ORDERED in the Southern District of Florida on April 18, 2011.

Paul G. Hyman, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

In re:	**Case No.: 08-29769-BKC-PGH**
GINN-LA ST. LUCIE LTD.,	**All Cases Jointly Administered**
LLLP, *et al.*,	
Debtors.	**Chapter 7**
________________________________/	
In re:	
GINN-LA QUAIL WEST LTD.,	
LLLP, *et al.*,	
Debtors.	
________________________________/	
Drew M. Dillworth, Trustee,	
Plaintiff,	**Adv. Proc. No.: 10-2976-PGH**
vs.	
Edward R. Ginn III, *et al.*,	
Defendants.	
________________________________/	

ORDER GRANTING IN PART AND DENYING IN PART LUBERT-ADLER'S AND THE INVESTOR DEFENDANTS' MOTIONS TO DISMISS

THIS MATTER came before the Court upon the Lubert-Adler

Defendants'[1] *Motion, Including Memorandum Of Law, Pursuant to Rule 7012(b)(6) of the Federal Rules Of Bankruptcy Procedure to Dismiss the Trustee's Third Amended Complaint for the Avoidance and Recovery of Fraudulent Transfers & Joinder in the Investor Defendants' Motion to Dismiss Counts III & VI of the Third Amended Complaint* ("Lubert-Adler Motion to Dismiss") (D.E.#165), and the Investor Defendants'[2] *Motion to Dismiss* ("Investors' Motion to Dismiss") (D.E.#172) (collectively with the Lubert-Adler Motion to Dismiss, the "Motions to Dismiss"). The Lubert-Adler Defendants and the Investor Defendants joined in each other's Motion to Dismiss. In addition, Edward R. Ginn III, Edward R. Ginn III Revocable Trust Dated Sept. 14, 2002, ERG Management, LLC, and ERG Enterprises, L.P. (collectively, the "Ginn Parties") joined in the Motions to Dismiss (D.E.#174).[3]

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[1]The Lubert-Adler Motion to Dismiss identifies the "Lubert-Adler Defendants" referenced herein as follows: 1) Lubert-Adler Management Co., L.P.; 2) Lubert-Adler Real Estate Fund III, L.P.; 3) Lubert-Adler Real Estate Parallel Fund III, L.P.;4) Lubert- Adler Capital Real Estate Fund III; 5) Lubert-Adler Real Estate Fund IV, L.P.; 6) Lubert-Adler Real Estate Parallel Fund IV, L.P.; 7)Lubert-Adler Capital Real Estate Fund IV, L.P.; 8) Lubert-Adler Group III, L.P.; 9) Lubert- Adler Group IV, L.P.; 9)Ira M. Lubert; and 10)Dean S. Adler.

[2]The Investors' Motion to Dismiss identifies the "Investor Defendants" referenced herein as the 356 limited partners in the Lubert-Adler Real Estate Fund III, L.P., Lubert-Adler Real Estate Parallel Fund III, L.P., Lubert-Adler Real Estate Fund IV, L.P., Lubert-Adler Real Estate Parallel Fund IV, L.P., and Lubert-Adler Capital Real Estate Fund IV, L.P. all of whom are listed in Smith Hulsey & Busey's Notice of Appearance filed on October 15, 2010 (D.E.#93).

[3] The moving parties shall be collectively referred to as the "Movants".

BACKGROUND AND PROCEDURAL HISTORY

On December 10, 2010, the Court entered an *Order Granting Without Prejudice Lubert-Adler's and the Investor Defendants' Motions to Dismiss Trustee's Second Amended Complaint and Granting Trustee 20 Days Leave to Amend Complaint* (the "Order Dismissing Second Amended Complaint")(D.E. #154). In dismissing the Second Amended Complaint, the Court granted leave to amend because Drew M. Dillworth (the "Trustee") advanced seemingly plausible theories of recovery in his oral argument and responsive briefs which were not adequately alleged in the Second Amended Complaint.

On December 30, 2010, the Trustee timely filed a *Third Amended Complaint For Avoidance and Recovery of Fraudulent Transfers* (the "Third Amended Complaint") (D.E. #163). A $675,000,000 loan transaction, comprised of a first loan in the amount of $525,000,000 and a second loan in the amount of $150,000,000, is at the heart of this adversary proceeding. The loans, consummated on June 8, 2006 and administered by Credit Suisse, Cayman Islands Branch, were guaranteed by the Debtors. Although the Debtors' guaranties were secured by First Liens and Second Liens (collectively, the "Liens") on substantially all of the Debtors' assets, the Debtors did not receive any of the Credit Suisse loan proceeds (the "Credit Suisse Transaction").

The Third Amended Complaint seeks to avoid transfers in connection with the Credit Suisse Transaction and generally alleges that each of the individuals and entities named as defendants

("Defendants") was either an initial transferee or the entity for whose benefit a transfer was made within the meaning of 11 U.S.C. § 550(a)(1); or, an immediate or mediate transferee within the meaning of 11 U.S.C. § 550(a)(2). The Third Amended Complaint contains alternative counts identifying two potential transfers to be avoided - the transfer of money and the transfer of Liens.

The first transfer consists of approximately $148 million of Credit Suisse loan proceeds ("Loan Proceeds") to the Defendants. In Counts I-VI (the "Loan Proceeds Counts"), the Trustee seeks to avoid the transfers of the Loan Proceeds which are alleged to have been intentionally and constructively fraudulent pursuant to 11 U.S.C. § 544(b) and applicable Florida fraudulent transfer law. The Trustee also seeks to recover the Loan Proceeds from each of the Defendants as an initial transferee or entity for whose benefit said transfers were made pursuant to 11 U.S.C. § 550(a)(1), or alternatively, to recover the Loan Proceeds from each of the Defendants found to be an immediate or mediate transferee pursuant to 11 U.S.C. § 550(a)(2).

The second transfer consists of the "Subsidiary Guaranties," mortgages, and liens on substantially all of the Debtors' assets which were issued in connection with the Credit Suisse Transaction. In Counts VII-XII (the "Lien Counts"), the Trustee alternatively seeks to avoid the transfers of the "Subsidiary Guaranties," mortgages, and liens issued in connection with the Credit Suisse Transaction which are alleged to have been intentionally and constructively fraudulent pursuant to 11 U.S.C. § 544(b) and applicable Florida fraudulent transfer law. The Trustee also seeks to recover the value of the "Guaranties,"[4] mortgages and liens transferred, as of the time they were transferred, from each of the Defendants as an entity for whose benefit the transfers were made pursuant to § 550(a)(1). The Court notes that in the Lien Counts, the Trustee does not seek recovery from the Defendants as subsequent transferees under § 550(a)(2).

In seeking dismissal of the Third Amended Complaint, the Movants renew and expand upon many of the arguments advanced in their motions to dismiss the Second Amended Complaint. Their primary argument is that the Loan Proceeds Counts should be dismissed because the subject transfers did not involve property of the Debtors. As to the Lien Counts, the Movants argue that the First Liens are unavoidable as established by the law of the case, and that avoidance of the Second Liens will yield no recovery to the Debtors' estates. Movants further argue that the defects in the Third Amended Complaint cannot be cured by re-pleading. In the Order Dismissing Second Amended Complaint, the Court granted the Trustee considerable leeway to restate his claims because of the

[4] At the hearing and in their papers, Movants took issue with the relief sought by the Trustee to avoid the transfers and recover the value of the "Guaranties", mortgages, and liens. The Movants argued that loan guaranties are obligations incurred (nor property transferred) which cannot be recovered under § 550(a). The Trustee's response states that this is a "non-issue" because the Counts seeking recovery were not intended to be construed as seeking recovery for the value of the "Guaranties" as distinct from the "Liens". Trustee's Resp. at 20 (D.E.#186). Based upon the Trustee's representation, the Court does not reach this issue raised by Movants.

severity of the malfeasance alleged. Having reviewed the Third Amended Complaint, and the applicable law, including the Eleventh Circuit's December 29, 2010 opinion in *Martinez v. Hutton (In re Harwell)*, 628 F.3d 1312 (11th Cir. 2010), and Judge Gold's February 11, 2011 reversal on appeal in *3V Capital Master Fund, Ltd., v. Off. Comm of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, 2011 WL 522008, (S.D. Fla. February 11, 2011) ("TOUSA II"), both of which were entered subsequent to the Order Dismissing Second Amended Complaint, the Court agrees that the Third Amended Complaint's Loan Proceeds Counts,[5] and Lien Counts as alleged with respect to the First Liens cannot be cured by re-pleading. These claims are not the proper vehicle to provide the redress the Trustee seeks for the malfeasant conduct alleged.

As discussed herein, the Court is persuaded that, as to the Loan Proceeds Counts and the Lien Counts respecting the First Liens, dismissal with prejudice is warranted based upon Movants' arguments that the Debtors did not have a property interest in the transferred funds, and that the First Liens are not subject to avoidance based upon the law of the case. As to the Second Liens, the Court notes that the Lien Counts fail to distinguish between the First and Second Liens. Therefore, the Court will dismiss the

[5] The Investors' Motion to Dismiss alternatively sought dismissal of Counts III and VI with leave to amend, on the basis that Counts III and VI were prejudicially ambiguous with respect to the Investor Defendants' alleged liability as initial and/or subsequent transferees. The Trustee argued that Rule 12(g) and (h) prohibited the Investor Defendants from raising these arguments in a second pre-answer motion. The Court's dismissal of the Loan Proceeds Counts renders these arguments moot.

Lien Counts without prejudice insofar as they allege claims regarding the Second Liens, and grant the Trustee leave to amend as to these claims.

CONCLUSIONS OF LAW

I. The Motion to Dismiss Standard

"The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case." *Mervyn's LLC, v. Lubert-Adler Group IV, LLC (In re Meryn's Holdings, LLC)*, 426 B.R. 488, 494 (Bankr. D. Del. 2010) (citations omitted). "In ruling on a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all well-pleaded facts alleged by the plaintiff are accepted as true." *Mann v. Kendall Props. & Invs., LLC (In re AS Mgmt. Servs., Inc.)*, 2007 WL 2377082, at *2 (Bankr. S.D. Fla. Aug. 16, 2007). "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.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(*citing Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (*citing Bell Atl. Corp. v. Twombly,* 550 U.S. at 555).

In addition to stating the standard for a motion to dismiss, the Order Dismissing Second Amended Complaint established that the

Court's consideration of Credit Agreements[6] not attached to the Second Amended Complaint was permitted without necessarily turning the motions to dismiss into motions for summary judgment. That discussion, which remains relevant, need not be repeated here. In addition, the Court notes that both parties relied upon an Acknowledgment and Forbearance Agreement (the "Forbearance Agreement") which was not attached to either the Second or Third Amended Complaint. However, the parties stipulated in open court that a true and correct copy of the Forbearance Agreement was attached as an exhibit to the Unsworn Declaration of Stuart Margulies (D.E. #200, Ex.1), and there was no objection to the Court's consideration of this document. In determining this matter, the Court also takes judicial notice of its own orders in the Debtors' main bankruptcy cases.

II. The Money Transfer: Were the Loan Proceeds Property of the Debtor?

Section 544 of the Bankruptcy Code permits the Trustee to "avoid any *transfer of property of the debtor* or any obligation incurred by the debtor that is voidable by – " specified creditors or purchasers under applicable state law. 11 U.S.C. § 544 (emphasis added). The Movants have not disputed that the transfer of Liens, on substantially all of the Debtors' property to secure the Debtors' guaranties in the Credit Suisse Transaction, was a transfer of property of the Debtors. The disputed issue is whether

[6]Capitalized terms, not otherwise defined herein, shall have the same meaning ascribed to the term in the Order Dismissing Second Amended Complaint.

the transfer of the Loan Proceeds to the named Defendants was in fact a transfer of property of the Debtors. This issue is critical because the Trustee can avoid the transfer of the Loan Proceeds *only if* the Loan Proceeds were property of the Debtors. Furthermore, successful avoidance of the Loan Proceeds is a predicate to their recovery under § 550.

A. Property of the Debtor is Determined by the Control Test

The concept of "property of the debtor" arises in several bankruptcy contexts. However, "[t]he Bankruptcy Code does not define 'property of the debtor.'" *Beiger v. IRS*, 496 U.S. 53, 58, 110 S.Ct. 2258, 2263 (1990)(determining that pre-petition payments for withheld payroll taxes and excise taxes were not transfers of property of the debtor subject to avoidance as preferences). In *Beiger*, the Court noted that:

> Because the purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate - the property available for distribution to creditors - "property of the debtor" subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings. For guidance, then, we must turn to § 541, which delineates the scope of "property of the estate" and serves as the postpetition analog to § 547(b)'s "property of the debtor."

Id. While the Third Amended Complaint alleges fraudulent transfers, in determining this matter the Court may nevertheless consider preference law because "[t]he rules established in the avoidable preference cases are applicable to a certain extent in the context of fraudulent transfers." *Nordberg v. Sanchez (In re*

Chase & Sanborn Corp.), 813 F.2d 1177, 1181 (11th Cir.1987).

> The purpose of avoidance of both types of transfers is to prevent a debtor from diminishing, to the detriment of some or all creditors, funds that are generally available for distribution to creditors. Consequently, any funds under the control of the debtor, regardless of the source, are properly deemed to be the debtor's property, and any transfers that diminish that property are subject to avoidance.

Id. Courts determining what constitutes "property of the debtor" in proceedings to recover fraudulent and/or preferential transfers have employed variations of the "control test" adopted by the Eleventh Circuit in *Sanchez.* In this case, the parties have seized upon language in Eleventh Circuit cases applying the control test, to argue, on behalf of the Movants, that property of the debtor is determined by application of a strict two-part control test, and to argue, on behalf of the Trustee, that the test is a pragmatic and flexible one requiring courts to look beyond the particular transfers in question to the entire circumstance of the transactions. Since entry of the Order Dismissing Second Amended Complaint, the Eleventh Circuit has addressed the evolution of its control test precedent in the context of conduit/transferee cases. *See In re Harwell*, 628 F.3d 1312. Having the benefit of *Harwell's* review of Eleventh Circuit control test precedent, the Court is persuaded that the statements of the control test relied upon by the parties are not two separate approaches to the issue of what constitutes property of the debtor, but rather part and parcel of the same test which asks what is the extent of the debtor's control over the subject property and is that control sufficient to determine that the property is that of the debtor.

The Eleventh Circuit initially adopted the control test in *Sanchez* to determine whether funds, that had been deposited into the debtor's account and transferred two days later to the defendant, were in fact property of the debtor. 813 F.2d at 1182. In determining that the transferred funds were not property of the debtor, the Eleventh Circuit stated that:

> Fraudulent transfers are avoidable because they diminish the assets of the debtor to the detriment of all creditors. Presuming control from the mere fact of transfer thus begs the essential question presented by section 548 claims: did the transfer diminish the assets of the debtor? Furthermore, presuming control under such circumstances poses the distinct danger that creditors could receive a windfall in the form of funds that simply passed through the debtor's possession but in fact were not the property of the debtor.
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> In determining whether the debtor had control of funds transferred to a noncreditor, the court must look beyond the particular transfers in question to the entire circumstance of the transactions.

Sanchez, 813 F.2d at 1181-82. Thus, *Sanchez*, looking at the entire circumstance of the transaction while applying the control test, started with the fact that the debtor had possession of the funds, and then asked whether the debtor controlled those funds. Based upon case-specific facts including the source and use of the funds, the tangential relationship between the funds and the debtor, and the deposit account having been opened under a name no longer used by the debtor, the *Sanchez* court determined that the debtor's possession of the funds was insufficient to establish the control necessary to render the funds property of the debtor. *Sanchez* also raised the concern that by avoiding the transfer, creditors might receive a windfall in the form of funds that were not property of the debtor. In this case, the Debtors *never* possessed the Loan Proceeds, nor do the allegations support the notion that the Debtors actually controlled the Loan Proceeds. In addition, the concern that creditors might receive a windfall, in the form of funds that were not property of the debtor, exists in this case.

With the exception of *Sanchez,* which specifically addressed the question of whether transferred funds were property of the debtor, *Harwell* traces the development of the control test in a series of Eleventh Circuit § 550(a)(1) "initial transferee" cases.[7] *Harwell*, 628 F.3d at 1317. In *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.)*, 848 F.2d 1196 (11th Cir. 1988), the court found that *Sanchez* applied "regardless of whether a court is attempting to determine whether a debtor controlled the transferred funds it transferred to a defendant or a defendant gained control over the funds transferred to it." *Id.* at 1199. As explained in *Societe Generale*, the control test as adopted in the Eleventh Circuit, "simply requires courts to step back and evaluate a transaction in its entirety to make sure that their conclusions are logical and equitable. This approach is consistent with the equitable concepts underlying bankruptcy law." *Id.* (finding that it

[7] The issue in § 550(a) initial transferee cases is generally whether a defendant is merely a conduit with no liability, or whether a defendant is liable as either an initial transferee of an avoided transfer or an entity for whose benefit the transfer was made.

would be inequitable to allow recovery against a conduit bank defendant that never actually controlled the funds). *Harwell* notes that *Societe Generale* made it clear that "equitable considerations played a major role in the control test." 628 F.3d at 1320. Notwithstanding, equitable considerations standing alone do not establish that the Debtors in this case controlled the Loan Proceeds. Without control by the Debtors, the Loan Proceeds cannot qualify as property of the Debtors. *See also Andreini & Co.* v. *Pony Express Delivery Services, Inc. (In re Pony Express Delivery Services, Inc.)*, 440 F.3d 1296, 1300 (11th Cir. 2006) (Under the control test, "a recipient of an avoidable transfer is an initial transferee only if they exercise legal control over the assets received, such that they have the right to use the assets for their own purposes, . . .").

In addition to the conduit/transferee cases, courts have used the control test to determine what constitutes property of the debtor in the context of the earmarking exception to avoidance of preferential transfers.[8] In this circuit, the two-part control test urged by the Movants was initially used by the district court in an earmarking/preference case, *Tolz v. Barnett Bank of S. Fla.*

[8] The earmarking doctrine prevents a trustee from avoiding particular transfers that appear to be preferences. Under certain conditions, property of a third party that is given to the debtor to enable the debtor to pay a specific creditor is "earmarked" and deemed to be property of the third party, rather than property of the debtor subject to avoidance. *In re Safe-T-Brake*, 162 B.R. at 363. The earmarking doctrine has not been expressly applied by the Eleventh Circuit. *See Bank of America, N.A. v. Mukamai (In re Egidi)*, 571 F.3d 1156, 1162 (11th Cir. 2009) ("This Court has not expressly applied the earmarking doctrine in the past, and we decline to do so today.").

(In re Safe-T-Brake of S. Fla., Inc.), 162 B.R. 359 (Bankr. S.D. Fla. 1993). As set forth by visiting Judge Robert Ginsberg, control in the earmarking context has two components:

> first, the power to designate which party will receive the funds; and, second, the power to actually disburse the funds at issue to that party. In other words, control means control over identifying the payee, and control over whether the payee will actually be paid.

Id. at 365 (*citing Matter of Smith*, 966 F.2d 1527, 1539 (7th Cir.) *cert. dismissed*, 506 U.S. 1030, 113 S.Ct. 683, 121 L.Ed.2d 604 (1992) (Flaum, J., dissenting)).

This test was later employed in the fraudulent transfer context to determine whether there was a transfer of property of the debtor in *Kapila v. Espirito Santo Bank, (In re Bankfest Capital Corp.)*, 374 B.R. 333 (Bankr. S.D. Fla. 2007). In *Bankfest*, Judge Cristol referred to *Safe-T-Brake's* two-part analysis as the elements of the control test, "as adopted in this circuit, [which] 'simply requires courts to step back and evaluate a transaction in its entirety to make sure that their conclusions are logical and equitable.'" *Id.* at 338 (*citing Sanchez*, 848 F.2d at 1199). Judge Cristol also noted that,

> [s]ome courts have complemented the control analysis by asking whose interests are primarily served by the challenged transaction. Where the transaction primarily serves the interests of the debtor, courts generally find a transfer of "property of the debtor." *Cf. Matter of Howdeshell of Ft. Myers*, 55 B.R. 470 (Bankr.M.D.Fla.1985); *In re Bowers-Siemon Chemicals Co.*, 139 B.R. 436 (Bankr.N.D.Ill.1992). Conversely, where the debtor's interests do not provide the impetus for the transaction, as was the case in *Sanchez/Chase & Sanborn*, 813 F.2d at 1177, courts are more likely to find that there was no fraudulent transfer of property of the debtor.

Id. at 339. Most recently, the *Safe-T-Brake* two-part control test was used by Judge Gold in the fraudulent transfer context to determine that transferred funds were not property of the conveying subsidiary debtors. *TOUSA II*, 2011 WL 522008 at *24. Although the two-part control test has been used by courts in this circuit, the Eleventh Circuit itself has not adopted this version of the test.[9]

Upon reexamination of Eleventh Circuit precedent, the Court finds that the Loan Proceeds Counts cannot survive as viable causes of action for fraudulent transfers of "property of the Debtors" based upon allegations that the Debtors were the substantive, if not the contractually-named borrowers, in the Credit Suisse Transaction. In the Eleventh Circuit, avoiding the transfer of the Loan Proceeds requires that the Loan Proceeds were property of the Debtors as determined by the Debtors' "control" over the Loan Proceeds. It is unnecessary for this Court to opine whether a one-dimensional or a strict two-prong analysis is the appropriate control test to determine if the Loan Proceeds are property of the Debtors. *Cf. Safe-T-Brake*, 162 B.R. at 365 (finding two-prong analysis rather than one-dimensional analysis appropriate in the earmarking context to determine whether an interest of the debtor in property was transferred). In this case, the issue is not the sufficiency and extent of the Debtors' control over the Loan

[9] In *Scanlon*, 239 F.3d 1195, 1197-98 (11th Cir. 2001), the Eleventh Circuit, affirming the bankruptcy court's judgment, noted that the district and bankruptcy courts focused on the debtor's degree of control over escrow funds using the *Safe-T-Brake* test to determine whether funds were property of the debtor, but that both courts failed to address appropriate state law concerning escrow funds. Movants' representation that the Eleventh Circuit cited the appropriateness of the two-part *Safe-T-Brake* control test in *Scanlon* is not quite accurate.

Proceeds, the issue is whether the Debtors had *any* control over the Loan Proceeds. The Court concludes that the answers to the essential questions - "Would the money from the Loan Proceeds been part of the estate had it not been transferred to the Defendants before the commencement of the bankruptcy proceedings?" and "Did the transfer of the money from the Loan Proceeds diminish the assets of the Debtors to the detriment of all the Debtors' creditors?" - is "no". *See Beiger*, 110 S.Ct. at 2263; *Sanchez*, 813 F.2d at 1181. The Debtors neither possessed, nor controlled, the Loan Proceeds. It was the parents of the Debtors who possessed and controlled the money. The Third Amended Complaint contains allegations that the Ginn and Lubert-Adler Defendants were insiders in control of the Debtors and that, in connection with the Credit Suisse Transaction, they exercised this control by having Robert F. Masters, a Ginn representative, execute the Credit Agreements on behalf of each of the loan parties. However, the Debtors were not parties to the First and Second Lien Credit Agreements. Robert F. Masters signed the First and Second Lien Credit Agreements, as Manager on behalf of the borrower, Ginn-LA CS Borrower, LLC, and as President on behalf of the borrower, Ginn-LA Conduit Lender, Inc. As to the Subsidiary Guaranties, Robert F. Masters signed on behalf of thirteen guarantors, including the Debtors, but he did so in his capacity as President of each entity. Thus, is signing the Subsidiary Guaranties, Robert F. Masters was acting on behalf of each subsidiary Debtor guarantor, not on behalf of the parent borrowers. As more fully discussed below, pursuant to the documents, the Debtors were guarantors, not borrowers, who had no property interest in the Loan Proceeds. The Loan Proceeds were not an asset of the Debtors and would not have been part of the Debtors' estates had they not been transferred. Thus, the transfer of the Loan Proceeds did not diminish the Debtors' assets to the detriment of all the Debtors' creditors. Taking all well-pleaded facts as true and construing the Third Amended Complaint in the light most favorable to the Trustee, the Court finds that the Loan Proceeds Counts fail to state a claim for relief that is plausible on its face. The Third Amended Complaint fails to allege that the Debtors exercised the requisite control over the Loan Proceeds to make the Loan Proceeds property of the Debtors which is a prerequisite for avoiding the transfers.

B. Trustee's Substantive Borrower & Collapsing Theories

In granting the Trustee leave to amend so that he could allege his "substantive borrower" and "collapsing" theories, the Court considered *Tousa I's* rejection of a broad control requirement to determine property of the debtor. *Off. Comm. of Unsecured Creditors of Tousa, Inc., et al., v. Citicorp N. Am., Inc., et al.*, (*In re Tousa, Inc*.), 422 B.R. 783, 873 (Bankr. S.D. Fla. 2009) ("Tousa I"). In *Tousa I*, the bankruptcy court found that requiring control as an essential element of a property interest was at variance with the statutory definition of a transfer. *Id.* at 874. On appeal, Judge Gold reversed *Tousa I,* and found that determination of a debtor's interest in property requires application of the "control test to the totality of the circumstances as established by the actual documents governing the transactions". 2011 WL 522008 at *24. While the facts of *Tousa* are markedly different from the facts of this case,[10] the Court recognizes that control must be an essential element of a property interest. Application of any version of the control test to the totality of the circumstances as established by the actual documents governing the transactions in this case, shows that the Debtors had no control over the Loan Proceeds, and consequently, the Loan Proceeds were not property of the Debtors.

Notwithstanding the foregoing, the Trustee maintains that the Court should collapse the Credit Suisse Transaction and look at the entire transaction to find that the Debtors had a legal or equitable interest in the Loan Proceeds as established by the Third Amended Complaint's allegations, *inter alia*, that: 1) the Debtors are identified as "Full Recourse Borrower Parties" not mere "guarantors" under the Master Restructuring Agreement ("MRA"), which did not recharacterize the parties' liabilities or positions from the initial loan documents; 2) the Debtors' interest in the Loan Proceeds is evidenced by the Defendant's responses to interrogatories indicating the transfers were made pursuant to the terms of the Lead Debtors' respective operating agreements; and 3)

[10]One of the key differences is that the *Tousa* debtor conveying subsidiaries were in fact co-borrowers of the new loan, whereas in this case, the Debtors are not borrowers in the Credit Suisse Transaction.

Credit Suisse would never have loaned the funds to mere shell entities, Ginn-LA Borrower, LLC and Ginn-LA Conduit Lender, Inc., the named "Borrowers", without the Debtors and other project entities having primary and not secondary liability for the full loan amount making the Debtors "substantively borrowers" not mere "guarantors" in the Credit Suisse Transaction.

1. Debtors are Guarantors not Borrowers in the Credit Suisse Transaction

Review of the Forbearance Agreement, which was not provided to the Court prior to entry of the Order Dismissing Second Amended Complaint, in conjunction with the Credit Agreements and the MRA, reveals that the Trustee's characterization of the Debtors as full recourse borrowers *ab initio* is inaccurate. The Debtors are neither defined as "Borrowers", nor are they signatories to the First and Second Lien Credit Agreements. The Debtors are, however, "Guarantors" under the Subsidiary Guaranties to which they were signatories. The June 30, 2008 Forbearance Agreement acknowledges the Borrowers' default under the Credit Agreements, identifies the Debtors as "Full Recourse Borrower Parties Other Than the Borrowers", and then collectively names the "Borrowers" and the "Full Recourse Borrower Parties Other than the Borrowers" as the "Full Recourse Borrower Parties." The Forbearance Agreement's recitals state that by executing the Forbearance Agreement, the Debtors reaffirmed their obligations under the Subsidiary Guaranties. However, by its terms, execution of the Forbearance Agreement was not to be construed in any way to expand the limited nature of the obligations. *See* Forbearance Agreement ¶20. These named terms are repeated in the December 19, 2008 MRA in which the Debtors are again identified as "Full Recourse Borrower Parties Other than the Borrowers", and then again collectively named with the "Borrowers" as "Full Recourse Borrower Parties". Significantly, the Borrowers are defined separately from the Debtors in every agreement. The post-default nomenclature defining the guarantor Debtors as "Full Recourse Borrowers Other than the Borrowers", and then naming them together with the "Borrowers" as "Full Recourse Borrower Parties" does not support the conclusion that the guarantor Debtors were full recourse borrowers at the inception of the initial Credit Suisse Transaction. "It is the law in this Circuit that 'when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.'" *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009)(*citing Griffin Ind., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir.2007)). Here, the Debtors are guarantors, not borrowers, under the Credit Agreements.

2. Responses to Interrogatories Don't Establish Debtor's Control

The Third Amended Complaint alleges that the Defendants themselves treated the Loan Proceeds as property of the Debtors. The allegations cite to the Ginn and Lubert-Adler Defendants' responses to interrogatory numbers "8" & "9". The question and response to number "8" is:[11]

Question: Regarding the transfers to Ginn and Lubert-Adler entities of Credit Suisse Loan Proceeds, and the guaranties and liens issued in connection with the loan transaction, please identify the consideration or value, if any, received by the Tesoro Debtors in exchange for:

(a) the portion of the loan proceeds distribution credited to the Tesoro Debtors;
(b) the guaranties they issued in connection with the loan transaction; and
(c) the liens they issued in connection with the loan transaction.

Lubert-Adler Response: [12]

In addition to the foregoing General Objections which are incorporated herein by reference, the Lubert-Adler Defendants object to this Interrogatory as being confusing. Subject to the objections asserted above, the Lubert-Adler Defendants respond as follows:

The transfers to the LA Fund III investment limited partnerships and Ginn were made pursuant to the terms of the Second Amended and Restated Agreement of Limited Partnership of Ginn-LA St. Lucie Ltd., LLLP which provided for distributions in the following order of priority:

1. To the limited partners in repayment of their loans to Debtor Ginn-LA St. Lucie Ltd., LLLP, including interest thereon;
2. To the limited partners, in proportion to their respective preferred return account balances;
3. To the partners in proportion to the balance of their unreturned capital contributions; and
4. The balance to the partners in proportion to their respective percentage interests (i.e., 20% to the general

[11] Interrogatories 8 & 9 repeat the same question. Number 8 addresses lead Debtor Tesoro and number 9 addresses lead Debtor Quail West. The complete Lubert-Adler Defendants' interrogatory questions and answers, along with the supplemental answers to interrogatories 8 and 9, were filed as exhibit "7" by the Trustee in his response to the motions to dismiss the Second Amended Complaint (D.E. #140 Ex.7).

[12] The Ginn Defendants Responses to interrogatories 8 & 9 were substantially similar to the Lubert-Adler Defendants' Responses. The complete Ginn Defendants' interrogatory questions and answers were filed as exhibit "6" by the Trustee in his response to the motions to dismiss the Second Amended Complaint (D.E. #140 Ex.6).

partner and 80% to the limited partners).

Trustee's Resp. to Mot. to Dismiss Second Am. Compl., Ex. 7 (D.E. #140-2).

Construing the Third Amended Complaint in the light most favorable to the Trustee does not lead to the conclusion that the interrogatory responses are, in effect, an admission by the Defendants that the Loan Proceeds were property of the Debtors. The Court notes that the respondents objected to the interrogatory as being confusing. In addition, the question asks what was the consideration received by the Debtor in exchange for the portion of the Loan Proceeds distribution "credited" to the Debtor. The Third Amended Complaint contains allegations that the Credit Suisse Transaction was cross-collateralized across the project entities, and that it was a complex, multi-tiered loan transaction. The Third Amended Complaint also contains a chart titled "How the Loan Proceed Distributions to Insiders were Debited and Credited Among the Project Entities". The Movants maintain that the interrogatory response describes the internal accounting allocation. The Court does not see how the interrogatory response supports the conclusory allegation that the Defendants "effectively conceded that the Debtors had either a legal or equitable interest" in the Loan Proceeds. Third Am. Compl. ¶87.

Although not alleged in the Third Amended Complaint, the Trustee's Supplemental Memorandum (D.E.#201) also argues that the Loan Proceeds were property of the Debtors because the Debtors' operating agreements "controlled" the disbursement of the Loan

Proceeds. Even if distribution of the Loan Proceeds was in keeping with the lead Debtors' operating agreements, this aspect of "control" is insufficient to establish the Debtors' property interest in the Loan Proceeds. The Court notes however, that the First Lien Credit Agreement provides for the "use of funds" in section 2.9:

> A. Tranche B Loans. The proceeds of Transche B Loans made to the Borrower shall be applied, together with the proceeds of the loans made pursuant to the Second Lien Agreement, (i) to repay the Existing Indebtedness of the Borrower, its Subsidiaries and the Bahamas Owner, (ii) to make certain distributions to the holders of Capital Stock in the Borrower in the amount of $333,125,000, and (iii) to pay the Transaction Costs.

First Lien Credit Agreement (D.E. #74, Ex. A).

The Trustee has not alleged that distribution of the Loan Proceeds violated section 2.9 (A) of the First Lien Credit Agreement. That the distribution of Loan Proceeds pursuant to the Credit Agreements may also be in keeping with the Debtors' operating agreements does not evidence that the Debtors exercised the requisite control over the Loan Proceeds to transform them into property of the Debtors.

3. Collapsing the Transaction to Determine its Substance

The Order Dismissing Second Amended Complaint noted that while courts in other circuits have, under appropriate circumstances, collapsed transactions to determine their economic reality, the Eleventh Circuit has offered no opinion as to the propriety of the collapsing doctrine. *See Order Dismissing Second Amended Complaint* at 11-13 (noting decisions in other circuits). At the hearing, counsel for the Trustee opined that "[c]ollapsing the transaction says you're really analyzing the substance of the transaction, and so while the Eleventh Circuit hasn't used the word 'collapsing', for all practical purposes, the words are really the same, because you're not looking at the form. You're looking at the substance of the relationship." Indeed, at the hearing, counsel repeatedly argued for "substance over form". However substance over form does not eliminate the control element required for finding that the Loan Proceeds were property of the Debtors.

It appears that the thrust of the Trustee's collapsing theory is that Credit Suisse would never have loaned the funds to the shell entity borrowers without the Debtors' liability being primary and not secondary. Arguing that the Debtors are substantively the borrowers rather than merely guarantors because they have primary liability for the full $675 million loan amount, the allegations cite paragraph 3 of the Subsidiary Guaranties which provides:

> Nature and Scope of Liability. Guarantor's liability under this Guaranty shall be primary and not secondary, in the full amount of the Guarantied Obligations, . . .

Fist Lien Subsidiary Guaranty ¶3 (D.E.#140 Ex.3). In their Motions to Dismiss, the Movants point out that there is a distinction between a guaranty of payment and a guaranty of collection under applicable law. Indeed, the Subsidiary Guaranties each state that the guaranty is a "guaranty of payment and performance of the Guarantied Obligations, and not a guaranty of collection." Fist Lien Subsidiary Guaranty ¶5. The Trustee's argument that paragraph

3 of the Subsidiary Guaranties shows that the Debtors are the real borrowers in interest because any other interpretation would impermissibly make paragraph 5 superfluous and meaningless is unpersuasive.

The distinction between a guaranty of payment and a guaranty of collection was described in *Chicago Title Ins. Co. v. Lerner*:

> "[A] a guaranty of payment is an obligation to pay the debt when due if the debtor does not. A guarantor of payment is *primarily liable* and waives any requirement that the holder of the note take action against the maker as a condition precedent to his liability on the guaranty. A guaranty of collection "is one under which the creditor can seek performance from the guarantor only after the occurrence of some condition such as the condition that the creditor has unsuccessfully and with reasonable diligence sought to collect the debt from the principal debtor."

435 B.R. 732,737 (S.D. Fla. 2010) (internal citations omitted) (emphasis added).

In this case, the Debtors are guarantors under the Subsidiary Guaranties which the Debtors signed as guarantors. As stated in the agreement, the Debtors' guaranties are guaranties of payment, not of collection. A guarantor of payment is primarily liable without the lender having first taken action against the borrower. *Id.*

The Trustee also alleges that the Debtors were substantively borrowers who had a legal or equitable interest in the Loan Proceeds based upon Credit Suisse's conditioning the loans on receipt of the Debtors' guaranties and Liens. The purpose of requiring a guaranty in any loan transaction is to provide the lender additional security against a default by the borrower. The fact that a lender conditions the grant of a loan on receipt of guaranties by an entity other than the borrower is not extraordinary, nor is it uncommon for a lender to request the guaranty to be secured by the assets of the guarantor. Requiring a guaranty as a condition of a loan does not transform the guarantor into a borrower.

The Court also notes that the allegations that the borrowers are shell entities are directly contradicted by allegations that Ginn-LA CS Borrower, LLC's assets consisted of the membership interests of four project entities. Conclusory allegations are insufficient to survive a motion to dismiss for failure to state a claim. *Ashcroft v. Iqbal*, 129 S.Ct. at 1949 (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. at 555). "[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.* at 1954. The Trustee's allegation that the principal source of repayment of the loan was the Debtors' and other project entities' assets does not make the subsidiary guarantor Debtors borrowers under the Credit Agreements. Nor does the Trustee's further argument that "the Borrower and its Subsidiaries" were responsible for loan repayment transform the subsidiary guarantor Debtors into borrowers. Guarantors generally are responsible for loan repayment in the event of a default.

The Court finds that the Trustee's collapsing theory is untenable. The Third Amended Complaint fails to specifically allege what must be collapsed to demonstrate that the Debtors exercised the requisite control over the Loan Proceeds to make them the

Debtors' property.

Notwithstanding the foregoing, the Court notes that the allegations concerning this transaction, if true, raise concerns of egregious intentional fraudulent conduct by multiple parties. Under no circumstances should the dismissal of the Loan Proceeds Counts be interpreted as an exoneration or a reward for ingenuity in designing fraudulent transfers. While the allegations do not support a cause of action for avoidance and recovery of the Loan Proceeds, they may support claims for breach of fiduciary duty. To prosecute an action based upon the fraudulent conveyance of the Loan Proceeds there must have been an actual transfer of the Debtors' property. In this case, the Debtors had no property interest in the Loan Proceeds themselves.

III. The Lien Transfers

A. Law of the Case – The First Liens

It is undisputed that the transfer of Liens on substantially all of the Debtors' assets was a transfer of property of the Debtors. Mindful of *Societe Generale's* direction to step back and evaluate the Credit Suisse transaction in its entirety to make sure its conclusions are logical and equitable, it is this Court's view that the proper cause of action would have been avoidance of the Liens against Credit Suisse. *See Societe Generale*, 848 F.2d at 1199. Unfortunately, early in this bankruptcy, the Trustee elected to release Credit Suisse from any such claims in exchange for post-petition financing. The Trustee requested and received this Court's approval for an interim cash collateral order which provided releases to Credit Suisse, and waiver of any and all claims as to the validity, perfection, priority, enforceability and avoidability of the First Lien Obligations. *Cash Collateral Order,* ¶ 7 (Main Case No.:08-29769, D.E.#77). The Cash Collateral Order also established February 23, 2009, as the bar date for the Trustee, all creditors, or any party in interest to file an objection to, or commence an adversary proceeding challenging, the First Lien Lenders' or Agent's claims, to avoid any security or collateral interest in the assets of the Debtors claimed by the First Lien Agent or Lenders, or to seek disgorgement of any payments made by the Debtors to the First Lien Lenders. *Id.* ¶8. The *Cash Collateral Order* further provided:

> In the event that no objection or complaint is filed prior to the Challenge Period Termination Date: (a) the waiver and release granted by Paragraph 7 above shall become final and binding on all parties (including any creditor or any subsequently appointed trustee); (b) the First Lien Obligations, and the First Lien Agent's and *First Lien Lenders' Liens in the First Lien Collateral shall be valid, perfected, nonavoidable*, and in full force and effect, not subject to any claims, counterclaims, setoffs, or defenses;

Id. (emphasis added).[13] No objections were filed, nor were any adversary proceedings commenced to challenge the validity or nonavoidability of the First Liens.

The Trustee subsequently requested and received this Court's approval for sale of the Debtors' assets free and clear of liens. In his third supplemental sale motion, the Trustee ratified the

[13] The Final Cash Collateral Order contains the same language.(Main Case, D.E.#99).

validity of the First Liens stating:

> The date established in the Final Financing Order by which Trustee Dillworth and any creditors or other parties in interest could challenge the validity and priority of Credit Suisse's liens and security interests upon virtually all of the Debtors' assets passed without any challenge being made. Accordingly, pursuant to the Final Financing Order, *Credit Suisse's liens have been conclusively established in this case as constituting valid first liens encumbering virtually all of the Debtors' assets*.

Trustee's Third Supplement and Add'l Proposed Amendment to Sale Motion, ¶4 (Main Case, D.E.#163)(emphasis added).

The Debtors' assets sold for approximately $27 million. *See Sale Orders* (Main Case, D.E.#s 185, 188, and 189). Credit Suisse received the majority of the sale proceeds with the Debtors' estates receiving a "carve-out" of $250,000. *Id.* The Movants argue that the law of the case doctrine bars any challenge to the validity of the Debtors' Liens which the Trustee ratified and confirmed in connection with this Court's approval of the Debtors' post-petition financing and sale of the Debtors' assets free and clear of liens.

The law of the case doctrine requires a court to follow what has been decided explicitly, as well as by necessary implication, in an earlier proceeding. *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 n.3 (11th Cir.1990). "The doctrine's reach is not as expansive as the rule of res judicata: the doctrine of 'law of the case' is limited insofar as it applies only to issues that were decided in the former proceeding but not to questions which might have been decided but were not." *Morrow v. Dillard*, 580 F.2d 1284, 1290 (5th Cir. 1978)[14] (citation omitted). "Nevertheless, 'the doctrine does mean that the duty of a lower court to follow what has been decided at an earlier stage of the case comprehends things decided by necessary implication as well as those decided explicitly.'" *Id.* (citation omitted).

The Movants maintain that the finding in the Order Dismissing Second Amended Complaint that - "releases and waivers were granted only to Credit Suisse and the First Lien Lenders who provided post-petition financing to the Debtors, no claims were released with respect to any third parties" - focuses on the waiver and release language in the financing orders rather than on the orders' Lien non-avoidance language. Notwithstanding that the issue was presented to the Court in terms of releases,[15] the Court having reviewed the subject orders, finds that the nonavoidability of the First Liens was explicitly decided and conclusively established in final orders that were entered on request of the Trustee.

The Trustee has argued that this is not an impediment to this action. The Trustee's Response states that "[c]onsistent with the [Cash Collateral] Order, the Trustee's Third Amended Complaint does not seek to avoid the First Liens as to Credit Suisse or the First

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[14]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981)(*en banc*) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[15] The Court bases its findings and rulings upon the issues presented by the parties. The Movants raised the law of the case issue as an aside in a footnote in their Motion to Dismiss Second Amended Complaint. The Trustee's response framed and discussed the issue in terms of releases and waivers as to Credit Suisse rather than other third parties.

Lien Lenders. It seeks avoidance and recovery only from the Defendants – the third parties for whose benefit the Liens were granted." Trustee's Resp. at 22. However, it appears that in making this argument, the Trustee is conflating avoidance and recovery.

Section 550 permits recovery "to the extent that a transfer is avoided". 11 U.S.C. § 550(a). "In fraudulent transfer actions, there is a distinction between avoiding the transaction and actually recovering the property or the value thereof. By its language, 11 U.S.C. § 544(b) indicates that the transaction must first be avoided before a plaintiff can recover under 11 U.S.C. § 550." *IBT Int'l, Inc. v. Northern (In re Int'l Admin Services, Inc.*), 408 F.3d 689, 703 (11th Cir. 2005). The *IBT* court noted a split of authority as to whether § 550 recovery requires that an initial transfer first be avoided, or whether it requires that it be merely avoidable. *Id.* at 705. The debtor in *IBT* specialized in marketing get-rich-quick schemes to unsophisticated consumers through a barrage of seminars and late night infomercials. *Id.* at 695. At issue were the transfers of $50 million, more than 100 times, among twenty-three different entities. *Id.* at 696. Finding § 550's phrase "to the extent a transfer is avoided" ambiguous, the Eleventh Circuit declined to embrace a strict construction of the statute[16] in a case involving a multitude of patently fraudulent

[16] *Collier* noting *IBT* as the better majority view, states: Recovery "to the extent that" a transfer is avoided has been interpreted to require a successful avoidance action against the initial transferee before recovery may be had from a subsequent transferee. The better view, adopted by the majority of courts, is that a transfer may be found avoidable and a recovery may be had from a subsequent transferee without suing the initial transferee. 5 *Collier on Bankruptcy* ¶ 550.02.

transfers. *Id.* at 707. "An opposite result would foster the creation of similar enterprises, for creditors would design increasingly complex transactions, with the knowledge that more transfers decreases the likelihood of a successful avoidance action." *Id.* The *IBT* court determined, "[i]n short, once the plaintiff proves that an avoidable transfer exists he can then skip over the initial transferee and recover from those next in line." *Id.* at 706. Thus, under *IBT,* § 550(a) recovery requires proof that an "avoidable" transfer exists. In order for the Trustee to recover based upon the transfer of the First Liens, the transfer must at least be "avoidable". However, at the Trustee's request, the First Liens were deemed to be "nonavoidable". That is now the law of the case, and it precludes recovery in respect of the First Liens. Had the Trustee not released Credit Suisse, and instead elected to preserve the First Liens for the benefit of the Debtors' estates, the result here would be different.

B. The Second Liens

Unlike the First Liens, the law of the case does not speak to the avoidability of the Second Liens. The Trustee alleges that he is entitled to recover the value of the Second Liens as of the time they were issued pursuant to § 550. The purpose of § 550 is to "restore the estate to the financial condition that would have existed had the transfer never occurred." *Bakst v. Wetzel (In re Kingsley)*, 518 F.3d 874, 877 (11th Cir. 2008) (*citing Sawran*, 359 B.R. 348, 354 (Bankr. S.D. Fal. 2007). The Tenth Circuit notes that:

> *ordinarily* in the case of an avoided lien, the estate will be returned to its previous position by simply avoiding the preferential lien and no further recovery will be necessary, but there may be circumstances where that remedy will be insufficient and recovery under § 550 needed instead.

Rodriguez v. Drive Fin. Services, (In re Trout), 609 F.3d 1106, 1111 (10th Cir. 2010)(finding the grant of monetary relief under § 550 is discretionary in cases involving nonpossessory liens).

The § 550 default rule of returning the transferred property itself suggests that avoidance and preservation of a lien is a sufficient remedy. *Id.* at 1112 -1113. This remedy recognizes the view that "when a lien is avoided, there is nothing left to recover." *In re Bremer*,408 B.R. 355, 360 (B.A.P.10th Cir. 2009) (*citing* 4 Norton Bankr. L. & Prac. 3d § 70.3). However, the Trustee argues that merely avoiding the Second Liens will not restore the Debtors to the financial condition that would have existed had the Lien transfer never occurred because the Lien transfer limited the Debtors' ability to dispose of its property prior to further depreciation. Movants' arguments - that § 550 recovery is unavailable to the Trustee because the transfers to be avoided are non-possessory liens on collateral the Trustee voluntarily sold at a sale establishing that there is no value in the Second Liens - are premature. [17]

The Court notes that the Lien Counts fail to distinguish between the First Liens which may not be avoided, and the Second

[17] Such arguments are more appropriately raised in the context of a motion for summary judgment rather than in a motion to dismiss.

Liens which might be. In addition, the Third Amended Complaint fails to clearly allege the value of the Second Liens. Therefore, the Court will dismiss without prejudice the Lien Counts to the extent they seek avoidance and recovery with respect to the Second Liens.

Because recovery under § 550(a)(1) is available only "to the extent that a transfer is avoided", and because the allegations concerning avoidance of the Second Liens are unclear, the Court does not reach the issue of whether the Defendants are entities for whose benefit the Second Liens were transferred.

CONCLUSION

For the reasons discussed herein, the Court dismisses the Third Amended Complaint's Loan Proceeds Counts. The Trustee has failed to state a viable cause of action for avoidance and recovery of the Loan Proceeds because they were never property of the Debtors. As to the Third Amendment Complaint's Lien Counts, the First Liens are unavoidable as established by the law of the case, but the claims with respect to the Second Liens survive the Motions to Dismiss. However, because the Lien Counts fail to distinguish between the First and Second Liens, the Court will dismiss the Lien Counts with prejudice as to the First Liens. As to the Second Liens, the Court will dismiss the Lien Counts without prejudice to the Trustee amending the Third Amended Complaint to state any claims respecting the Second Liens.

The dismissal of the Loan Proceeds Counts and the Lien Counts as to claims concerning the First Liens should not be construed as an endorsement of the intentionally fraudulent conduct alleged. In the Court's view the appropriate causes of action were avoidance of the Lien transfers to Credit Suisse and breach of fiduciary duty. The Trustee's error in releasing Credit Suisse - who also may have been defrauded by the Debtors' insiders - appears to have cost the Debtors' creditors far more than the $250,000 "carve-out" the Trustee "negotiated" for the estate.

ORDER

The Court, having heard the argument of counsel, reviewed the Third Amended Complaint, the submissions of the parties, the applicable law, and being otherwise fully advised in the premises, hereby **ORDERS AND ADJUDGES** that:

1. The Motions to Dismiss are **GRANTED IN PART AND DENIED IN PART**.

2. The Loan Proceeds Counts I-VI of the Third Amended Complaint are **DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM**.

3. The Lien Counts VII-XII of the Third Amended Complaint are **DISMISSED WITH PREJUDICE** to the extent they assert claims in respect of the First Liens, and **DISMISSED WITHOUT PREJUDICE** to the extent they attempt to assert claims in respect of the Second Liens.

4. The Trustee is granted twenty days leave to amend the Third Amended Complaint to assert claims respecting the Second Liens.

# # #

Copies furnished to:

Mr. Moorefield, Esq.

Mr. Stearns, Esq.
Mr. Singerman, Esq.
Mr. Busey, Esq.
Mr. Throckmorton, Esq.
Mr. Baena, Esq.

The Trustee is directed to serve a copy of this order on any interested parties who do not receive electronic service.