UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re: Case No. 9:11-bk-19510-FMD
Chapter 11

Basil Street Partners, LLC,

Debtor.
_____/

Antaramian Properties, LLC,

Plaintiff,

v. Adv. No. 9:12-ap-00863-FMD

Basil Street Partners, LLC,
F. Fred Pezeshkan,
Iraj Zand, and
Raymond Sehayek,

Defendants.
_____/

ORDER ON MOTIONS
FOR SUMMARY JUDGMENT
(Doc. Nos. 27 and 29)

THIS PROCEEDING came on for hearing on October 30, 2012, of the motions for summary judgment filed by (i) Plaintiff, Antaramian Properties, LLC and various Counterclaim Defendants[1] (Doc. No. 27); and (ii) Defendants/Counterclaim Plaintiffs, F. Fred Pezeshkan, Iraj Zand, and Raymond Sehayek (Doc. No. 29). After careful consideration of the motions, the exhibits and affidavits filed in support thereof, the responses to the motions (Doc. Nos. 51 and 53), and the arguments of counsel, and as set forth in detail below, the Court makes the following findings:

1. The Undisputed Facts[2] set forth herein are established and require no further proof at trial.

2. As a matter of law, the fiduciary duties owed to the Debtor by Jack J. Antaramian ("Antaramian") did not terminate upon his resignation as President of Basil Street Partners, LLC (the "Debtor").

3. As a matter of law, Antaramian Properties, LLC ("APL") is the assignee and holder of the BSP Loan, subject to the affirmative defenses and counterclaims described herein.

4. As a matter of law, the obligations of F. Fred Pezeshkan ("Pezeshkan"), Iraj Zand ("Zand"), and Raymond Sehayek ("Sehayek") (collectively, "PZS") under their Guaranties were not satisfied or paid when the Debtor paid down the first $15,000,000.00 of the BSP Loan.

5. As a matter of law, APL's claims against PZS on account of their Guaranties are limited to claims for contribution, based upon the amount APL paid to acquire the BSP Loan from Regions, subject to the determination of the following three issues:

   (a) Whether the differing caps on the Guaranties establish an agreement that PZS's and Antaramian's liabilities be apportioned differently.

   (b) Whether PZS's liability for a contribution claim are offset by the value of the BSP Loan, and ultimately the value of the Property.

   (c) Whether Antaramian is entitled to pre-judgment interest on his contribution claims, and if so, the rate applicable rate of interest.

6. As a matter of law, PZS lack standing to pursue claims for Antaramian's alleged breach of fiduciary duties owed to the Debtor.

7. As a matter of law, APL is entitled to summary judgment on the Debtor's and PZS's claims for breach of fiduciary duty arising from the Heat Investment Transaction.

Accordingly, for the reasons that follow, the Court grants the motions for summary judgment in part, to the extent of the foregoing findings, and otherwise denies the motions for summary judgment.

[1] The Counterclaim Defendants are Jack Antaramian, individually and in his capacity as a co-trustee of the Antaramian Family Trust, and entities owned or controlled by him, including Antaramian Properties, LLC, Antaramian Family, LLC, and the Antaramian Family Trust (the "Counterclaim Defendants").

[2] Capitalized terms are defined hereafter.

Background

This proceeding involves an extremely contentious dispute between Antaramian and his former business associates, PZS. All four individuals possess, indirectly through a chain of affiliated entities, ownership interests in the Debtor. The Debtor is the owner of property comprising a portion of the overall development known as the Naples Bay Resort, an upscale resort complex located in Naples, Collier County, Florida (the "Property").

Prior to the critical events described herein, Regions Bank ("Regions") was the holder of a consolidated promissory note (the "Note") in the amount of $109,000,000.00 secured by a mortgage (the "Mortgage") on the Property. Antaramian and PZS personally guaranteed the Debtor's obligations to Regions (the "Guaranties"). The Note, Mortgage, Guaranties and other loan documents are referred to as the "BSP Loan." By October 2009, the Note had fully matured, and the Debtor was in default for the principal balance then outstanding of approximately $36,000,000.00. In February 2010, Regions commenced a state court action to foreclose the Mortgage and to collect the outstanding indebtedness from the Debtor, Antaramian, and PZS pursuant to the Note and Guaranties (the "State Court Action").[3]

As discussed more fully below, in July 2010, Antaramian formed APL, the Plaintiff herein, to purchase the BSP Loan from Regions. Upon its acquisition of the BSP Loan in September 2010, APL continued with the prosecution of the State Court Action.

On October 19, 2011, after a year of litigation as the plaintiff in the State Court Action, APL, in the capacity of lead petitioning creditor, filed an involuntary Chapter 7 bankruptcy petition against the Debtor. After numerous contested hearings, the Debtor filed a motion to convert the case to Chapter 11, and on June 28, 2012, the Court entered an order converting the case to a case under Chapter 11 and appointing a Chapter 11 Trustee.[4]

On September 19, 2012, the Chapter 11 Trustee commenced this adversary proceeding (the "Removed Action") by filing a notice of removal of the State Court Action. Although the State Court Action involves numerous parties and claims for relief, the Chapter 11 Trustee removed only a portion of those claims for relief to this Court through her Notice of Removal.[5] Thus, not all of the parties to the State Court Action are parties to this Removed Action. Likewise, not all of the claims asserted in the State Court Action are pending before this Court. PZS joined in and agreed to the removal of the State Court Action, and each of the parties to the Removed Action consented in writing to the jurisdiction of the Bankruptcy Court and to the entry of final orders and judgment(s) by the Bankruptcy Court.[6]

Claims Being Litigated in the Removed Action

The issues before the Court on the parties' motions for summary judgment arise from the operative pleadings in the State Court Action. Those pleadings are:

(i) APL's First Amended Complaint (Doc. No. 84, Exh. 1);

(ii) The Debtor's Answer to APL's Amended Complaint, Affirmative Defenses, and Counterclaims against APL, Antaramian, and Antaramian Family, LLC (Doc. No. 84, Exh. 2);

(iii) Answer and Affirmative Defenses to the Debtor's Counterclaims (Doc. No. 84, Exh. 3);

(iv) PZS's Answer to Amended Complaint, Affirmative Defenses, and First Amended Counterclaims against the Counterclaim Defendants (Doc. No. 84, Exh. 10); and

(v) Counterclaim Defendants' Amended Answer and Affirmative Defenses to PZS's First Amended Counterclaims (Doc. No. 84, Exh. 11).

APL's First Amended Complaint contains six counts. Generally, APL alleges that it obtained a valid assignment of the BSP Loan documents from Regions. In Counts I and II, APL seeks to foreclose the Mortgage and security interest encumbering the Property and certain of the Debtor's personal property. In Count III, APL seeks to collect the outstanding indebtedness owed by the Debtor pursuant to the Note. And, in Counts IV, V, and VI, APL seeks to collect payment of the outstanding indebtedness under the Note from PZS pursuant to their Guaranties.

[3] Case No. 10-1269-CA, pending in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida.
[4] Main Case Doc. No. 306.
[5] Doc. No. 1 (unless otherwise stated, docket citations are to the adversary docket).
[6] Doc. Nos. 3 and 16.

In response to APL's First Amended Complaint, PZS filed their Answer, Affirmative Defenses, and First Amended Counterclaims. PZS's allegations supporting their affirmative defenses also form the basis of their five counterclaims. In general, PZS defend against APL's claims by alleging that Antaramian owed PZS a fiduciary duty to negotiate favorable terms related to the resolution of their Guaranties, and that Antaramian breached his fiduciary duty when he acquired the assignment of the BSP Loan from Regions and then attempted to enforce the Note and Guaranties against the Debtor and PZS.

In Count I of their Amended Counterclaims, PZS assert a claim for breach of fiduciary duty against Antaramian, APL, Antaramian Family, LLC, and the Antaramian Family Trust. In Count II, PZS assert a claim against Antaramian, APL, Antaramian Family, LLC, and the Antaramian Family Trust for aiding and abetting Antaramian's alleged breach of fiduciary duty. In Count III, PZS allege a fraud claim against APL. In Count IV, PZS assert a claim against Antaramian, Antaramian Family, LLC, and the Antaramian Family Trust for aiding and abetting APL's alleged fraud. And, in Count V, PZS seek a judicial declaration that APL's acquisition of the BSP Loan be deemed to have been made for their benefit and that of the Debtor. The Debtor, in its counterclaims, asserts the same five causes of action against the Counterclaim Defendants.[7]

In response to PZS's and the Debtor's counterclaims, the Counterclaim Defendants raise various affirmative defenses in their Answer and Affirmative Defenses, but they rely in their motion for summary judgment primarily upon waiver and estoppel. The gist of the Counterclaim Defendants' waiver and estoppel defenses is that PZS and the Debtor knew that Antaramian was negotiating to acquire the BSP Loan for his own benefit, and that PZS specifically authorized him to engage in such negotiations. The Counterclaim Defendants also argue that PZS were themselves negotiating to acquire the BPS Loan, and are thus estopped to complain that Antaramian breached any fiduciary duties by acquiring the BSP Loan.

The Summary Judgment Motions

APL and the Counterclaim Defendants have moved for summary judgment on Counts I through VI of APL's First Amended Complaint, and on Counts I through V of PZS's and the Debtor's counterclaims. PZS have moved for summary judgment on Counts I, II, and V of their First Amended Counterclaims. At the October 30, 2012 hearing on the motions for summary judgment, the Court granted the Chapter 11 Trustee's request that, because at this time the Debtor's interest is essentially aligned with that of PZS, the Chapter 11 Trustee be permitted to adopt PZS's position and arguments on the summary judgment motions.

Statement of Undisputed Facts

Although the parties strenuously contest the legal issues, the facts giving rise to APL's First Amended Complaint, the Debtor and PZS's affirmative defenses and counterclaims, and the Counterclaim Defendants' affirmative defenses to those counterclaims are largely undisputed. Accordingly, the Court makes the following factual findings (the "Undisputed Facts"):

A. Ownership and Control of the Debtor and Related Entities

1. The Debtor is a Delaware limited liability company.

2. PZS and Antaramian are not, and have never been, members of the Debtor, although they have indirect ownership interests in the Debtor.

3. The Debtor's manager is Naples Bay Resort Holdings, LLC, which is also a Delaware limited liability company.

4. Antaramian Partners Limited Partnership, LLLP ("APLP") is the 100% owner of Naples Bay Resort Holdings, LLC, the Debtor's manager.

5. The manager of Naples Bay Resort Holdings, LLC, is NBR Manager, LLC, which is also a Delaware limited liability company.

6. APLP also indirectly owns, through its three limited partners, 100% of NBR Manager, LLC.

7. The general partner of APLP is an entity known as Sloane Street Partners, LLC ("Sloane Street").

8. Sloane Street has two managers: Pezeshkan and Zand.

9. Sloane Street owns .01% of APLP.

10. The three limited partners of APLP own the other 99.99% of APLP. Those three limited partners,

[7] The Antaramian Family Trust is not named as a defendant in any of the Debtor's counterclaims.

and their respective ownership interests of APLP, are as follows:

(i) Antaramian Family, LLC (39.996%);

(ii) Naples Bay Investors, LLC (39.996%); and

(iii) Pezeshkan (19.998%).

11. Antaramian Family, LLC, Naples Bay Investors, LLC, and Pezeshkan, also own 100% of Sloane Street and NBR Manager, LLC, in a 40%, 40%, 20% respective apportionment.

12. Antaramian, individually, is the manager of Antaramian Family, LLC.

13. Sehayek and Zand are the two managing members of Naples Bay Investors, LLC.

14. Pezeshkan and Thomas MacIvor ("MacIvor") are the two managers of Naples Bay Investors, LLC.

B. History of the Debtor's Loan Transactions

15. On September 22, 2003, the Debtor obtained a loan from AmSouth Bank in the amount of $13,986,000.00. The Debtor executed a promissory note, secured by a mortgage on the Property and a UCC-1 financing statement encumbering various personal property owned by the Debtor.

16. Also on September 22, 2003, Antaramian and PZS, in their individual capacities, executed unconditional personal guaranties in favor of AmSouth Bank for payment of the note.

17. On numerous occasions in 2004 and 2005, the Debtor executed and entered into additional loan agreements with AmSouth Bank, pursuant to which the Debtor borrowed additional funds from AmSouth Bank.

18. On September 30, 2005, AmSouth Bank entered into a *Participation Agreement* with several other banks, including Northern Trust, RBC, and PNC (the "Participating Banks").[8] Pursuant to the *Participation Agreement*, the Participating Banks acquired ownership interests in the note, Mortgage and other loan documents. The Participating Banks were involved in Antaramian's and PZS's negotiations concerning the BSP Loan.

19. Regions is the successor-in-interest to AmSouth Bank.

20. On June 29, 2007, the Debtor executed an *Amendment to Loan Agreement*, which acknowledged the Debtor's indebtedness to Regions, as successor-in-interest to AmSouth Bank, under the previous loan agreements in the total principal amount of $94,600,000.00. The Debtor also obtained an additional $15,000,000.00 loan advance.

21. In connection with the June 29, 2007 transaction with Regions, the Debtor executed a *Consolidated Promissory Note* in favor of Regions in the principal amount of $109,600,000.00 (the "Note").

22. On June 29, 2007, Antaramian and PZS, in their individual capacities, again executed personal guaranties of payment of the Note (the "Guaranties"), with Antaramian's Guaranty being limited to $30,000,000.00, and PZS's Guaranties each being limited to $15,000,000.00.

23. The Note, the Guaranties, and any other related loan documents in connection with the Debtor's financing from Regions are collectively referred to hereinafter as the "BSP Loan."

24. The Note matured by its own terms on June 29, 2009. As of that date, the outstanding principal balance of $36,013,491.42 remained due under the Note.

25. On July 29, 2009, the Debtor executed a *Loan Modification Agreement* that extended the maturity date of the Note to September 27, 2009.

26. On October 5, 2009, Regions demanded payment from the Debtor, Antaramian, and PZS of the outstanding principal balance, together with accrued interest and late fees, in the total amount of $36,119,846.76, by October 15, 2009.

27. On December 14, 2009, the Debtor, Antaramian, and PZS executed and entered into a *Forbearance Agreement* with Regions and the Participating Banks that granted a forbearance period to the Debtor through December 31, 2009. The purpose of the *Forbearance Agreement* was to allow Northern Trust on one hand, and the Debtor, Antaramian, and PZS on the other, to discuss potential financing terms, which, if acceptable to all parties,

[8] The *Participation Agreement* is not in the record before the Court, but it is referenced in the *Forbearance Agreement* dated December 14, 2009, which is attached as Exhibit HH to APL's First Amended Complaint. *See* Doc. No. 27, Exh. 2 – Part 8, pp. 12-23.

would have facilitated Northern Trust's purchase of the BSP Loan from Regions.

28. Northern Trust did not purchase the BSP Loan from Regions.

C. History of the Negotiations Concerning the BSP Loan Between Antaramian, PZS, Regions, and the Participating Banks

29. As early as December 22, 2009, PZS acknowledged that Antaramian, on the one hand, and PZS, on the other, had "strong differences and adverse positions" concerning their obligations to one another under the BSP Loan. (Doc. No. 27, Exh. 10.)

30. Pezeshkan acknowledged that for over six months, Antaramian had been negotiating with Regions over terms by which Antaramian, or one of his affiliated entities, would purchase the BSP Loan at a discount and "take over the assets" of the Debtor. *Id.*

31. On December 29, 2009, the Debtor's counsel emailed Antaramian that PZS were not interested in being borrowers under the terms that Northern Trust proposed during the forbearance period. PZS consented to Antaramian's "pursuing negotiations with Northern Trust directly for [his] own account." (Doc. No. 27, Exh. 19.)

32. In late December 2009, Antaramian, in addition to negotiating with Northern Trust for the purchase of the BSP Loan, also engaged in negotiations with PZS for a potential deal that would have released PZS from their Guaranties if Antaramian was ultimately successful in purchasing the BSP Loan from Regions or Northern Trust. Antaramian's counsel accepted an offer made by PZS on December 24, 2009, under which PZS would have each paid Antaramian $1,000,000.00 to be released from their Guaranties if Antaramian acquired the BSP Loan and assumed all responsibility and liability for the underlying project at the Naples Bay Resort. (Doc. No. 30, Part 19 (Exh. 17).)

33. The December 24, 2009 offer from PZS was expressly conditioned on Antaramian's agreement to the financing terms with Regions and/or Northern Trust for the purchase of the BSP Loan. *See id.* Because Antaramian did not reach an agreement regarding the financing, the condition precedent to the deal between Antaramian and PZS was never satisfied, and the deal never came to fruition.

34. By early February of 2010, PZS were engaged, without Antaramian's involvement, in their own negotiations with Regions to work out the BSP Loan. On February 2, 2010, Pezeshkan emailed James Kearley ("Kearley"), a Vice President of Regions who served as one of the primary contacts for Regions in connection with the BSP Loan, regarding workout solutions that would not involve financing from Northern Trust. (Doc. No. 27, Exh. 16.)

35. On February 11, 2010, Pezeshkan sent Kearley a settlement proposal, in which Pezeshkan stated that PZS "do not speak for Mr. Antaramian," and that their offer does "not include any payments or recovery from Mr. Antaramian," such that the PZS proposal "represent[s] the minimum [Regions] would recover. . . ." (Doc. No. 27, Exh. 17.) The proposal refers to resolution of the PZS Guaranties, and not to PZS's acquisition of the BSP Loan.[9]

36. On February 18, 2010, Regions filed the State Court Action.

37. On March 23, 2010, the Debtor, Antaramian, and PZS executed a *Pre-Negotiation Agreement* with Regions in an effort to settle the State Court Action. (Doc. No. 27, Exh. 12.) The agreement set forth the terms and conditions under which Regions would participate in settlement discussions. The agreement confirmed the continued "internal disagreements" between Antaramian and PZS, and permitted Regions to conduct settlement discussions with any or all of the guarantors, including Antaramian by himself, or PZS by themselves. *Id.* at § 2.

38. On April 15, 2010, Pezeshkan sent Kearley a letter with additional settlement proposals for a number of loans, including the BSP Loan. One of the proposals was for an entity designated by Antaramian to buy the Note for $8,000,000.00.

39. On April 24, 2010, Antaramian emailed Kearley and two other Regions representatives with an offer for the Antaramian Family Trust to purchase the BSP Loan, including all of the Guaranties, for $5,000,000.00. Antaramian stated that the offer was confidential and was "not to be shared with anyone other than the participating banks." (Doc. No. 30, Part 24 (Exh. 22).)

40. On May 4, 2010, Antaramian and his wife met in person with two Regions' representatives to discuss the Antaramian Family Trust's purchase of the BSP Loan. (Doc. No. 30, Part 25 (Exh. 23); Doc. No. 30,

[9] *See id.* (noting that the proposed payments to the banks would be "in satisfaction of the guarantees as per the enclosed proposals").

Part 35 (Exh. 33, pp. 10-11).) PZS were not invited to, nor did they attend, this meeting.

41. On May 24, 2010, Pezeshkan sent a follow-up letter and amended offer to Kearley concerning the initial April 15, 2010 offer that he had submitted to Regions. Pezeshkan stated that the current offer increased the settlement proposal by $2,750,000.00. This offer contemplated contribution by all of the guarantors—not just PZS. (Doc. No. 30, Part 21 (Exh. 19).)

42. By June 23, 2010, Antaramian had conveyed his intention not to participate in PZS's May 24, 2010 settlement proposal. *See* email from Pezeshkan to Kearley acknowledging Antaramian's decision not to participate in the PZS settlement proposal submitted on May 24, 2010, and stating that Regions and the other Participating Banks would be dealing with Antaramian separately from PZS. (Doc. No. 27, Exh. 18.)

43. As of June 24, 2010, PZS were aware that Antaramian and PZS were negotiating separately with Regions and the Participating Banks. In an email, Pezeshkan clarified the current terms of PZS's proposal, including PZS's cooperation in Regions' foreclosure of the Property, and a guaranty that Regions would receive $8,000,000.00 at the foreclosure sale. Pezeshkan also stated that Antaramian would not be a party to or third party beneficiary of PZS's settlement package, and that Regions and the Participating Banks would, therefore, "retain all their rights against [Antaramian] and his affiliates to get even more." (Doc. No. 27, Exh. 15.)

44. As of June 2010, the Debtor was in a financially precarious situation without the ability to cover its expenses. As a result, the Debtor, together with Antaramian and PZS, entered into an *Expense Funding Agreement* with Regions, pursuant to which the Debtor borrowed an additional $300,000.00. (Doc. No. 51, Exh. 4.)

45. The Debtor continued to experience operating deficits into July of 2010 and was reliant on Regions to fund those deficits. Regions refused to exceed its $300,000.00 commitment under the *Expense Funding Agreement*.

46. On June 29, 2010, Antaramian directed an attorney from the law firm representing the Debtor in another matter to prepare, on Antaramian's behalf, a draft *Loan Sale and Assignment Agreement* for Antaramian to submit to Regions. In the draft, Antaramian proposed that the Antaramian Family Trust would purchase an assignment of the BSP Loan from Regions. (Doc. No. 30, Part 26 (Exh. 24).) Antaramian delivered a copy of that agreement to Regions for its consideration on June 30, 2010. (Doc. No. 30, Part 27 (Exh. 25).) This proposed transaction was not consummated.

47. On July 12, 2010, Pezeshkan sent an email to Kearley expressing his frustration with Regions and the Participating Banks for not providing timely responses to PZS's settlement proposals. (Doc. No. 51, Exh. 8.) In that email, Pezeshkan stated that Antaramian and PZS were dealing separately from one another, and that PZS were negotiating with Regions without Antaramian's involvement.

48. In response to Pezeshkan's July 12, 2010 email, Kearley replied that the Participating Banks had rejected PZS's June 24, 2010 offer; he stated that Regions' only interest was in selling the Note. Regions did not care who the ultimate purchaser was. *Id.*

49. Also on July 12, 2012, Kearley sent Antaramian an email stating that "the bank group . . . has responded to PZS in a fashion that can benefit everyone if you guys can find a way to have a constructive conversation . . . and work together. Regions is ready to champion any reasonable settlement offer . . . ." (Doc. No. 56, Exh. 82.)

50. On July 15, 2010, Antaramian emailed PZS asking whether they would have an interest in participating in a deal where PZS would "get out of" their obligations under the BSP Loan for no cash payment and the release of their Guaranties. (Doc. No. 30, Part 22 (Exh. 20).)

51. One day later, on July 16, 2010, Antaramian sent Northern Trust a draft *Loan Sale and Assignment Agreement* that proposed a sale of the BSP Loan to the Antaramian Family Trust for $8,000,000.00. (Doc. No. 30, Part 28 (Exh. 26).) This agreement was not consummated.

52. On July 19, 2010, while Antaramian's proposal to Northern Trust was pending, Antaramian met in person with PZS to discuss a resolution of the BSP Loan, and the respective positions that Antaramian and PZS would take in their meetings with Regions on the following day. (Doc. No. 30, Part 23 (Exh. 21).)

53. PZS testified at their respective depositions that they agreed with Antaramian to work together to present a "divided front" to Regions, in the hope that Antaramian would be able to negotiate a favorable deal mutually beneficial to all of them. Specifically,

Pezeshkan testified that the subject of the meeting was for PZS to let Antaramian "handle the negotiation with the bank on buying the project or discounting the note." (Doc. No. 30, Part 33 (Exh. 31, p. 4).) PZS's "job" was "to go in the bank and be difficult and not agree to anything, and let [Antaramian] do his job." *Id.*

54. Zand likewise testified that Antaramian told PZS at the July 19, 2010 meeting that "he felt very strongly that he could . . . buy the project back from the bank for the benefit of the partnership and the partners, that, to be able to do that, [PZS and Antaramian] must take a certain adversarial position in front of the bank to say to [the bank] that [PZS] are not interested in the project and allow Mr. Antaramian to buy the project for the partners and for Basil Street." (Doc. No. 30, Part 34 (Exh. 32, p. 5).) Zand further testified at his deposition that after PZS had shown no interest in resolving the BSP Loan, Antaramian would present himself as "the resolver, the knight in shining armor." *Id.* at p. 6.

55. Finally, Sehayek testified at his deposition that at the July 19, 2010 meeting, Antaramian and PZS agreed that PZS would act as if they were adverse to Antaramian, despite the fact that they had agreed to work together to negotiate and buy the BSP Loan on behalf of both Antaramian and PZS. (Doc. No. 30, Part 38 (Exh. 36).)

56. The following day, on July 20, 2010, PZS and Antaramian participated in separate meetings with Regions. PZS met with Regions first.

57. When PZS's meeting concluded, Antaramian met with Regions. Afterwards, Antaramian told PZS he had reached a deal with Regions, but he did not disclose the substance of his meeting or the specific terms of the deal. Antaramian testified at his deposition that he did not disclose the terms of the deal to PZS because he agreed, at Regions' request, to keep the terms of the deal confidential. (Doc. No. 30, Part 35 (Exh. 33, pp. 26-28).)

58. On July 21, 2010, Regions sent Antaramian a draft *Purchase and Sale Agreement*, subject to further revision and approval from the Participating Banks. (Doc. No. 27, Exh. 20.)

59. On July 22, 2010, Antaramian emailed a letter of resignation to Pezeshkan, Zand, and MacIvor (one of the managers of Naples Bay Investors, LLC) resigning from his positions as Member Representative and President of the Management Committee of NBR Manager, LLC. (Doc. No. 27, Exh. 29.)

60. On July 23, 2010, MacIvor sent a letter to Antaramian, rejecting Antaramian's resignation due to his failure to provide three days' written notice of the resignation, and removing Antaramian for cause as a member of the NBR Manager, LLC Management Committee and President of APLP, Sloane Street, and NBR Manager, LLC. (Doc. No. 27, Exh. 30.)

61. On July 27, 2010, the Articles of Incorporation of APL were filed with the Florida Department of State – Division of Corporations. (Doc. No. 30, Part 2 (Exh. 1, pp. 4-12).) The recitals of APL's September 14, 2010 Operating Agreement indicate that the business of APL includes the "acquisition and ownership of promissory notes, mortgages, guaranties, security agreements and other loan documents from Regions Bank (the 'Loan Documents') that [APL] may acquire and the foreclosure or negotiations thereon." (Doc. No. 30, Part 2 (Exh. 1, p. 13).) Section 8(a) of the APL Operating Agreement states that its exclusive purpose includes the acquisition of mortgage debts, including the "Loan Documents" referred to in the aforementioned recitals provision, and the authority to "deal with such debts as it determines, which may include foreclosures of property secured by such debts…and enforcement of guarantees and acts with respect to such debts." *Id.* at p. 21.

62. On July 29, 2010, Antaramian's attorney sent a second letter of resignation to MacIvor, stating that Antaramian was resigning from all of his director, management, and officer positions of the various affiliated entities, including his position as President of the Debtor. (Doc. No. 27, Exh. 34.) At all relevant times prior to his resignation, Antaramian had been serving as the Debtor's President.

63. Antaramian's July 21, 2010 proposed transaction with Regions (Undisputed Fact 58) was not finalized, because RBC, as one of the Participating Banks, demanded more than its proportional share of the purchase proceeds. On August 2, 2010, Kearley emailed Antaramian, stating that unless Antaramian or PZS were able to come up with additional proceeds of nearly $1.5 million to satisfy RBC's demands, the sale of the Note to the Antaramian Family Trust would not proceed. (Doc. No. 27, Exh. 21.)

64. That same day, on August 2, 2010, Antaramian replied to Kearley that he was returning the earnest money deposit to the Antaramian Family Trust. *Id.*

65. On August 3, 2010, MacIvor sent a letter to Kearley indicating that the Debtor's management

structure had changed (i.e., that Antaramian had been removed). The letter informed Kearley that the current members of the Debtor's management committee were Pezeshkan and Zand, and that Zand was serving as President of the Debtor's Manager, with Pezeshkan and Sehayek serving as Vice-Presidents. (Doc. No. 27, Exh. 35.)

66. On August 5, 2010, Antaramian emailed Kearley to inquire whether a sale of the Note could be effectuated without the inclusion of the PZS Guaranties. (Doc. No. 30, Part 31 (Exh. 29).) The following day, Kearley responded to Antaramian that Regions could not sell the Note apart from the PZS Guaranties. *Id.* Kearley stated to Antaramian that if PZS could pay $1,400,000.00 to Regions, Regions would "most likely be willing to release them on Basil" (i.e., release them from their obligations under the Guaranties). *Id.* There is no record evidence that Antaramian relayed that "offer" to PZS.

67. On August 12, 2010, Antaramian and Kearley exchanged emails in which Antaramian asked Kearley to confirm that Regions was negotiating exclusively with him and the Antaramian Family Trust for the purchase of the BSP Loan. (Doc. No. 30, Part 6 (Exh. 5).) Kearley confirmed that Regions was "not negotiating with any other party at this time" and that he "intend[s] to do everything possible to try to get to the finish line with AFT before abandoning efforts and looking elsewhere." *Id.*

68. On August 24, 2010, Pezeshkan emailed Kearley with a new PZS proposal, proposing that a third party pay $8,500,000.00 for the BSP Loan. (Doc. No. 27, Exh. 22.) Pezeshkan asked that the proposal be kept confidential, except for the Participating Banks and the proposed buyer. *Id.*

69. Regions did not accept PZS's August 24, 2010 offer. Instead, on September 13, 2010, Regions and APL executed a *Sale and Assignment Agreement*, pursuant to which Regions sold and assigned the BSP Loan to APL for $8,668,000.00 (Doc. No. 30, Part 5 (Exh. 4, pp. 4-26).)

70. On September 15, 2010, Pezeshkan and Kearley exchanged emails in which Kearley confirmed that Regions had sold the BSP Loan to an entity affiliated with Antaramian. (Doc. No. 30, Part 3 (Exh. 2).)

71. That same day, the local press printed a newspaper article in which Antaramian stated, "I'm the Bank." (Doc. No. 30, Part 4 (Exh. 3).)

72. On September 29, 2010, Regions executed an *Omnibus Assignment* of the BSP Loan, including the Note, Mortgage, and PZS Guaranties, in favor of APL. (Doc. No. 30, Part 5 (Exh. 4, pp. 42-44).)

73. Kearley testified at his deposition that Regions was in ongoing negotiations with Antaramian for the purchase of the BSP Loan from at least July 21, 2010 (the day after Antaramian met with Regions and thereafter refused to disclose to PZS the substance of that meeting or terms of the deal that had been reached) through September 13, 2010 (the date on which Regions and APL executed the *Sale and Assignment Agreement*). (Doc. No. 30, Part 36 (Exh. 34, p. 3).)

The Parties' Contentions
as to the Undisputed Facts

Although the foregoing facts are not in dispute, Antaramian and PZS disagree as to their legal impact and effect. In their affirmative defenses and counterclaims, PZS allege that Antaramian owed them a fiduciary duty as a matter of law by virtue of the relationships they shared as limited partners of APLP and indirect owners of the Debtor. Antaramian argues that no such fiduciary duty existed.

Alternatively, PZS contend that the history of negotiations over the BSP Loan gives rise to an implied fiduciary duty on the part of Antaramian in favor of the Debtor and PZS. Specifically, PZS point to what they characterize as "joint" offers that they submitted to Regions on April 15 and May 24, 2010. (Undisputed Facts 38, 41.) PZS also rely on Antaramian's July 15, 2010 email asking if they wanted to participate in a potential deal that Antaramian was apparently trying to structure. (Undisputed Fact 50.) PZS further contend that a fiduciary relationship was established, at the latest, when they met with Antaramian in person on July 19, 2010, to discuss what they perceived to be a joint negotiation plan for their upcoming meetings with Regions, which they understood would result in a mutually beneficial deal for both Antaramian and themselves. (Undisputed Facts 52-55).

PZS further argue that Antaramian breached his fiduciary duty to them when he conducted "secret" negotiations with Regions while PZS were under the impression that they were acting jointly. (Undisputed Facts 39, 40.) PZS also assert a breach of fiduciary duty on the basis of Antaramian's "secret" July 20, 2012 meeting with Regions, after which he failed to disclose the terms of his secret deal with them (Undisputed Fact 57), and later declined to include them in a deal that could have resulted in the release of their Guaranties, despite being given multiple

opportunities to do so. (Undisputed Facts 63, 64, 66.) Instead, PZS contend that Antaramian chose to (i) form APL for the purpose of acquiring the BSP Loan (Undisputed Fact 61); (ii) confirm that Regions was negotiating exclusively with him (Undisputed Fact 67); and (iii) close the deal for his own benefit. (Undisputed Facts 69, 72.) PZS complain that they did not learn about Antaramian's deal with Regions until two days after the agreement had been executed, and only then through emails with Kearley and by reading about it in the local press. (Undisputed Facts 70, 71.)

On the other hand, Antaramian counters that no implied fiduciary duty ever existed in favor of PZS. Antaramian contends that PZS could not, as a matter of law, have reposed the requisite trust in him to negotiate their Guaranties, when PZS themselves knew and repeatedly acknowledged that they were negotiating separately from Antaramian, and, on several occasions, expressly authorized him to do just that. Antaramian points out that PZS acknowledged these separate negotiations—and authorized their occurrence—as early as late December, 2009. (Undisputed Facts 29, 30, 31.) Antaramian further contends that PZS's separate negotiations continued into early February 2010 (Undisputed Facts 34, 35), and that PZS confirmed Antaramian's (and their own) right to negotiate separately on March 23, 2010, when they signed the *Pre-Negotiation Agreement*. (Undisputed Fact 37.) Antaramian argues that by June 23, 2010, PZS knew Antaramian was not participating in their "joint" offers of April 15 and May 24, 2010. (Undisputed Fact 42.) And, Antaramian contends that Pezeshkan's June 24, 2010 email to Kearley belies any assertion that PZS were relying on Antaramian to negotiate on their behalf. (Undisputed Fact 43.)

With respect to the July 19, 2010 meeting with PZS and the ensuing July 20, 2010 meeting with Regions, Antaramian argues that he never accepted any trust that PZS claim to have reposed in him, and that absent his acceptance of such trust, no implied fiduciary duty can have arisen. Antaramian points to his removal from the various management committees (Undisputed Fact 60) as an outward manifestation of evidence that PZS did not, in fact, repose any trust in him to negotiate for them. Finally, Antaramian notes that as late as August 24, 2010, PZS submitted a new proposal to Regions that they asked be kept confidential. (Undisputed Fact 68.) Since that submission occurred shortly before Antaramian's deal ultimately closed, Antaramian argues that any attempt by PZS to argue that they were not still negotiating for their own benefit, or that Antaramian should be precluded from negotiating his own deal, is belied by the evidence.

Scope of the Court's
Summary Judgment Rulings

As set forth above, the Court ruled at the October 30, 2012 summary judgment hearing that the Chapter 11 Trustee, on behalf of the Debtor, could adopt PZS's position and arguments as argued in their summary judgment motion. In addition, in ruling upon APL's *Motion to Strike Unpled Claims and Claims Not Removed by the Trustee* (Doc. No. 46),[10] the Court ruled that the parties were limited in their summary judgment motions to the claims and theories asserted in the pleadings that had been filed in the State Court Action, and that the Court would not grant summary judgment on claims or theories that had not been framed by the state court pleadings.[11] The Court is aware that it may consider a theory raised for the first time in summary judgment papers, if the opposing party has a meaningful opportunity to respond to the newly advanced theory.[12] However, the Court has discretion in appropriate circumstances to deny summary judgment, even though the movant may have technically discharged its burden.[13]

Accordingly, in making this ruling, the Court has not considered the arguments that PZS raised for the first time in their summary judgment motion, but that were not alleged in their Affirmative Defenses and First Amended Counterclaims. These include (i) PZS's contentions regarding the existence of an express fiduciary duty owed to them by Antaramian under the APLP partnership agreement and other affiliated entities' governing documents; and (ii) PZS's request for the imposition of a constructive trust or the equitable subordination of APL's claim, because Count V of PZS's counterclaims asked only for a declaration that the BSP Loan be deemed to have been purchased for the benefit of the Debtor and PZS.

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[10] This motion was directed to PZS's Statement of Counts and Defenses to be Litigated (Doc. No. 35) and their Motion for Summary Judgment (Doc. No. 29).

[11] *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").

[12] *See Cost Recovery Services LLC v. Alltel Communications, Inc.*, 259 F.App'x. 223 (11th Cir. 2007); *Air Turbine Technology, Inc. v. Atlas Copco AB*, 410 F.3d 701, 708-09 (11th Cir. 2005); *Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1201-02, n. 11 (11th Cir. 2003) (court may consider theories that support summary judgment even if not raised by the parties).

[13] *See National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F.2d 647, 651 (5th Cir. 1962); *Sejour v. Davis*, No. 1:10cv96-SPM/GRJ, 2012 WL 3079090 (N.D. Fla. July 30, 2012).

This ruling is without prejudice to either parties' ability to seek leave to amend the pleadings to conform to the evidence presented at trial.[14]

Legal Analysis

I. Jurisdiction

This Court has jurisdiction over the Removed Action pursuant to 28 U.S.C. § 1452, 28 U.S.C. § 1334, 28 U.S.C. § 157, and the Standing Order of General Reference entered in this District.[15] The Removed Action is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C), (E), (K), and (O). The parties have expressly consented to entry of final orders and judgments with respect to each claim and counterclaim in the Removed Action.[16]

II. Summary Judgment Standard

In a removed action, the bankruptcy court resolves state law claims in accordance with state substantive law.[17] In reaching that resolution, however, bankruptcy courts must apply federal rules of procedure.[18] Rule 56 of the Federal Rules of Civil Procedure, incorporated in full by Rule 7056 of the Federal Rules of Bankruptcy Procedure, applies in this removed adversary proceeding.

To prevail on summary judgment, Rule 56(a) requires the moving party to show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, courts must review the record, and all its inferences, in the light most favorable to the nonmoving party.[19] When parties have each moved for summary judgment – essentially cross motions – courts review each motion separately under the same general standard. In other words, each moving party must show that there are no genuine disputes as to any material facts that would preclude judgment as a matter of law on the claims, defenses, or parts thereof that are put in issue by the moving party's motion. The fact that both parties have filed motions for summary judgment does not necessarily require that one party or the other prevail, as the mere filing of cross motions, by itself, does not establish that either party is entitled to judgment as a matter of law.[20]

In order to prevail on its motion for summary judgment, APL, as Plaintiff, must establish that it is entitled to judgment as a matter of law. Because an affirmative defense can preclude judgment from being entered in the plaintiff's favor,[21] part of APL's burden as the moving party is to establish that the Debtor and PZS's affirmative defenses are invalid or legally insufficient. Otherwise, it will not have shown that it is entitled to judgment as a matter of law. APL, as Plaintiff, must also show that there are no genuinely disputed material facts as to both (i) its own claims and (ii) any affirmative defenses.[22] Because the Debtor and PZS would bear the burden of persuasion on their affirmative defenses at trial, APL, as the moving party, may discharge its burden by producing evidence that negates the Debtor's and PZS's defenses.[23]

Because the Court must apply the Rule 56(a) standard separately to each party's cross motion, the foregoing analysis applies equally to PZS's motion for summary judgment on their counterclaims.

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[14] Fed. R. Civ. P. 15(b); *Diaz v. Jaguar Restaurant Group, LLC*, 627 F.3d 1212, 1214 (11th Cir. 2010) ("Allowing an amendment to the pleadings at the close of trial to conform to the evidence presented is within the trial court's discretion.").

[15] *See In re Standing Order of Reference Cases Arising Under Title 11, United States Code*, Case No. 6:12-mc-26-ORL-22 ("any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 are referred to the bankruptcy judges for this district").

[16] *See In re Bellingham Ins. Agency, Inc*., No. 11-35162, --- F.3d ----, 2012 WL 6013836 (C.A.9 (Wash.) Dec. 4, 2012) (even if the bankruptcy court lacks the constitutional authority to enter a final judgment on a claim, the parties can consent to the bankruptcy court's entry of a final judgment).

[17] *In re Harmon*, No. 10-03207, 2011 WL 1457236, *4 (Bankr. S.D. Tex. Apr. 14, 2011).

[18] *Id*.

[19] *Bedoya v. Travelers Property Cas. Co. of America*, 773 F. Supp. 2d 1326, 1328 (M.D. Fla. 2011).

[20] 11 *Moore's Federal Practice*, § 56.120[2].

[21] *Haven Federal Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 733 (Fla. 1991) (noting that a valid affirmative defense is one that defeats the plaintiff's cause of action).

[22] *See generally* 11 *Moore's Federal Practice* § 56.40[1][b], which notes that "[w]hen the non-movant will bear the burden of persuasion at trial, the moving party may discharge its initial burden on the motion [for summary judgment] by producing evidence that negates the non-movant's claims or defenses." (emphasis supplied).

[23] *See In re Camtech Precision Mfg., Inc.*, 471 B.R. 293, 298 (S.D. Fla. 2012) (stating that a party moving for summary judgment "must come forward with evidence to defeat or overcome [an] affirmative defense").

III. APL's Motions for Summary Judgment as to Counts I through VI of the Amended Complaint

A. APL is the Owner and Holder of the BSP Loan

The Court finds that there are no genuine disputes of material fact concerning APL's status as the owner and holder of all the loan documents which comprise the BSP Loan, including the Note, Mortgage, and PZS Guaranties.

First, APL purchased the BSP Loan from Regions pursuant to the executed *Sale and Assignment Agreement* (Undisputed Fact 69), and received an assignment of the BSP Loan from Regions pursuant to the *Omnibus Assignment*. (Undisputed Fact 72.) Thus, subject only to the lien arising from the post petition financing provided by Family Access Exchange, LLC, during the course of the Debtor's bankruptcy case,[24] APL has the senior lien on the Debtor's real property pursuant to the Mortgage, as well as a security interest in its personal property pursuant to the UCC-1 financing statement. (Undisputed Fact 15.)

Second, the Note contains a Florida choice of law provision. Under Florida law, in an action to enforce a note, the plaintiff must prove that (i) the defendant executed the note; (ii) the plaintiff owns and holds the note; (iii) the defendant either (a) failed to pay the note when due, or (b) failed to make the installment payment when due and plaintiff has accelerated the balance; and (iv) the defendant owes plaintiff a specified sum of damages under the note that has been due since the date of default.[25] There are no genuine disputes of material fact as to any of these elements.[26]

Third, each of the PZS Guaranties contains a Florida choice of law provision. Florida law recognizes a guaranty as a contract, and an action to enforce a guaranty is considered a species of a general breach of contract action.[27] Again, there are no genuine disputes of fact as to any of these elements. PZS executed the Guaranties, the Note is in default with an outstanding balance, and PZS have not paid that balance, leaving APL with an unsatisfied debt.[28]

B. The Debtor's and PZS's Affirmative Defenses

Because APL, as the moving party, must also show that it is entitled to judgment as a matter of law, the Court shall now examine PZS's and the Debtor's defenses to the enforcement of the BSP Loan against them.

1. PZS's Defenses Unique to the Enforcement of the PZS Guaranties

(a) PZS's Affirmative Defense of Satisfaction/Payment

PZS argue that their personal guaranties have been satisfied. In support of their argument, they cite to Section 1(a) of the Guaranties, which states that the Guarantors unconditionally guarantee to Bank certain obligations of the Debtor under all of the Loan documents, including "the payment of the Loan up to a maximum amount of $15,000,000.00." (Doc. No. 27, Exh. 2 – Part 5, pp. 31-56 (Exh. V, W, X).)

PZS argue that their Guaranties are "first dollar" guaranties; accordingly, they construe the words "up to" to mean that their liability under their respective Guaranties is completely discharged once the Borrower (i.e., the Debtor) paid down the total loan balance by $15,000,000.00. Because the Debtor has paid approximately $74,000,000.00 of the Note balance—well over the $15,000,000.00 mark—PZS argue that they are no longer liable under their Guaranties. APL, on the other hand, argues that the PZS Guaranties are "last dollar" guaranties. Accordingly, APL construes the "up to" language as constituting a cap on each individual guarantor's personal liability, and argues that PZS remain liable—up to that cap—for any outstanding indebtedness under the Note.

The Court need only interpret the Guaranties to determine which party's interpretation is correct.[29] Where the determination of the issues in a lawsuit depends upon the construction of a written instrument

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[24] Post petition financing was provided pursuant to 11 U.S.C. §364 and this Court's Order (Main Case Doc. No. 203).

[25] *See* Fla. R. Civ. P. 1.934.

[26] *See* Affidavit of Russell Phillips. (Doc. No. 27, Exh. 36.)

[27] *Swan Landing Development, LLC v. Florida Capital Bank, N.A.*, 19 So. 3d 1068, 1070 (Fla. 2d DCA 2009) (recognizing the guaranty as a contract and noting that the count asserting a claim under the guaranty was a breach of contract count); *Drury v. National Auto Lenders, Inc.*, 83 So. 3d 951, 952 (Fla. 3d DCA 2012) (stating that in service by publication context, action under a guaranty is "akin to and legally indistinguishable from an action for breach of contract"). As such, a plaintiff must prove (i) the existence of the guaranty; (ii) a material breach thereof; and (iii) damages resulting from the breach. *Technical Packaging, Inc. v. Hanchett*, 992 So. 2d 309, 313 (Fla. 2d DCA 2008).

[28] *See* Affidavit of Russell Phillips. (Doc. No. 27, Exh. 36.)

[29] *Bryan v. Braun Cadillac, Inc.*, 599 So. 2d 1050 (Fla. 5th DCA 1992).

and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by the entry of summary judgment.[30] Only when the contract is ambiguous, or where there are two reasonable interpretations of an agreement, is there a question of fact which would require a review of extrinsic evidence to ascertain the parties' intent.[31]

The Court finds the foregoing language of Section 1(a) of the Guaranties to be plain, unambiguous, and susceptible to only one reasonable interpretation. The "up to" language simply serves to cap PZS's liability at $15,000,000.00. PZS's argument that the $15,000,000.00 amount is not a liability cap—but rather a pay-down threshold, which, once reached, extinguishes their liability completely—is refuted both by the plain language of the Guaranties and by Florida law. Florida courts have squarely rejected the interpretation advanced by PZS.[32]

In addition, the Pezeshkan and the Sehayek (but not the Zand) Guaranties contain additional language, in bold typeface, at the end of Section 1 that confirms that the $15,000,000.00 is a cap:

> **The liability cap referred to in Section 1(a) above shall also apply to that certain Guaranty Agreement previously executed by Guarantor to Bank on September 30, 2005 for the benefit of the Antaramian Capital Partners, LLC and thus, the maximum cumulative liability to Bank under either guaranty shall not exceed $15,000,000.00.** (emphasis supplied)

(Doc. No. 27, Exh. 2 – Part 5, p. 33 (Exh. V); p. 51 (Exh. X).)

Lastly, PZS's own admissions confirm their understanding that their Guaranties were "last dollar" guaranties. When PZS signed the Forbearance Agreement on December 14, 2009, they acknowledged and agreed that the "Loan Documents," a term which was defined to include the Guaranties, were in full force and effect. PZS ratified and affirmed that representation.[33] PZS made that acknowledgement at a time when well over $15,000,000.00 had been paid toward the Note balance. In fact, at that time, the outstanding principal had been paid down to just over $36 million. The Court finds that PZS's acknowledgment that the PZS Guaranties were still in full force and effect confirms their understanding that their Guaranties were "last dollar" guaranties and have not been satisfied.

PZS also argue that Antaramian is judicially estopped from taking a position adverse to them on this issue because when he was a defendant in the State Court Action (prior to APL's acquisition of the BSP Loan from Regions), Antaramian asserted the same argument that PZS now make. Antaramian had argued in the State Court Action that his Guaranty was satisfied because the Note principal had been paid down by more than $30,000,000.00.[34]

In order for the doctrine of judicial estoppel to apply, the party who is sought to be estopped must have successfully maintained an inconsistent position in a prior judicial proceeding.[35]

Although PZS and Antaramian asserted that their Guaranties had been satisfied in the motions to dismiss they filed in the State Court Action, there is no evidence that the state court granted Antaramian's motion to dismiss. And, the state court denied PZS's motion to dismiss on the same issue.[36] Simply put, because PZS have not demonstrated that Antaramian successfully maintained this argument in the State Court Action, the doctrine of judicial estoppel is inapplicable.[37]

Accordingly, the Court finds that PZS's affirmative defense of payment and satisfaction is

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[30] *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1096 (Fla. 1st DCA 1999).

[31] *Berloni S.P.A. v. Della Casa, LLC*, 972 So. 2d 1007, 1010 (Fla. 4th DCA 2008); *In re Fountain Imaging of North Miami Beach, LLC*, 392 B.R. 508, 514-15 (Bankr. S.D. Fla. 2008).

[32] *See, e.g., Kim v. Peoples Federal Sav. & Loan Ass'n of Tarentum, Pennsylvania*, 538 So. 2d 867, 870-71 (Fla. 1st DCA 1989); *Woodruff v. Exchange Nat. Bank of Tampa*, 392 So. 2d 285, 286 (Fla. 2d DCA 1980) ("the limit of liability stated in the guaranty expressed a limit on [the guarantor's] aggregate liability rather than a designation of the first $275,000 of the indebtedness as that part of the debt which [the guarantor] guarantied. A general guaranty that contains only a ceiling on the guarantor's aggregate liability requires the guarantor to answer for deficiencies up to the specified ceiling without respect to the amount of proceeds received by the creditor from the debtor.").

[33] *See* Forbearance Agreement, § 7. (Doc. No. 27, Exh. 2 – Part 8, p. 16.)

[34] *See* Doc. No. 29, p. 8 (citing Exh. 115).

[35] *Olin's, Inc. v. Avis Rental Car System of Fla., Inc.*, 104 So. 2d 508, 511 (Fla. 1958) (stating that judicial estoppel is not applicable unless the previous position was successfully maintained); *Brown & Brown, Inc. v. School Bd. of Hamilton County*, 97 So. 3d 918, 920 (Fla. 5th DCA 2012).

[36] *See* Doc. No. 4, Exh. 43, pp. 42-43.

[37] *Brown & Brown*, 97 So. 3d at 920 (citing *JSZ Fin. Co., Inc. v. Whipple*, 939 So. 2d 1189, 1191 (Fla. 4th DCA 2006)).

legally insufficient, and APL has met its burden on summary judgment with respect to this affirmative defense.

(b) PZS's Affirmative Defense that Antaramian is Limited to a Claim for Contribution

PZS also argue that APL is prohibited from enforcing the PZS Guaranties because APL's principal, Antaramian, and PZS were co-guarantors of the Note, and Florida law limits co-guarantors to claims for contribution from each other. The Court agrees.

The theory of contribution is grounded in equity. It derives from the notion that when two or more persons are liable for a debt, it is inequitable to require only one person to satisfy the entire indebtedness. Thus, the typical situation involving a claim for contribution in the guaranty context arises when co-guarantors are liable to a third party for an amount certain, and the third party looks to only one of the guarantors to satisfy the entire indebtedness. In that case, the guarantor who has paid the entire indebtedness may then seek contribution from his co-guarantors for their fair share of the joint liability.[38] The facts of this case, however, differ from the typical scenario described above. Here, Antaramian did not pay the entire indebtedness owed under the Note to Regions. Instead, he acquired the BSP Loan from Regions at a steep discount, through an entity indirectly owned and completely controlled by him, and now seeks to collect the entire outstanding loan balance against his former co-guarantors, up to the caps of their Guaranties.

These facts implicate the holding in *Curtis v. Cichon*.[39] In *Curtis*, a corporation executed a promissory note in favor of a bank. The corporation's four shareholders each personally guaranteed payment of the note. A little over a year after the note was executed, the bank assigned its interest in the note to one of the shareholders and his wife. After the assignment, the corporation defaulted on the note. The assignee/shareholder accelerated payment on the note, and sued his co-guarantors to collect the entire outstanding indebtedness pursuant to their guaranties. On appeal of the trial court's grant of summary judgment in favor of the defendants, Florida's Second District Court of Appeal held that a guarantor is precluded from collecting payment from his co-guarantors for the full amount of the debt owed on the note, and thereby avoiding his own percentage of liability.[40]

The holding in *Curtis* applies to the undisputed facts in this case. Antaramian purchased an assignment of the BSP Loan, including the Note and the PZS Guaranties, from Regions and now seeks to enforce the full amount of the Note against PZS pursuant to the Guaranties (subject to the $15,000,000.00 caps). If allowed to do so, Antaramian would profit by over $36 million (the $45,000,000.00 amount PZS are collectively liable for under their Guaranties less the $8,668,000.00 Antaramian paid to acquire the Note). Such a result is clearly inconsistent with the principles announced in *Curtis*.

Antaramian's attempt to distinguish *Curtis* is not persuasive. *Curtis* involved a pre-default assignment, while the assignment in this case occurred after Regions had declared a default and commenced litigation, there is no authority that this distinction bears legal significance. Although the status of the BSP Loan as a defaulted loan, rather than a performing loan, may have been a factor that Antaramian considered in deciding upon the amount he was willing to pay to acquire the BSP Loan, the legal principle that a co-guarantor must remain liable for his fair share of the total liability remains unchanged.

Antaramian characterizes the acquisition price of the BSP Loan as being the payment of his fair share of the Note under his Guaranty obligation. In other words, Antaramian argues that he has not escaped liability on his Guaranty, because he paid real dollars out of his own pocket to discharge that liability. But, Antaramian paid less than $9 million to Regions, an amount that would be more than offset by the profit he stands to gain if he is awarded a judgment of $15,000,000.00 against each of PZS. The Court cannot countenance this unjust enrichment at the expense of Antaramian's co-guarantors, who would each end up being liable to Antaramian for more than what he alone paid to Regions. The amount of a claim for contribution is based on the amount paid to acquire an assignment of the underlying debt.[41] The Court holds that Antaramian is entitled to seek contribution from PZS based solely on the amount of his payment.

[38] *See, e.g., Desrosiers v. Russell*, 660 So. 2d 396 (Fla. 2d DCA 1995) ("In the event that one of the guarantors has paid more than his share of the amount owed, he is entitled to demand contribution from the others."); *Hanrahan v. Barry*, 363 So. 2d 54 (Fla. 3d DCA 1978) (holding that where one guarantor paid the note in full on demand, he was entitled to seek contribution from his other co-guarantors).

[39] 462 So. 2d 104 (Fla. 2d DCA 1985).

[40] *Id.* at 105.

[41] *See, e.g., Albrecht v. Walter*, 572 N.W.2d 809 (N.D. 1997).

Finally, the Court concludes that Antaramian's having structured the acquisition of the BSP Loan through APL does not negate PZS's affirmative defense. When APL acquired the BSP Loan, APL was owned 60% by the Antaramian Family Trust.[42] Antaramian serves as a trustee of APL's majority owner, the Antaramian Family Trust. He also served as the sole manager of APL. In that capacity, Antaramian enjoyed complete control over APL.[43] The Court will not elevate the form of the transaction over its substance, and thereby allow APL to accomplish what Antaramian himself could not under Florida law.[44] This ruling is faithful to the equitable principles that apply generally in the contribution context,[45] and also prevents Antaramian from avoiding his percentage of liability by the immense profit he would obtain at the expense of his co-guarantors.

Accordingly, the Court applies *Curtis* to (i) preclude Antaramian from avoiding his own percentage of liability under the Note and from an unjust enrichment at the expense of his co-guarantors, and (ii) limit ALP and Antaramian to a claim for contribution against PZS. Consequently, the Court denies summary judgment to APL on Counts IV, V and VI of its Amended Complaint because PZS have raised a valid affirmative defense, and APL has not shown it is entitled to judgment as a matter of law.

While Antaramian is entitled to claims for contribution against PZS, the Court cannot determine the precise amounts of those claims because of other factual and legal issues which have not been addressed by the parties:

First, what apportionment of liability should be utilized? While the general rule announced in *Curtis* is that guarantors are generally presumed to be equally liable for their own proportion of the liability, that presumption may be rebutted by evidence of an agreement that the parties would be liable in some other percentage.[46] The PZS Guaranties are capped at $15,000,000.00 in liability each, while the Antaramian Guaranty contained a liability cap of $30,000,000.00. Accordingly, the issue remains as to whether the differing caps are indicative of an agreement that the parties' liability be apportioned disparately.

Second, should PZS's liability for a contribution claim be offset by the value of the BSP Loan, and ultimately the value of the Property? Florida courts have held that "where there is a money judgment entered against a guarantor prior to a foreclosure sale, the guarantor should be allowed to demonstrate that the foreclosure sale reimbursed the mortgagee to the extent that the sale would render enforcement of the guaranty inequitable, either in whole or in part."[47]

Third, is Antaramian entitled to pre-judgment interest on his claim? And, if so, at what rate of interest? While some Florida cases suggest that pre-judgment interest is part of any claim for damages, there is authority that pre-judgment interest may not be warranted.[48] In addition, there is a question as to whether interest would be allowed at the Note rate or, instead, the statutory rate provided in Florida Statutes section 55.03.[49]

In conclusion, the Court finds that PZS have raised a valid affirmative defense to Counts IV, V, and VI. Therefore, APL is not entitled to judgment as a matter of law on those counts. Additionally, because the

[42] (Doc. No. 27, Exh. 40; Doc. No. 29, Exh. 1.)

[43] *See* APL Operating Agreement, § 1(a)-(b) (Doc. No. 29, Exh. 1.)

[44] *Fickling Properties v. Smith*, 123 Fla. 556, 559-560 (1936) (permitting courts to disregard the "corporate fiction" in equity when the separate corporate existence is used "merely as a convenience for accomplishing an unconscionable transaction" that inures to the benefit of the individual controlling the corporation).

[45] *Fletcher v. Anderson*, 616 So. 2d 1201, 1202 (Fla. 2d DCA 1993) ("The doctrine of equitable contribution is grounded on principles of equity and natural justice and not on contract."); *Desrosiers*, 660 So. 2d at 399.

[46] *See Curtis*, 462 So. 2d at 105-06.

[47] *Fort Plantation Investments, LLC v. Ironstone Bank, FSB*, 85 So. 3d 1169, 1171 (Fla. 5th DCA 2012).

[48] *See, e.g., Hughes v. Irons*, 370 So. 2d 76, 78 (Fla. 2d DCA 1979) ("As far as appellant's entitlement to prejudgment interest is concerned, it matters not whether her recovery is viewed as being grounded in contract or in tort. Her claim was liquidated. In actions ex contractu, prejudgment interest is allowable when a claim is liquidated, computed from the date the debt is found to be due."). *But see* 32 Fla. Jur. 2d Interest and Usury § 3 (noting that "[a]lthough prejudgment interest is awarded as a matter of course under Florida law, the law is not absolute and may depend on equitable considerations").

[49] The Court notes that pre-judgment interest was recoverable in *Mandolfo v. Chudy*, 564 N.W.2d 266, 273 (Neb. App. Ct. 1997), *aff'd* 573 N.W 2d 135 (Neb. 1998) (awarding interest at the rate established in the note). The Court also notes, however, that Florida law may require the Court to utilize the statutory rate. *See, e.g., Desrosiers v. Russell*, 660 So. 2d at 399 (holding that attorneys' fees provided for in a guaranty were not recoverable in a contribution suit because the contribution claim was not premised on the written instrument but rather arose by operation of law).

Court has identified additional factual and legal issues not raised or briefed by the parties, the Court is precluded from treating the claims on the Guaranties as contribution claims until those issues are resolved. Accordingly, the Court will deny APL's motion for summary as to Counts IV, V, and VI.

2. The Debtor's and PZS's Breach of Fiduciary Duty Defense to the Enforcement of the Note and Guaranties

The Debtor and PZS have asserted a breach of fiduciary duty as both an affirmative defense and an affirmative claim for relief. A defendant may raise a breach of fiduciary duty as an affirmative defense.[50] Because the Court is required to evaluate each cross motion for summary judgment separately, it analyzes the breach of fiduciary duty claim first as an affirmative defense.[51] As set forth above, APL must conclusively demonstrate that it is entitled to judgment as a matter of law, which requires it to establish that each of the Debtor's and PZS's asserted defenses are legally insufficient.[52]

A. Breach of Fiduciary Duty Arising from APL's Acquisition of the BSP Loan

The Debtor and PZS contend that: (i) Antaramian owed a fiduciary duty to them; (ii) Antaramian breached his fiduciary duty by forming APL, acquiring the BSP Loan, and attempting to enforce the BSP Loan documents against them; (iii) Antaramian's conduct is attributable to APL and the other Counterclaim Defendants; and, (iv) APL's claims should, therefore, be barred.

1. Fiduciary Duty to the Debtor

Because the Note, Mortgage, and PZS Guaranties contain Florida choice of law provisions, the defenses to the enforcement of those instruments are governed by Florida law. Florida's choice of law rules, however, indicate that claims involving the internal affairs of a corporation, such as breaches of fiduciary duties, are subject to the laws of the state of incorporation.[53] Because the Debtor is a Delaware entity, its affirmative defense and counterclaim are subject to Delaware law. Under Delaware law, a claim for breach of fiduciary duty requires proof of two elements: (i) that a fiduciary duty existed; and (ii) that the defendant breached that duty.[54] As to the first element, it is clear that, unless such duties were waived, Antaramian owed fiduciary duties to the Debtor because he served as its President until he resigned on July 29, 2010.[55] Officers of a company owe the company the fiduciary duties of care and loyalty.[56]

(a) *Antaramian's fiduciary duties to the Debtor did not terminate upon his resignation*

While APL does not dispute that a company president owes a fiduciary duty to the company, it argues that Antaramian's fiduciary duties to the Debtor ceased to exist when he resigned as the Debtor's President on July 29, 2010. Consequently, APL argues, Antaramian owed no fiduciary duty to the Debtor when the purchase and sale of the BSP Loan ultimately occurred on September 13, 2010.

While the parties have not cited, and the Court has not located, any Delaware authority on the issue, a number of jurisdictions apply the principle that a former corporate officer or director may be liable to a corporation for breach of fiduciary duty for transactions that were consummated after the officer's resignation, but that began before the resignation. In other words, an officer cannot escape liability for breach of a fiduciary duty merely by resigning when the acts or conduct that give rise to the breach began while the fiduciary duty was in existence.[57]

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[50] *See Southern Internet Systems Inc., ex rel. Menotte v. Pritula*, 856 So. 2d 1125 (Fla. 4th DCA 2003); *Wallace v. Odham*, 579 So. 2d 171, 173 (Fla. 5th DCA 1991); *James River-Pennington, Inc. v. CRSS Capital, Inc.*, No. 13870, 1995 WL 106554, at *12 (Del. Ch. Mar. 6, 1995).

[51] *See, e.g., Jaynes v. U.S.*, 68 Fed. Cl. 747, 761 (Fed. Cl. 2005).

[52] *Id.*

[53] *Chatlos Foundation, Inc. v. D'Arata*, 882 So. 2d 1021, 1023 (Fla. 5th DCA 2004); *In re Friedlander Capital Management Corp.*, 411 B.R. 434, 442 (Bankr. S.D. Fla. 2009).

[54] *ZRii, LLC. v. Wellness Acquisition Group, Inc.*, No. 4374-VCP, 2009 WL 2998169, *11 (Del. Ch. Sept. 21, 2009).

[55] Undisputed Fact 52.

[56] *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009).

[57] *See, e.g., Microbiological Research Corp. v. Mona*, 625 P.2d 690, 695 (Utah 1981) ("where a transaction has its inception while the fiduciary relationship is in existence, an employee cannot by resigning and not disclosing all he knows about the negotiations, subsequently continue and consummate the transaction in a manner in violation of his fiduciary duties"); *Dowell v. Bitner*, 652 N.E.2d 1372, 1379-80 (Ill. App. 4th Dist. 1995) ("The resignation of an officer will not sever liability for transactions completed after termination of the officer's association with the corporation for transactions which (1) began during the existence of the relationship, or (2) were founded on information acquired during the relationship."); *Mussetter v. Lyke*, 10 F. Supp. 2d 944, 964 (N.D. Ill. 1998) (chairman of board of directors did not effectively insulate himself from breach of fiduciary duty

In *Florida Discount Properties*, two directors of the condominium association's board of directors negotiated, while serving as directors, to purchase certain common area property owned by the association and a recreational facilities lease associated with that property. The directors were later removed from the board. Nine days after their removal, the directors finalized their purchase of the property and lease.[58] In the ensuing litigation, the association alleged that its former directors had conspired to breach their fiduciary duty and to usurp a corporate opportunity by purchasing the common area property and associated lease. The appellate court affirmed the trial court's ruling in favor of the association, and specifically affirmed the trial court's finding that the directors had utilized their position on the board to negotiate an advantageous economic position for themselves and to the detriment of the association.[59]

The facts in *Florida Discount Properties* are similar to this case: Antaramian commenced negotiations with Regions for the purchase of the BSP Loan prior to his resignation as the Debtor's President. Therefore, his subsequent resignation does not relieve him from potential liability for any breach that may have occurred as a result of his actions while the fiduciary duty was in existence.

APL argues that the only negotiations Antaramian engaged in while serving as the Debtor's President were on behalf of the Antaramian Family Trust, and that those negotiations ended on August 2, 2010. APL claims that Antaramian did not negotiate on its behalf until after he had resigned as the Debtor's President. The Court finds this argument unpersuasive. It is clear that the negotiations, in principle, for the purchase of the loan by Antaramian through an affiliated entity began at least as early as July 20, 2010, prior to his resignation. Moreover, APL was formed on July 27, 2010, prior to Antaramian's resignation. Thus, the Court rejects the notion that the genesis of the sale to APL occurred only after Antaramian's resignation as the Debtor's President. The fact that the sale was not consummated until September 13, 2010 does not sever Antaramian's potential liability for his pre-resignation conduct.

(b) *Absent waiver or estoppel, Antaramian's failure to disclose was a breach of fiduciary duty*

The next issue is whether APL's acquisition of the BSP Loan, without disclosure to the Debtor, and APL's subsequent attempt to enforce the Note and Mortgage, constitute a breach of Antaramian's fiduciary duties to the Debtor. The facts in *Citicorp Venture Capital, Ltd. v. Committee of Creditors Holding Unsecured Claims*[60] are similar to those herein. In *Citicorp*, the appellant ("CVC") owned a 28% equity interest in the direct parent company of another entity, Papercraft. CVC's vice-president served as one of Papercraft's directors. While CVS was a fiduciary of Papercraft (because CVC's vice-president sat on Papercraft's board of directors), and while Papercraft's Chapter 11 case was pending, CVC secretly purchased 40.8% of Papercraft's unsecured claims, having a face value of nearly $61,000,000.00, for just over $10,500,000.00. The purchase was made without disclosure to Papercraft's board of directors, the official committee of unsecured creditors, or the bankruptcy court.

When CVC's purchases came to light, the unsecured creditors' committee objected to the allowance of CVC's claims and sought equitable subordination of the claims to the extent those claims were deemed allowed. The bankruptcy court held that CVC had breached its fiduciary obligation to act in the best interest of Papercraft and its creditors, because under general insolvency law, including the law as applied by Delaware courts, directors and officers of a corporation owe a fiduciary duty to creditors during the period in which the corporation is insolvent.[61] Specifically, the bankruptcy court found that CVC, as a fiduciary, had purchased the Papercraft notes (i) for the dual purpose of making a profit and being able influence the course of Papercraft's course of reorganization in the bankruptcy case to the benefit of CVC's own self-interest; (ii) with insider, non-public information that was only available to CVC as a fiduciary; and (iii) without disclosure to the bankruptcy court, Papercraft's board of directors, the unsecured committee, or the selling note holders. As a result of CVC's breach of its fiduciary duties, the bankruptcy court constructed and applied a *per se* rule that "when a claim is purchased by an insider at a discount without

by resigning when resignation was offered in direct contemplation of an already-planned transaction to divest corporation of its assets); *Florida Discount Properties, Inc. v. Windermere Condominium, Inc.*, 786 So. 2d 1271 (Fla. 4th DCA 2001).

[58] *Florida Discount Properties*, 786 So. 2d at 1273.

[59] *Id.*

[60] 160 F.3d 982 (3d Cir. 1998).

[61] *See, e.g., Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 787 (Del. Ch. 1992); *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 790-91 (Del Ch. 2004) ("When a firm has reached the point of insolvency, it is settled that under Delaware law, the firm's directors are said to owe fiduciary duties to the company's creditors.").

adequate disclosure to the debtor and creditors, 'the insider's newly acquired claim will be limited to the amount paid by the acquiring insider and recovery on the claim will be limited to the percentage distribution provided in the plan, as applied to the allowed claim.'"[62]

CVC appealed the bankruptcy court's ruling. The district court affirmed the bankruptcy court's finding that CVC's conduct constituted a breach of fiduciary duty, but reversed the bankruptcy court's *per se* rule and remanded for a determination of the amount of CVC's claims that should be subordinated pursuant to 11 U.S.C. § 510(c). Both parties appealed to the Third Circuit. In affirming the district court's ruling, the circuit court agreed with the bankruptcy court's assessment that CVC's conduct reflected "ample inequitable conduct to support a subordination remedy,"[63] and that the bankruptcy court's findings made "this a paradigm case of inequitable conduct by a fiduciary."[64] The court concluded that, at a minimum, the remedy for such inequitable conduct should deprive CVC of its profits on the purchase of the notes.[65]

All three of the bankruptcy court's findings in *Citicorp* are present in this case in some form or fashion. First, APL's enforcement of BSP Loan has the potential to generate enormous profit. And, as a creditor of the Debtor, APL has influenced the Debtor to the benefit of its own self interests. APL initiated this bankruptcy case as an involuntary liquidation, and, upon conversion of the case to Chapter 11, has proposed a plan of reorganization whereby it would obtain ownership of the Debtor's assets.[66] Second, Antaramian was an insider of the Debtor, knew its sensitive financial information, and was able to negotiate with Regions on the basis of that information. And third, Antaramian failed to disclose the terms of the APL acquisition to the Debtor. This is analogous to CVC's failure to disclose its purchase of Papercraft's notes to Papercraft's board of directors. As a result, Antaramian denied the Debtor the opportunity to participate in the purchase of its own indebtedness at the same discounted price. That opportunity is undeniably a corporate opportunity that should have been presented to the Debtor.[67]

Instead of disclosing his deal to the Debtor, Antaramian took affirmative steps to ensure that the Debtor and PZS were excluded from his deal. Antaramian asked Regions to confirm that it was dealing exclusively with him, and did not offer to involve the Debtor or PZS in the deal, despite being given at least two opportunities to do so.[68] As the court in *Citicorp* observed, "[t]he absence of a disclosure in circumstances of this kind make it extremely difficult to say with confidence what would have happened had no breach of duty occurred and that, in itself, is a compelling reason for insisting upon disclosure."[69]

(c) *Issues of fact regarding waiver and estoppel preclude summary judgment*

The Court has found that Antaramian's potential liability for his alleged breach of fiduciary duty to the Debtor did not terminate upon his resignation. The Court has also found that Antaramian's conduct in acquiring the BSP Loan, without disclosure, constitutes a breach of an otherwise existing fiduciary duty. However, APL and Antaramian contend that the Debtor waived its right to complain about Antaramian's actions because the Debtor, through PZS, knew and authorized Antaramian to engage in the negotiation for the acquisition of the BSP Loan. An issue of fact exists as to whether this contention remains viable beyond July 19, 2010, the date on which Antaramian and PZS met to discuss their negotiation strategy with Regions. As discussed below, the Court finds that issues of fact exist as to (i) whether a superseding agreement between Antaramian and PZS was reached on July 19, 2010, pursuant to which Antaramian would negotiate with Regions for all of their mutual benefit; and (ii) whether any such superseding agreement—if it did exist—was applicable to the Debtor as well. If so, then Antaramian's conduct following his July 20, 2010 meeting with Regions would constitute a breach of his fiduciary duty owed to the Debtor.

For the same reason, an issue of fact exists with respect to Antaramian's estoppel argument. A party asserting an equitable estoppel theory must show: (i) a representation of material fact that is contrary to a later asserted position; (ii) reasonable reliance on that representation by the party claiming estoppel; and (iii) a detrimental change in position by the party claiming estoppel caused by its reliance on that representation.[70] In order to prevail on this affirmative defense,

[62] *Citicorp*, 160 F.3d at 986.
[63] *Id.* at 987.
[64] *Id.*
[65] *Id.* at 991.
[66] Main Case Doc. No. 375.
[67] *See Citicorp*, 160 F.3d at 987 (citing *Brown v. Presbyterian Ministers Fund*, 484 F.2d 998, 1005 (3d Cir. 1973)).
[68] Undisputed Facts 49, 55, 56.
[69] 160 F.3d at 988.
[70] *Progressive Exp. Ins. Co. v. Camillo*, 80 So. 3d 394, 401-02 (Fla. 4th DCA 2012).

Antaramian must establish these elements as of July 19, 2010. Accordingly, the Court finds that significant issues of fact exist with respect to the Debtor's breach of fiduciary duty defense against Antaramian.

To the extent that Antaramian is found to have breached his fiduciary duties, this breach is attributable to APL. Antaramian formed APL for the sole purpose of acquiring the BSP Loan. A corporate entity may be disregarded in the interest of justice when equitable considerations among members of a corporation require it.[71] Furthermore, courts may disregard the "corporate fiction" in equity when the separate corporate existence is used "merely as a convenience for accomplishing an unconscionable transaction" that inures to the benefit of the individual controlling the corporation.[72]

Because there are issues of fact relating to the issues of waiver and estoppel, APL has not shown that it is entitled to judgment as a matter of law. Accordingly, it is appropriate to deny APL's motion for summary judgment on Counts I, II, and III against the Debtor.

2. Fiduciary Duty to PZS

Although the Court has ruled above that APL is limited to claims for contribution against PZS, PZS have also asserted the defense of breach of fiduciary duty in an attempt to bar completely APL's claims against them on their Guaranties. PZS argue that they shared both an express and an implied fiduciary relationship with Antaramian, and that he breached his fiduciary duties to them by acquiring the PZS Guaranties and seeking to enforce those guaranties against them in full.[73]

PZS contend that they shared an implied fiduciary relationship with Antaramian. In order to prevail on this defense, PZS must prove the existence of a fiduciary relationship, that Antaramian breached that relationship, and damages. PZS's implied fiduciary relationship theory rests not on the governing documents of the various affiliated entities but rather on operation of law as applied to the specific facts that allegedly give rise to the relationship. Because the defense is not an entity-specific defense, and the PZS Guaranties contain a Florida choice of law provision, Florida law applies.

Under Florida law, an implied fiduciary relationship exists when there is a relationship of trust and confidence existing between the parties, such as "where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused."[74] Implied fiduciary relationships are "premised upon the specific factual situation surrounding the transaction and the relationship of the parties."[75] Reliance by the party reposing trust is a critical element.[76] Thus, an implied fiduciary relationship can arise where there is a degree of dependency on one party and an undertaking by the other party to protect and/or benefit the dependent party.[77] The relationship is not limited to legal duties but can also encompass moral, social, domestic, or merely personal duties.[78]

Because of the fact-specific inquiry that must be undertaken to analyze whether an implied fiduciary relationship exists, including the need for courts to determine not only whether one party has reposed trust in another party but also whether that party has accepted such trust, courts will often need to assess the credibility of the parties involved. Thus, the determination of whether such a relationship exists may not be well-suited for summary judgment.[79]

The Court finds that prior to July 19, 2010, PZS were aware that Antaramian was negotiating with Regions for his own account to purchase the BSP Loan. Thus, the only event of legal significance that the Court will consider as potentially forming the basis for an implied fiduciary duty is the joint July 19, 2010 meeting between PZS and Antaramian.

The Court finds that there are genuine disputes of material fact concerning whether the parties formed an implied fiduciary relationship during that meeting, such

[71] *See In re Phillips Petroleum Securities Litigation*, 738 F. Supp. 825, 838 (D. Del. 1990); *see also Pauley Petroleum, Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. 1968).
[72] *Fickling*, 123 Fla. at 559-560.
[73] As discussed above, because PZS's theory supporting the existence of an express fiduciary duty owed by Antaramian to them was not fully articulated until the instant summary judgment motion, the Court will exercise its discretion to abstain from ruling on that theory at this stage of the proceeding.

[74] *Doe v. Evans*, 814 So. 2d 370 (citing *Quinn v. Phipps*, 93 Fla. 805 (1927)).
[75] *Doe*, 814 So. 2d. at 374 (citing *Capital Bank v. MVB, Inc.*, 644 So. 2d. 515, 518 (Fla. 3d DCA 1994)).
[76] *Crusselle v. Mong*, 59 So. 3d 1178, 1181 (Fla. 5th DCA 2011).
[77] *Id.* (citing *Masztal v. City of Miami*, 971 So. 2d 803, 809 (Fla. 3d DCA 2007)).
[78] *Crusselle*, 59 So. 3d at 1181 (citing *Harrell v. Branson*, 344 So. 2d 604, 607 (Fla. 1st DCA 1977)).
[79] *See, e.g., Crusselle*, 59 So. 3d at 1181 (denying summary judgment based on conflicting evidence).

that it superseded the prior understandings between the parties that they were negotiating separately. In order for such a fiduciary relationship to exist, the Court must find that PZS reposed trust in Antaramian at the July 19, 2010 meeting, and that Antaramian accepted such trust. Mere legal conclusions as to the satisfaction of those elements will not suffice.

Therefore, the Court denies summary judgment on this affirmative defense. At trial, the Court will weigh the parties' testimony concerning the substance of the July 19, 2010 meeting, including whether Antaramian and PZS agreed to unite to present a "divided" front to Regions so that Antaramian could negotiate the best deal for all of them, as co-guarantors, and for the Debtor as the primary obligor.

However, although factual issues preclude granting summary judgment on the issue of whether an implied fiduciary relationship existed, there are no factual issues as to Antaramian's subsequent conduct. Thus, if the Court finds that the Debtor and PZS reposed trust in Antaramian to negotiate for all of their benefit, and that Antaramian agreed to undertake that responsibility, then Antaramian's subsequent actions in not disclosing the terms of his deal and proceeding to exclude PZS from a deal that would have otherwise resolved their Guaranties would constitute a breach of that duty. If, on the other hand, PZS did not repose trust in Antaramian, or if Antaramian did not accept such trust, then an implied fiduciary duty cannot exist as a matter of law, and PZS's claims on that theory will fail.

B. Breach of Fiduciary Duty in Connection with the Heat Investment, LLC Transaction

The Debtor and PZS allege in their counterclaims that Antaramian provided financial benefits to John Abbott, a Regions' employee, through an entity known as Heat Investment, LLC ("the Heat Investment Transaction").[80] As set forth in APL's motion for summary judgment, the uncontroverted evidence is that (i) the parties to the Heat Investment Transaction were Antaramian Capital Partners, LLC, and Heat Investment, LLC, neither of which are parties to this adversary proceeding, and (ii) no financial benefit was provided to Heat Investment, LLC, other than the cancellation of its purchase contract and return of its deposit, together with interest. Neither the Debtor nor PZS have offered any contravening evidence, nor have they opposed summary judgment on this issue. Accordingly, the Court finds, as a matter of law, that APL is entitled to summary judgment on this issue.

IV. Motions for Summary Judgment on Counts I, II, and V of the Debtor's and PZS's Counterclaims

As outlined above, APL seeks summary judgment as to Counts I, II, and V of the Debtor's and PZS's counterclaims. PZS seeks summary judgment in its favor as to those same counts.

A. Count I - Breach of Fiduciary Duty

For the reasons set forth in Section III, above, the Court will deny the motions for summary judgment as to Count I of the Counterclaims.

B. Count II - Aiding and Abetting Breach of Fiduciary Duty

The elements of a claim for aiding and abetting a breach of fiduciary duty under Delaware law are: (i) the existence of a fiduciary relationship; (ii) the fiduciary breached its duty; (iii) a defendant, who is not a fiduciary, knowingly participated in the breach; and (iv) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary.[81] Similarly, under Florida law, the elements of the claim are: (i) a fiduciary duty on the part of the primary wrongdoer; (ii) a breach of that fiduciary duty; (iii) knowledge of the breach by the alleged aider and abettor; and (iv) the aider and abettor's substantial assistance or encouragement of the wrongdoing.[82]

Because the Court has already found that factual issues preclude it from granting summary judgment on the first element of this claim, it shall deny the motions for summary judgment as to Count II.

C. Count V - Declaratory Relief

In Count V, PZS and the Debtor request that the Court "declare that the misappropriation of a business opportunity from Basil Street and its members by Antaramian and his alter egos should entail that the misappropriated opportunity, namely the acquired

[80] Debtor's Counterclaim, Doc. No. 84, Exh. 2 ¶ 57 and PZS's Counterclaim, Doc. No. 84, Exh. 10 ¶ 59.

[81] *Feeley v. NHAOGC, LLC*, No. 7304-VCL, 2012 WL 5949209, *6 (Del. Ch. Nov. 28, 2012) (citing *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002)).

[82] *Hogan v. Provident Life and Acc. Ins. Co.*, 665 F. Supp. 2d 1273 (M.D. Fla. 2009); *In re Caribbean K Line, Ltd.*, 288 B.R. 908 (Bankr. S.D. Fla. 2002).

Basil Street loan and related instruments, should be deemed to have been acquired by Antaramian and his alter egos for the benefit of Basil Street and its members such that the actual or equitable ownership of the Basil Street loan and related instruments is vested in Basil Street for the benefit of Basil Street and all of its members."[83]

In order to grant this relief, the Court must first find that a usurpation of a corporate opportunity occurred. Usurpation of a corporate opportunity is a species of a breach of fiduciary duty by a corporate director or officer for breaching the duty of loyalty by seeking to advance one's self interest over that of the corporate entity.[84] As a threshold matter, the Court finds that this claim for relief belongs to the party who owned the corporate opportunity – the Debtor – and not PZS, as indirect owners of the Debtor. The cases PZS cite in support of their argument that they have standing to assert this claim on behalf of the Debtor are inapposite because those cases apply to disputes between co-venturers in a joint venture, and not to members of a limited liability company.[85] Accordingly, the Court grants, in part, APL's motion for summary judgment as to Count V, in that it holds that PZS lack standing to pursue this claim.

As to the Debtor's claim, Delaware law applies.[86] Under Delaware law, a corporate officer may not pursue a corporate opportunity for his own benefit if (i) the corporation is financially able to exploit the opportunity; (ii) the opportunity is within the corporation's line of business; (iii) the corporation has an interest or expectancy in the opportunity; and (iv) by taking the opportunity for his own, the officer will be placed in a position contrary to his duties to the corporation.[87]

The second element is met as a matter of law, as the opportunity for an entity to purchase its own debts at a discount is of substantial benefit to the corporation.[88] The third element is satisfied, because the Debtor would have had a strong economic interest in reducing its outstanding indebtedness from over $36 million to less than $9 million. And, the Court has already discussed the fourth element in the context of rejecting Antaramian's argument that his resignation insulates him from potential liability. Therefore, if the first element is satisfied, the Court will find that a corporate opportunity has been usurped.

With respect to the first element, although there is no record evidence that the Debtor had the financial ability to exploit the opportunity to purchase the BSP Loan at a significant discount, as the court in *Citicorp* held, the failure to make disclosure makes it extremely difficult to determine what would have happened had no breach of duty occurred.[89] In other words, if the Debtor had known the ultimate purchase price that Regions had agreed to accept from Antaramian and APL, perhaps it could have come up with the necessary funds to take advantage of Regions' willingness to sell the BSP Loan at such a large discount.

If the Court finds that the failure to make disclosure constitutes a breach of Antaramian's fiduciary duty to the Debtor, application of *Citicorp* results in the Debtor's prevailing on Count V.[90] But, as the Court has stated above, factual disputes on the issues of waiver and estoppel preclude granting summary judgment at this time. Accordingly, the Court will deny the motions for summary judgment as to Count V.

IV. APL's Motion for Summary Judgment on Counts III and IV of PZS's and the Debtor's Counterclaims

A. Count III - Fraud

In Count III of their counterclaims, PZS and the Debtor allege fraud against APL. Originally pled against Regions, the claim is now asserted against APL. The claim is based upon allegations that Regions, through its officers Russell Phillips and John Abbott, made intentional false statements to the Debtor and PZS in connection with a 2008 loan amendment to the Note, under which the Debtor and the Guarantors sought to extend the Note's maturity date by two years from its June 2009 maturity date.

[83] (Doc. No. 84, Exh. 2, p. 44; Doc. No. 84, Exh. 10, p. 53).
[84] *See, e.g., B.F. Rich & Co., Inc. v. Gray*, 933 A.2d 1231, 1236 n. 6 (Del. 2007) (acknowledging a violation of fiduciary duty by engaging in self-dealing transactions and usurping corporate opportunities).
[85] *See, e.g., New Vista Dev. Corp. v. Doral Terrace Associates, Ltd.*, 878 So. 2d 462 (Fla. 3d DCA 2004).
[86] *Chatlos Foundation, Inc. v. D'Arata*, 882 So. 2d at 1023 (internal affairs of corporation of are governed by law of state where entity is incorporated).
[87] *Johnston v. Greene*, 121 A.2d 919 (Del. 1956); *Guth v. Loft*, 5 A.2d 503 (Del. 1939).
[88] *See Citicorp*, 160 F.3d at 988 (citing *Brown v. Presbyterian Ministers Fund*, 484 F.2d 998, 1005 (3d Cir. 1973)).
[89] 160 F.3d at 988.
[90] *Id*.

PZS and the Debtor allege that in reliance upon these false statements, they made payments to Regions of approximately $20,000,000.00 that they would not otherwise have been obligated to make, in exchange for Region's agreement to act in good faith with respect to the loan extension discussions.[91] Conflicts in the deposition testimony of PZS, Russell Phillips, and John Abbott preclude summary judgment at this time.

The Court acknowledges APL's affirmative defense that Florida Statutes section 687.0304 prohibits an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.[92] Although Russell Phillips testified at deposition regarding a term sheet that Regions had presented to the "borrowing group" concerning the proposed loan extension, neither party has provided that term sheet to the Court as part of the summary judgment record. The Court is thus unable to determine whether the "term sheet" constitutes a "credit agreement" within the meaning of the Florida statute.

Where a defendant has moved for summary judgment on the basis of its own affirmative defense, it must establish that there is no genuine issue of material fact as to any element of that defense.[93] As a Counterclaim Defendant, APL has not discharged its burden to establish that there is no genuine issue of material fact as to any element of its defense. Accordingly, for this additional reason, the Court denies summary judgment to APL on its affirmative defense that Florida Statutes section 687.0304 bars PZS's fraud claim.

B. Count IV - Aiding and Abetting Fraud

The elements under Florida law for action for aiding and abetting fraud are: (i) the existence of an underlying fraud; (ii) the aider and abettor's knowledge of the fraud; and (iii) the aider and abettor's provision of substantial assistance to the primary wrongdoer to advance the commission of the fraud.[94] For the reasons set forth above, because a genuine issue of material fact exists as to the existence of an underlying fraud, the Court will deny APL's motion for summary judgment as to Count IV of the Debtor's and PZS's counterclaims.

[91] *See* PZS Counterclaims (Doc. No. 84, Exh. 10, ¶ 97).
[92] Fla. Stat. § 687.0304(2).
[93] *Int'l Stamp Art, Inc. v. U.S. Postal Service*, 456 F.3d 1270, 1274 (11th Cir. 2006).
[94] *ZP No. 54 Ltd. P'ship v. Fidelity & Deposit Co. of Maryland*, 917 So. 2d 368, 372 (Fla. 5th DCA 2005).

V. CONCLUSION

For the foregoing reasons, the Court finds that the Undisputed Facts set forth herein are established and require no further proof at trial; that as a matter of law, whatever fiduciary duties were owed to the Debtor by Antaramian did not terminate upon his resignation as President of the Debtor; that PZS's obligations under their Guaranties were not satisfied or paid when the Debtor paid down the first $15,000,000.00 of the BSP Loan to Regions; that the claims of APL and Antaramian against PZS on account of their Guaranties are limited to claims for contribution, in an amount to be determined; that PZS lack standing to pursue claims for Antaramian's alleged breach of fiduciary duties owed to the Debtor; and, that APL is entitled to summary judgment in its favor as to the Debtor's and PZS's claims for breach of fiduciary duty arising from the Heat Investment, LLC, Transaction.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the Motions for Summary Judgment, are GRANTED in part to the extent set forth herein, and otherwise are DENIED.

DONE and **ORDERED** in Chambers, at Tampa, Florida, on December 7, 2012.

/s/
Caryl E. Delano
United States Bankruptcy Judge