Sapino, and 2) Exhibits A and B to the Affidavit in Opposition of Ruben Giacomozzi. The Court directs counsel for Defendants Roman Sapino and Ruben Giacomozzi, on or before May 5, 2017, to electronically file 1) the affidavit in opposition of Roman Sapino, without Exhibit L, and 2) the affidavit in opposition of Ruben Giacomozzi, without Exhibits A and B.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order, as more specifically set forth in its Proposed Order for Attachment, Imposing Preliminary Injunction and Granting Related Relief (“Proposed Order”), 1) directing the turnover to Plaintiff by OSG Corp. (“OSG”) and Tri Global Financial Services, Inc. (“Tri Global”) all servicing of certain loans (“Loans”) made to the Underlying Borrowers and the Underlying Related Borrowers, including turnover of all related funds on hand by OSG and Tri Global and all funds that may follow; 2) directing the turnover to Plaintiff by OSG, Tri Global, Chicago Elite and the Guarantors of all requested financial information and documentation as required by the written agreements among the parties, including the MJPA’s, the IRAs, and as previously requested by Plaintiff and BRG/Capstone; 3) directing the preservation of all files, documents and records related to the subject Loans to the Underlying Borrowers and the Underlying Related Borrowers in their current state; 4) directing the turnover to Plaintiff of all original files, documents and records related to the subject Loans to the Underlying Borrowers and the Underlying Related Borrowers; 5) appointing an independent party to execute all documents necessary to endorse the subject Loans to the Underlying Borrowers and the Underlying Related Borrowers to Plaintiff, as needed; 6) prohibiting OSG, Tri Global and the Guarantors from interfering with the transition of servicing to Plaintiff,

including collecting any payments from the Underlying Borrowers or the Underlying Related Borrowers; 7) prohibiting further real property transfers by the record owners of the Fraudulently Conveyed Property or the equity owners of such record owners; 8) permitting prejudgment attachment against the Attached Property; 9) permitting filing of Notices of Pendency or similar filings against the Fraudulently Conveyed Properties; and 10) permitting expedited discovery by Plaintiff related to property transfers and property dissipation by the OSG Guarantors and the Tri Global Guarantors.

Defendants oppose the motion.

B. The Parties' History

The Complaint alleges as follows:

Defendant OSG and Plaintiff executed a Master Joint Participation Agreement ("OSG MJPA") in August 2010 which establishes the terms under which Plaintiff shall receive a senior participation interest in the loans granted by OSG to its borrowers. Defendant Tri Global and Plaintiff executed a Master Joint Participation Agreement in August 2010 ("Tri Global MJPA") which establishes the terms under which Plaintiff shall receive a senior participation interest in the loans granted by Tri Global to its borrowers.

Defendants Roman Sapino ("Sapino") and Ruben Giacomozzi ("Giacomozzi") executed a guaranty in August 2010 ("OSG Guaranty"). The OSG Guaranty establishes the terms under which Defendants Sapino and Giacomozzi ("OSG Guarantors") are liable for OSG's obligations to Plaintiff. Defendants Symon Garber ("Garber"), Valentina Zubok ("V. Zubok"), Galina Garber-Sheinin ("Garber-Sheinin"), Sapino and Giacomozzi executed a guaranty in August 2010 ("Tri Global Guaranty"). The Tri Global Guaranty establishes the terms under which the Guarantors Garber, V. Zubok, Garber-Sheinin, Sapino and Giacomozzi are liable for Tri Global's obligations to Plaintiff. Garber-Sheinin, Sapino, Giacomozzi, Garber and V. Zubok are referred to collectively as the "Guarantors."

Plaintiff alleges that numerous OSG and Tri Global Participation Loans to borrowers have been in default for more than 150 days, and Plaintiff has not received payment of its senior participation interests in those loans, despite demand. Plaintiff alleges that the Guarantors have sold, transferred and disposed of assets in breach of the OSG and Tri Global Guarantees. The Complaint outlines that fraudulent conduct (pp. 12-24 of Complaint) which occurred between 2010 and 2016, which includes fraudulent transfers of properties. The Complaint contains causes of action for *inter alia* breach of the OSG and Tri Global MJPAs, breach of the OSG and

Tri Global Guarantees, and fraudulent conveyances pursuant to New York Debtor and Credit Law (“DCL”) § 273.

On February 3, 2017, over the objection of Defendants,³ the Court issued a temporary restraining order (“TRO”) directing that, pending the hearing and determination of this motion, 1) all files, documents and records related to the subject Loans to the Underlying Borrowers and Underlying Related Borrowers shall remain in their current state and shall not be altered or modified in any way; and 2) the record owners of the following real properties, and the individuals and entities having an ownership interest in such record owners of the following real properties: 101 Warren Street, Unit 3210, New York, NY 10007; 34 Waterview Court, Riverhead, NY 11901; 117 Louise Court, Riverhead, NY 11901; 356-2 Oakleigh Avenue, Baiting Hollow, NY 11933; 2 Cliff Way, Baiting Hollow, NY 11933; 220 East 65th Street, Unit 18-N, New York, NY 10021; 1040 North Lakeshore Drive, Unit 7-C, Chicago, IL 60611; and 100 Winston Drive, Unit VG-5, Cliffside Park, NJ 07010, are enjoined and restrained from transferring or granting any interest in such real property, and Defendants are enjoined and restrained from transferring any equity or ownership interest which any of them may have in the entities having record ownership in such real properties, pending further Order of this Court..

In support of the motion, John P. O’Gorman (“O’Gorman”), a Vice President with COTMF affirms the truth of the allegations in the Complaint regarding the agreements executed by Defendants and provides copies of the OSG MJPA; OSG Guaranty; Tri Global MJPA; Tri Global Guaranty; Information Rights Agreement dated June 7, 2016 by and between, *inter alia*, OSG and COTMF (“OSG IRA”); Information Rights Agreement dated June 27, 2016, by and between, *inter alia*, Tri Global and COTMF (“Tri Global IRA”); and Information Rights Agreement dated June 27, 2016 by and between, *inter alia*, Defendant Chicago Elite Cab Corp. (“Chicago Elite”), a company owned by Garber among others (“Chicago Elite IRA”) (Exs. A-G to O’Gorman Aff. in Supp.).

O’Gorman affirms that as of December 31, 2015, COTMF had a Participant Investment,

³ Plaintiff initially filed its application *ex parte*, without notice to Defendants, but counsel for Defendants learned of the application and appeared before the Court to oppose Plaintiff’s application for a temporary restraining order. Had counsel for Defendants not independently learned of the application, the Court would have required Plaintiff to provide Defendants with notice of its application before considering Plaintiff’s application for temporary restraints based on the Court’s determination that Plaintiff had not met the high burden to warrant proceeding with the TRO application without giving Defendants an opportunity to respond.

as defined in the OSG MJPA, of at least \$76,609,890. In connection with purchases of senior participation interests under the OSG MJPA, COFMP, as of January 21, 2017, has a Participant Investment of at least \$75,870,973. COTMF currently has a participation interest in 66 loans (“OSG Participation Loans”) that OSG has granted to its underlying borrowers. There are 120 New York City Taxi Medallions which act as collateral for repayment of the 66 loans. Pursuant to the OSG MJPA, OSG continued to service the OSG Participation Loans, but COTMF may terminate that right and take over servicing of some or all of the OSG Participation Loans (“Takeover Right”) as set forth in the OSG MJPA.

Pursuant to Section 8(c)(iii) of the OSG MJPA, COTMF has issued payment demand letters to OSG (“OSG Put Letters”) (Ex. H to O’Gorman Aff. in Supp.). OSG has not honored its obligations in that it has not made the required payments to COTMF. As of January 26, 2017, COTMF is owed at least \$40,197,448 in principal from OSG for the loans set forth in the OSG Put Letters. This \$40,197,448 is included in the Participant Investment figure of \$75,870,973. Additional sums are owed to COTMF under the OSG MJPA and OSG Put Letters, including interest, default interest, prepayment fees, late fees and attorney’s fees.

Under the OSG Guaranty, Defendants Sapino and Giacomozzi, the OSG Guarantors, are liable for 20% of the principal amount outstanding as of the date of demand by COTMF for payment, plus additional amounts as set forth in Section 3 of the OSG Guaranty. O’Gorman affirms that this equates to at least \$8,039,489 of liability based on the minimum amount owed by OSG of \$40,197,448. O’Gorman affirms, however, that an Unlimited Guarantee Event has occurred under Section 4 of the OSG Guaranty and, therefore, the liability of the OSG Guarantors to COTMF is at least \$40,197,447. The conduct constituting an Unlimited Guarantee Event includes the fraudulent conveyances alleged in the Complaint, as well as breaches of the representations and warranties in the OSG Participation Loans, which constitute an Unlimited Guarantee Event.

Pursuant to Section 8 of the OSG MJPA, COTMF exercised its Takeover Right and issued takeover notices to OSG (“OSG Takeover Notices”) (Ex. I to O’Gorman Aff. in Supp.). O’Gorman provides a list of the OSG Participation Loans regarding which COTMF has already exercised its Takeover Right (Ex. J to O’Gorman Aff. in Supp.). O’Gorman affirms that OSG has not honored its obligations under the OSG MJPA and OSG Takover Notices in that it has not provided to COTMF all of the documents and information that COTMF needs to service the OSG Participation Loans for which COTMF has exercised its Takeover Right.

O’Gorman provides similar affirmations regarding the Tri Global MJPA. He affirms that, with respect to the Tri Global MJPA: 1) as of January 21, 2017, COTMF had a Participant Investment of \$76,209,859; 2) under the Tri Global MJPA, COTMF has a senior participation interest in 87 loans (“Tri Global Participation Loans”) that Tri Global has granted to its underlying borrowers; 3) there are 331 Chicago Taxi Medallions which act as collateral for repayment of the 87 loans; 4) COTMF has issued payment demand letters to Tri Global (“Tri Global Put Letters”) (Ex. K to O’Gorman Aff. in Supp.); 5) Tri Global has not honored its obligations under the Tri Global MJPA and Tri Global Put Letters in that it has not made the required payments to COTMF; 6) in addition to the loans set forth in Exhibit K, COTMF hereby makes demand on Tri Global for payment under Section 8(c)(iii) of the Tri Global MJPA for the Sadia & Nadia Corp. Loan; 7) as of January 21, 2017, Tri Global owes COTMF at least \$73,632,882 in principal under the Tri Global MJPA for the loans set forth in the Tri Global Put Letters, including the Sadia & Nadia Corp. Loan, and additional sums are owed for interest, default interest, prepayment fees, late fees and attorney’s fees; 8) Tri Global Guarantors are liable for 20% of the principal amount outstanding as of the date of demand for payment by COTMF, plus additional amounts as set forth in the Tri Global Guaranty, which equate to at least \$14,726,576 in liability based on the minimum amount currently owed by Tri Global of \$73,632,882; 9) an Unlimited Guarantee Event has occurred under Section 4 of the Tri Global Guaranty, and the liability of the Tri Global Guarantors to COTMF is therefore at least \$73,632,882; and 10) pursuant to Section 8 of the Tri Global MJPA, COTMF exercised its Takeover Right and issued takeover notices to Tri Global (“Tri Global Takeover Notices”) (Ex. L to O’Gorman Aff. in Supp.). O’Gorman provides a list of the Tri Global Participation Loans for which COTMF has already exercised its Takeover Right (Ex. M to O’Gorman Aff. in Supp.). O’Gorman affirms that Tri Global has not honored its obligations under the Tri Global MJPA and Tri Global Takeover Notices in that it has not provided to COTMF all of the documents and information that COTMF needs to service the Tri Global Participation Loans for which COTMF has exercised its Takeover Right.

O’Gorman also lists the documents that OSG, Tri Global, the Guarantors and Chicago Elite are required to deliver to COTMF and the actions that OSG and Tri Global are required to perform under the MJPA’s (O’Gorman Aff. in Supp. at ¶¶ 22-26). He affirms that Berkeley Research Group, LLC (“BRG”), on behalf of COTMF, previously requested this information and submits that, to the extent the information has not been provided, it should be provided

immediately.

O’Gorman submits that Plaintiff requires emergency relief because OSG and Tri Global have not made required payments to COTMF, and have not provided evidence of their willingness or economic ability to honor their contractual obligations, and because many Defendants have allegedly participated in the fraudulent conveyances alleged in the Complaint. In addition, the underlying borrowers operate taxi cabs which generate taxi cab revenue and if those borrowers are paying OSG and Tri Global under their loans, then OSG and Tri Global are “blatantly violating their contractual obligations” (O’Gorman Aff. in Supp. at ¶ 28) to pay COTMF.

O’Gorman also advises the Court that the Tri Global Guarantors operate various taxi cab companies which own medallions and earn taxi revenue. He affirms that the loans listed on Exhibit W to his affidavit are to companies controlled by the Tri Global Guarantors. O’Gorman affirms that, while sporadic payments are being made, the Put Letters issued by COTMF reflect that these underlying loans are more than 150 days in default. O’Gorman submits that it is “unrealistic” (O’Gorman Aff. in Supp. at ¶ 29) to believe that Tri Global would properly service and enforce loan remedies against entities controlled by the Tri Global Guarantors and affirms that Tri Global has not provided any information demonstrating that enforcement action against these borrowers is underway. O’Gorman submits that COTMF should immediately receive the required information from Tri Global and be able to immediately take over servicing of all loans.

In his Second Affidavit in Support, which the Court has sealed, O’Gorman provides documents containing personal information of some of the Guarantors that was provided to COTMF. O’Gorman provides personal financial statements of V. Zubok, G. Garber-Sheinin, Sapino, Giazomozzi and Garber, and a copy of Garber’s 2014 joint federal tax return (Exs. A-F to O’Gorman Sec. Aff. in Supp.).

In further support of the motion, counsel for Plaintiff (“Plaintiff’s Counsel”) provides copies of *inter alia* Business Entity Searches for EZVZ Family Holdings LLC #s 1-4 (Exs. C-F to Burke Aff. in Opp.), deeds regarding the properties at issue, and rental/sale listings for the Bridge Tower Property (*see* Comp. at ¶ 120), Lake Worth Property (*see* Comp. at ¶ 155) and Warren Street Property (*see* Comp. at ¶ 194) (Burke Aff. in Supp. at Exs. C-EE). In her supplemental affirmation, Plaintiff’s counsel provides a copy of a deed dated November 14, 2016 made by EZVZ Family Holdings LLC #3 (Ex. A to Burke Reply Aff.).

In further support of the motion, Haywood Miller (“Miller”) affirms that he is a Managing Director with BRG, a global consulting firm, and has over 30 years of experience as a financial restructuring consultant. Miller affirms that he has worked with lenders who have loaned money to taxi cab operators in multiple jurisdictions including Chicago and New York, and has analyzed taxi medallion markets with regard to medallion valuations and sales activity.

Miller affirms that he is fully familiar with the facts in this action based on his review of public records related to sales of Chicago taxi medallions as well as the Tri Global Guaranty. Miller makes reference to Section Four of the Tri Global Guaranty which provides the mechanism/formula by which the value of the taxi medallions shall be calculated, which includes the use of information provided by the City of Chicago Business Affairs and Consumer Protection (“BACP”). Miller affirms that he has reviewed the information posted on the BACP website for taxi medallion sales for the relevant time period, from September 2015 through December 2016, and calculated both monthly and three month price averages for the medallions sold during that time period. He provides a chart reflecting that information (Ex. A to Miller Aff. in Supp.).

In opposition to the motion, Sapino affirms that he is the President and a 50% shareholder of OSG. He has been extensively involved in the taxi industry and has owned and operated several taxi-related businesses including OSG, a New York-based financier and servicer of taxi medallion loans. He has owned OSG with Giacomozzi, his business partner, since 1992 and they are both minority shareholders in Tri Global, which is engaged in a similar line of business. OSG typically sells senior interests in its medallion loans to institutional participants, such as Plaintiff which currently holds senior participating interests in 66 loans totaling approximately \$76 million. Each of these loans is secured by one or more New York City tax medallions and the majority of these loans are serviced by OSG although Sapino is working towards an agreement, without prejudice to OSG’s rights, to voluntarily transfer servicing of those loans to Plaintiff.

Sapino affirms that during the height of the taxi industry when medallion values were at their peak, OSG and Plaintiff “enjoyed an amicable and lucrative business partnership” (Sapino Aff. in Opp. at ¶ 3). He affirms that the recent destabilization of the taxi industry and the presence of Uber and similar ride-share services has dramatically affected OSG’s loan portfolio and “softened” the value of New York City medallions (Sapino Aff. in Opp. at ¶ 3). Sapino submits that Plaintiff, unlike OSG and its borrowers, is not an “innocent casualty” (*id.* at ¶ 4) of

the effect of ride-sharing services on value of taxi medallions. Rather, Plaintiff actively promotes Uber and, therefore, is a factor in the downturn of the taxi industry. In support, Sapino provides copies of promotions launched by Plaintiff by which consumers would receive a 20% discount on all Uber rides when they paid with a Capital One Quicksilver credit card, and a September 14, 2015 report discussing the significant decrease in taxi usage in New York and increase in Uber users (Exs. C and D to Sapino Aff. in Opp.). Sapino affirms that Plaintiff, through its partnership with Uber, has been pushing OSG's borrowers to default on their commitments while simultaneously undermining the value of OSG's collateral. OSG nonetheless chose to cooperate with Plaintiff, in good faith, to attempt to restructure and/or modify many of its non-performing loans and was in constant contact with Plaintiff.

Sapino disputes Plaintiff's contention that he and Giacomozzi owe millions of dollars on their guarantees, and denies Plaintiff's allegations of fraud and impropriety. Sapino affirms that the collateral package of medallions that secures the subject loans is "more than adequate" (Sapino Aff. in Opp. at ¶ 6) to satisfy 20% of the aggregate principal indebtedness called for under the limited guarantees. Sapino also submits that Plaintiff's contention that Defendants have triggered an Unlimited Guarantee Event is "presumably based" (Sapino Aff. in Opp. at ¶ 7) on an erroneous computation of the unlimited recourse formula set forth in the limited guarantees. Sapino suggests that Plaintiff intentionally omitted from its motion, including the affidavit in support of Miller, any mention of this formula.

Sapino also affirms that he never owned, or claimed to own, many of the assets that Plaintiff contends were fraudulently transferred. Moreover, Sapino submits, in asserting that Sapino has secretly liquidated assets and concealed proceeds, Plaintiff has misconstrued Sapino's financial statements and intentionally overlooked the fact that Sapino has lost millions of dollars of wealth due to the softening of the taxi medallion market. Sapino affirms that Plaintiff, just months after receiving the last financial statements on which it now relies in support of its fraud claim, "eagerly modified" (Sapino Aff. in Opp. at ¶ 8), on behalf of several medallion companies, loans totaling in excess of \$5 million.

Sapino submits that Plaintiff's application to freeze and attach the assets of Sapino and Giacomozzi is unwarranted, and might prevent them from paying household bills and routine living expenses and attorney's fees incurred in defending this action, and prevent them from operating their businesses. With respect to Plaintiff's application for an order authorizing the inspection of OSG's offices to compile records and other documents, Sapino affirms that all of

these documents and records have been produced to Plaintiff or its agents. With respect to Plaintiff's application for an order compelling OSG to turn over monies received from its borrowers as well as the servicing of its loans, Sapino affirms that OSG has been timely making those payments in the ordinary course of operations and, therefore, there is no basis for such an order.

With specific reference to Plaintiff's allegation of a fraudulent conveyance of property located at 100 Winston Drive, Unit VG-5, Cliffside Park, New Jersey ("Cliffside Park Condo"), Sapino affirms that as of 2014, he and his wife had been residing apart for nearly 7 years. While his wife continued to maintain her residence in Fort Lee, New Jersey, since their separation Sapino and a companion have resided in the Cliffside Park Condo. Sapino purchased the condominium in 2011 as reflected in the deed provided (Ex. P to Burk Aff. in Supp.). In late 2014, Sapino suffered a life-threatening illness and underwent surgery in 2016. To ensure that his companion could continue to reside at the Cliffside Park Condo if he did not survive, Sapino's attorney created The Roman Sapino 2015 Qualified Personal Residence Trust ("Sapino Trust") of which Sapino is the trustee. The Cliffside Park Condo was thereafter conveyed to the Sapino Trust on April 13, 2015.

Sapino disputes Plaintiff's assertion that the conveyance to the Sapino Trust was intended to defraud creditors or protect assets and affirms that as of April 2015, he possessed, and continues to possess, interests in various investments and businesses, including taxi medallions, which continue to hold value. Sapino notes that the Cliffside Park Condo was the only asset placed in the Sapino Trust and affirms that the conveyance of that Condo, valued at approximately \$2 million, did not render him insolvent, and further affirms that he was not insolvent at the time that the transfer was made. Sapino affirms that his net worth as of April 2015, excluding the value of the Cliffside Park Condo, totaled in excess of \$15 million. Moreover, the planning to transfer the Cliffside Park Condo began prior to April 2015, and the transfer closed on April 13, 2015, prior to Plaintiff's demand for payment under the limited guarantees.

Sapino affirms, similarly, that Plaintiff's allegations of fraudulent conduct with respect to property located at 1512 Palisade Avenue, Unit 5J, Fort Lee, New Jersey ("Palisade Avenue Property") are unfounded. Sapino concedes that the Palisade Avenue Property was listed on his 2012 and 2014 personal financial statements but affirms that those financial statements included assets and liabilities attributable both to Sapino and his wife. Sapino affirms that, since the day

it was acquired, he has never owned the Palisade Avenue Property. Sapino provides a deed dated August 7, 2002 (Ex. M to Sapino Aff. in Opp.) which reflects that the Palisade Avenue Property was deeded to Maria Sapino (“Maria”) alone. Sapino affirms that Maria subsequently sold the Palisade Avenue Property, and he received no portion of the sale proceeds. Sapino affirms that he also signed the September 2016 deed to which Plaintiff makes reference, but did so at the request of Maria’s attorney who advised Sapino that his signature was required on the deed, notwithstanding the fact that he did not possess any ownership interest in the property.

Sapino also disputes Plaintiff’s allegation that OSG failed to provide financial information and documentation as required under the Information Rights Agreement (“IRA”) (see Comp. at ¶ 276). Sapino affirms that OSG provided Plaintiff with all records and documents required under the MJPA that were necessary to service the loans. Plaintiff also requested that Sapino and Giacomozzi sign an IRA, and O’Gorman represented that the documents and information responsive to the IRA would assist Plaintiff in facilitating a global and/or partial resolution of the defaulted loans. Sapino and Giacomozzi agreed to the terms of the IRA, which was signed 6 years after OSG entered into the MJPA. Sapino and Giacomozzi also voluntarily subjected themselves and OSG to a full audit of all records by BRG. Sapino submits that Plaintiff’s true motive in obtaining this information, which Sapino and Giacomozzi spent months gathering, was “to use these documents and information in aid of a scorched earth litigation campaign” (Sapino Aff. in Opp. at ¶ 61). Sapino affirms that OSG’s attorneys responded, on numerous occasions, to BRG and/or Plaintiff’s requests and promptly provided all documents and information to Plaintiff to which it was entitled under the IRA. By way of example, Sapino provides correspondence dated October 14, 2016 and October 21, 2016 between counsel for Plaintiff and counsel for OSG regarding Plaintiff’s request for numerous categories of documents information (Exs. O and P to Sapino Aff. in Opp.). Under these circumstances, Sapino submits, Plaintiff’s allegations against OSG, Sapino and Giacomozzi are “completely baseless” (Sapino Aff. in Opp. at ¶ 66).

In further opposition to the motion, Defendants provide affidavits in opposition of Defendants V. Zubok, Daniella Itin (“Itin”), S. Garber, G. Garber-Sheinin and Giacomozzi. These Defendants, similarly, dispute Plaintiff’s allegations regarding Defendants’ compliance with their obligations under the relevant agreements, as well as Plaintiff’s allegations regarding fraudulent transfers of properties. Giacomozzi affirms the truth of Sapino’s affirmations, excluding those portions addressing issues concerning his personal finances and other personal

issues. Giacomozzi challenges Plaintiff's allegation that he engaged in fraudulent activity which, Giacomozzi submits, is based on a decline in Giacomozzi's net worth between 2013 and 2015. Giacomozzi affirms that this decline was directly attributable to the industry-wide downturn in the taxi business, and submits that Plaintiff is aware that this is the sole explanation for the decline in Giacomozzi's net worth. He also dismisses the significance of Plaintiff's allegation that he never explained this decline, affirming that Plaintiff never inquired or requested any explanation

In her affidavit in opposition, Itin affirms that Plaintiff made a number of information requests to Tri Global and that Tri Global "fully cooperated" with those requests (D. Itin Aff. in Opp. at ¶ 2). In support, Itin provides copies of email and text message information and meeting requests between the parties (Ex. A to D. Itin Aff. in Opp.). Itin also affirms that Tri Global, following Plaintiff's instruction, negotiated modifications of many of the underlying loans with borrowers, and provides term sheets memorializing these modifications (Ex. B to Itin Aff. in Opp.).

Garber opposes Plaintiff's motion and disputes Plaintiff's allegation that his 2010 transfer of an apartment located on Warren Street in New York City was fraudulent. Garber affirms that he and his wife transferred this property to 101 Warren Street LLC, an entity that they controlled, and that the transfer took place well in advance of Plaintiff's demand for payment from Garber. Garber affirms that in 2009, he established trusts as part of his estate planning. In 2014 and early 2015, he transferred certain real properties in which he had an interest to these trusts as part of that estate planning. At that time, his businesses were performing well, the medallion values were strong and he was "fully solvent" when these transfers occurred (Garber Aff. in Opp. at ¶ 7). He affirms, further, that the decline in his net worth from 2012 was primarily attributable to the decline in value of taxi medallions and other taxi businesses.

Garber-Sheinin opposes the motion, disputing Plaintiff's allegation that her transfer of properties located on North Lakeshore Drive in Chicago and East 65th Street in New York City were fraudulent. Garber-Sheinin affirms that the transactions involving these properties were for estate tax planning purposes. Garber-Sheinin affirms that, at the time of these two transactions, she believed that she had sufficient assets to pay all of her debts. Garber-Sheinin also affirms, as do other Defendants, that the reduction in her net worth was attributable to the decline in the value of the taxi medallions that she owned, and that she disclosed that decline in the personal

financial statements that she provided to Plaintiff.

In further opposition to the motion, counsel for Tri Global and other named Defendants (“Tri Global Defendants”) affirms that Tri Global Defendants intend to raise affirmative defenses, and assert a counterclaim, based on Defendants’ contention that Plaintiff has campaigned to promote Uber, and thereby devalue the Chicago taxi medallion market, harming the collateral for the Tri Global Debt. Counsel for Tri Global Defendants affirms that there is other litigation pending arising out of similar claims, including the matter titled *Transit Funding Assocs. LLC et al. v. Capital One Equipment Finance Corp. et al.*, New York County Supreme Court Index Number 652346/15. Counsel for Tri Global Defendants provides a copy of the decision in that action denying in part Capital One’s motion to dismiss (Ex. D to Fleming Aff. in Opp.). At page 8 of that decision, the court, in outlining plaintiffs’ fraud claim, states *inter alia* that “Further, Plaintiffs claim that not only did Capital One never intend to perform the contract, but it also falsely stated to Plaintiffs that it would continue in the business of medallion funding, when it actually had undisclosed plans to exit the business and partner with Uber.”

C. The Parties’ Positions

Plaintiff submits that OSG and Tri Global have not enforced the loan documents against the defaulting Underlying Borrowers, which has adversely affected Plaintiff’s ability to enforce the loan documents. Therefore, Plaintiff seeks an Order affirming Plaintiff’s Takeover Right with respect to all of the loans currently being serviced by OSG and Tri Global, and compelling OSG and Tri Global to provide Plaintiff with the documents and information that it needs to effectively service the loans and enforce the Underlying Borrowers’ loan documents.

Plaintiff submits, further that the Court should grant the requested injunctive relief and order of attachment because Plaintiff has demonstrated the significant liability of OSG and Tri Global and the Guarantors to Plaintiff, and has established that Defendants have been taking steps to secrete their assets. Plaintiff submits that the Guarantors’ efforts to engage in the alleged fraudulent concealment scheme are evidenced, *inter alia*, by 1) their conversion of hard assets to cash and “attendant failure” to account for that cash (P’s Memo. of Law in Supp. at p. 16), and 2) their fraudulent conveyance of property in violation of the DCL. Plaintiff contends that it has provided evidence of transfers of property for no, or nominal, consideration, to insiders or entities controlled by the Guarantors and other badges of fraud, including the Guarantors’ decreasing assets at the same time that their liabilities to Plaintiff were increasing. With respect to Plaintiff’s application for an order of attachment, Plaintiff submits that the intent

to frustrate Plaintiff's collection of any judgment can be "readily inferred" (P's Memo. of Law in Supp. at p. 22) from the Guarantors' transfers of millions of dollars of property that they had previously listed in personal financial statements. Plaintiff contends, further, that the timing of the transfers coincides with the early 2014 commencement of litigation by Tri Global and Chicago Elite, *inter alia*, in the United States District Court for the Northern District of Illinois ("Chicago Litigation") (*see* Ex. B to Burke Aff. in Supp.) in which Tri Global and, by extension, the guarantors admitted that their obligations to Plaintiff were "looming" (P's Memo. of Law in Supp. at p. 23).

Plaintiff submits that it has demonstrated a likelihood of success on the merits by establishing the clear liability of the Guarantors to Plaintiff under the applicable agreements between the parties, and providing proof of the fraudulent transfers. Plaintiff contends, further, that it has established that it will suffer irreparable harm without the requested relief because, without the requested restraints, Plaintiff will be unable to collect on any judgment. Plaintiff also submits that a balancing of the equities favors Plaintiff because, without the requested restraints, Plaintiff will have difficulty obtaining the monies owed to it under the subject agreements, and it would be inequitable to permit OSG, Tri Global and the Guarantors to circumvent their obligations to Plaintiff by failing to make required payments and improperly engaging in the fraudulent conveyance of identified properties.

Tri Global Defendants oppose the motion submitting that Plaintiff has not established its right to an order of attachment. Defendants submit that Plaintiff has not demonstrated a likelihood of success on the merits *inter alia* because 1) Plaintiff has not presented any computation to support its claim that an Unlimited Guarantee Event has occurred and, in support of its claim, has misstated the calculation to be performed to determine Loan to Value Ratio; 2) with respect to its alternative claim under the limited guarantee, Plaintiff is improperly attempting to make this a guarantee of more than 20% by claiming that it can recover substantial sums under the loans, and then pursue the guarantors for more, but the applicable instrument does not so provide; 3) it is unclear that Plaintiff properly triggered a repurchase obligation by Tri Global under Section 8(iii) of the MJPA because, notwithstanding its purported Put Letters invoking that section, Plaintiff instructed Tri Global to take certain actions which resulted in Tri Global negotiating forbearance and loan modification agreements with borrowers that Plaintiff agreed to which, in turn, raises questions as to whether Plaintiff's own conduct harmed the value of the collateral, which value has a direct impact on the amount of any claimed liability under

the limited guarantees; and 4) Plaintiff's conduct in partnering with Uber raises "serious questions" (Tri Global Memo. of Law in Opp. at p. 15) as to whether Plaintiff's own conduct is responsible for a decline in the value of the collateral.

Tri Global Defendants submit, further, that 1) Plaintiff has not demonstrated that the Tri Global Guarantors have disposed, or are disposing, of property in an attempt to defraud creditors, in light of Defendants' submissions which demonstrate that the decline in asset values in the personal statements of the guarantors was attributable to a decline in their principal assets, specifically the taxi medallions; 2) Plaintiff's allegation regarding the 2010 conveyance of the Warren Street Property, in addition to being unfounded, is barred by the applicable six-year statute of limitation; 3) Plaintiff's allegations regarding Garber-Sheinin's improper conveyance of property are refuted by Garber-Sheinin who affirms that her transfer of the East 65th Street and North Lakeshore Drive Properties were completed for estate tax planning purposes, and that her transfer of the North Lakeshore Drive Property to her daughters did not deprive Plaintiff of any assets; 4) Plaintiff cannot demonstrate that it will suffer irreparable injury without injunctive relief because, while Plaintiff's allegations include fraudulent conveyance claims, the essence of Plaintiff's action is a suit for money damages; and 5) a balancing of the equities favors Tri Global Guarantors who would be subject to a prejudgment restraint on all of their real and personal property if the Court were to grant the motion.

Defendants OSG, Sapino and Giacomozzi oppose the motion submitting *inter alia* that 1) Plaintiff, whose claims primarily seek a money judgment, does not have the "extraordinary right" to freeze assets, notwithstanding its "false and unsubstantiated" allegations (OSG Ds' Memo. of Law in Opp. at p. 5) that Defendants have engaged in conduct that may render them judgment-proof; 2) as Plaintiff instructed OSG to engaged in work-outs with its borrowers, specifically instructing OSG to pursue negotiations with borrowers to restructure or otherwise address the non-performing loans, Plaintiff has not properly triggered any repurchase obligation by OSG under the MJPA; 3) Plaintiff has failed to demonstrate liability under the limited guarantees, in part because the collateral package of medallions that secures the loans is more than adequate to satisfy 20% of the aggregate principal indebtedness called for under the limited guarantees, notwithstanding Plaintiff's allegedly intentional efforts to devalue the medallion market; 4) Plaintiff's suggestion that Sapino or Giacomozzi's conduct triggered an unlimited guarantee event appears to be based on an erroneous computation of the unlimited recourse formula set forth in the limited guarantees; 5) Plaintiff's fraudulent transfer claim is legally

deficient in light, *e.g.*, of evidence demonstrating that Sapino's conveyance of the Cliffside Park condominium into the Sapino Trust was made in connection with legitimate estate planning efforts, and at a time when he possessed, as he continues to possess, interests in various investments and businesses that continue to hold their value; 6) Plaintiff has not met the high burden to warrant an order of attachment in light of the weakness of Plaintiff's fraudulent conveyance claims, and in further consideration of the fact that Sapino's significant financial losses, on which Plaintiff relies in support of its motion, are attributable to the weakening of the New York City and Chicago taxi medallion markets, of which Plaintiff is well aware; and 7) the Court should deny Plaintiff's application to file a notice of pendency, in part because of Plaintiff's inability to demonstrate that property was fraudulently conveyed, and because the essence of Plaintiff's action is a suit for monetary damages.

RULING OF THE COURT

A. Injunctive Relief

To demonstrate entitlement to a preliminary injunction under CPLR § 6301, the movant must demonstrate a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction. *Matter of Advanced Digital Security Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612, 613 (2d Dept. 2008) citing *Matter of K.W.F. Realty Corp. v. Kaufman*, 16 A.D.3d 688, 689-90 (2d Dept. 2005); *Olabi v. Mayfield*, 8 A.D.3d 459 (2d Dept. 2004). A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

A preliminary injunction may not be obtained to preserve assets as security for a potential monetary judgment even if the evidence shows that a party intends to frustrate any judgment by making it uncollectible. *Fatima v. Twenty Seven-Twenty Four Realty Corp.*, 65 A.D.3d 1079 (2d Dept. 2009) citing, *inter alia*, *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 545 (2000).

Mandatory injunctive relief should not be granted *pendente lite* without a showing of

extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action. *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 762 (2d Dept. 2007).

B. Order of Attachment

CPLR § 6201(3) provides that an order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts[.]

To obtain an order of attachment under CPLR § 6201(3), the plaintiff must demonstrate that the defendant has or is about to conceal his or her property in one or more of several enumerated ways, and has acted or will act with the intent to defraud his or her creditors, or to frustrate the enforcement of a judgment in favor of the plaintiff. The moving papers must contain evidentiary facts, as opposed to conclusions, proving the fraud. *Mineola Ford Sales v. Rapp*, 242 A.D.2d 371 (2d Dept. 1997). In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the underlying action to obtain an order of attachment. *Id.*

Attachment is a provisional remedy designed to secure a debt by preliminary levy upon the property of the debtor to conserve it for eventual execution, and the courts have strictly construed the attachment statute in favor of those against whom it may be employed. *Hume v. 1 Prospect Park ALF, LLC*, 137 A.D.3d 1080, 1081 (2d Dept. 2016), citing *Grafstein v. Schwartz*, 100 A.D.3d 699 (2d Dept. 2012); *J.V.W. Inv. Ltd. v. Kelleher*, 41 A.D.3d 233 (2d Dept. 1999). To be granted an order of attachment under CPLR § 6201(3), a plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors or to frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff. *Hume v. 1 Prospect Park ALF, LLC*, 137 A.D.3d at 1081, quoting *Benedict v. Browne*, 289 A.D.2d 433 (2d Dept. 2001). In addition to proving fraudulent intent, the plaintiff must show a probability of success on the merits. *Hume v. 1 Prospect Park ALF, LLC*, 137 A.D.3d at 1081, citing CPLR § 6212(a); *Shisgal v. Brown*, 3 A.D.3d 434 (1st Dept. 2004); *Benedict v. Browne*, 289 A.D.2d at 433.

C. Application of these Principles to the Instant Action

The Court denies the motion and vacates the temporary restraining order issued by the Court on February 3, 2017, except that the directive that all files, documents and records related to the subject Loans to the Underlying Borrowers and Underlying Related Borrowers shall remain in their current state and shall not be altered or modified in any way shall remain in effect, pending further court order. Based on the Court's conclusion that this directive does not constitute injunctive relief, the Court will not require Plaintiff to post a bond as a condition of this relief.

The Court denies Plaintiff's motion based on the Court's conclusion that 1) Plaintiff has not established a likelihood of success on the merits in light of the conflicting affidavits and exhibits regarding *inter alia* a) the extent to which OSG and Tri Global have complied with their obligations under the Agreements, including their obligations to provide financial documentation to Plaintiff, and b) the circumstances under which the allegedly fraudulent transfers occurred, which raise significant factual issues regarding Plaintiff's ability to prove that those transfers were fraudulent; 2) Plaintiff has not established that it will suffer irreparable injury without the requested injunctive relief because it appears that Plaintiff's injury is compensable by money damages, and in consideration of the principle that a party may not obtain an injunction simply to preserve assets as security for a potential monetary judgment even if the evidence shows that a party intends to frustrate any judgment by making it uncollectible, which Defendants, in any case, dispute; and 3) Plaintiff has not established that a balancing of the equities favors Plaintiff, both because of the significant factual disputes regarding whether Guarantors in fact engaged in fraudulent transfers of properties, and in consideration of evidence presented by Defendants in support of their contention that Plaintiff has partnered with at least one ride-sharing company and, therefore, itself contributed to the decline in Guarantors' net worth on which Plaintiff relies, in part, in support of its application. In light of the foregoing, the Court also denies Plaintiff's motion to file a notice of pendency, to appoint an independent party to execute documents necessary to endorse the Loans, to file a Notice of Pendency or similar filing, or for expedited discovery.

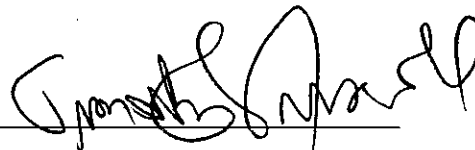
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on May 8, 2017 at 11:00 a.m.

ENTER

DATED: Mineola, NY
April 19, 2017



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 27 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE