SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

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INDEX NO. 653777/2020

MOTION SEQ. NO. 001 002

RESORTS GROUP, INC.,

Plaintiff,

- v -

CERBERUS CAPITAL MANAGEMENT, L.P., CERBERUS PARTNERS II, L.P., CERBERUS INSTITUTIONAL REAL ESTATE PARTNERS IV, L.P., CI II MF ECHO, LLC,CRE ECHO GROUP, LLC,CERBERUS INSTITUTIONAL PARTNERS VI, L.P., CRE NIAGARA MANAGEMENT HOLDINGS, LLC,CRE NIAGARA MANAGER, LLC,CRE BUSHKILL GROUP, LLC,CRE NIAGARA HOLDINGS, LLC,CRE NIAGARA PARTICIPATION HOLDINGS, LLC,CLUB EXPLORIA, LLC

Defendants.

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DECISION + ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 137, 138, 139, 140, 141, 142, 143, 144, 145, 159, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 193, 194, 195

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 158, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ORDERED that the motions to dismiss the amended complaint by defendants Cerberus Capital Management, L.P., Cerberus Partners II, L.P., Cerberus Institutional Real Estate Partners IV, L.P., CI II MF Echo, LLC, Cerberus Institutional Partners VI, L.P., CRE Niagara Management Holdings, LLC, and CRE Niagara Manager, LLC's (collectively, the Cerberus Defendants) and by defendants CRE Niagara Holdings, LLC (CRE Niagara Holdings), Club Exploria, LLC (Club Exploria), CRE Niagara Participation Holdings, LLC (CRE Niagara Participation), CRE Bushkill Group, LLC (CRE Bushkill), and CRE Echo Group, LLC (CRE Echo; collectively with CRE Niagara, Club Exploria, CRE Participation and CRE Bushkill, the CRE Defendants) are GRANTED IN PART.

Cerberus Defendants

The Cerberus Defendants are not parties to any of the subject contracts so they cannot be sued for breach (*Randall's Island Aquatic Leisure, LLC v City of New York*, 92 AD3d 463 [1st Dept 2012]). Nor can they be held liable by piercing their corporate veils since plaintiff merely alleges that the Cerberus Defendants dominated and caused their subsidiaries, the CRE Defendants, to breach the contracts (*EBG Holdings LLC v Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *12 [Del Ch Sept. 2, 2008] ["the requisite element of fraud under the alter ego theory must come from an inequitable use of the corporate form itself as a sham, and not from the underlying claim"]; *see Capone v Castelton Commodities Intl. LLC*, 148 AD3d 506, 507 [1st Dept 2017]). This is not a basis for piercing the corporate veil under applicable Delaware law (*id.; see Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 [1st Dept 2008] ["the issue of whether the corporate veil of (defendant), a Delaware corporation, should be pierced is governed by Delaware law"]).*

Likewise, the allegation that a parent, motivated by economic incentives to protect its interest in its subsidiary, caused the subsidiary to breach, does not support a valid claim for tortious interference based on the economic interest doctrine (*White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; *see Ruha v Guior*, 277 AD2d 116 [1st Dept 2000] [allegation that malice was sole motivation rebutted by "plaintiffs' own claims that defendants' actions were financially motived"]). The fraud claim, moreover, fails for lack of particularity about misrepresentations with scienter made by the Cerberus Defendants rather than by the CRE Defendants (CPLR 3016[b]; *see RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678 [1st Dept 2019]). When a sophisticated party sells to a private equity company and contracts, as is ordinarily the case, with subsidiaries formed for the limited purpose of acquiring and operating the company, one cannot seek to hold the parent private equity company liable if the parent is not made a party to the agreement. Concerns about solvency of the subsidiary are often ameliorated with a guarantee. Indeed, the decision not to contract with "a more solvent parent entity is an agreement to take counterparty credit risk" (*Capone*, 2016 WL 1222163, at *8).

CRE Defendants

Plaintiff's newly-asserted claims (contained for the first time in the amended complaint) for breach of the Unit and Asset Purchase Agreement (Dkt. 14 [the UAPA]) must be dismissed in favor of the Delaware action based on the broad Delaware forum selection clause contained in that agreement.

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* New York law would compel the same result under the circumstances (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998] ["Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance"]; *see Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, 173 AD3d 568, 569 [1st Dept 2019] [no showing that "that such domination was abused in order to commit a fraud against plaintiffs, apart from the alleged breach of contract, which does not constitute a wrong warranting piercing the corporate veil"]).

There is no basis, however, to dismiss this entire action in favor of the Delaware one. Three of the four agreements that were allegedly breached--the Servicing Agreement with CRE Bushkill (Dkt. 17), the Participation Agreement with CRE Bushkill as Holder (Dkt. 18), and the Supplemental Agreement with CRE Bushkill and CRE Niagra Participation (Dkt. 19)--contain broad mandatory New York forum selection clauses applicable to all claims related to these agreements (Dkt. 17 at 36; Dkt. 18 at 35; Dkt. 19 at 4). The fourth agreement at issue, the PSQ Agreement with CRE Bushkill (Dkt. 20), lacks a forum selection clause but is related to the Servicing Agreement. The UAPA's forum selection clause does not apply to the breach claims related to these agreements because they do not principally concern the UAPA and only relate to it tangentially to the extent that the agreements were executed as part of a larger transaction. While the UAPA's forum selection clause would apply if the subject contracts themselves altogether lacked a forum selection clause, these sophisticated parties, being well aware that they agreed to litigate all claims arising from the UAPA in Delaware, nonetheless also expressly agreed to litigate claims related to the subject agreements in New York. This deliberate drafting decision must be given effect and the specific forum selection clauses at issue here choosing New York must be enforced. Otherwise, those clauses would be rendered completely meaningless (*see Alvogen Group Holdings LLC v Bayer Pharma AG*, 176 AD3d 551 [1st Dept 2019]).

Nor will dismissal in favor of a prior pending action be granted as a matter of discretion where, as here, the parties specifically agreed to a New York forum (*see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 456 [1st Dept 2010]). Discovery, of course, will be coordinated with the Delaware action to maximize efficiency.

Additionally, only those of the CRE Defendants that are parties to the subject contracts may be sued for their breach (*Randall's Island,* 92 AD3d at 463). Thus, the claims for breach of the Servicing Agreement and the PSQ Agreement may only be asserted against CRE Bushkill and Club Exploria (as its successor by merger) and the claims for breach of the Participation Agreement and the Supplemental Agreement may only be asserted against CRE Bushkill, Club Exploria, and CRE Niagara Participation (as the current Holder). It would be premature to reach the merits of these tersely-briefed claims. Whether plaintiff's contractual indemnification claim is time-barred under the contracts' shortened limitations period implicates questions of fact, which the CRE Defendants appear to concede by not addressing the issue in reply.

It is also premature to decide whether the damages cap on the indemnification claims applies given the allegations of willful misconduct, fraud and intentional misrepresentation (*see* Dkt. 26 at 61-62). The Court of Appeals' recent decision holding that gross negligence does not vitiate "contractual limitations on remedies that do not immunize the breaching party from liability for its conduct" is inapposite where, as here, the parties explicitly contracted to impose such limitations as part of their agreement (*see Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 349 [2020]). While a reasonable clause limiting liability may

not be vitiated due to fraud, there is no reason to believe that the Court of Appeals intended to override standard contractual provisions that expressly set limits on liability subject to agreed-upon express, delineated exceptions. Sophisticated parties are surely free to do so; if not, virtually every exculpatory clause in sophisticated operating, partnership, and indenture agreements would be upended. *Matter of Part 60 Put-Back Litig.*, which rejected the argument that gross negligence could vitiate a RMBS sole remedy clause, certainly does not prohibit enforcement of agreements by sophisticated parties who expressly contracted for a different rule.

The claims for breach of the implied covenant of good faith and fair dealing asserted as against the contracting parties and their successors by merger survive for now as they are predicated on the bad-faith exercise of discretion, which the CRE Defendants do not meaningfully address (*see Shatz v Chertok*, 180 AD3d 609, 610 [1st Dept 2020]). Because the contracts are governed by New York law, arguments based on Delaware law are inapposite.

The fraud claim is dismissed for lack of sufficient allegations of scienter (*Fried v Lehman Bros. Real Estate Assocs. III, L.P.*, 156 AD3d 464, 465 [1st Dept 2017]). Dismissal is without prejudice to moving for leave to replead if specific facts can be alleged showing that the breaches were intended at the time of contracting and a clear indication of which defendant made each alleged misrepresentation (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 442 [1st Dept 2015]; *see Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736 [1st Dept 1981]). While plaintiff does appear capable of pleading that promises were made that were never intended to be kept, which would be actionable if tied to specific defendant entitles rather than to "Cerberus," there would still be questions of whether rescission at this juncture is practicable, whether contractual damages would suffice to make plaintiff whole and whether any out-of-pocket fraud damages would be duplicative anyway (*see MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018]).

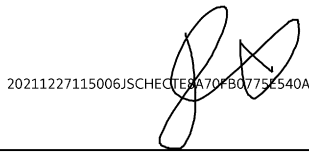
The tortious interference claims are dismissed based on the economic-interest doctrine and because the complaint does not allege how a particular non-contracting CRE Defendant caused the contracting party to breach or why it was the but-for cause of the breach (*see Wiesen v Verizon Commc'ns, Inc.*, 183 AD3d 485 [1st Dept 2020]). These claims simply appear to be another attempt to extend contractual liability to non-signatories.

The parties' other arguments are unavailing.

Accordingly, it is further ORDERED that the Clerk is directed to enter judgment dismissing plaintiff's claims against the Cerberus Defendants, CRE Echo and CRE Niagara Holdings, and plaintiff's claims against the remaining defendants are severed and shall continue; and it is further

ORDERED that the first and fifth causes of action are dismissed except as against CRE Bushkill and Club Exploria; the second, fourth and sixth causes of action are dismissed except as against CRE Bushkill, Club Exploria, and CRE Niagara Participation; and the remaining claims are all dismissed; and it is further

ORDERED that a preliminary conference will be held on Microsoft Teams (audio only) on January 31, 2022 at 1:00 p.m., and the parties' joint letter shall be e-filed at least one week before the conference.



12/27/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER