UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CITRUS TOWER BOULEVARD IMAGING CENTER, LLC, Debtor.	)	CHAPTER 11 Case No. 11-70284-mgd
CITRUS TOWER BOULEVARD IMAGING CENTER, LLC, Plaintiff, v. KEY EQUIPMENT FINANCE, INC., Defendant.	)	Adversary Proceeding No. 14-05105 mgd

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT AND OBJECTION TO CLAIM

Defendant Key Equipment Finance, Inc. ("KEF"), respectfully submits this Memorandum of Law in support of its Motion to Dismiss Complaint and Objection to Claim filed by Plaintiff Citrus Tower Boulevard Imaging Center, LLC ("Plaintiff").

SUMMARY

In its Complaint, Plaintiff alleges that it submitted draw requests to KEF for work that was never performed and the proceeds of which were directed to

accounts owned or controlled by the Plaintiff's insiders. Amazingly, this is not a complaint against the Plaintiff's insiders who are alleged to have submitted potentially fraudulent draw requests resulting in millions of dollars of damages suffered by KEF for which it has not been reimbursed. Instead, in what can only be described as bizarre, Plaintiff seeks to hold KEF liable for being defrauded by Plaintiff.

Not surprisingly, these bizarre assertions are not supported by law or fact. Indeed, Plaintiff's claims asserted in its Complaint and Objection to Claim (the "Complaint") are barred for multiple reasons and are without merit.

First, Plaintiff admits in its Complaint that (1) it previously released all claims against KEF in a forbearance agreement and (2) that unless Plaintiff can avoid the release as a preferential transfer, the claims asserted in the Complaint are subject to the release. However, the forbearance agreement is not subject to avoidance, because, among other reasons, the time for bringing preferential transfer claims expired 2 years after entry of the order for relief – making the expiration date July 12, 2013. As such, any claim for preference is time barred and the releases contained in the forbearance agreement are effective to bar all claims

held or asserted by Plaintiff.[1] Second, even without the forbearance agreement, the lease agreement signed by Plaintiff contained a waiver of future claims that is independently enforceable to bar Plaintiff's claims. Finally, even if there were no releases in favor of KEF, Plaintiff's claims have no individual merit in that (1) Plaintiff's claim for equitable disallowance is not recognized under the prevailing law of this circuit, (2) there is no allegation sufficient to support a finding of inequitable conduct on the part of KEF (indeed, the allegations show that Plaintiff potentially defrauded KEF)[2], (3) there was no breach of contract,

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[1] Further, KEF was unable to find any case law supporting Plaintiff's claim that a release contained in a forbearance agreement could be avoided as a preferential transfer, even if it were not time barred.

[2] KEF notes that it is unclear whether it was defrauded, as the imaging facility was fully constructed, furnished, and operational after it was fully funded by KEF. *See In re Citrus Tower Boulevard Imaging Center LLC*, Case No. 11-70284, Doc. 146, p. 2 (Order Granting Debtor's Motion to Assume Unexpired Lease with Sky Top Enterprises LLC) (the "Assumption Order") (noting that the center was operating as of November 2010)). The Court may take judicial notice of its previous orders. *See, e.g., Perdomo v. HSBC Bank USA*, 2014 U.S. Dist. LEXIS 46274 (S.D. Fla. Jan. 13, 2014) ("A district court may take judicial notice of certain facts without converting a motion to dismiss into a motion for summary judgment. . . . These facts can include pleadings and orders in a prior case if they [are] public records that [are] not subject to reasonable dispute because they [are] capable of accurate and ready determination by resort to sources whose accuracy [can] not reasonably be questioned.") (citing *Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010) (citations omitted, alterations in original).

(4) there is no independent basis to support Plaintiff's tort claims, (5) there is no allegation of control to support the lender liability claim, and (6) the objection to KEF's claim will be rendered moot by the filing of an amended proof of claim setting forth amounts received by KEF from Plaintiff after the Petition Date.

RELEVANT BACKGROUND

Plaintiff was formed in 2008 to develop an imaging center in Clermont, Florida (the "Project") (Compl. ¶ 8.) Franklin B. Trell ("Trell") ran the everyday business of Plaintiff until March of 2011. (Compl. ¶ 9.) Plaintiff needed financing for the development, build-out, and furnishing of the Project. (Compl. ¶ 12.) KEF agreed to provide the requested financing. (Compl. ¶ 13.) On January 6, 2010, Plaintiff, through Trell, executed a Master Lease Agreement with KEF (the "Lease Agreement"). (Compl. ¶ 14.)

The Lease Agreement contains, in relevant part, the following waivers:

> **TO THE EXTENT PERMITTED BY APPLICABLE LAW, LESSEE WAIVES… ANY RIGHTS NOW OR HEREAFTER CONFERRED BY STATUTE OR OTHERWISE TO RECOVER INCIDENTAL OR CONSEQUENTIAL DAMAGES FROM LESSOR FOR ANY BREACH OF WARRANTY OR FOR ANY OTHER REASON OR TO SET OFF OR DEDUCT ALL OR**

> **ANY PART OF ANY CLAIMED DAMAGES RESULTING FROM LESSOR'S DEFAULT, IF ANY, UNDER THE RELATED LEASE.**

(Lease Agreement ¶ 24, attached hereto as Exhibit A) (*emphasis in original*).[3]

Plaintiff made draw requests to KEF through Trell and Cynthia Vinson ("Vinson"). (*See* Compl. ¶¶ 11, 22-25, 27, and 28.) The Project was completed by and began operating in late 2010. (*See* Assumption, p. 2 (noting that the center was operating as of November 2010)).

Plaintiff alleges that certain payments were made at Plaintiff's request, through Trell and Vinson, to entities named "MD Office Solutions, LLC" and "Medical Development Group, LLC". (Compl. ¶ 27.) Plaintiff further alleges that the payments to "MD Office Solutions, LLC" and "Medical Development Group, LLC" were made to SunTrust accounts that are owned or controlled by Trell and/or Vinson. (Compl. ¶ 28.) Plaintiff further alleges that there is no evidence that "MD Office Solutions, LLC" and "Medical Development Group, LLC" actually provided any services to Plaintiff for the Project. (Compl. ¶ 38.) As such, Plaintiff alleges that through its authorized agents, Trell and Vinson, it defrauded KEF by

[3] Because the Master Lease Agreement was referenced and relied upon in the Complaint, attaching the cited document to a Motion to Dismiss is proper and does not render a Motion to Dismiss a Motion for Summary Judgment. *Bickley v. Caremark RX, Inc., et al.*, 461 F.3d 1325, 1329 n. 7 (11th Cir. 2006).

submitting false draw requests to KEF that KEF relied upon in making advances to Plaintiff. (*See* Compl. ¶¶ 27, 28, and 38.)[4]

Unable to pay its debts to KEF, Plaintiff negotiated a forbearance agreement (the "Forbearance") with KEF. (Compl. ¶¶ 52-53.) The Forbearance includes a release of claims against KEF by Plaintiff. (Compl. ¶ 53.) Specifically, the release states as follows:

> 9. Release and Waiver of Any Claims and Defenses: The Obligated Parties [including Plaintiff] represent that, as of this date, they have no claim or defense of any kind, including without limitation, offset or otherwise, to payment in full under the terms of the Lease Documents, to the Lease Documents or to any other instrument or document executed therewith, including this Agreement. The Obligated Parties further represent that they do not have any claim whatsoever against KEF, its officers, attorneys, agents, employees, successors or assigns ("Released Parties"), arising out of the financial relationships between them and the Released Parties. To the extent that any such claim, set-off or defense may exist, the Obligated Parties on behalf of themselves and their successors and assigns, hereby release and forever discharge Released Parties from any and all claims, demands, and causes of action, known or unknown, that the Obligated Parties may have as of the date of this Agreement, arising out of or in any way connected with, directly or indirectly:
>
> - This Agreement and/or the financial relationship between and among any of the Obligated Parties and the Released Parties, prior to the date of this Agreement.

[4] Plaintiff recently filed an Adversary Proceeding (Doc. 335) against Trell and Vinson accusing them of, among other things, submitted fraudulent draw requests to KEF.

- Any representations, commitments, agreements or statements made, or allegedly made, by Released Parties, their agents or employees at any time to any of the Obligated Parties, prior to the date of this Agreement; and

- Any negotiations concerning or relating to loans or other credit allegedly committed to by Released Parties to any of the Obligated Parties prior to or during the negotiations relating to the formation and execution of this Agreement, or the agreements contemplated hereby, regardless of whether such negotiations or commitments were oral or in writing.

The Obligated Parties hereby stipulate and agree that in consideration for the financial accommodations as set forth in this Agreement, any and all such claims arising prior to the date of this Agreement, shall be and hereby are forever released, settled, waived, adjusted and discharged.

The Obligated Parties further acknowledge and agree that KEF's actions to date, in connection with or in the administration of the Lease Documents, have been reasonable, appropriate, and do not constitute and have not constituted interference with or an attempt to control or actual control of any assets or operations of any business of any of the Obligated Parties.

(Forbearance ¶ 9, attached hereto as Exhibit B) (*emphasis in original*).[5]

Plaintiff filed for bankruptcy on July 12, 2011. (Compl. ¶ 54.) Plaintiff ultimately shut down its business and liquidated its assets, paying the net sale proceeds to KEF. (Compl. ¶¶ 55-57.) Plaintiff also sought, and obtained, entry of

[5] *See* Note 3, *supra*.

two adequate protection orders from this Court to adequately protect KEF's interest in Plaintiff's assets, including certain causes of action (the "Adequate Protection Orders"). (Doc. 106 and 263.) Throughout the pendency of the Plaintiff's bankruptcy case, KEF has supported the Plaintiff in its attempts to reorganize. (*See, e.g.*, Doc. 166, Transcript of Hearing on Motion for Order Approving Assumption of Un-Expired Non-Residential Real Property Lease.) Despite having numerous opportunities to do so in the nearly 3-years since Plaintiff filed its bankruptcy case, KEF is unaware of Plaintiff ever complaining to this Court about KEF acting improperly or inequitably prior to filing the Complaint.

ARGUMENT AND CITATION OF AUTHORITY

A. Rule 12(b)(6) Standard.

When deciding a Rule 12(b)(6) motion, the Supreme Court has stated that the pleading standard of Rule 8 demands "more than an un-adorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Rather, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*

Therefore, in evaluating a motion to dismiss, this court need not accept conclusions of law or unwarranted inferences cast in the form of factual allegations. *Farrell v. Time Service, Inc.*, 178 F. Supp. 2d 1295, 1300 (N.D. Ga. 2001). Instead, the claims set forth in the Complaint must be plausible, rather than merely conceivable. *See Twombly*, 127 S. Ct. at 1974. Thus, only well-pleaded facts must be taken as true; conclusory allegations are entitled to no presumption of truth. *See Oxford Asset Mgmt. Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

As demonstrated below, the Complaint fails to assert any basis upon which relief can be granted and should be dismissed under Fed. R. Civ. P. 12(b).

B. The Waivers and Releases in the Lease Agreement and the Forbearance Bar Plaintiff's Claims against KEF.

As noted above, in the Lease Agreement, Plaintiff prospectively waived any right "to set off or deduct all or any part of any claimed damages resulting from lessor's default, if any, under the related lease." (Lease Agreement ¶ 24.) This advance waiver is valid and enforceable. *See, e.g., Bank of the Ozarks v. ARCO Comm'ty Outreach Coalition Inc.*, No. CV212-017, 2013 U.S. Dist. LEXIS 5740, *9 (S.D. Ga. Jan. 15, 2013); *see also Fielbon Dev. Co., LLC v. Colony Bank of Houston Cnty.*, 290 Ga. App. 847, 853 (2008) ("By consenting to [waiver and consent language], [guarantor] agreed in advance to the bank's actions and

inactions in this case, even if the end result was a correspond[ing]. . . increase of risk or a novation . . . a party may consent in advance to the conduct of future transactions and will not be heard to 'claim his own discharge' upon the occurrence of that conduct.").

Further, if the prospective waiver contained in the Master Lease Agreement were not enough, Plaintiff provided additional broad waivers in the Forbearance. Specifically, Plaintiff represented and agreed as follows: (1) that it has no claims against KEF as of the date of the Forbearance; (2) to the extent any claims existed against KEF by Plaintiff, Plaintiff "release[d] and forever discharge[d] [KEF] from any and all claims, demands, and causes of action, known or unknown, that the [Plaintiff] may have as of the date of [the Forbearance] arising out of or in any way connected with, directly or indirectly … [the Forbearance] and/or the financial relationship between and [Plaintiff] and [KEF], prior to the date of this Agreement" or "[a]ny representations, commitments, agreements or statements made, or allegedly made, by [KEF]…, prior to the date of this Agreement; (3) Plaintiff "**stipulate[d] and agree[d] that in consideration for the financial accommodations as set forth in this [Forbearance], any and all such claims arising prior to the date of this [Forbearance], shall be and hereby are forever released, settled, waived, adjusted and discharged;** and (4) Plaintiff "further

acknowledge[d] and agree[d] that KEF's actions to date, in connection with or in the administration of the Lease Documents, have been reasonable, appropriate, and do not constitute and have not constituted interference with or an attempt to control or actual control of any assets or operations of any business of any of the Obligated Parties." (Forbearance ¶ 9) (*emphasis in original*).

In short, the acknowledgements, releases and waivers contained in the Forbearance bar any and all of Plaintiff's claims. *See, e.g., Rice v. Huff*, 221 Ga. App. 592, 593 (1996) (noting that "[w]here the terms of a written [release] contract are clear and unambiguous, the court will look to the [release] contract alone to find the intention of the parties" and holding that a broad release was effective to preclude assertion of claims) (some alterations in original); *Darby v. Mathis*, 2012 Ga. App. 444, 445 (1994) (where a release purports to "release any and all claims, demand, rights, and causes of action," the court should give such terms their plain and broad meaning); *Adams v. EMC Mort. Corp.*, No. 12-cv-00344-RB-KLM, 2012 U.S. DIst. LEXIS 186918, * 24-30 (D. Colo. Aug. 21, 2012) (relying on Colorado law, which holds that "[a] release is an agreement to which the general contract rules of interpretation and construction apply[, and] [u]nless ambiguous, a contract under Colorado law is interpreted and enforced according to the plain and ordinary meaning of its language," in dismissing claims based on a prior release

agreement). Indeed, even Plaintiff acknowledges that the releases it provided purports "to release all claims held by Plaintiff against [KEF], including potentially the claims asserted in this Complaint . . . ." (Compl. ¶ 101.) As such, Plaintiff seeks to avoid the releases contained in the Forbearance by alleging that they are avoidable preferential transfers. However, as noted below, the Forbearance is not subject to avoidance and, accordingly, "all claims held by Plaintiff against [KEF]" have been released, requiring dismiss of the Complaint with prejudice.

C. Count VIII For Avoidance and Recovery of Preference is Time Barred.

As noted above, Plaintiff filed for bankruptcy on July 12, 2011. As such, the deadline to file a complaint for the avoidance of preferential transfers expired on July 12, 2013. 11 U.S.C. § 546(a) (noting that a claim under section 547 "may not be commenced after … 2 years after the entry of the order for relief; or 1 year after the appointment or election of the first trustee…if such appointment or election occurs before the expiration of the [2 year period]".) Because Plaintiff's claim of preference is time barred, the releases, waivers, and acknowledgements contained

in the Forbearance continue to be binding on Plaintiff, thereby requiring the dismissal with prejudice of Plaintiff's Complaint.[6]

D. Even if Plaintiff did not Provide Releases and Waivers, Plaintiff Fails to Allege Any Inequitable Conduct to Support Counts I and II for Equitable Disallowance/ Reduction and Equitable Subordination and Equitable Disallowance is not Recognized as a Claim Under Prevailing Authorities.

As a preliminary matter, Plaintiff's claim for equitable disallowance is not recognized in this circuit. *In re Mobile Steel Co.*, 563 F.2d 692, 699 (5th Cir. 1977) (noting that "equitable considerations can justify only the subordination of claims, not their disallowance…. Disallowance of claims on equitable grounds would add nothing to the protection against unfairness already afforded the bankrupt and its creditors. If the claimant's inequitable conduct is directed against the creditors, they are fully protected by subordination. If the misconduct directed against the bankrupt is so extreme that disallowance might appear to be warranted, then surely the claim is either invalid or the bankrupt possesses a clear defense against it. Thus, where the bankrupt is the victim it has an adequate remedy at law. It follows that disallowance of a wrongdoer's claim on nonstatutory grounds would

[6] Further, KEF was unable to find any case ever avoiding a release based upon preferential transfer claims. Accordingly, even if this claim were decided on its merits, it would fail.

be an inappropriate form of equitable relief.") (citations omitted) As such, Count I of Plaintiff's Complaint is not recognized as an available remedy in this circuit.[7]

Further, to state a claim for equitable subordination, Plaintiff must allege that (1) KEF engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of Plaintiff or conferred an unfair advantage on KEF; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code. *In re Mobile Steel Co.*, 563 F.2d at 699. In the Complaint, however, Plaintiff's fail to allege that KEF engaged in any inequitable conduct. In fact, just the opposite, the Complaint suggests that **Plaintiff defrauded KEF** by submitting false draw requests for which KEF funded Plaintiff and for which KEF has not been reimbursed. Adding insult to injury, Plaintiff now takes the position that KEF acted inequitably, intentionally, and tortiously, in being defrauded by Plaintiff.[8]

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[7] Decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

[8] KEF notes that it is unaware of Plaintiff ever taking such a position in the more than 3-years that its bankruptcy case has been pending. Indeed, Plaintiff never took issue with KEF while Plaintiff sought KEF's support for its reorganization efforts (which was provided) and never questions KEF's actions in seeking, and obtaining, adequate protection orders from this Court. Indeed, the timing of this litigation suggests that the litigation is being advanced not based upon merit, but as a result of KEF seeking to recover on the guaranty issued by

Instead of alleging actual inequitable conduct – a feat that it is unable to do, because no inequitable conduct exists – Plaintiff attempts to misconstrue certain terms of the Lease Agreement and expand that falsity into inequitable conduct and even into independent torts. However, simply saying that KEF committed inequitable conduct is not sufficient to survive a motion to dismiss, as conclusory allegations are entitled to no presumption of truth. See Oxford Asset Mgmt. Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002). In this case, there are no "inequitable" facts that support a claim for the equitable subordination of KEF's claim. Indeed, the only inequitable actions described in the complaint relate to Plaintiff's defrauding of KEF. As such, Counts I and II must be dismissed with prejudice.[9]

George Overend in favor of KEF. (*See Key Equipment Finance Inc. v. George D. Overend, et al.*, Case No. 12-2473-CAP, United States District Court for the Northern District of Georgia.) A cursory review of the Complaint shows that Overend is the driving force behind its filing. Indeed, the Complaint frequently is told from the perspective of Overed – alleging that "Overend" knew or did not know of certain actions (rather than Plaintiff) -- and specifically seeks the subordination of KEF's claim to the claims of Overend. (Compl. ¶¶ 21, 22, 70, 75, 81, 85, 91, and 98.)

[9] It is also unclear what injury to creditors can be attributed to KEF, given that the actions complained of related to KEF being defrauded by Plaintiff. Further, KEF agreed to provide financing for the build-out of the facility – a facility that was fully operational after being funded by KEF. Finally, the third element of equitable subordination is likewise not satisfied, as subordination would be

E. Even if Plaintiff did not Provide Releases and Waivers, Plaintiff's Complaint Demonstrates That no Breach of Contract Occurred.

As noted in paragraph 18 of the Complaint, KEF agreed "to make the Progress Payments to the Suppliers upon Borrower's request at the times and in the amounts set forth in the Purchase Documentation." (Compl. ¶ 18; for ease of reference, the PPL Agreement is attached hereto as Exhibit C.) The Complaint further alleges that the Progress Payments made by KEF were in fact made "upon Borrower's request." (*See* Compl. ¶¶ 21, 22, 24, 25, 27.) In fact, there is no allegation that KEF made Progress Payments other than upon Borrower's request. As such, Plaintiff has not demonstrated how this provision has been breached.[10]

Paragraph 18 of the Complaint further reads, in relevant part, "KEF shall have **no obligation** to make any Progress Payment hereunder unless…" certain information is provided to KEF. (Compl. ¶ 18) (emphasis added). This phrase demonstrates when KEF is **obligated** to make a Progress Payment. In other words,

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contrary to the Adequate Protection Orders entered in this case, which granted, among other things, replacement liens in causes of action held by the Plaintiff.

[10] It appears that Plaintiff believes that use of the phrase "Purchase Documentation" when discussing the time and manner of payment creates some duty on KEF to inspect the Purchase Documentation and otherwise ensure that the work supporting the Purchase Documentation was performed. However, there is no provision cited in the Complaint that imposes such a duty on KEF – because none exists.

if Plaintiff provided the required information to KEF and KEF refused to make the Progress Payment, KEF could be liable for breach of the agreement. However, there is no provision that says "KEF is obligated **not** to make a Progress Payment, unless it receives the following information." As such, Plaintiff is trying to redraft the clear and unambiguous terms of the documents to manufacture a breach of contract claim. However, since the cited terms of the lease documents demonstrate that no breach occurred, Plaintiff's claim for breach of contract must be dismissed with prejudice, even if such claims were not previously waived and released.

F. Even if Plaintiff did not Provide Releases and Waivers, Plaintiff's Complaint Fails to Allege an Independent Duty to Support Its Claims for Negligence and Gross Negligence.

Throughout the Complaint, Plaintiff complains that KEF breached the terms of the Lease Agreement and/or the PPL Agreement. (*See, e.g.*, Compl. ¶¶ 18-51, 80, 84.) In Counts IV (Negligence) and Count V (Gross Negligence), Plaintiff incorporates all of the alleged breaches of the Master Lease Agreement and/or the PPL Agreement. (Compl. ¶¶ 76, 82.) As such, Plaintiff is seeking to use its breach of contract allegations to support tort claims of negligence and gross negligence. However, as noted in a recent decision from Judge Duffy "[a] defendant's mere negligent performance of a contractual duty does not create a tort cause of action; rather, a defendant's breach of a contract may give rise to a tort cause of action

only if the defendant has also breached an independent duty created by statute or common law." *Sanders v. U.S. Bank Nat. Assoc. as Trustee for GSR 2007-2F*, Case No. 1:13-cv-3192-WSD, 2013 U.S. Dist. LEXIS 164179, *9 (N.D. Ga. November 19, 2013) (citing *Fielbon Dev. Co. v. Colony Bank of Houston Cnty.*, 660 S.E.2d 801, 808 (Ga. App. 2008)). In the Complaint, Plaintiff fails to cite an independent duty created by statute or common law that was breached by KEF. Accordingly, Plaintiff's claims for negligence and gross negligence, to the extent they somehow survived the waivers and releases given by Plaintiff in favor of KEF, still fail as a matter of law and must be dismissed with prejudice.

G. Even if Plaintiff did not Provide Releases and Waivers, Plaintiff's Complaint Fails to Allege Facts to Support a Lender Liability Claim.

As a preliminary matter, it is unclear based upon the case law whether there is an independent cause of action for "lender liability". However, in Kipperman v. Onex Corp., 411 B.R. 805, 873 (N.D. Ga. 2009), Judge Forrester noted that "[t]he case law makes clear that a critical issue in any claim of lender liability is whether 'the dominant corporation exerted 'actual, operative, total control' such that the subservient corporation has 'no separate mind, will or existence of its own and was a business conduit' for the dominant corporation." Kipperman v. Onex Corp., 411 B.R. 805, 873 (N.D. Ga. 2009) (citing *In re iPCS, Inc.*, 297 B.R. 283, 294 (Bankr. N.D. Ga. 2003)). As such, it appears that a "lender liability" claim is related to an

alter ego analysis. However, the Complaint makes no allegations relating to KEF exercising control over Plaintiff or otherwise supporting a lender liability claim, assuming such a claim exists. For this reason, as well as the waivers and releases referenced above (including the release of any "control" claims), Plaintiff's claim for lender liability should be dismissed with prejudice.

H. Plaintiff's Objection to Proof of Claim will be Mooted by the Filing of an Amended Proof of Claim.

As alleged in the Complaint, KEF received certain adequate protection payments and sale proceeds after filing its original proof of claim. KEF intends to amend its proof of claim to reflect these payments. Further, KEF intends to remove any reference to attorneys' fees as it is not an over-secured creditor in the Plaintiff's bankruptcy case. With the dismissal of Plaintiff's other claims asserted against KEF and the amendment of KEF's proof of claim, KEF submits that Plaintiff's claim objection would be rendered moot. As such, this claim should likewise be dismissed.

WHEREFORE, KEF respectfully requests that the Court: (i) grant this Motion; (ii) dismiss the Complaint with prejudice; (iii) award KEF its attorneys' fees and costs; and (iv) grant such other and further relief as is just under the circumstances.

This 7th day of May 2014.

/s/ John F. Isbell
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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT AND OBJECTION TO CLAIM with the Clerk of Court using the CM/ECF system which will send automatic notification of such filing to the following attorneys of record:

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This 7th day of May 2014.

/s/ John F. Isbell
John F. Isbell