SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** IAS 34M

Justice

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UNI-RTY CORPORATION, GOLDEN PLAZA LIMITED PARTNERSHIP,

Petitioners,

- v -

NEW YORK GUANGDONG FINANCE, INC, GUANGDONG BUILDING INC.,THE ESTATE OF JOSEPH CHU, ALEXANDER CHU, CENTRE PLAZA, LLC,EASTBANK, N.A., CHINA CONSTRUCTION BANK, AGRICULTURAL BANK OF CHINA, SHERIFF OF NEW YORK COUNTY,

Respondents.

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INDEX NO. 157621/2012

DECISION AND ORDER AFTER TRIAL

In this CPLR Article 52 special proceeding, Petitioners Uni-Rty Corporation and Golden Plaza Limited Partnership (hereinafter, "GPLP") seek to enforce a 2013 judgment entered in a Southern District of New York Action (the "federal action") against respondent/judgment debtor New York Guangdong Finance, Inc ("NYGFI"). Petitioners allege that, in violation of New York Debtor & Creditor Law ("DCL") §§ 273 and 276, NYGFI's shareholders—including respondents China Construction Bank ("CCB"), Agricultural Bank of China ("ABC" or collectively with CCB, "the Banks"), the Estate of Joseph Chu, Alexander Chu (collectively the "Chu Respondents")—engaged in a scheme to fraudulently distribute NYGFI's assets amongst themselves, thereby rendering NYGFI insolvent and unable to pay judgment creditors. Accordingly, pursuant to CPLR 5225 (a), 5225 (b), and 5227, petitioners seek (1) to void the fraudulent transfer of assets and (2) an order compelling respondents to turnover NYGFI assets that they are allegedly holding so that petitioners may enforce the underlying judgment.

The Court conducted a bench trial from February 14-17, 2023. During the trial, each side presented three witnesses: for petitioners, Alex Chu, his wife Irene Chu, and Anthony Colombini, who was a director and officer at NYGFI; for respondents, Zhijie Fan, who works in ABC's legal department in China, Wei Zhongru, a CCB employee working in a similar capacity, and Greg Brown, who served as counsel for the Banks during their litigation of a derivative action in Texas on behalf of NYGFI. All witnesses testified credibly. Additionally, pursuant to a So-Ordered Stipulation dated February 8, 2023, parties stipulated that deposition testimony from non-appearing witnesses—principally, Lawrence Wong and Joseph Chuang—would be introduced into the record subject to the Court's resolution of any asserted objections. The Court issued rulings on those objections on the record on February 14, 2023. (NYSCEF doc. no 1040, trial transcript 2.14.23.) On or about August 4, 2023, the parties submitted their respective proposed findings of fact and conclusions of law to the Court.

For the reasons set forth below, the Court finds that petitioners have not demonstrated that respondents fraudulently conveyed NYGFI assets under DCL §§ 273-a or 276.

FINDINGS OF FACT

In 1987, Joseph Chu and Guangdong International Trust & Investment Corporation ("GITIC") formed NYGFI and were its original shareholders. (NYSCEF doc. no. 979, 980, Bank Exhibits ("BX")-A and B, certificate of incorporation and bylaws.) In 1992, NYGFI invited Agricultural Bank of China, China Construction Bank, and Lawrence Wong to become shareholders of the corporation. Each shareholder paid $2 million for a 20% equity interest in NYGFI. (NYSCEF doc. no. 981, BX-C, business cooperation agreement.) Around this same time, ABC made two loans to NYGFI totaling $7.5 million, and CCB made three loans totaling $10 million. (NYSCEF doc. nos 983-985, BX- E-G, loan agreements.) At the time of the Banks' investments, NYGFI held real estate assets in three principal locations: Texas, New York, and China. The Texas assets were principally controlled and managed by Wong, the New York assets by the Chu Respondents, and the China assets by GITIC. (NYSCEF doc. no. 1037, Petitioners' Exhibit (PX)-74, Wei He's March 1997 report.)[1]

By around 1995-1996, the New York assets included a 50% interest in Guangdong Building Inc. ("GBI"), which held title to Golden Pacific Plaza located at 241 Canal Street (and which would later become the subject of the federal litigation), certain shares of United Orient Bank that Joseph Chu had purchased for $1.92 million in 1989, and an equity interest in a property in Flushing, N.Y. (NYSCEF doc. no. 402 at ¶16-37, Chu Respondents' statement of material facts [describing how GBI purchased Golden Pacific Plaza from petitioner Uni-Rty, then sold a 50% interest to NYGFI]; NYSCEF doc. no. 552 at 38, Joseph Chu deposition [explaining that he personally owned 50 percent of GBI and NYGFI owned the other 50 percent]; NYSCEF doc. 1037 at 14 [describing Joseph Chu's purchase of United Orient Bank Stock in NYGFI's name]; NYSCEF doc. no. 1122, PX-64, Chu letter to GITIC [stating that NYGFI owned approximately 240,000 shares of the stock].)

Several years after becoming investors, the Banks sent representatives to work in NYGFI offices and to report to their China-based offices the status of the corporation's real estate investments in the United States. Their representatives— Wei He and Chaosheng Chen for CCB, Zhongping Fang for ABC—began reporting on NYGFI's mismanagement and how Wong and Chu would exclude them from participating in the corporation's operation. Wei He's report describes the existence of significant problems within the corporation, including investing in poor assets with huge risks. (NYSCEF doc. no. 1037 at 17.) He goes on to explain how the Banks were "egregiously excluded," that Wong and Chu attempted "to take advantage of the deficient management policy and visa restrictions on Chinese shareholders," and that Chinese shareholders/representatives could not "participate in the daily operation and management decision-making process, and don't have knowledge about true operation status." (*Id.*)[2] Fang

[1] CCB appointed Wei He as a representative to NYGFI to manage and oversee CCB's equity interest and loan to the corporation. He held that position from 1994 to 1997.

[2] NYSCEF doc. no. 991, BX-O appears to be the same document with a slightly different translation. In sum and substance, the documents describe the same business practices.

reported the same: "[NYGFI] has only made one statement in June this year, and no matter how much we urge them, they ended up keeping putting [sic] it off...Project files are not established, and reports of each project are not provided to each shareholder. Similarly, we are not allowed to participate in operation and management." (NYSCEF doc. no. 990, BX-N, Fang's 11.07.96 report; see also NYSCEF doc. no. 986, BX-I, Fang's 12.28.1995 report [reiterating belief that Wong was attempting to make him and Wei He "mere puppets"] and NYSCEF doc. no. 993, BX-R, Fang's 03/1998 report [reiterating that "the management is very chaotic. It is not the issue of the level of management; rather it was someone creating the chaos so as to reap gains from fishing in muddy waters."])

The Texas and New York Derivative Actions

In 2001, after several years of being excluded in this manner, CCB, ABC, and GITIC commenced the Texas action against Wong and several of his business associates. Therein, the Banks asserted both derivative claims on behalf of NYGFI and a direct claim for fraud. (*See* NYSCEF doc. no. 996, petition for Texas action.) They alleged that Wong had engaged in a series of fraudulent real estate schemes and self-dealing transactions, failed to provide the Banks with proceeds from NYGFI's investments, and failed to repay over $20 million in loans initially provided to NYGFI. (*Id.*; NYSCEF doc no. 1027, Chu Respondents Exhibit ("CX")-14, sixth amended petition.) Wong and NYGFI denied liability and asserted counterclaims accusing the Banks and GITIC of misappropriating profits from NYGFI's China assets. (NYSCEF doc. no. 1041 at 390, Brown testimony; NYSCEF doc. no. 943 at 137, Wong dep. testimony.)

In 2002, the Banks commenced a derivative action in New York on behalf of the corporation against the Chu Respondents, GBI, and EastBank N.A.[3] (NYSCEF doc. no. 995, BX-U, complaint-N.Y. derivative action.) In March 2003, the Chu Respondents filed an answer and asserted derivative and direct counterclaims against the Banks, alleging that they had aided and abetted wrongdoing concerning the company's Texas and China assets.

Greg Brown, who served as counsel for the Banks in the Texas action for two and a half years, testified that the shareholder derivative actions were "incredibly hard-fought." (NYSCEF doc. no. 1041 at 390.) Parties engaged in "exhaustive" discovery, which from the Bank's perspective, involved obtaining all the records of the corporation's real estate investments that had been withheld previously. (*Id.*) Brown, who was responsible for reviewing his law firm's monthly billings, testified that they regularly ran into the hundreds of thousands of dollars as the firm had anywhere from four to eight lawyers working on the case. (*Id.* at 390-391.)

In 2004, during a three-day mediation session, the Banks (now including GITIC) and Wong agreed to settle the Texas derivative action. The settlement agreement (NYSCEF doc. no. 999, BX-BB) provided as follows:

(1) The Banks assigned the $17.5 million in loans that they had made to NYGFI to W. Ong Co. (an entity entirely owned by Wong, in his individual capacity) (*id.* at ¶ 3 [a] [ii] [1]);
(2) Each bank transferred their 20 percent share in NYGFI (constituting 60 percent of the total outstanding shares of NYGFI) to W. Ong Co. (*id.* at ¶ 3 [a] [ii] [2]);

[3] Unlike with the Texas Action, the Banks did not assert direct claims against the Chu Respondents.

(3) Wong paid the Banks $3 million immediately and executed a $9 million promissory note to be paid over nine years (*id.* at ¶ 3 [a] [ii] [4-5]);
(4) All parties (including NYGFI) released each other from liability (*id.* at ¶ 3 [a] [ii] [9], ¶ 3 [a] [iii]).

The agreement also granted Wong the exclusive right to negotiate a resolution to all claims the banks and NYGFI held against the Chu Respondents in the New York action. Alex Chu testified that he learned of the settlement and explained, in his conversations with Wong during this exclusive period, that "[Wong] gave me the impression that he [was] actually speaking for the banks and he was looking for us to contribute into that settlement that he promised the banks for everything to go away." (NYSCEF doc. no. 1041 at 323, Chu testimony.)

On February 18, 2005, the parties settled the New York action. This global agreement modified the Texas one to the extent that the Chu Respondents would pay the Banks $7 million, while Wong would pay $4.5 million, and the Banks agreed to accept $500,000 less in return for payment over six months instead of nine years. (NYSCEF doc. no. 1013 at ¶ 3-5, BX-QQ, N.Y. settlement agreement.) Additionally, the Chu Respondents assigned their 20-percent equity interest in NYGFI to W. Ong. Co., giving Wong a 100-percent ownership of the corporation (*id.* at ¶ 10), and NYGFI released to the Chu Respondents its 50-percent interest in GBI (and, indirectly, the Golden Pacific Plaza) and its interest in the United Orient Bank stock. (*Id.* at ¶ 12 [a]- [b].) The New York agreement did not amend the Banks' assignment of their $17.5 million NYGFI loans to W. Ong Co.,[4] who, to reiterate, became the sole owner of NYGFI. There is no evidence in the record of W. Ong. Co. attempting to collect on said loans. Nor did the settlement agreement address NYGFI assets in China.[5] Of the $11.5 million that the Banks received in the settlement, $8,251421.27 was paid in attorneys' fees, meaning the three banks split $3,248,534.73 three ways. (NYSCEF doc. no 1016, BX-TT, schedule of attorneys' fees; NYSCEF doc. no. 1042 at 457, Fan testimony.)

This Court (Ramos, J.) approved the New York settlement in October 2005. (NYSCEF doc. no. 1014, N.Y. settlement approval.) The District Court of Texas approved the amended Texas settlement in March 2006, specifically finding that "all parties consented to the motion [for approval] and that the Settlement Agreements were in the best interest of New York Guangdong Finance Inc. and of its shareholders." (NYSCEF doc. no. 1015, BX-SS, Texas settlement approval.)

Pursuant to the settlement agreements, Wong and Chu-affiliated entities paid the Banks the required $11.5 million. (NYSCEF doc. no 1012, BX-PP, Chu wire transfer [demonstrating two payments from "Irving R. Raber Co Inc."—a Chu-affiliated company—to the Banks]; NYSCEF doc. no. 1048 at 158-159, Wong dep. testimony [testifying that he personally paid part of the $4.5 million and that the other portion came from W. Ong Co].)

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[4] Including loans made by GITIC and Chu, the total assignment of loans to W. Ong Co. exceeded $20 million and was as large as $27.5 million.

[5] Witnesses Fan and Wei testified that they each individually conducted investigations within their respective banks and found no evidence that ABC or CCB possessed NYGFI China-based assets, either in 2016 or before trial in 2023. (NYSCEF doc. no. 1042 at 458-460; NYSCEF doc. no. 1043 at 623, Wei testimony.) Brown further testified that during the Texas litigation, he "did not see any evidence that supported [Wong's counterclaim for misappropriating of the Chinese assets]." (NYSCEF doc. no 1041 at 158.)

In 2011, Wong dissolved NYGFI. (NYSCEF doc. no. 1017, BX-UU, certificate of dissolution.)

The Federal Action

In 1995, petitioners commenced the federal action in the Southern District of New York against NYGFI, Joseph and Alexander Chu, GBI, and Eastbank, N.A. related to petitioners' joint venture with NYGFI in 1990 and GBI's subsequent acquisition of the Golden Pacific Plaza. (NYSCEF doc. no. 1023, CX-1, joint venture agreement; NYSCEF doc. no. 1024, CX-4, federal action complaint.) More specifically, petitioners asserted that NYGFI and the Chu Respondents undermined the venture to develop, own, and operate the Golden Pacific Plaza, which caused petitioners to default on a loan to NYGFI and enter into a sale to GBI. (*Id.*) Petitioners asserted breach of contract and fraudulent inducement causes of action against the Chu Respondents.[6]

In 2004, around the same time the derivative actions were being litigated, a jury returned a verdict in favor of petitioners, though Judge John Sprizzo vacated it as against the weight of evidence and ordered a new trial. (NYSCEF doc. no. 16, CX-16, Sprizzo December 2004 Order.) In July 2009, after the Texas and New York actions settled but before NYGFI was dissolved, Judge George Daniels presided over the new trial. The jury again returned a verdict in favor of petitioners, finding, in pertinent part, that (1) NYGFI had breached the joint venture agreement and was therefore liable for $8.25 million, and (2) Joseph and Alexander Chu made false representations that fraudulently induced petitioners into selling Golden Pacific Building to GBI and liable for $250,000. By Decision and Order dated May 25, 2012, Judge Daniels upheld the jury verdict. (NYSCEF doc. no. 1030, CX-26, Daniels' 2012 Decision and Order.) The Clerk of the Court entered judgment against NYGFI that same day for the $8.25 million, then amended the amount in January 2013 to $20,547,020.55 to include interest. The Second Circuit affirmed the May 2012 Decision and Order. (*See Uni-Rty Corp. v Guangdong Bldg, Inc.*, 571 Fed. Appx. 62 [2d Cir 2014].)

Procedural Posture of the Instant Action

Petitioners commenced the instant action in October 2012. They allege that NYGFI's shareholders divided the corporation's assets amongst themselves through the two settlement agreements, leaving it insolvent and unable to pay the underlying judgment. (NYSCEF doc. no. 1 at ¶¶ 34, 71-89 complaint.) Accordingly, petitioners seek (1) to vacate the transfer of assets as described in the Texas and New York settlements, (2) for judgment against each respondent in the amount of the underlying judgment, and (3) an order directing them to turnover NYGFI assets that they are allegedly holding. (*Id.* at ¶ 1.) In September 2014, petitioners moved for summary judgment pursuant to CPLR 409, which this Court (Coin, J.) denied. On appeal, the First Department affirmed that petitioners submitted no evidentiary proof of NYGFI's ownership of the United Orient Bank stock or interest in GBI and that they failed to demonstrate either a lack of fair consideration for the asset transfers or NYGFI's insolvency. (*Uni Rty Corp. v New York Guangdong Fin., Inc.*, 140 AD3d 446, 447-448 [1st Dept 2016].)

[6] Petitioners did not include the Banks or Wong as parties in the action.

In February 2019, the Banks and the Chu Respondents separately moved for summary judgment pursuant to CPLR 409, which the Court also denied. (*Uni-Rty v New York Guangdong Fin., Inc.*, 2020 NY Slip Op 33133[U] [Sup. Ct. NY County 2020] [Love, J].) Under DCL § 273, Justice Love found that there were issues of fact as to whether the settlement rendered NYGFI insolvent and whether NYGFI received fair value in return for disclaiming interest in certain assets; under DCL § 276, Justice Love found issues of fact as to whether petitioners' claim was time-barred, whether petitioners had demonstrated actual fraud, and whether they had demonstrated that the Banks and/or the Chu Respondents held ownership interests in various Texas and Chinese-based assets. (*Id.* at 8-17.) As part of this Court's trial, the parties submitted proposed findings of fact and conclusions of law that address these outstanding issues.

CONCLUSIONS OF LAW

Debtor Credit Law § 273-a[7]

DCL § 273-a provides, "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." To be considered a fraudulent conveyance under § 273, petitioners must establish by clear and convincing evidence that the settlements lacked fair consideration. (*See Farkas v D'Oca*, 305 AD2d 237, 237 [1st Dept 2003]; *Matter of U.S. Bancorp Equip Fin., Inc. v Rubashkin*, 98 AD3d 1057, 1060 [2d Dept 2012] [finding trial court erred in granting petition to void the subject mortgage since petitioner failed to establish by clear and convincing evidence that the mortgage was fraudulent under § 273].) The term "fair consideration," as defined by DCL § 272, has two components: first, the judgment debtor must receive the fair equivalent of the property conveyed or the antecedent debt discharged; second, parties must have undertaken the exchange in good faith. (*See* DCL § 272; *Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]; *HBE Leasing Corp. v Frank*, 61 F3d 1054, 1057-1058 [2d Cir 1995].) Fair consideration is a question of fact to be determined under the circumstances of the particular case. (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]; *Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003].)

After reviewing the record, the Court finds that petitioners have not demonstrated by clear and convincing evidence that the Texas and New York settlements lacked fair consideration.[8] Petitioners assert that NYGFI did not receive consideration in return for releasing

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[7] All provisions of the DCL have been repealed. However, the parties recognize that the DCL was in effect when respondents settled the Texas and New York actions in 2004 and 2005 and are thus applicable to this special proceeding.

[8] On appeal of the petitioners' pre-discovery motion for summary judgment, the First Department found that the settlement payments from Wong and Chu constituted "indirect" payments from NYGFI. (*Uni Rty Corp*, 140 AD3d at 447.) In their post-trial proposed conclusions of law, the Banks argue the First Department's holding does not comport with evidence obtained in discovery after the appeal and thus is not controlling precedent. From the Banks' perspective, the payments were made directly by Wong and Chu, on behalf of themselves, to resolve the direct claims asserted in the Texas litigation. Under this theory, since Wong and Chu acted separately from NYGFI, petitioners cannot establish that an entity that is a "defendant in an action for money damages" made the payments,

all parties from liability in the Texas and New York derivative actions and for giving up its equity interest in GBI and United Orient Bank. This is true, they argue, because NYGFI's $17.5 million in outstanding loans from the Banks and $2 million in loans from the Chu Respondents were not discharged but rather assigned to W. Ong. Co. [9] (NYSCEF doc. no. 1163 at 12, petitioners post-trial memo of law.) Petitioners' position, however, does not account for the fact that, pursuant to the terms of the settlements, W. Ong Co. consolidated ownership of NYGFI and acquired NYGFI's loan obligations. As described above, the Banks and the Chu Respondents not only assigned their right to collect on their loans to W. Ong Co., but also gave W. Ong Co. a 100 percent equity interest in NYGFI. For practical purposes, then, NYGFI's obligation to repay the Bank loans became extinguished when NYGFI's sole owner—W. Ong Co.—also became its creditor for those loans.

Trial testimony from Colombini, Fan, and Wei indicates that Wong's acquisition of both NYGFI and its loan debt was a design feature in the settlement agreements. As to what NYGFI received as consideration, Colombini explained that it was his understanding that NYGFI released certain liabilities for loans, and when pressed that this might not be true and that the loans "didn't disappear," he testified that the assignment of the Banks' loans to Wong became "a debt against himself." (NYSCEF doc. no. 1040 at 180-181.) Similarly, Fan testified that "the Bank give [sic] the equity and debt to Wong's group so Wong's group and NYGFI are both creditor and debtor to each other. According to Chinese law, that is overlapped. So in this way, there will be some part of the debt eliminated." (NYSCEF doc. no. 1042 at 488.) On cross examination, when asked whether NYGFI would have to repay those loans to Wong, Wei clarified that "the Bank's transferred the loans to Wong and it will be up to Wong to decide if it were getting payment from NYGFI... and Wong holds 100 percent shares of NYGFI." (NYSFCEF doc. no 1043 at 609.) To this end, petitioners have failed to adduce any evidence that Wong intended or sought to have NYGFI pay down any of the loans. (NYSCEF doc. 943 at 166, Wong dep. testimony [averring that he did not attempt to collect the loans].)

As the Banks and the Chu Respondents argue, the assignment of NYGFI's loans was not of the ordinary variety whereby a third party acquires the loan obligations and has the same interest in collecting on the debt as the previous creditors. Petitioners' citations do not address this distinction between an ordinary assignment of debt and the rather unique circumstances found here of a creditor obtaining complete ownership of the debtor corporation. (*See Benson v Deutsche Bank Nat. Tr., Inc.* (109 AD3d 495 [2d Dept 2013].) As such, none of petitioners' cases are persuasive. Instead, from the Court's perspective, the Second Circuit has provided the most instructive line of cases, all of which find that indirect benefits running to the debtor by the asset transfer may be considered fair consideration. In *HBE Leasing Corp. v Frank* (48 F3d 623 [2d Cir. 1995]), the Second Circuit explained that when a debtor transfers property, but the transferee gives the consideration to a third party, the debtor will ordinarily not have received fair consideration; however, this rule may be disregarded to the extent that the debtor receives an indirect benefit from the entire transaction. (*Id.* at 638; *see also Rubin v Manufacturers Hanover*

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and so there can be no fraudulent conveyance. Petitioners and the Chu Respondents both reject this position and argue that the First Department's ruling on this issue controls as the law of the case. The Court need not address this dispute because, even assuming the payments were made by an entity described by § 273, petitioners have not demonstrated a lack of fair consideration.

[9] The $17.5 and $2 million figures do not include a calculation of any accrued interest.

Trust Co., 661 F2d 979, 991 [2d Cir. 1981] ["If the consideration given to the third person has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved."]) Such appears to be precisely the case here: in return for disclaiming interest in United Orient Bank and GBI to the Chu Respondents and for the release of all other parties, NYGFI received the indirect economic benefit of its debt discharged from W. Ong Co.'s acquisition of both NYGFI and its loans. (*See* DCL § 272; *Eagle Eye Collection Corp. v Shariff*, 190 AD3d 600, 601 [1st Dept 2021] [debtor's conveyance of something for value to extinguish a mortgage loan was made "in payment of an antecedent debt, and cannot constitute a fraudulent conveyance under DCL § 273-a."]

In addition to the discharge of an antecedent debt, respondents identify two other sources of valid consideration that NYGFI received in the settlement. The first is that the settlement resolved the shareholder impasse that had limited NYGFI's ability to conduct business. In the parties' motion to approve the settlement agreements in Texas, they note that NYGFI "is effectively blocked in its ability to conduct any corporate business as long as its articles of incorporation and bylaws require 100% consent for action and the parties continue to litigate." (NYSCEF doc. no. 1036 at 7, PX-44, joint motion for approval.) The second source of consideration is the benefit NYGFI received in settling lengthy and expensive litigation, including by limiting legal fees that NYGFI might have had to pay to the Banks for any substantial benefit the corporation received through the derivative litigation. Against all the forms of consideration identified by respondents—the discharge of at least $20 million in antecedent debt, the benefits of consolidated ownership, the end to lengthy litigation—petitioners' accounting identifies only a 50 percent interest in GBI worth between $4.2 million and $6.5 million[10]and shares of United Orient Bank stock worth approximately $1.9 million in or around 1990-1991[11] that NYGFI disclaimed. Viewed in this light, it is evident that petitioners have not demonstrated through clear and convincing evidence that NYGFI did not receive a fair equivalent for, at most, $8.4 million in property it gave up in the settlements.

Citing *PalmOne, Inc. v R.C.S. Computer Experience, LLC* (2007 NY Slip Op. 50873 [U] at n2 [Sup. Ct. Suffolk County 2007]) and *Nat'l Communs. Corp v Bloch* (259 AD2d 427, 427 [1st Dept 1999]), petitioners argue that, where a transfer involves self-interested parties on both sides of the transaction, the burden of proof shifts to respondents and it is incumbent on them to demonstrate the presence of fair consideration. There are two problems with this argument: on the one hand, the above discussion establishes that respondents *have* affirmatively shown a fair equivalent to the property given up; on the other, even if they had not done so, petitioners have not alleged the type or degree of self-dealing that was present in those two cases and as such, have not justified shifting the burden of proof.

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[10] Alex Chu testified that Joseph Chu purchased the Golden Plaza Hotel for $13 million through GBI and agreed to sell 50 percent of GBI to NYGFI for $6.5 million. However, Chu also testified that NYGFI only ever paid $4.2 million of the total obligation. Not paying the entire $6.5 million either reduces the value of NYGFI's interest in GBI or constitutes a loan of $2.3 million to the Chu Respondents that was discharged when Wong acquired complete control of the company.

[11] The settlement agreement does not mention NYGFI's one-third interest in the Flushing, New York property and, thus, is not included in the consideration given.

To the latter point, in *PalmOne*, the two individual defendants controlled both RCS Computer Experience and Northeast Financial Group and attempted to keep assets from RCS's creditors by transferring them to Northeast (*id.* at n2);[12] in *Bloch*, the First Department recognized that defendant Bloch owned a 50 percent interest in the judgment-debtor company and a 100 percent interest in the company receiving the assets. (*Bloch*, 259 AD2d at 427.) Here, no one entity held a majority or controlling interest in NYGFI when they executed the settlement agreements (indeed, part of the problem was that no one company controlled NYGFI and the bylaws required a 100 percent shareholder vote to conduct business), none of the parties were on both sides of the agreement, and independent counsel represented NYGFI during negotiations. (NYSEF doc. no. 1041 at 387, [Brown describing that all parties were represented by independent counsel, including NYGFI].)

As to the good-faith prong of § 273-a, good faith may be shown by (1) an honest belief in the propriety of the activities in question, (2) the lack of intent to take unconscionable advantage of others, and (3) no intent or knowledge of the fact that the activities in question will hinder, delay, or defraud others. (*Bank of Communs. v Ocean Dev. American Inc.*, 904 F Supp 2d 356, 361 [SDNY 2012].) In other words, good faith is required of both the transferor and the transferee, and it is lacking when there is a failure to deal honestly, fairly, and openly. (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006].)

The record demonstrates that the settlement payments were made to resolve legitimate claims that the Banks brought against Wong and the Chu Respondents for excluding them from the management of NYGFI. Trial testimony from Chu, Brown, and others suggests that the Banks' derivative litigation had become extremely contentious and costly. (*Supra*, at 3.) As to his motive to settle, Chu credibly testified that he had to take a more proactive role in the derivative litigation after his father's death and that prosecuting the Chu counterclaims against the Banks became that much more difficult. He explained:

> "It's overwhelming since my father passed. But all of this going back and forth is very taxing. I don't have the information no matter how hard I go and find it. I don't know the characters...I can't pick up the phone and talk to somebody at GITIC or talk to somebody at Agricultural Bank. There was absolutely no way for me to independently do anything other than just be on the receiving end...I just want to be, you know, out of it, to be done with it. So I was very interested [in settling] and I follow-up [sic] with Larry." (NYSCEF doc. No. 1042 at 517.)

As described *supra*, in 2004, parties to the Texas action participated in a three-day long, arm's length mediation effort to settle that litigation, a process that the mediator reported to the Texas court was the "result of good faith efforts of all parties and their respective attorneys." (NYSCEF doc. no. 1000, BX-CC, mediator letter.) Thereafter, two different courts approved the settlement agreements: in 2005, this Court approved the New York one; and in 2006, the Texas

[12] It should also be noted that the court burdened defendants to show fair consideration because of their alleged self-dealing *and* because they were moving for summary judgment. (*PalmOne*, 2007 NY Slip Op. 50873 at n2.)

court then approved the global settlement, specifically finding that it was in the best interest of NYGFI. The only conclusion to be drawn from the testimony heard by this Court is that the parties entered into settlement negotiations in an honest attempt to resolve the increasingly expensive litigation. This is especially true since petitioners have not come forth with any direct evidence that the agreements were the product of a scheme to defraud judgment creditors or that the shareholders sought to use their position to advance their interests at the expense of the corporation's creditors.

On previous motion sequences, petitioners had argued that the challenged settlement agreements favored NYGFI's directors, officers, and shareholders such that respondents must (but failed) to present evidence to overcome a presumption against a good faith transaction. (*See Uni-Rty Corp.*, 140 AD3d at 488 [finding that petitioners "submitted no evidence" that the transfers were not made in good faith and that their reliance on the presumption against transfers to interested parties was misplaced as they had not shown the corporation's insolvency].) Yet, just as when they moved for summary judgment, petitioners at trial did not make the requisite showing that the corporation was insolvent or that the Banks and Chu Respondents were the type of insiders to which the presumption applies.

To show NYGFI's insolvency, petitioners did not call an accounting expert to testify. Rather, they relied upon Wong's deposition testimony that the corporation was "probably" insolvent after the settlement and the corporation's 2000 tax return that showed assets valued at more than $35 million. (NYSCEF doc. no. 1048 at 124-125; BX-T, NYGFI tax return.) This evidence is insufficient to establish insolvency under DCL §271, which requires a showing that the corporation's salable assets were less than the amount the corporation would be required to pay on existing liabilities when they become mature. (*See* Debtor & Creditor Law § 271; *Flowers v 73rd Townhouse, LLC*, 202 AD3d 403, 404 [1st Dept 2022] [holding that plaintiff established prima facie that defendant corporation was insolvent through an expert accountant's report that was "based on an exhaustive analysis of the financial records produced by defendants"]; *Kenyon & Kenyon LLP v SightSound Tech., LLC*, 151 AD3d 530, 531 [holding plaintiff did not establish insolvency by relying "solely on the book value of assets and tax returns and offered no evidence of market value of [defendant's] assets."])

And as the Court has already described (*see* discussion of burden shifting, *supra* at 8-9), respondents are not the type of insiders to which the presumption typically applies. (*See Matter of CIT Group/Commercial Servs., Inc*, 25 AD3d at 303 ["Transfers to a *controlling* shareholder, officer, or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent" (emphasis added)]; *Matter of P.A. Bldg. Co. v Silverman*, 298 AD2d 327, 328 [1st Dept 2002] [transfer of assets to defendant lacked good faith where he was also the chairman and 80 percent shareholder of the corporation that made transfer].) As petitioners have neither demonstrated that NYGFI received less than a fair equivalent for the assets that NYGFI transferred nor that the settlement agreement lacked good faith, petitioners have not demonstrated a DCL Section 273-a violation.

Debtor Creditor Law § 276

DCL § 276 provides, "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed by law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." § 276 permits the Court to void transfers of assets of ostensibly fair transactions where parties actually intended to defraud a creditor. (*See Wall Street Assocs.*, 257 AD2d at 529 [explaining that § 276 addresses actual fraud, as opposed to constructive fraud under § 273-a, and does not require proof of unfair consideration or insolvency].)

Whether Petitioners Timely Commenced Their § 276 Claim

CPLR 213 (8) requires actions based on fraud to be commenced within six years from when the fraud occurred or two years from when the petitioner knew of the fraud, or with reasonable diligence, should have discovered it. (CPLR 213 [8]; *MBI Int. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 114 [1st Dept 2017].) As Justice Love noted in his September 2020 Decision and Order, petitioners do not dispute that the petition was filed on October 26, 2012, more than six years from when petitioners allege the fraudulent conveyances took place, i.e., when the parties executed the Texas and New York settlement agreements. (*Uni-Rty*, 2020 NY Slip Op 33133[U] at * 9-10.) Additionally, Justice Love determined that there were issues of fact as to when petitioners possessed knowledge from which the fraud could reasonably be inferred since Kung Joseph Chuang (petitioners' principal) stated that he learned of the existence of the settlement agreements in 2008 or 2009 only to later testified that he did not know about them until 2012.[13] (*Id.* at *10.)

At trial, parties stipulated that Chuang's deposition would be entered into the record, subject to the Court's ruling on the parties' objections. A review of his testimony reveals that he first learned about the Texas and New York derivative actions in 2008 or 2009 when his lawyers presented him with certain records from the New York action. (NYSCEF doc. no. 1046 at 51-53, Chuang dep. testimony.) He further testified that he waited to investigate the substance of these actions until 2012, when he first became aware of the settlement agreements. (*Id.* at 110-111) He explained that he had "no interest to investigate" in 2008 or 2009 because the actions were purely derivative, and petitioners were concerned with getting a judgment against the corporation. (*Id.*) Based on this timeline, it is also clear that Chuang failed to investigate in September 2010, when counsel for his corporation informed Judge Daniels in the federal action that petitioners were going to file fraudulent conveyance claims under the DCL because they were concerned that NYGFI and GBI assets had been transferred to the Chu Respondents. (NYSCEF doc. no. 1021, BX-YY, counsel letter to Justice Daniels ["This matter is especially urgent since Dr. Joseph Chuang, one of plaintiffs' principals, was told by an in-house attorney for defendants that all assets of Guangdong Building, Inc. and New York Guangdong Finance, Inc. have been transferred to defendant Alexander Chu."].)

To more precisely situate the letter, the jury in the second federal trial had returned a verdict in petitioners' favor, and while the parties were awaiting a decision from the court on the

[13] To reiterate, respondents had moved for summary judgment, and as such, Justice Love was required to view Chuang's testimony in a light most favorable to the nonmoving party.

Chu Respondents' motion to vacate the award, petitioners allegedly received notice from an opposing attorney that assets were being fraudulently transferred. Thus, by September 2010, petitioners would have had a strong incentive to monitor NYGFI's assets, and it should have been clear that an investigation into the derivative claims asserted by the corporation's shareholders over how the corporation was managing its assets was warranted. Even still, Chuang and petitioners waited until 2012. Such conduct suggests that petitioners did not act with the degree of diligence required by CPLR 213 (8).

At the very latest, petitioners were on inquiry notice in September 2010, and Chuang's admission that he still did not investigate the derivative actions triggered the running of the statute of limitations. (*See MBI Intl. Holdings*, 151 AD3d at 115 [holding a plaintiff was under inquiry notice beginning when the defendant entered into a settlement agreement with a third party that affected its rights and that the plaintiff's failure to pursue a reasonable investigation triggered the running of the statute of limitations]; *Aozora Bank, Ltd. v Deutsche Bank Sec. Inc.*, 137 AD3d 685 [1st Dept 2016] ["[W]here the circumstance are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shut his eyes to the facts which call for investigation, knowledge of fraud will be imputed to him."].) To be timely, then, petitioners were required to assert this claim by September 2012. Since they did not do so, the Court finds these claims to be time-barred.[14] Nonetheless, the Court will address the petitioners' substantive arguments under DCL § 276.

Whether Clear and Convincing Evidence Demonstrates Respondents' Intent to Defraud

Since actual fraud under § 276 may be difficult to prove, petitioners are permitted to rely on "badges of fraud," i.e., circumstantial evidence commonly associated with fraudulent transfers, that give rise to the inference of fraudulent intent. (*Id.*; citing *Pen Pak Cor. V LaSalle Natl. Bank*, 240 AD2d 384, 386 [2d Dept 1997]; *Brennan v 3250 Rawlins Ave. Partners, LLC*, 171 AD3d 603, 605 [1st Dept 2019].) The First Department has recognized that badges of fraud include (1) the inadequacy of consideration, (2) a close relationship between the parties to the alleged fraudulent transaction, (3) a secret and hasty transfer of assets not in the usual course of business, (4) the transferor's knowledge of the creditor's claim and its inability to pay, and (5) the retention of the property by the transferor after conveyance. (*Wall Street Assocs.*, 257 AD2d at 529; *MFS/Sun Life Trust-High Yield Series v Van Dusen Airport. Servs. Co.*, 910 F Supp 913, 935 [SDNY 1995].) Depending on context, badges of fraud will vary in significance and the presence of multiple indicia will increase the strength of the inference. (*Id.*)

Here, it should be noted that petitioners have presented no direct evidence of fraudulent intent. There is no documentary or testimonial evidence that the Banks or the Chu Respondents intended to use the settlement agreements to distribute NYGFI's assets amongst themselves or to leave the corporation insolvent and unable to pay creditors.

[14] Despite Justice Love identifying this issue as one for the trier of fact, petitioners did not advance a position in their post-trial proposed conclusions of law and accompanying memorandum of law. Accordingly, petitioners appear to concede the point.

Petitioners are left to rely on several of the badges of fraud described above to argue for an inference of fraudulent intent. The Court has already explained its findings as to petitioners' argument that NYGFI received inadequate consideration and/or retained possession of NYGFI assets. As to the remaining indicators of fraud, they do not support an inference of actual intent.

Petitioners describe an "indisputably" close relationship among the shareholders, one characterized not as "arms-length strangers but business partners and NYGFI insiders" and that they worked together to loot NYGFI. (NYSCEF doc. no 1163 at 21.) Yet Petitioners do not cite evidentiary support for these assertions. And the record is particularly clear that NYGFI's shareholders were engaged in a managerial dispute for the better part of a decade, from around 1994-1995, when the Banks' NYGFI representatives in Texas first describe being excluded from operational decisions (*see* NYSCEF doc. nos. 986, 987, 990, 991, 993 and 994 [all describing the Banks' continued belief that they were being excluded from management]), through 2005-2006 when the settlements were executed. Respondents demonstrated that the conflict left NYGFI nearly inoperative from 1996 onward, when the company held its last shareholder meeting (NYSCEF doc. no. 1035, 1036 [describing NYGFI's inability to conduct corporate business during the duration of the derivative litigation since NYGFI requires 100 percent consent to act].) As to the not engaging in arms-length negotiations, the Texas mediator certainly did not believe this to be true, writing to the court that parties engaged in good faith negotiations (NYSCEF doc. no. 1000), and both Chu and Wong testified that their respective contributions to the settlement agreement were bargained for and very difficult. (NYSCEF doc. no. 1042 at 521-522 [describing tense negotiation].)

Petitioners argue that an intent to commit fraud is implicated by the Texas and New York settlement agreements because they represent transfers of assets "not in the usual course of NYGFI's day-to-day business." (NYSCEF doc. no. 1163 at 22.) Of course, if the settlements are not considered part of NYGFI's usual business practice, this is only because prosecuting and/or defending the actions was not part of the corporation's usual business. In the circumstances presented here, where NYGFI's shareholders have brought legitimate derivative claims, it is difficult to see why significance should attach to whether the settlement agreements exist within the ordinary course of business. After all, as described at length, their purpose was to end destructive litigation and limit expensive legal fees, both of which are rational business purposes. And though petitioners contend that the terms were unique and highly extraordinary, they have not demonstrated that they were not in the interest of NYGFI.

Lastly, petitioners argue that NYGFI, the Banks, and the Chu Respondents knew about the pending federal action before distributing NYGFI assets. Yet this assertion drastically reduces the complexity of respondents' knowledge. When they settled in 2005-06, Judge Sprizzo had ordered a new trial in the federal action because the previous verdict was against the weight of evidence, the new one would not take place for approximately four to five years, and a full and final judgment would not be entered for another three years. Given the enormous uncertainty surrounding petitioner's federal claims, simply having knowledge of petitioners' cause of action cannot, without anything more, create an inference of fraud.

For all of these reasons, petitioners have not demonstrated that an inference of actual intent to defraud should be applied. Accordingly, petitioners have not demonstrated by clear and

convincing evidence that respondents, with actual intent, fraudulently conveyed property belonging to NYGFI under § 276.

Since the Court has found respondents not liable to petitioners under DCL §§ 273-a and 276, the Court need not address the Banks' argument that DCL § 278 prevents petitioners from recovering against innocent purchasers or the Chu Respondents' argument that § 278 limits the amount to which petitioners are entitled.

Accordingly, for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the petition of Uni-Rty Corporation and Golden Plaza Limited Partnership for orders pursuant to CPLR 5225, 5227, and 5228 and Debtor Creditor Law § § 273-a and 276 is denied, and this special proceeding against respondents New York Guangdong Finance, Inc., Guangdong Building Inc., the Estate of Joseph Chu, Alexander Chu, Centre Plaza, LLC, EastBank, N.A., China Construction Bank, and Agricultural Bank of China is dismissed with prejudice; and it is further,

ORDERED that the Clerk of the Court shall enter judgment accordingly, and it is further

ORDERED that counsel for respondents China Construction Bank and Agricultural Bank of China shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry.

DATE: 9/5/2023 **DAKOTA D. RAMSEUR, JSC**

Check One: [x] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify _____)**