

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
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In re:
TOUSA, INC., *et al.*,

Debtors.

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF TOUSA, INC., *ET AL.*,

Plaintiff,

vs.

CITICORP NORTH AMERICA, INC., *ET AL.*,

Defendants.

Chapter 11 Cases

Case No. 08-10928-JKO

Jointly Administered

Adv. Pro. No. 08-1435-JKO

**PLAINTIFF'S OPPOSITION TO THE SENIOR TRANSEASTERN
LENDERS' MOTION TO DISMISS FIRST AMENDED
ADVERSARY COMPLAINT**

The Senior Transeastern Lenders have filed a motion to dismiss with prejudice the claims asserted against them in Counts VII through XVIII of the First Amended Adversary Complaint (the "First Amended Complaint" or "FAC").¹ For the reasons stated below, the motion should be denied in all respects.

¹ Senior Transeastern Lenders' Motion To Dismiss First Amended Adversary Complaint And Memorandum Of Law In Support Of Motion (Adv. Pro. D.E. 151) (Nov. 4, 2008) (hereafter "STL Mot."). The Senior Transeastern Lenders are identified in footnote 1 on p. 1 of their motion.

Motions to dismiss are governed by familiar standards. Fed. R. Civ. P. 12(b)(6) authorizes dismissal only if a complaint “fail[s] to state a claim upon which relief can be granted.” In considering a motion under that rule, the Court must assume the truth of factual allegations in the complaint and construe those allegations, and reasonable inferences from them, in the light most favorable to the plaintiff. The Court may take judicial notice of certain facts from sources whose accuracy cannot be reasonably questioned, but may not resolve disputed questions of material facts, when deciding a motion to dismiss. *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the * * * claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The complaint’s allegations must “raise a right to relief above the speculative level.” *Id.* at 1965. But if a complaint meets that threshold, “[s]pecific facts are not necessary.” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). Fed. R. Civ. P. 8(d)(2) expressly permits a party to “set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones.” Fed. R. Civ. P. 8(d)(3) permits a party to “state as many separate claims or defenses as it has, *regardless of consistency*” (emphasis added).

ARGUMENT

The claims against the Senior Transeastern Lenders arise from interrelated transactions on July 31, 2007. On that date, the Conveying Subsidiaries (together with other debtors, including TOUSA) borrowed \$200 million from the First Lien Lenders and \$300 million from

the Second Lien Lenders, and secured their debt to those lenders by granting liens on their property. FAC ¶ 25. The money obtained through those loans was used, among other things, to fund the Transeastern Settlement, pursuant to which more than \$420 million was paid to the Senior Transeastern Lenders to repay a debt for which the Conveying Subsidiaries were not liable. *Id.* ¶¶ 25-32. The First Amended Complaint asserts claims against the Senior Transeastern Lenders in Counts XIII-XVIII, which correspond to the claims asserted in Counts VII-XII of the original complaint, as well as new claims against those defendants that are asserted in Counts VII-XII of the First Amended Complaint.

I. THE FIRST AMENDED COMPLAINT SUFFICIENTLY ALLEGES THAT PROPERTY OF THE DEBTORS WAS TRANSFERRED TO THE SENIOR TRANSEASTERN LENDERS

Counts XIII-XVIII of the First Amended Complaint are based on the premise that the funds that were transferred to the Senior Transeastern Lenders – funds obtained through the First and Second Lien Term Loans – were the property of the Conveying Subsidiaries. If that premise is correct, the payment to the Senior Transeastern Lenders was a fraudulent transfer. If, on the other hand, the loan proceeds were *not* property of the Conveying Subsidiaries, it is clear that a fraudulent transfer to the First and Second Lien Lenders occurred when the Conveying Subsidiaries incurred obligations to those lenders and secured the obligations by granting liens.

Not surprisingly, the Senior Transeastern Lenders argue that the proceeds of the First and Second Lien Loans were *not* property of the Conveying Subsidiaries. The First and Second Lien Lenders may well argue the opposite, but their position on this issue has not yet been revealed. Citicorp and Wells Fargo have participated in this proceeding as Administrative Agents but the First and Second Lien Lenders themselves were identified as Doe defendants in the original complaint. They were first joined as individually named defendants in the First Amended

Complaint, and they have not yet answered the complaint or filed motions to dismiss. Therefore, plaintiff does not yet know what position they will take on this question.

It is clear that property of the Conveying Subsidiaries was fraudulently transferred on July 31, 2007, even though it is not yet clear *which* property was fraudulently transferred to *which* transferees.² Perhaps the fraudulent transfer was the payment to the Senior Transeastern Lenders, using the proceeds of the First and Second Lien Loans; perhaps it was the incurrence of obligations and grant of liens to the First and Second Lien Lenders. The Court need not and should not attempt to resolve that uncertainty on a motion to dismiss. Instead, the Court should defer a ruling on these questions until it has the benefit of a complete factual record and has heard the views of all parties (including the First and Second Lien Lenders that have not yet been heard). Most importantly, the Court should not dismiss claims against one set of defendants (either the Transeastern Lenders or the First and Second Lien Lenders) on the basis of a ruling that the loan proceeds were or were not property of the Conveying Subsidiaries, unless and until it is clear that the ruling will also govern claims against the other set of defendants.

In this opposition to the Senior Transeastern Lenders' motion to dismiss, we set forth arguments in support of the proposition that the proceeds of the First and Second Lien Loans were property of the Conveying Subsidiaries. We acknowledge, however, that this issue is not entirely free from doubt and that there are arguments that support different conclusions. Indeed, at some later point in these proceedings, plaintiff may proffer such arguments and urge the Court

² It is also clear that, regardless of which property was transferred to which transferees, the Conveying Subsidiaries did not receive reasonably equivalent value in exchange for the transfer. The Senior Transeastern Lenders do not challenge the sufficiency of the allegations in the First Amended Complaint concerning reasonably equivalent value.

to reach a different conclusion, on the basis of a complete record, from the conclusions we advance here at this preliminary stage of the litigation. For present purposes, however, the First Amended Complaint sufficiently alleges that the proceeds of the First and Second Lien Loans were property of the Conveying Subsidiaries. The Senior Transeastern Lenders' motion to dismiss should be denied, notwithstanding the possibility that the Court may ultimately decide to the contrary on the basis of a complete record.

1. Section 548(a)(1) of the bankruptcy code permits the avoidance of certain transfers of "an interest of the debtor in property."³ As the Senior Transeastern Lenders recognize (STL Mot. at 9-10), the property of the debtor is "that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Under 18 U.S.C. § 541(a)(1), the property of the estate includes (with exceptions not relevant here) "all legal or equitable interests of the debtor in property." (Emphasis added.)

The First Amended Complaint alleges that the Conveying Subsidiaries borrowed funds under the First and Second Lien Term Loans. FAC ¶¶ 32, 143, 150, 157, 164, 171, 178. It alleges that those funds "were property of each of the Conveying Subsidiaries" and that this property was transferred to the Senior Transeastern Lenders. *Id.* ¶¶ 143, 150, 157, 164, 171, 178. Those allegations are alone sufficient, but the First Amended Complaint goes further. It also alleges that the Conveying Subsidiaries, when they borrowed the funds, incurred a direct and primary obligation to repay the loans and that they provided the funds that were used to

³ The STL Motion acknowledges that, for purposes of this motion, there are no material differences between section 548 and the state laws invoked by the Amended Complaint. See STL Motion at 8 n.13.

make certain prepetition payments of principal and interest on the First Lien Term Loans. In addition, the Conveying Subsidiaries were guarantors of the loans and granted liens on their property to secure the loans.⁴

These allegations are more than sufficient to support the claim that the Conveying Subsidiaries held a legal or equitable interest in the borrowed funds, and that the funds transferred to the Senior Transeastern Lenders, in the words of *Begier*, “would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings.” *Begier*, 496 U.S. at 58. There can be no serious doubt that if the Conveying Subsidiaries had retained the borrowed funds, rather than transferring those funds to the Senior Transeastern Lenders, those funds would have been included within the debtors’ estates when the petition was filed, thereby ensuring that those funds, along with other property of the debtors, would be available to creditors. See *Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641, 645 (B.A.P. 10th Cir. 2000) (holding that, by virtue of being a borrower, “the debtor had a legal and equitable interest in the Trust Loan proceeds, and the Transfer to the Bank diminished the debtor’s estate. On the debtor’s petition date, the Trust Loan proceeds were no longer available

⁴ Identical provisions in the First and Second Lien Term Loans establish that the Conveying Subsidiaries were borrowers. Each Conveying Subsidiary signed the loan agreements as a “Subsidiary Borrower.” The preambles to the agreements define those signatories as “Borrowers.” In Section 2.1, the lenders agreed “to make loans” to the Borrowers. In Section 2.6, the Borrowers “promise to repay” the loans. Section 10.20(b) provides that each Borrower shall be liable for all amounts due from any Borrower, and Section 10.20(f) reiterates that the Borrowers are obligated to repay as joint and several obligors. In Sections 4.12 and 6.11, the Borrowers agree to use the proceeds of the term loans to finance the “Acquisition,” which is defined in Section 1.1 to encompass the discharge of all amounts of outstanding indebtedness to the Transeastern JV Entities.

to pay unsecured creditors.”). “In the bankruptcy setting, courts have held that transfers by a debtor of borrowed funds constitute transfers of the debtor’s property.” *In re Smith*, 966 F.2d 1527, 1533 (7th Cir. 1992). These cases reflect the principle that when funds are loaned to a borrower, they become the property of the borrower (who incurs a contractual obligation to repay the loan).

If funds are lent to co-borrowers (rather than to a single borrower), each of the co-borrowers has a property interest in the funds. As the Supreme Court explained in an analogous context, “if the conclusion were otherwise, the * * * property would belong to no one.” *United States v. Craft*, 535 U.S. 274, 285 (2002). That conclusion would shield the borrowed funds from creditors even if all of the co-borrowers filed a bankruptcy petition. See *ibid.* (“This result not only seems absurd, but would also allow [co-owners] to shield their property.”). Not surprisingly, although the issue has been considered infrequently, courts that have confronted the question have held that borrowed funds are the property of the co-borrowers. *Bash v. Suntrust Banks, Inc. (In re Ohio Business Machines, Inc.)*, 356 B.R. 786, 2007 WL 177941 (B.A.P. 6th Cir. 2007) (unpublished opinion) (property of a subsidiary corporation included funds that were co-borrowed by a parent corporation and its subsidiary, and used to pay parent’s debt); *Anzalone v. Dulgerian (In re Dulgerian)*, 388 B.R. 142, 151 (2008) (co-borrowed funds are property of co-borrower).

In arguing to the contrary, the Senior Transeastern Lenders rely on a single district court decision, *Bennett & Kahnweiler Associates v. Ratner (In re Ratner)*, 132 B.R. 728 (N.D. Ill. 1991). They contend that this case “addressed whether a debtor had an interest in loan proceeds because he was a co-borrower on a loan with his wife.” STL Mot. At 13. But that was not the issue decided in *Ratner*. As the opinion states in three separate places, the case addresses an

entirely different question – whether a debtor who acted as a co-borrower *made a transfer* to his co-borrower. *Ratner*, 132 B.R. at 733-34 (“Plaintiffs argue that a debtor who acts as a co-borrower while insolvent has made a transfer.” “The question of whether Ratner’s act amounted to a transfer is a question of law.” “There is no legal authority to support plaintiffs’ position that a debtor who acts as a co-borrower while insolvent has made a transfer.”). That question is entirely irrelevant here. The First Amended Complaint does not allege that the act of borrowing constituted a *transfer* of the Conveying Subsidiaries’ property, let alone that it constituted a transfer *to a co-borrower*. The transfer that is alleged is the payment of funds to the Senior Transeastern Lenders.

2. Relying on *Nordberg v. Sanchez (In re Chase & Sanborn Corp.)*, 813 F.2d 177 (11th Cir. 1987), the Senior Transeastern Lenders argue that the Conveying Subsidiaries had no property interest in the loan proceeds because they did not “control” the property. But *Sanchez* does not govern this case. In *Sanchez*, the owner of the debtor corporation borrowed funds through a personal loan, deposited those funds in a specially-opened corporate account, withdrew the funds almost immediately thereafter, and then used the funds for personal purposes. There was no indication that the corporation held legal or equitable title to the funds; the corporation’s fleeting possession of the property was the only basis for suggesting that the corporation might have an interest in the property. The Eleventh Circuit held that this possession was not enough to create a property interest, and the corporation’s lack of “control” over the property was one of the factors supporting that conclusion.

From that narrow holding, the Senior Transeastern Lenders attempt to infer a broad principle that “control” is an essential element of any property interest. That inference is clearly wrong. There are many examples of interests in property that do not encompass control of the

disposition of the property. A tenant by the entirety holds property even if he cannot unilaterally alienate the property; similarly, the beneficiary of a trust holds a property interest in the trust, even if he cannot control the disposition of the trust's property. See *United States v. Craft*, 535 U.S. 274, 284 (2002) (referring to these and other examples and citing cases). Indeed, the broad "control" test urged by the Senior Transeastern Lenders would negate the paradigmatic example of a fraudulent transfer, in which the owner of an insolvent corporation transfers corporate funds to a personal account for his personal use. In that situation, the owner, rather than the corporation, may exercise de facto control over the disbursement of the corporate funds to his own account, but no one would suggest that the owner's control negates the corporation's legal and equitable interest in the funds.⁵

A "control" requirement is also belied by the statutory definition of "transfer." That term is defined broadly to include "each mode, *direct or indirect*, absolute or conditional, *voluntary or involuntary*, of disposing of or parting with (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54) (emphasis added). Similarly, the statutory definition of fraudulent transfer makes clear that a fraudulent transfer may occur whether the debtor acts "voluntarily or involuntarily." 11 U.S.C. § 548(a)(1) (emphasis added). These definitions leave no doubt that a debtor may

⁵ Nor does the "earmarking" doctrine control here. Under that doctrine, which has been applied in cases addressing preferences, some cases have held that if a new lender loans funds that are earmarked for the payment of debt owed to an existing creditor, the payment is not a preferential transfer of the debtor's property. But that doctrine is invoked when the transaction, viewed in its entirety, merely replaces one creditor with another, and does not diminish the value of the estate. See *Tolz v. Barnett Bank of South Florida (In re Safe-T-Brake of South Florida, Inc.)*, 162 B.R. 359, 363-366 (S.D. Fl. 1993); *In re Bohlen*, 859 F.2d 561, 566 (8th Cir. 1988). That is not the situation here. The estates of the Conveying Subsidiaries were diminished by the payments to the Senior Transeastern Lenders, because the Conveying Subsidiaries – which were not liable for any debt to them – received no value from the release of the Senior Transeastern Lenders' claims against others. Amended Compl. ¶¶ 139, 146, 153, 160, 167, 175.

own property even if the debtor has no power to prevent some other party from transferring the property.

3. The motion also argues at great length that the loan proceeds were not the property of the Conveying Subsidiaries merely because they were guarantors of the debt to the First and Second Lien Lenders. That argument is entirely irrelevant, because the Conveying Subsidiaries were borrowers, not mere guarantors. The Senior Transeastern Lenders elide that distinction, but the distinction was clearly significant to the parties to the loan agreements. See, e.g., Motion By Citicorp North America, Inc., In Its Capacity As Administrative Agent For The Revolving Credit Facility, To Dismiss The First Amended Adversary Complaint (Adv. Pro. D.E. 148) at 5 (“In exchange for the lenders relaxing certain financial covenants, TOUSA’s subsidiaries, which were already (and continued to be) guarantors * * * agreed to be co-borrowers.”). And there can be no doubt from the terms of the agreements that the Conveying Subsidiaries were, in fact, borrowers, not mere guarantors. See *supra* note 7.

4. The motion argues that the Conveying Subsidiaries’ payment of principal and interest on the loans did not confer ownership of the loan proceeds, and misconstrues the First Amended Complaint to suggest implicitly that a property interest sprang to life when those payments were made, but did not exist prior to that time. STL Mot. at 13 n.19. Plaintiff makes no such allegation. The Conveying Subsidiaries obtained the property interest when they borrowed the funds, not at a later time when payments of principal and interest were made. The payment of principal and interest is neither necessary nor sufficient (standing alone) to confer ownership of the borrowed funds. That payment, however, is relevant evidence that the Conveying Subsidiaries were not mere guarantors, but instead were borrowers, and therefore that the loan proceeds were their property.

II. COUNTS VII-XII STATE CLAIMS AGAINST THE SENIOR TRANSEASTERN LENDERS

Unlike Counts XIII-XVIII, which allege that the payment to the Senior Transeastern Lenders constituted the initial fraudulent transfer, Counts VII-XII of the First Amended Complaint allege that the Conveying Subsidiaries' grant of liens to the First and Second Lien Lenders constituted an initial fraudulent transfer. If the grant of liens was an avoidable fraudulent transfer, 11 U.S.C. § 550(a) permits recovery of "the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee."⁶ Counts VII-XII seek such recovery from the Senior Transeastern Lenders pursuant to section 550, alleging that they are either "entit[ies] for whose benefit such transfer was made" (FAC ¶¶ 90, 99, 108, 117, 126, 135) or that they are "mediate transferee[s] of such initial transfer." *Id.* ¶¶ 91, 100, 109, 118, 127, 136.

A. Counts VII-XII Of The First Amended Complaint State Claims Against The Senior Transeastern Lenders As Entities For Whose Benefit The Liens Were Transferred

The Senior Transeastern Lenders recognize (STL Mot. at 6) that the First Amended Complaint asserts claims against them as entities for whose benefit the transfer was made, but

⁶ Although claims may be asserted against initial transferees as well as mediate transferees and entities for whose benefit a transfer was made, Section 550(d) limits plaintiffs to a single satisfaction of its claims.

they do not advance any argument that those claims should be dismissed.⁷ For that reason, even if the Senior Transeastern Lenders were to prevail on other aspects of their motion, the Court should not dismiss Counts VII-XII.

The failure to seek dismissal of those claims is not surprising, because the claims clearly are cognizable under *Air Conditioning, Inc. of Stuart v. Leasing Service Corp.*, 845 F.2d 293 (11th Cir. 1988). In that case, the debtor borrowed from, and granted a security interest in its property to, a bank, to induce the bank to issue a letter of credit to a third party beneficiary to which the debtor owed an antecedent debt. The Eleventh Circuit held that the transfer of the security interest to the bank was an avoidable preference and that the beneficiary of the letter of credit was an entity for whose benefit the transfer was made. Therefore, the value of the security interest could be recovered from the beneficiary of the letter of credit under section 550(a)(1). *Compton Corp. v. Blue Quail Energy, Inc.*, 831 F.2d 586 (5th Cir. 1988), involved an identical pattern and reached the same conclusion.

The allegations in Counts VII-XII parallel both of those cases. Those counts allege that the debtors fraudulently transferred a security interest in their property to the First and Second Lien Lenders, in order to induce those lenders to provide funds that were paid to the Senior Transeastern Lenders. The Senior Transeastern Lenders, therefore, were entities for whose

⁷ The Senior Transeastern Lenders assert (STL Mot. at 11) that it is “essential” to “every one of the Committee’s claims against the Senior Transeastern Lenders” to establish that the Conveying Subsidiaries “had an ‘interest’ in the proceeds of the New Loans.” That assertion is incorrect with regard to claims asserting that the Senior Transeastern Lenders’ are entities for whose benefit the transfer was made. Those claims do not require proof that the debtors’ property was transferred to the Senior Transeastern Lenders, because an entity for whose benefit a transfer is made, by definition, cannot be a transferee. See *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 896 (7th Cir. 1988) (“§ 550 distinguishes transferees (those who receive the money or other property) from entities that get a benefit because someone else received the money or property.”).

benefit the transfer of the security interest was made, and the value of the transferred property may be recovered from them under section 550(a)(1).

B. Counts VII-XII Of The First Amended Complaint State Claims Against The Senior Transeastern Lenders As Mediate Transferees

If the Court concludes that the First Amended Complaint does not sufficiently state claims against Senior Transeastern Lenders as entities for whose benefit the transfer was made, it should rule that Counts VII-XII sufficiently state claims against the Senior Transeastern Lenders as mediate transferees. (As explained in n. 7, *supra*, a party may be either an entity for whose benefit a transfer was made or a transferee, but cannot be both.) These claims rest on the initial transfer of liens on the property of the Conveying Subsidiaries in connection with the First and Second Lien Term Loans. Those liens ostensibly had a value equal to the Conveying Subsidiaries' obligations to the First and Second Lien Lenders – obligations to repay \$500 million in principal and interest on the term loans. In conjunction with this transfer of the Conveying Subsidiaries' property (*i.e.*, the liens) to the First and Second Lien Lenders, the lenders transferred a substantial portion of the value of that property to the Senior Transeastern Lenders. Pursuant to sections 4.12 and 6.11 of the First and Second Lien Term Credit Agreements, more than \$420 million of the proceeds of the First and Second Lien Term Loans were transferred from the New Lenders to the Senior Transeastern Lenders.

The motion characterizes this claim as “unprecedented.” STL Mot. at 21. It is not. The Eleventh Circuit has recognized that a debtor may recover from a mediate transferee the value of property that was fraudulently transferred, even if that value is embodied in a different form of property than the form of the initial transfer. In *International Administrative Services, Inc. v. IBT International, Inc.*, 408 F.3d 689 (11th Cir. 2005), an initial fraudulent transfer of cash was followed by a series of transactions, culminating in the purchase of a commercial office

condominium development by a mediate transferee. See *id.* at 697, 708. The Court upheld a fraudulent conveyance claim against the mediate transferee. “It is undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner as long as it can be identified. *Id.* at 709 (quoting *In re Bridge*, 90 B.R. 839, 848 (Bankr. E.D. Mich. 1988)). The *Bridge* case, quoted and cited with approval by the Eleventh Circuit, involved the fraudulent transfer of a ranch, followed by the sale of the ranch and the use of the proceeds of the sale to acquire Canadian treasury bills. *Bridge*, 90 B.R. at 844. *Bridge* permitted recovery from the transferee that held the treasury bills, reasoning that “[b]ecause the bills are traceable as proceeds of property of the estate, they are likewise property of the estate, pursuant to 11 U.S.C. § 541(a)(6).” *Id.* at 848. That statutory definition includes, as property of the estate, the “[p]roceeds, product, [and] offspring * * * of or from property of the estate.” That analysis finds additional support in section 9-102(a)(64) of the U.C.C., which defines “proceeds” to include “whatever is collected upon, or distributed on account of, collateral.” (Emphasis added.) So, here, the money paid to the Senior Transeastern Lenders was the proceeds, product, and offspring of the property transferred to the First and Second Lien Lenders.

The Senior Transeastern Lenders argue that Counts VII-XII must fail because the First and Second Lien Lenders continue to hold the liens. STL Mot. at 21. That contention misses the point entirely. It is not necessary for a mediate transferee to obtain the property that was initially transferred, so long as the *value* of that property can be reliably traced to the mediate transferee. In *Bridge*, for example, the property that was originally transferred – the ranch – was converted to cash of equivalent value; the cash, in turn, was converted to Canadian treasury bills. *Bridge* held that the treasury bills could be recovered under Section 550(a)(1), which permits the debtor to recover either the property that was fraudulently transferred or the value of

that property, from any transferee. See 11 U.S.C. §§ 550(a)(1)-(2) (authorizing recovery of “the property transferred, or * * * the value of such property” from initial, immediate, or mediate transferees).

The Senior Transeastern Lenders also argue (STL Mot. at 21-23) that the allegations of the First Amended Complaint are insufficient because the Conveying Subsidiaries merely incurred “obligations” to the First and Second Lien Lenders, while section 550 provides for liability only if there have been “transfers” of the debtor’s property. In a related argument, the motion contends that successful avoidance of the Conveying Subsidiaries’ obligations to the First and Second Lien Lenders would provide a complete remedy, leaving nothing to be recovered from the Senior Transeastern Lenders. Both of those arguments simply ignore the allegations of the First Amended Complaint. The First Amended Complaint alleges that each Conveying Subsidiary granted liens on its property and assets, and thereby *transferred property*, to the First and Second Lien Lenders. FAC. ¶¶ 33, 98, 107, 116, 125, 134. Moreover, it is permissible for the debtor to seek recovery from a mediate transferee, even if the debtor has not sued (or obtained any remedy from) the initial transferee. See, *e.g.*, *In re Advanced Telecommunications Network*, 321 B.R. 308 (M.D. Fla 2005); *In re Richmond Produce*, 195 B.R. 455, 463 (N.D. Cal. 1996). Under that doctrine, plaintiffs could, in theory, obtain no remedy as to the First and Second Lien Lenders, and recover the value of the transferred property from the Senior Transeastern Lenders.

III. THE COURT NEED NOT DECIDE THE HYPOTHETICAL QUESTION WHETHER TO PERMIT AMENDMENT OF THE COMPLAINT TO ASSERT CLAIMS ON BEHALF OF TOUSA

The Senior Transeastern Lenders also request an order barring any further amendments of the complaint. However, the only potential amendment that they specifically address is a

hypothetical amendment that would assert fraudulent transfer claims on behalf of TOUSA or affiliates of TOUSA that are not Conveying Subsidiaries. They argue that, because of defenses that the Senior Transeastern Lenders could assert against any fraudulent transfer claim that might be asserted by those entities, an amendment to the complaint to add such claims would be futile.

There is no need for the Court to rule on this hypothetical question. Neither the original complaint nor the First Amended Complaint has attempted to assert such claims, and plaintiff has no present intention to seek to add any such claims. It would be an understatement to suggest that this issue is not yet ripe for judicial consideration; this is an issue that has not even *germinated*. It would be pointless for the Court to attempt to imagine such claims and to decide, in the abstract, what defenses to those claims would or would not be valid.

The motion is also premature if it seeks to preclude *any* further amendment of the complaint – including amendments relating to the claims by the Conveying Subsidiaries against the Senior Transeastern Lenders. Plaintiff has no present intention of seeking any such amendments, but we can imagine circumstances (which are currently hypothetical) in which amendment would be appropriate and would not be futile. If any specific amendment is requested in the future, the Court will have the opportunity to consider that amendment on its merits. There is no need for the Court to address this issue now, when the question is purely hypothetical.

CONCLUSION

The Court should deny the Senior Transeastern Lenders' motion to dismiss the First Amended Complaint.

Dated: November 18, 2008

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications in this Court set forth in Local Rule 2090-1(A)

/s/ Patricia A. Redmond

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I HEREBY CERTIFY that the undersigned attorneys are appearing *pro hac vice* in this matter pursuant to court order dated July 10, 2008 [D.E. 1360, 1362, 1363 in Ch. 11 No. 08-10928]

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2008 a true and correct copy of the foregoing document has been sent via email to the following:

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