45 Misc.3d 1217(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
Supreme Court, New York County, New York.

TAP HOLDINGS, LLC, Irving Place Capital Partners II, LP, Irving Place Capital Investors II, LP, Irving Place Capital MB–PSERS II, LP, the BSC Employee Fund V11, LP, and IPC Manager II, LLC, for Themselves and in the Right and on Behalf of Tap Operating Company LLC, Plaintiffs,
v.
ORIX FINANCE CORP., Maps CLO Fund I, LLC, Maps CLO Fund II, Ltd, Wells Fargo Bank, N.A., Union Bank of California, N.A., CIT Lending Services Corporation, Bank Midwest, N.A., Brown Brothers Harriman & Co., Prudential Insurance Company of America, OFS Funding, LLC, OFSI Fund III, Ltd., CIT CLO I Ltd., Tap Automotive Holdings, LLC, Gregory Adler, Kenneth C. Cleveland, and Edward M. Kleinschmidt, Defendants,
Orix Finance Corp., Maps CLO Fund I, LLC, Maps CLO Fund II, LTD, Wells Fargo Bank, N.A., Union Bank of California, N.A., CIT Lending Services Corporation, Bank Midwest, N.A., Brown Brothers Harriman & Co., Prudential Insurance Company of America, OFS Funding, LLC, OFSI Fund III, Ltd., CIT CLO I Ltd., Counterclaim–Plaintiffs,
v.
Tap Holdings, LLC, Irving Place Capital Partners II, L.P., Irving Place Capital Investors II, L.P., Irving Place Capital MB–PSERS II, L.P., and the BSC Employee Fund VII, L.P., Counterclaim–Defendants.

No. 600691/10. | Nov. 7, 2014.

Attorneys and Law Firms

Ivan O. Kline, Esq., Friedman & Wittenstein, for Plaintiff.

Edwin Baum, Esq., Crowell Moring, for Defendant (Orix).

James H. Neale, Esq., Norton Rose Fulbright, for Defendant (New Tap).

Opinion

CHARLES E. RAMOS, J.

***1** In motion sequence 020, plaintiff IPC Manager II, LLC (IPC Manager) moves for an order pursuant to CPLR 3212(a) and (e) granting its motion for summary judgment on the eighth cause of action for successor liability set forth in the second amended complaint (Complaint) against defendant TAP Automotive Holdings, LLC (New Tap), and severing the cause of action as against New Tap, and pursuant to CPLR 4311, referring the matter to a referee to hear and report on the amounts due under the notes which are the subject of the eighth cause of action.

In motion sequence 021, defendants ORIX Finance Corp. (now known as ORIX Corporate Capital Inc.), MAP Clo Fund I, LLC, MAPS CLO Fund II, Ltd., Wells Fargo Bank, N.A., Union Bank, N.A., CIT Lending Services Corporation, Bank Midwest, N.A., Union Bank N.A., CIT Lending Services Corporation, Bank Midwest N.A. (Now known as Armed Forces Bank, N.A.), Brown Brothers Harriman & Co., The Prudential Insurance Company of America, OFS Funding, LLC, OFSI Fund III, Ltd. and CIT CLO I. Ltd. (collectively, the Senior Lenders) move pursuant to CPLR 3212 granting their motion for summary judgment and dismissing the third through eighth causes of action in the complaint.

In motion sequence 022, defendant/counterclaim-plaintiff New Tap moves for partial summary judgment against the IPC Manager and in favor of New Tap on the eighth cause of action.

Motion sequence numbers 020–022 are herein consolidated for disposition.

Background[1]

The following facts are undisputed, except where noted.

Plaintiffs Irving Place Capital Partners II, L.P., Irving Place Capital Investors II, L.P., Irving Place Capital MB–PSERS II, L.P., and The BSC Employee Fund VII, L.P. (IPC Investors), are limited partnerships. The IPC Investors own, through an intermediate holding company, plaintiff TAP Holdings, LLC, a majority of the membership interests of non-party Tap Operating Co., LLC (Tap). Since 2005, Tap Holdings held 100% of the membership interests in Tap.

In 2005, the Senior Lenders extended senior secured loans to nonparty Tap Operating Company, LLC (Tap) in the

amount of $60 million in connection with Tap's acquisition of an automotive parts company (Senior Secured Credit Facility). Pursuant to Senior Secured Credit Facility, the Senior Lenders took a security interest in substantially all of Tap's assets. Tap Holdings guaranteed the secured loans and granted the Senior Lenders a security interest in 100% of its Tap membership units.

Tap made another significant acquisition in 2006, financed by an additional $30 million term secured loan extended by the Senior Lenders, and the issuance of senior subordinated notes (Subordinated Notes) held by non-parties Allied Capital Corporation (Allied) and JZ Capital Partners Limited (JZ Capital) (together, the Noteholders). Defendants Orix Finance Corp. (Orix) was the administrative agent for the Senior Secured Credit Facility.

In addition to the financing provided by the Senior Lenders and the Noteholders, Tap Holdings contributed approximately $86 million to the equity of Tap, by 2006.

***2** Plaintiff IPC Manager is the assignee of the claims of the Noteholders, and also manages three of the IPC Investors (IPC Manager Rule 19–A Statement, ¶ 23).

Throughout 2008, Tap was in default of certain technical covenants in the Senior Secured Credit Facility. Rather than declare Tap in default, the Senior Lenders and Tap entered into a series of forbearance agreements, pursuant to which, in exchange for equity infusions by the IPC Investors, the Senior Lenders agreed not to exercise their rights to seek payment of the full loan amount or to enforce their security interests (IPC Manager Rule 19–A Statement ¶¶ 33–38).

In June 2008, the IPC Investors executed a participation agreement with the Senior Lenders wherein they acknowledged events of default under the Senior Secured Credit Facility. In the participation agreement, the IPC Investors provided a partial guaranty, in the form of a promise to purchase $7 million of subordinated "last-out" participation interests in the Senior Secured Credit Facility, in the event of a payment default by Tap.

In December 2008, Orix exercised its rights as a secured creditor with respect to the membership units of Tap pledged by Tap Holdings, terminated Tap Holdings' voting rights and removed all of Tap's board members-with the exception of one, and appointed two individuals to the Board (IPC Manager Rule 19–A Statement ¶¶ 39–41). In January 2009, the Senior Lenders refused to extend the forbearance period, and declared an event of default under the Senior Secured Credit Facility based upon Tap's failure to comply with certain financial covenants. On the same day, the Senior Lenders demanded the IPC Investors fund the guaranty under the participation agreement and purchase the $7 million last-out participation interests.

On October 30, 2009, the Senior Lenders and New Tap, a newly-created entity, voted to proceed with a sale of all of Tap's assets to New Tap pursuant to Article 9 of the UCC (Asset Transfer).

In the Asset Transfer, the Senior Lenders accepted all of the assets of Tap, including its goodwill, in satisfaction of its obligations under the Senior Secured Credit Facility. The assets were then sold to New Tap in exchange for $66 million in new, senior secured notes, and New Tap's assumption of certain liabilities of Tap totaling more than $20 million (New Tap's Rule 19–A Statement in Opp., ¶ 84). New Tap did not assume obligations of the amounts due to plaintiffs, including to the Noteholders under the Notes, on which Tap owed approximately $38,446,712 on the eve of the Asset Transfer.

The Asset Transfer purportedly did not include any notice to Tap Holdings or the public in general, nor did did the Senior Lenders arrange for an auction or any other mechanism by which other parties, including plaintiffs, would be able to submit a competing offer (Plaintiffs' Counter-statement of Material Facts, ¶ 113 O).

According to plaintiffs, Tap's performance had strongly rebounded during the third quarter of 2009 just prior to the Asset Transfer. The IPC Investors valued Tap at substantially in excess of $66 million when the Asset Transfer was effectuated, and assert that they would have sought to acquire the business themselves at a price in excess of $66 million had they been given the opportunity to do so (Plaintiffs' Counter-statement of Material Facts, ¶ 115 A).

***3** In March 2010, IPC Manager and the Noteholders entered in an assignment agreement (Assignment Agreement), whereby the latter assigned and transferred claims that arose with respect to the Asset Transfer (Exhibit 107, annexed to the Kline Aff.).

Eighth Cause of Action

The IPC Manager, as assignee of the claims of the Noteholders, asserts a claim for successor liability against the Senior Lenders and New Tap arising out of New

Tap's failure to pay down the Notes. In support of the claim, the IPC Manager alleges that the Asset Transfer was specifically structured with the intent to shear Tap of its assets while leaving it without the ability to pay the Noteholders. New Tap has allegedly engaged in a de facto merger with Tap, and exists as a mere continuation of Tap and its subsidiaries. Further, IPC Manager alleges that the Senior Lenders formed New Tap solely for the purpose of receiving the assets and business of Tap, albeit fraudulently conveyed, and dominated and directed New Tap's acquisition of those assets for the purpose of fraudulently transferring Tap's assets. The IPC Manager seeks to hold New Tap and the Senior Lenders jointly and severally liable for all obligations and amounts owed by Tap and its subsidiaries to the Noteholders on the Notes.

Defendants previously moved to dismiss the claim for successor liability, which this Court denied, on April 11, 2012 (N.Y.SCEF Doc. No. 230). The First Department affirmed this Court's decision the following year (*Tap Holdings, LLC,* 109 AD3d 167).

Discussion

The IPC Manager moves for summary judgment on its claim for successor liability on the ground that there are no material facts in dispute that New Tap is a "virtual clone" of Tap, and is a successor to Tap for breach of the Notes under two theories of successor liability: mere continuation and de facto merger. The IPC Manager relies upon undisputed evidence that, as part of the Asset Transfer, Tap transferred substantially all of its assets, including its name and goodwill to New Tap. New Tap assumed virtually all of the liabilities of Tap other than the Notes, and New Tap holds itself out as the "successor" to Tap. Further, the date of the Asset Transfer was the last day that Tap did business, after which Tap had no funds and kept no financial records. Tap also breached its obligations on the Notes by failing to make the required payments, the Noteholders assigned their claims to the IPC Manager, and New Tap is a successor to Tap and thus liable for Tap's obligations under the Notes.

In opposition and in support of its own motion for summary judgment to dismiss the claim, New Tap maintains that the Asset Transfer was not fraudulent as it is undisputed that the Senior Lenders were entitled to foreclose on Tap, and Tap was not rendered insolvent by the transaction because it was already insolvent. New Tap argues that the factors that might support successor liability are not present here, because there is evidence that Tap was not extinguished by the Asset Transfer, and the IPC Manager has not established continuity of ownership between Tap and New Tap.

***4** New Tap also asserts that the assignment of the Noteholders' claims for no consideration is champertous and violates a contractual prohibition on assignment contained within the Notes, the IPC Manager lacks standing to assert its claim in any event, and the Court of Appeals has not recognized an independent doctrine of successor liability for breach of contract claims.

I. Successor Liability

A. It is undisputed that the Notes are valid and binding on Tap, and that Tap has failed to make required payments on them (New Tap's Response to IPC Manager's Rule 19–A Statement, ¶¶ 32, 35–38).

B. Pursuant to the Assignment Agreement, the Noteholders assigned their claims under the Notes to the IPC Manager, pursuant to the Assignment Agreement.

1. No Assignment Clauses

New Tap and the Senior Lenders assert that the IPC Manager lacks standing to pursue its claim under the Notes because the Subordinated Note Purchase Agreement (SNP Agreement) explicitly and repeatedly prohibits the IPC Manager from acquiring, by assignment, the rights of the Noteholders that give rise to its fifth through eighth causes of action. They rely upon sections 9.07 and 5.02(s) of the SNP Agreement.

Section 9.07(a) provides that a Noteholder "may ... assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement."The definition of "Eligible Assignees" excludes the IPC Manager, "neither BSMB [one of the IPC Investors] ... nor any Affiliate of the foregoing shall qualify as an Eligible Assignee under this definition."

Section 9.07(g) permits each Noteholder to sell participations to one or more Persons (other than any Loan Party or any of its Affiliates). The definition of affiliate exempts The Bear Stearns Companies, Inc. and their subsidiaries, but expressly excludes BSMB, which includes the IPC Manager under its former name.

With respect to negative covenants under the SNP Agreement, section 5.02(s) states:

"So long as any Note or any other Obligation of any Loan Party under any Loan Document shall remain unpaid, the

Borrower [Tap] and its Subsidiaries will not, at any time ... Bear Stearns Merchant Banking [IPC Manager's predecessor] and their respective Subsidiaries and Affiliates shall not purchase, redeem, prepay, tender for or otherwise acquire, directly or indirectly, any of the outstanding Notes or Senior Debt except upon the repurchase or prepayment of the Notes in accordance with the provisions of Article II of the Senior Credit Agreement (...). The Borrower will promptly cancel all Notes or Senior Debt acquired by it or any of the other Loan Parties or such Affiliates pursuant to any purchase, redemption, prepayment or tender for the Notes or Senior Debt pursuant to any provision of this Agreement or otherwise and no Notes or Senior Debt may be issued in substitution or exchange for any such Notes or Senior Debt."

General Obligations Law section 13–101 provides that any claim can be transferred except one to recover for a personal injury. Whether a non-assignment clause renders a subsequent assignment void, or merely constitutes the breach of a personal covenant not to assign, depends upon the expressed intent of the parties, namely whether the language is sufficiently clear declaring the invalidity of such assignments (*Allhusen v. Caristo Constr. Corp.,* 303 N.Y. 446 [1952]; *Macklowe v. 42nd Street Dev. Corp.,* 170 A.D.2d 388, 399 [1st Dept 1991]).

***5** The contractual language upon which defendants rely contains no provision that assignments made in contravention thereof, or to an "ineligible assignee," should be void or result in no acquisition of rights by reason of such assignment. In addition, the contractual language does not indicate that the non-assigning party has no obligation to recognize the assignee (*compare Allhusen,* 303 N.Y. 446 [anti-assignment clause provided that any assignment of money due or to become due without written consent "shall be void"]). Neither do any of the cited provisions expressly prohibit assignment of *claims,* which the Assignment Agreement purports to effectuate.

The section entitled "negative covenants" does not invalidate the Assignment Agreement. The restrictions contained therein are clearly intended to benefit the Noteholders, as the "Lenders" under the agreement, who can elect to either enforce or waive them. In either event, it is not clear on what basis defendants cannot invoke them, and even if they could, New Tap at most would have a claim for damages, which it has not asserted. IPC Manager also persuasively argues that non assignment clauses do not apply to the assignment of claims after the loss has occurred (*Allied Irish Banks, P.L.C. v. Bank of America, N.A.,* 2006 WL 278138, *5 [SD N.Y.2006]). Here, the Assignment Agreement was entered into after the Asset Transfer, in which the obligation to pay the Noteholders under the Notes was repudiated by New Tap.

Accordingly, the Court rejects defendants' argument that the Noteholders' assignment of claims to the IPC Manager is voided by the terms of the SNP Agreement.

2. Champerty

Defendants asserts in the alternative, in opposition to the IPC Manager's motion for summary judgment and in support of their own motion, that the Noteholders' assignment of claims under the Notes is void as champertous: the IPC Manager paid no financial consideration for its purchase of the Noteholders' claims under the Notes, and the IPC Manager had no preexisting proprietary interest in the Notes. Defendants point out that the Noteholders had written down the value of the Notes to $0 prior to the assignment.

Section 489 of the Judiciary Law codifies the doctrine of champerty, which is an equitable defense that was developed to prevent or curtail the commercialization of or trading in litigation. What the statute prohibits is the purchase of claims "with the intent and for the purpose of bringing an action that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up in an effort to secure costs" (*Trust for the Certificate Holders of the Merrill Lynch Mortge. Invs., Inc. Mtge. Pass–Through Certificates, Series 1999–C1 v. Love Funding Corp.,* 13 NY3d 190, 198–202 [2009] [*Love Funding Corp.*]; *Bluebird Partners v. First Fid. Bank,* 94 N.Y.2d 726 [2000]; *71 Clinton St. Apts. LLC v. 71 Clinton Inc.,* 114 AD3d 583 [1st Dept 2014] [internal citations omitted]).

***6** In New York, the prohibition of champerty has always been "limited in scope and largely directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs," and is not intended to prevent the purchase for the honest purpose of protecting some other important or independent right of the assignee (*Love Funding Corp.,* 13 NY3d 190).

The "mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the sole purpose of bringing the suit, which implies an exclusion of any other purpose" (*Bluebird Partners,* 94 N.Y.2d 726).

In the context of acquisition of a debt instrument, if a party purchases it for the purpose of enforcing it, rather than to make money from litigating it, that is not

champerty simply because the party intends to do so by litigation (*Love Funding Corp.,* 13 NY3d 190), as often "a purchaser of debt obligations will [likely] be required to resort to litigation to recover on the debt" (*Red Tulip, LLC v. Neiva,* 44 AD3d 204, 213–214 [1st Dept 2007], *lv dismissed*10 NY3d 741 [2008]; *see also Sprint Communications Co., L.P. v. APCC Services, Inc.,* 554 U.S. 269, 284–85 [2008]).

Courts are necessarily hesitant to find that an action is champertous as a matter of law. Where the assignee had a preexisting financial interest in the debt instrument (*see Red Tulip, LLC,* 44 AD3d at 213–214), or where the assignee obtaining the claim or debt does so as part of a larger transaction and the intent to commence litigation is incidental to that larger transaction (*SB Schwartz & Co. v. Levine,* 82 AD3d 742 [2d Dept 2011]), such assignments are not prohibited by section 489 of the Judiciary law.

In contrast, champerty has been found where the assignee was a shell formed exclusively for the purpose of litigating the subject action and did not actually purchase the debt instrument, but rather, conducted litigation by proxy in exchange for a fee (*Justinian Capital SPC ex rel Blue Heron Segregated Portfolio v. West LB AG,* 43 Misc.3d 598 [Sup Ct, N.Y. County 2014, Kornreich, J.] [although the assignee was suing for one hundred percent of the lost value on the debt instrument caused by defendants, it agreed to remit the majority of its value back to the seller in the event of recovery, in exchange for a fee]).

The inquiry into purpose is a factual one (*Love Funding Corp.,* 13 NY3d 190; *Bluebird Partners,* 94 N.Y.2d at 738–739). Moreover, defendants bear the burden of proof insofar as the doctrine of champerty is an affirmative defense (*Brignoli v. Balch, Hardy & Scheinman,* 178 A.D.2d 290 [1st Dept 1991]).

Here, the IPC Manager received assignment of the Noteholders' claims following the Asset Transfer, in which Tap's assets and certain liabilities, excluding the obligations under the Notes, were transferred to New Tap. At that time, Tap owed the Noteholders approximately $38 million on the Notes. Thus, seeking to enforce the Noteholders' rights under the Notes as against New Tap was "a means to enforce an otherwise legitimate claim" (*see Love Funding Corp.,* 13 NY3d at 199 ["if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation"]; *Sprint Communications Co., L.P.,* 554 U.S. at 284–85).

***7** Nonetheless, New Tap asserts that the fact that the Noteholders had written down the value of the Notes to $0 both internally and on its 10–K filings with the SEC, and represented to the IPC Manager that they were not interested in paying any litigation expenses, demonstrates that the assignment to IPC Manager was merely a pretext for conducting litigation for a fee. This leads to the inescapable conclusion that the claims under the Notes would not be prosecuted but for the assignment.

Defendants point to the deposition testimony of Richard Perkal, the managing director of one of the IPC Investors, who testified that the purpose of the assignment was to "protect our [IPC Investors'] rights," while acknowledging that the Noteholders "did not want to share in any of the expenses [of litigation], so we agreed that they would assign part of the claim in exchange for getting part of the recovery" (Perkal Dep Tr 95, annexed to the Neale Aff, mot seq 022).

Undoubtedly, IPC Manager was not a stranger to the transactions underlying its acquired claims. IPC Manager was the manager of the funds that indirectly held the majority ownership interest in Tap, through Tap Holdings, at the time of the Asset Transfer and directly held a $7 million participation in Tap's senior secured debt that the Asset Transfer eliminated. The assigned claims arose as a result of the same transaction (the Asset Transfer) which eliminated IPC Manager's interest, who has a financial stake in the future of Tap's assets (*see Red Tulip, LLC,* 44 AD3d at 214).

However, although IPC Manager had a relationship with the borrower [Tap] and the guarantors [Tap Holding] under the Notes, it did not have a preexisting proprietary interest in the Notes themselves, and did not suffer any direct losses flowing from New Tap's elimination of the Notes as a liability.

Further, the IPC Manager acquired the Noteholders' claims (not the Notes themselves) to "prosecute the Claims" at its sole cost and expense" (Assignment Agreement, § 2[a], Exhibit 107, annexed to the Kline Aff.). The IPC Manager paid no cash consideration for the acquisition, and in a waterfall provision setting forth the distribution of funds obtained as a result of this lawsuit, agreed to pay nearly fifty percent of any recovery back to the Noteholders, after first reimbursing the IPC Investors' litigation expenses incurred in prosecuting claims relating to the Asset Transfer and their participation interests (Assignment Agreement, § 5[a], Exhibit 107, annexed to the Kline Aff.). These elements do raise the issue of champerty: "it is not champerty to sue on behalf of a debt that you buy for yourself, but it is champerty to sue, on behalf of another and for a fee, for

debt that is not really your own" (*Justinian Capital SPC ex rel Blue Heron Segregated Portfolio,* 43 Misc.3d 598).

Notwithstanding that the Assignment Agreement is a "means to enforce an otherwise legitimate obligation," this Court cannot conclude as a matter of law that the IPC Manager did not acquire assignment of the Noteholders' claims in order to make money from litigating it, by proxy (*compare Promenade v. Schindler El. Corp.,* 39 AD3d 221, 223 [1st Dept], *lv dismissed*9 NY3d 839 [2007]; *Justinian Capital SPC ex rel Blue Heron Segregated Portfolio,* 43 Misc.3d 598). Resolving this issue requires a factual determination, largely pertaining to purpose, motive and credibility, that cannot be resolved at the summary judgment stage (*see Love Funding,* 13 NY3d at 200–01; *Richbell Info Servs. v. Jupiter Partners,* 280 A.D.2d 208, 216, 219 [1st Dept 2001]).

3. Successor Liability

***8** The IPC Manager asserts that incontrovertible evidence establishes its entitlement to summary judgment under the mere continuation and de facto merger exceptions of the successor liability doctrine.

In opposition, defendants assert that the claim for successor liability fails because the doctrine applies only to tort actions and not claims on a promissory note, citing to *Schumacher v. Richards Shear Co.* (59 N.Y.2d 239 [1983]).

The Court of Appeals, which stated in *Schumacher* (*Id.*) that "it is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor", has not addressed the issue of whether the doctrine of successor liability applies to a contract claim.

Nonetheless, this Court finds unpersuasive the contention that the doctrine of successor liability is inapplicable to contract claims under New York law. The Court of Appeals simply did not address it in *Schumacher* (*Id.*). Furthermore, the First Department has already, resoundingly and unanimously sustained the eighth's cause of action for successor liability in this action (*Tap Holdings, LLC,* 109 AD3d 167). While the holding was not a determination on the merits, there is a plethora of authority within the First Department extending the doctrine of successor liability to contract claims (*see ePlus Group Inc. v. SNR Denton LLP,* 111 AD3d 494 [1st Dept 2013] [de factor merger doctrine applied to breach of a lease]; *Holme v. Global Minerals and metals Corp.,* 63 AD3d 417, 417–18 [1st Dept 2009] [de facto merger doctrine applied to contractual obligation of seller]; *Kretzmer v. Firesafe Prods. Corp.,* 24 AD3d 158 [1st Dept 2005]; *Fitzgerald v. Fahnestock & Co.,* 286 A.D.2d 573, 575 [1st Dept 2001] ["the IAS court erred when it limited the de facto merger doctrine to tort actions since it has been squarely held applicable in breach of contract actions"]; *Ladenburg Thalmann & Co. v. Tim's Amusements, Inc.,* 275 A.D.2d 243, 248 [1st Dept 2000]; *see also Cargo Partner AG v. Albatrans, Inc.,* 352 F3d 41, 46–47 [2d Cir2003] [analyzing whether de facto merger doctrine applies to make a corporation that purchases assets liable for the seller's contracts, under New York law]).

A. Mere Continuation

A successor company that absorbs and continues the operation of the predecessor is the mere continuation of the predecessor. Factors tending to show mere continuation include the transfer of all of the predecessor company's assets, including its business location, employees, management, and good will (*Tap Holdings, LLC,* 109 AD3d at 176).

Here, it is undisputed that all of Tap's officers transferred to New Tap in the same titles and roles as they previously held (*see* New Tap's Response to IPC Manager's Rule 19–A Statement, ¶¶ 48–49). New Tap offered employment to all of Tap's approximately 1,000 employees (New Tap's Response to IPC Manager's Rule 19–A Statement, ¶¶ 93), and all Tap employees in fact transferred to New Tap in identical positions (New Tap's Response to IPC Manager's Rule 19–A Statement, ¶ 50). New Tap substituted for Tap as sponsor and administrator of Tap's employee benefit plans (New Tap's Response to IPC Manager's Rule 19–A Statement, ¶¶ 97–98).

***9** It is also undisputed that New Tap has the same business locations as Tap, including retail, manufacturing and distribution facilities, in addition to identical phone and fax numbers, and website address (New Tap's Response to IPC Manager's Rule 19–A Statement, ¶¶ 72–74, 125–127).

The Asset Transfer of substantially all of Tap's assets included its goodwill, cash, cash equivalents, deposits, accounts receivable, all inventory, goods, raw materials, favorable leases, property, plant and equipment fixtures, rights to payment of money, and general intangibles including copyrights, trademarks and domain name registrations (New Tap's Response to IPC Manager's Rule 19–A Statement, ¶¶ 56, 87; Foreclosure Agreement, Schedule 2.1, Exhibit 40, annexed to the Kline Aff.).

Tap's business operations remained largely unchanged

and uninterrupted as a result of the Asset Transfer (New Tap's Response to IPC Manager's Rule 19–A Statement, ¶¶ 49, 52–56, 59, 66, 70, 120–123; Salvin Aff in Opp, ¶ 8). New Tap even held itself out to the public, including landlords and vendors, as the successor to Tap (IPC Manager's Rule 19–A Statement, ¶¶ 84, 92, 143–144; Salvin Aff in Opp, ¶ 8). For instance, Darren Salvin, Tap's former general counsel and current dissolution officer, and general counsel of New Tap, stated in a letter to an entity regarding a license agreement:

"[W]e are now known as TAP Worldwide, LLC [New Tap], successor in interest to the former Transamerican Auto Parts Company LLC [Tap] ... It does not affect us operationally" (Exhibit 93, annexed to the Kline Aff.).

In an email to one of Tap's landlords, Salvin stated: "The New company is really the old company" (Exhibit 92, annexed to the Kline Aff.). Two weeks following the consummation of the Asset Transfer, Salvin stated in an email to counsel for the Senior Lenders:

"[I]f and when a successor claim comes our way ..., at that point in time, all of the old Officers will be official Officers of New Tap anyway. A plaintiff's lawyer will be able to conduct discovery to find this out pretty easily" (Exhibit 70, annexed to the Kline Aff.).

Two months following the Asset Transfer, Tap's board resigned (IPC Manager's Rule 19–A Statement, ¶ 157).

IPC Manager cites to evidence that the Asset Transfer left Tap with no funds, business assets or employees, which New Tap does not meaningfully dispute[2] (IPC Manager's Rule 19–A Statement, ¶¶ 149–150152; Salvin Aff. in Opp).

According to Salvin, Tap's dissolution officer and sole employee, Tap continues to be active in defending regulatory matters arising from its pre-Asset Transfer activities, responding to third party subpoenas, and continues to deal with tax authorities to settle or close out Tap's tax accounts, which he states takes up about fifteen percent of his time (Salvin Aff. in Opp). Nonetheless, Salvin wrote to one of Tap's landlords one month after the Asset Transfer, stating:

***10** "Your former tenant [Tap's principal operating subsidiary], is no longer in business .... the Company was rendered asset-less and insolvent" (Exhibit 103, annexed to the Kline Aff.).

In sum, there is overwhelming undisputed evidence as to the complete continuity of Tap's business as a result of the Asset Transfer, which effectively extinguished Tap (*see Tap Holdings, LLC,* 109 AD3d at 170).

B. De Facto merger

Under the de facto merger doctrine, one corporation absorbs another, without adhering to the statutory requirements for a merger. Underlying this doctrine is the principle that "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Fitzgerald v. Fahnestock & Co.,* 286 A.D.2d 573 [1st Dept 2001]).

The four hallmark elements of a de factor merger are: (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets and general business operations (*Fitzgerald*, 286 A.D.2d at 574).

IPC Manager has established continuity of ownership: Tap's executives remained in their same positions at New Tap, and received equal or greater ownership in New Tap as a result of the Asset Transfer (IPC Manager's Rule 19–A Statement, ¶ ¶ 107, 119).

Alternatively, this element is demonstrated by the undisputed fact that, prior to the Asset Transfer, the Senior Lenders exercised their rights under the Senior Secured Credit Facility(following an event of default thereunder) and removed all members of Tap's board with one exception, and appointed two new members of Tap's board, while Orix, as administrative agent for the Senior lenders, attained sole voting rights (IPC Manager's Rule 19–A Statement, ¶¶ 39–41). As set forth in the Foreclosure Agreement, the Senior Lenders retained control of 100% of the voting rights for Tap's membership units at the time of the Asset Transfer, and formed and own 80% of New Tap (IPC Manager's Rule 19–A Statement, ¶ 105). Thus, the Senior Lenders held and exercised the rights of the 100% equity owner of Tap prior to the Asset Transfer, and are currently the 80% equity owners of New Tap.

With respect to the element of cessation of ordinary business and dissolution, formal, legal dissolution is not required "so long as the acquired company is shorn of its assets and has become, in essence, a shell" (*Fitzgerald,* 286 A.D.2d at 575). As stated above, IPC Manager has submitted evidence that Tap ceased d/b/a a result of the

Asset Transfer, which resulted in the transfer of substantially all of Tap's assets to New Tap, and New Tap fails to raise a triable issue in opposition.

***11** In addition, IPC Manager has submitted undisputed evidence of New Tap's assumption of liabilities ordinarily necessary for the uninterrupted continuation of Tap's business. Section 2.4 of the Foreclosure Agreement sets forth the liabilities that New Tap assumed, including amounts owed to "ordinary course vendors," real estate and vehicle leases, and obligations to service providers (Exhibit 40, annexed to the Kline Aff.). New Tap's October 2009 balance sheet shows that it assumed all of the accounts payable and accrued expenses, other than interest owed under the Notes (Exhibits 98–99, annexed to the Kline Aff.).

In opposition, New Tap asserts that the use of a UCC foreclosure to effectuate the Asset Transfer precludes successor liability. However, New Tap does not submit any authority to support this contention, and IPC Manager submits authority which holds the opposition view (*e.g. Miller v. Forge Mench Partnership Ltd.,* 2005 WL 267551, *12 [SD N.Y.2005]; *see also NTL Capital, LLC,* 73 AD3d 410).

New Tap also asserts that IPC Manager has failed to establish that it was unfairly prejudiced by the Asset Transfer because it cannot demonstrate that Tap sold its assets for inadequate consideration.

A showing that the Noteholders' have suffered some form of injustice or prejudice as a result of the Asset Transfer is undoubtedly part of the analysis as to whether application of the doctrine of successor liability is warranted (*see Cargo Partner AG,* 352 F3d at 46–47 ["The purpose of the doctrine of de facto merger is to avoid the patent injustice which might befall a party simply because a merger has been called something else"]; *Societe Anonyme Dauphitex v. Schoenfelder Corp.,* 2007 WL 3253592, *5–7 [SD N.Y.2007] ["The mere continuation exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor's creditors"]). Indeed, the very purpose of the doctrine, which is judicially-created and rooted in equity, is to provide a remedy to one who has been wronged where the form of the transaction does not accurately portray its substance (*Id.; Holme v. Global Minerals and Metals Corp.,* 22 Misc.3d 1123 [Sup Ct, N.Y. County], *affirmed*63 AD3d 417 [1st Dept 2009]).

In applying the doctrine, courts consider a range of issues, including whether the predecessor sold its assets for inadequate consideration, or if the transaction was somehow fraudulent as to certain creditors (*see e.g. In re New York City Asbestos Litig.,* 15 AD3d 254, 259 [1st Dept 2005]). The First Department's prior decision in this action does not hold otherwise. In concluding that the claim for successor liability was sufficiently stated, the First Department highlighted the allegations that the Senior Lenders engaged in "complex machinations ... with the singular goal of shirking the obligation to make payments on the [N]otes which were assigned to the [IPC] Manager," and that an "overall element of injustice or unfairness must always be present" (*Tap Holdings, LLC,* 109 AD3d at 175, 185).

***12** Defendants assert that IPC Manager cannot demonstrate prejudice necessary to support successor liability. The evidence establishes that Tap was rendered insolvent before the Asset Transfer, and thus, the Noteholders, who had written the Notes' value down to $0, cannot credibly argue that they were deprived of a remedy that was otherwise available to them, and will obtain a windfall if permitted to recover under the Notes. Defendants also assert that applying the doctrine here would punish New Tap and the Senior Lenders because they elected to preserve the operations of Tap instead of conducting a liquidation sale that would have annihilated the business, put hundreds of employees out of work and reduced the Senior Lenders' ability to recover on their senior secured debt under the Senior Secured Credit Facility.

Meanwhile, the IPC Manager contends that the Noteholders were prejudiced by the Asset Transfer because there is no dispute that the Asset Transfer rendered Tap insolvent and without the means to pay the Notes, while Tap's performance had strongly rebounded during the third quarter of 2009 just prior to the Asset Transfer. The IPC Manager asserts that none of Tap's creditors, including the Noteholders, or the public in general, received any notice of the impending sale of Tap's assets to New Tap, who were thus deprived of the right to submit a competing offer. The IPC Investors represent that they valued Tap at substantially in excess of $66 million that the Senior Lenders effectively "paid" for Tap's assets at the time of the Asset Transfer. IPC Manager asserts that it would have sought to acquire the business itself at a price in excess of $66 million had they been given the opportunity to do so (Plaintiffs' Counter-statement of Material Facts, ¶ 115 A).

Numerous issues of fact remain, which precludes awarding summary judgment in either IPC Manager's or defendants' favor, as to the imposition of successor liability upon New Tap, including the issue of the

injustice, if any, suffered by the Noteholders as a result of the Asset Transfer.

3. Senior Lenders' Motion for Summary Judgment

The Senior Lenders move for summary judgment dismissing the third through seventh causes of action asserted under the DFTA. The fourth cause of action is for breach of the duty of good faith and fair dealing. The fifth through seventh causes of action are premised upon alter ego liability.

A. Corporate Veil Piercing

New York law governing corporate veil piercing does not materially differ from Delaware law (*Tap Holdings, LLC,* 109 AD3d at 174–75; *see also Spinnell v. JP Morgan Chase Bank, N.A.,* 59 AD3d 361 [1st Dept], *lv denied*13 NY3d 713 [2009]). Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which caused plaintiff's injury (*James v. Loran Realty v. Corp.,* 85 AD3d 619 [1st Dept 2011], *affirmed*20 NY3d 918 [2011]). Courts also consider whether there has been, inter alia, an overlap in ownership and directorship, or common use of office space and equipment (*Forum Ins. Co. v. Texarkoma Transp. Co.,* 229 A.D.2d 341 [1st Dept 1996]). This fact-laden inquiry is "particularly unsuited for resolution on summary judgment" (*Id.*).

***13** The Senior Lenders merely assert that IPC Manager cannot establish any of the elements, and shift the focus on the Noteholders' lack of injury or unjust loss caused by the Asset Transfer because the Noteholders had publicly represented (in SEC filings) that the Notes were worthless prior to consummation of the transaction. Under the Senior Lenders' reasoning, the Asset Transfer could not have been the proximate cause of the loss in value of the Notes.

IPC Manager raises two issues of fact in opposition to this contention. IPC Manager points to a letter that Allied (one of the Noteholders) sent to the Senior Lenders just one day prior to the Asset Sale, wherein it claims that there was sufficient value in Tap's businesses to "satisfy a meaningful portion of [the Notes], and that the impending transaction would "defraud the Noteholders from recovery of their very substantial subordinated debt" (Exhibit 48, annexed to the Kline Aff in Opp). Further, Allied's SEC filing (which reported that the Notes were a total loss) was dated 30 days prior to the Asset Sale but filed 6 days after the Asset Sale had occurred.

In addition, IPC Manager submits experts' opinions that, at the time of the Asset Transfer, Tap's value surpassed $125 million, which was sufficient to pay all amounts then owed on the Notes, while the Senior Lenders proffer their own experts' opinions.

Notwithstanding the remaining triable issue with respect to the injury to the Noteholders, issues of fact also remain concerning the Senior Lenders' level of control and domination over New Tap. The Senior Lenders contend that there is no evidence of any of the indicia of their domination and control required to pierce the corporate veil. In opposition, IPC Manager points to the deposition testimony of New Tap's interim CEO, Ronavan Mohling, who was appointed by Orix on the eve of the Asset Transfer.

Mohling states that, although he was the sole member-manager of New Tap at the time of the Asset Transfer, he was not consulted or even included in email communications regarding the terms of the transaction, nor did he make any decisions with respect thereto (IPC Manager's Response to Senior Lenders' Rule 19–A Statement, ¶ 114C). Specifically, he was not involved in the decision as to what assets New Tap would acquire, which employees it would hire, what liabilities it would assume, who the officers would be, or what amount New Tap paid to acquire Tap's business (*Id.*). It appears from the record that all of these decisions were made by the Senior Lenders and Tap's counsel, Salvin, from whom Mohling took direction (*Id.*).

Several days following the Asset Transfer, Salvin wrote to one of Tap's/New Tap's landlord:

"[T]he new company [New Tap] formed by the banks (also owned and operated by the banks), on whose behalf I presently write, desire to retain possession of your premises ... I can represent that the banks are not offering such accommodation to other, similarly situated Landlords with whom [Tap's principal operating subsidiary] had entered into leases ... [T]he banks require ... a reduction in Base Rent" (Exhibit 73, annexed to the Kline Aff in Opp).

***14** Undoubtedly, a plaintiff bears a heavy burden to demonstrate that corporate veil piercing is warranted. Nonetheless, IPC Manager has raised triable issues which preclude summary judgment resolution.

B. Breach of the Duty of Good Faith and Fair Dealing

The Senior Lenders urge dismissal of the claim for breach of the duty of good faith and fair dealing on the grounds that IPC Manager cannot show damages or that the Senior Lenders acted in bad faith with respect to the Asset Transfer as pertains to the treatment of the Notes.

IPC Manager's claim is based upon allegations that, while invoking their express contractual right to foreclose upon the collateral, the Senior Lenders acted in bad faith by secretly transferring Tap's assets to an entity (New Tap) that they own and control, while leaving Tap with no means of paying the IPC Investors for their participation interests and releasing Tap from its liabilities to the Noteholders (*see* Court's 2011 Decision, 9).

First, triable issues remain as to the element of damages, including the Notes' value and whether the Asset Transfer actually caused the Noteholders' losses.

As to the Senior Lenders' second argument in support of dismissal, triable issues of fact do remain. The Senior Lenders undoubtedly had discretion under the Subordination Agreement to dispose of the collateral in the event of a default by Tap's operating subsidiary, and it is undisputed that a default occurred. Nonetheless, as this Court stated in its 2011 decision:

"The duty of good faith and fair dealing is imposed on the Senior Lender's exercise of discretion under the Subordination Agreement, to the extent it grants them "complete discretion" in determining the time and manner of foreclosure of the collateral (*see Dalton v. Educ. Testing Serv.,* 87 N.Y.2d 384, 389 [1995]) ... [E]ven where one has an apparently unlimited right under a contract, that right may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract" (*Richbell Information Services, Inc.,* 309 A.D.2d 288, 302 [1st Dept 2003]) (2011 Decision, 11).

Thus, even where a party is granted "complete discretion," such discretion is not unfettered and would not extend to secretly disposing of the collateral for insufficient value and in such a manner as to hinder the Noteholders' ability to recover their substantial debt under the Notes, as IPC Manager alleges.

In its Rule 19–A Statement, IPC Manager submits that, in the months prior to the Asset Transfer, Tap retained a financial advisor who conducted discussions with a competitor of Tap concerning a potential combination of the two companies whereby Tap would be acquired, but he was directed to break off the discussions by Tap's CEO so that Tap could pursue a transaction with the Senior Lenders instead (IPC Manager's Response to Senior Lenders' Rule 19–A Statement, ¶¶ 113 E–J).

According to the financial advisor, this decision negatively impacted Tap as the competitor "seemed very interested in a transaction that could potentially solve the problem at Tap" (*Id.*). Otherwise, no sale or third-party capital raising process was conducted, and the financial advisor opposed proceeding with a foreclosure sale under UCC Article 9 (*Id.*). The financial advisor stated in his deposition,

***15** "[A]s I recall what they [Senior Lenders] were proposing ... to have a very, at the time I believe, a very abbreviated 10 day sort of auction period where the banks would act as a sort of stalking horse through Article 9 and do [a] very quick sale of the company [Tap] to the banks. Not get the sub-debt [Noteholders] or equity [IPC Investors] involved in the process before that sort of notice period. And just in my experience it is very unusual way to facilitate restructuring when there are all these different stakeholders involved" (Sammett Dep Tr, 102–03, Exhibit 2, annexed to the Kline Aff in Opp).

One of plaintiffs' experts stated in his report,

"[T]he Transaction [Asset Transfer] lacked any kind of competitive dynamic ... [W]hile the Transaction was the sale of the entirety of Tap's business as a going concern ... I have never seen a business sold through use of a foreclosure procedure where (as here) nobody-including existing financial stakeholders were left with nothing ... [and] none [of my colleagues] has ever seen such a transaction carried out in the manner as occurred in this case ... In short, in my experience and considered opinion, the procedure followed in this case was not reasonably designed to obtain the highest value, or even a fair value, for the businesses sold in the Transaction" (Exhibit 63 at 19–21, annexed to the Kline Aff in Opp).

The Senior Lenders counter that they acted in furtherance of their own legitimate economic interests to minimize their growing losses following Tap's default, which constitutes "good faith," by definition. Nonetheless, IPC Manager has raised triable issues with respect to whether Tap's assets were disposed of for insufficient value, and/or without sufficient attempt to obtain fair value for the assets which rises to the level of bad faith. These are fact issues which cannot be resolved at the summary judgment stage.

C. UCC Article 9

The Senior Lenders seek to dismiss the claim for violation

of UCC Article 9 on the grounds that the Asset Transfer was a consensual strict foreclosure governed by UCC § 9–620, under which plaintiffs lack standing to challenge. IPC Manager maintains that the Asset Transfer was a private sale of collateral subject to UCC § 9–610.

The section invoked by the Senior Lenders, UCC § 9–620, sets forth the procedure by which a secured party can accept collateral following a debtor's default in full or partial satisfaction of its debt without the need for a sale or other disposition, i.e. a "strict foreclosure."

The section requires the debtor's consent to the foreclosure. The section also specifies two methods by which a secured party who elects to proceed via this method must notify certain other interested persons who have or claim to have an interest in the collateral, and who do not object after receiving notice from the foreclosing creditor within a set time period (UCC § 9–621). An effective acceptance by the debtor discharges subordinate security interests and liens (UCC § 9–622).

***16** Interested parties who must be notified under UCC § 9–620 include those who notify the secured party that they claim an interest in the collateral within a certain time period, holders of certain security interests and liens who have filed a financing statement, and holders of security interests who have perfected by compliance with a statute described in UCC § 9–311(a).

UCC § 1–203 imposes an obligation of good faith on a secured party's enforcement under the strict foreclosure section, which sets a lower bar than the more stringent standard of commercial reasonableness which governs sales of collateral, discussed below.

IPC Manager asserts that the Asset Transfer was not a consensual strict foreclosure but a private sale of collateral, governed by UCC § 9–610. This section permits a secured party to dispose of collateral upon a debtor's default, following either a public or private sale. Every aspect of the disposition of the collateral, including the method, manner, time, place, and other terms, must be commercially reasonable[3] (UCC § 9–610[b]).

In support of its contention that the Asset Transfer constituted a consensual strict foreclosure under UCC § 9–620, the Senior Lenders claim that (as set forth in the Foreclosure Agreement), New Tap acquired all of the assets of Tap in return for a note (New Tap Note) in the amount of $66 million, which Tap assigned to the Senior Lenders, in return for which the Senior Lenders released Tap from any obligations under the Senior Secured Credit Facility. According to the Senior Lenders, the step in the process by which Tap assigned the New Tap Note to the Senior Lenders constitutes the debtor's "consent" to the Senior Lenders' acceptance of the collateral, as required by UCC § 9–620.

The Senior Lenders fail to demonstrate as a matter of law that New Tap's acquisition of Tap's assets in exchange for the New Tap Note which was simultaneously assigned to the Senior Lenders in partial satisfaction of Tap's indebtedness under the Senior Secured Credit Facility constitutes a strict foreclosure governed by UCC § 9–620.

The Recitals section of the Foreclosure Agreement states that Tap agrees to "sell, assign and transfer the Subject Assets" to New Tap, who is defined therein as the "Buyer," and to "sell, assign and transfer all remaining Subject Assets to the Buyer ... as payment in kind for the remaining balance of the Obligations" (Foreclosure Agreement, Recitals at VII, Exhibit 42, annexed to the Baum Aff., mot seq 021). The Foreclosure Agreement then states that the "Buyer wishes to purchase the Subject Assets and assume certain liabilities" of Tap (*Id.*).

The Foreclosure Agreement states that "the sale of the subject assets [to New Tap] is ... on an as is, where is' basis" (Foreclosure Agreement, § 2.9). Included in the "sale" to New Tap are assets which were not subject to the Senior Lenders' security interest, and even obligated New Tap to offer employment to all employees employed by Tap on the same terms on which they were employed at Tap (Foreclosure Agreement, §§ Recitals, VII, 2.1[a], 2.5). The Foreclosure Agreement also obligated New Tap to pay all taxes "arising as a result of the sale" of Tap's assets, to fund disbursement requests on Tap's bank accounts prior to closing, and to assume certain ordinary course liabilities "in order to avoid disruption in the Buyer's future relationship with critical vendors and customers and to assure continuity of business" (Foreclosure Agreement, §§ 2.4[b], 3.1, 8).

***17** The terms of the Foreclosure Agreement suggest, in substance, a private sale of an entire business as a going concern, rather than the simple taking of collateral by a secured party. Thus, the Senior Lenders fail to demonstrate as a matter of law that the Asset Transfer was a strict foreclosure governed by UCC § 9–620, and are not entitled to dismissal of the claim for violation of UCC, Article 9. If the Asset Transfer, in fact, constituted a sale governed by UCC § 9–610, there remain triable issues with respect to whether it was conducted in a commercially reasonable manner.

Accordingly, it is

ORDERED that parties' motions for summary judgment (020–022) are denied in their entirety.

The parties are directed to appear for a Pre-trial conference on November 18, 2014 at 10:30AM.

Parallel Citations

45 Misc.3d 1217(A), 2014 WL 5900923 (N.Y.Sup.), 2014 N.Y. Slip Op. 51611(U)

Footnotes

1 The facts recited herein relate solely to the motions before this Court. For a full recitation of the factual background in this action, see this Court's decision dated April 11, 2012 (N.Y.SCEF Doc. No. 230), and *Tap Holdings, LLC v. Orix Finance Corp.* (109 AD3d 167 [1st Dept 2013]).

2 New Tap's Response to IPC Manager's Rule 19–A Statement, as well as the Salvin affidavit submitted in opposition to the motion, are bereft of citations to evidence supporting its contentions and thus, inadequate to the task of contravening IPC Manager's Statement of Undisputed Facts (*see* *Calisto Pharmaceutical, Inc. v. Picker,* 74 AD3d 545, 546 [1st Dept 2010]).

3 The Official Comment to the section states that a low price fetched for collateral following a sale is subjected to careful scrutiny by a court (Official Comment to UCC § 9–610).UCC § 9–615(f) even provides a method for calculating a surplus or deficiency where the transferee in the sale is the secured party (or related to the secured party), and the amount of proceeds of the disposition of the collateral is significantly below the range of proceeds that a complying disposition to a person other than the secured party would have brought.

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