

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 SECOND LIEN AGENT'S
MOTION TO DISMISS**

Defendant Wells Fargo Bank, N.A., ("Wells Fargo"), the successor administrative agent under the July 31, 2007 Second Lien Term Loan Credit Agreement, has filed a motion¹ to dismiss all claims against individual Second Lien Lenders and the Transeastern Lenders, and to dismiss prayers for relief seeking equitable subordination and the disgorgement of interest. For the reasons stated below, that motion should be denied in its entirety.

¹ Second Lien Agent's Motion To Dismiss (I) All Claims Against Individual Second Lien Lenders, (II) All Claims Against The Transeastern Lenders, And (III) Prayers For Equitable Subordination And Interest (Adv. Pro. D. E. No. 13) (hereafter "Mot.").

FACTUAL BACKGROUND

This fraudulent transfer proceeding arises from the ill-fated decision of TOUSA and its subsidiary TOUSA Homes LP (“Homes LP”) to form the Transeastern Joint Venture in June 2005 and to finance it by taking on massive indebtedness to the Transeastern Lenders. Compl. ¶¶ 2, 18. TOUSA and Homes LP were guarantors of the Transeastern Debt,² but none of the other Debtor subsidiaries were liable for any of it. Compl. ¶¶ 19-21.

The Transeastern Joint Venture foundered within months. By November 2006, the Administrative Agent for the Transeastern Lenders had sued TOUSA and Homes LP to compel performance of certain alleged guarantees. Compl. ¶¶ 3, 22-24. Only TOUSA and Homes LP were parties to the litigation. Compl. ¶ 24.

After months of litigation, TOUSA and Homes LP settled the cases through a series of agreements that restructured the joint venture, paid off the Transeastern Lenders and the other members of the Joint Venture, and took on at least half a billion dollars, and perhaps as much as \$800 million, in New Debt. Compl. ¶¶ 1, 3, 31. Lenders under the Senior Credit Agreement received cash payments exceeding \$421 million (Compl. ¶ 27); lenders under the Senior Mezzanine Credit Agreement received New Subordinated Notes and certain PIK Notes (Compl. ¶ 28); and Lenders under the Junior Mezzanine Credit Agreement received certain warrants to acquire common stock of TOUSA. Compl. ¶ 29. Certain Falcone entities, on information and belief, received cash payments of \$49 million. Compl. ¶ 26.

Although only TOUSA and Homes LP were obligors on the Transeastern Debt, the New Credit Agreements – consisting of a \$200 million First Lien Term Credit Agreement, a \$300

² These Transeastern Credit Agreements totaled \$675 million consisting of (1) a \$450,000,000 Senior Credit Agreement; (2) a \$137,500,000 Senior Mezzanine Credit Agreement; and (3) a \$87,500,000 Junior Mezzanine Credit Agreement. Compl. ¶ 19.

million Second Lien Term Credit Agreement, and the Amended Revolver Agreement – made every Debtor subsidiary a guarantor and co-borrower of the New Debt that was used to satisfy the obligations of TOUSA and Homes LP. Compl. ¶¶ 31-33. The New Credit Agreements purported to grant liens on “the property and assets of all of the Debtors, whether real or personal, tangible or intangible, and wherever located.” Compl. ¶ 32. In short, TOUSA and Homes LP borrowed some \$675 million to finance the Transeastern Joint Venture and thereafter, using money they had borrowed under some or all of the New Credit Agreements, repaid those debts by encumbering the assets of most of the TOUSA subsidiaries, including all of the Debtors.

The Debtors filed their petition for bankruptcy on January 29, 2008, less than six months after they settled the Transeastern Litigation. Compl. ¶ 8. After Debtors declined to pursue any claims against any of their lenders, plaintiff, the Official Committee of Unsecured Creditors, sought and received the Court’s permission to commence an adversary proceeding seeking to avoid transfers under 11 U.S.C. §§ 544, 548, and 550.

Defendant Wells Fargo, as successor Administrative Agent under the Second Lien Term Loan Credit Agreement, now moves to dismiss all claims against individual Second Lien Lenders and the Transeastern Lenders, and to dismiss prayers for relief seeking equitable subordination and the disgorgement of interest.

ARGUMENT

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).

Wells Fargo acknowledges those rules, but flouts them in the next breath. The first half of its motion consists of an incomplete and misleading recitation of “facts” on which the Court may not rely³ and arguments that are irrelevant⁴ in the context of a motion to dismiss. Those “facts,” in any event, have no bearing on any of the specific requests to dismiss claims or prayers for relief that are advanced in the remainder of Wells Fargo’s motion. Indeed, when Wells Fargo finally addresses those matters (Mot. ¶¶ 41-72), it does not even cite to its “Statement of Facts.”

³ To cite just one illustration, Wells Fargo’s “Statement of Facts” is based “principally” on a declaration and SEC filings. Mot. ¶ 8 n. 3. In attempting to justify its improper reliance on these sources, Wells Fargo can point only to a case permitting consideration of such documents to show that statements were made, but *not* for the truth of the statements. See *id.* at ¶ 40; *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 n.10 (11th Cir. 1999) (citing *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015 (5th Cir. 1996) and *Kramer v. Time Warner, Inc.*, 937 F.2d 767 (2d Cir. 1991) for the proposition that such documents could not be considered for the truth of the statements they contain). That, of course, is precisely what the motion attempts to do, improperly.

⁴ For example, Wells Fargo suggests “[a]s an aside” that substantive consolidation will be appropriate. Mot. ¶ 22. That suggestion is clearly wrong. Defendants will never meet the heavy burden of proving that “there is substantial identity between the entities to be consolidated” and that “consolidation is *necessary* to avoid some harm or to realize some benefit.” *Reider v. FDIC*, 31 F.3d 1102, 1108 (11th Cir. 1994) (emphasis added); see also *Eastgroup Properties v. Southern Motel Association, Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991). Nor will the evidence overcome the plain fact that creditors relied on the “separate credit” of the Conveying Subsidiaries and will be extraordinarily prejudiced by substantive consolidation. *Reider*, 31 F.3d at 1108. But wholly apart from the fact that substantive consolidation would be completely unjustified on the merits, there is no excuse for Wells Fargo’s decision to devote two pages of its motion to an issue that it later concedes “is beyond the scope of a motion to dismiss.” Mot. ¶ 22.

Rather than add to the number of words that Wells Fargo has already wasted on extraneous matters, we address here only those issues that are germane to the question whether specific claims and prayers for relief should be dismissed.

I. THE COURT SHOULD NOT DISMISS CLAIMS AGAINST THE SECOND LIEN DOE DEFENDANTS

Wells Fargo moves for dismissal of all claims against the “Second Lien Doe Defendants.” In doing so, it invites confusion as to which claims against which defendants Wells Fargo seeks to dismiss.

The Complaint names as defendants “Doe New Lenders Nos. 1-100,” who are identified as the original lenders and signatories, and their successors, assigns, and participants, in the First Lien Term Loan Credit Agreement, the Second Lien Term Loan Credit Agreement, and the Amended Revolver Agreement. Compl. ¶¶ 12, 31. The Complaint does not use the term “Second Lien Doe Defendants.” That is a term invented by Wells Fargo. According to the definition offered by Wells Fargo the term encompasses *all* of the “Doe New Lenders Nos. 1-100.” Mot. ¶ 3. Thus, the term “Second Lien Doe Defendants” as defined by Wells Fargo encompasses the original lenders and signatories (and their successors, assigns, and participants) that loaned money (1) pursuant to the First Lien Term Loan Credit Agreement only; (2) pursuant to the Second Lien Term Loan Credit Agreement only; (3) pursuant to the Amended Revolver Agreement only; (4) pursuant to any two of those agreements; and (5) pursuant to all three agreements.⁵ However, the proposed order that accompanies Wells Fargo’s motion does not use the term “Second Lien Doe Defendants” or “Second Lien Lenders.” It refers, instead, to “Doe New Lenders Nos. 1-100,” apparently encompassing all five categories of lenders mentioned

⁵ Wells Fargo also uses the term “Second Lien Lenders,” which is defined in ¶ 3 of its motion to have the same meaning as the term “Second Lien Doe Defendants.”

above. We presume that, despite this confusion, Wells Fargo intends the term “Second Lien Doe Defendants” to have its plain meaning, *i.e.*, the original lenders and signatories (and their successors, assigns, and participants) under the Second Lien Term Loan Credit Agreement. That narrower meaning is the only meaning that can be reconciled with many of the assertions in the motion.⁶

Imputing that apparent meaning to the term “Second Lien Doe Defendants,” however, does not eliminate the confusion, because Wells Fargo has moved for the dismissal of “all claims” against the Second Lien Doe Defendants. It is entirely possible, if not likely, that at least some of the parties that loaned money pursuant to the Second Lien Term Loan Credit Agreement (or their assignees) also loaned money (or are assignees of lenders) pursuant to the First Lien Term Loan Credit Agreement and/or the Amended Revolver Agreement. Dismissal of “all claims” against such a defendant would encompass dismissal of claims relating to the loans under the latter agreements, not just claims relating to the Second Lien Term Loan Credit Agreement.

This confusion merely highlights the impropriety of attempting to dispose of claims in the abstract, in a motion to dismiss. The Complaint named “Doe” defendants and described them as it did precisely because, until the identity of those defendants is known, it is impossible to know which of the claims will pertain to any specific party. A fully developed factual record that reveals the identity of the Doe defendants will permit the parties and the Court to parse the

⁶ For example, ¶ 44 of the motion states that the Second Lien Agent (*i.e.*, Wells Fargo) is the administrative agent for the “Second Lien Lenders.” That assertion is false under a literal reading of Wells Fargo’s definition of “Second Lien Lenders” because Citicorp North America, Inc. is the administrative agent for the First Lien Term Loan Credit Agreement and the Amended Revolver Agreement. The assertion is true only if “Second Lien Lenders” means (as one would

record, defendant by defendant and claim by claim, and to sort out, with precision, how to resolve each claim against each defendant.

Fortunately, the Court can decide the Wells Fargo motion without resolving its many ambiguities. Whether the motion is construed and interpreted in the narrowest way possible or in the broadest way possible, it is entirely without merit. Whatever was intended by Wells Fargo, its motion to dismiss claims against the Second Lien Doe Defendants should be denied for at least five reasons.

A. Wells Fargo Lacks Standing To Move For The Dismissal Of Claims Against Other Parties

Wells Fargo properly acknowledges (with respect to its motion to dismiss claims against the Transeastern Lenders, though not with respect to its motion to dismiss claims against the Second Lien Doe Defendants) that defendants must generally assert their own legal rights and interests, not the rights of a third person. Mot. ¶ 54 n.12. That principle, alone, requires denial of Wells Fargo's motion to dismiss claims against the Second Lien Doe Defendants.

To have standing in its own right, Wells Fargo must demonstrate, among other things, that (1) it has a legally protected interest of its own that is affected by the assertion of the claims against the Second Lien Doe Defendants, *and* (2) that the remedy it seeks – dismissal of those claims – will protect that interest. See, e.g., *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The motion falls short in both respects. Wells Fargo asserts *only* the interests of third parties and it fails to

expect from the term itself) those parties that loaned money pursuant to the Second Lien Term Loan Credit Agreement.

identify any respect in which Wells Fargo, and not just those third parties, would benefit from dismissal of claims against others.

To be sure, under some circumstances a party may have standing to litigate in its own name for the benefit of others. Thus, for example, in *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 128 S.Ct. 2531 (2008), the Supreme Court held that a company acting as a collection agent, to collect money owed to third parties, had standing to sue in its own name to recover the money owed. The facts and reasoning in that case, however, merely emphasize why Wells Fargo does not have standing here. In *Sprint*, the third parties appointed the collection agent as their “true and lawful attorney-in-fact,” assigned “all rights, title and interest” in their claims to the collection agent, and agreed that the assignment of legal title to those claims could not be revoked without the agent’s written consent. *Id.* at 2534. Thus, even though the claims originally belonged to third parties, the third parties “assigned their claims to the [litigant] lock, stock, and barrel.” *Id.* at 2542. For standing purposes, this complete and irrevocable assignment meant that the claims belonged to the assignee, and that the assignee could litigate those claims in its own name and on its own behalf.

Here, however, there is no indication that the lenders have assigned their rights, liabilities, or claims to Wells Fargo. Indeed, the lenders have not been heard from at all and, at this time, there is no way to know what they would say regarding Wells Fargo’s rights and authority (if any) in relation to their claims. In *Sprint*, the assignors clearly manifested an intent to be bound by a judgment against the assignee. Wells Fargo’s motion does not assert that the Second Lien Doe Defendants have expressed such an intent.

In addition to failing to show that its motion would protect any of its own legally protected rights or interests, Wells Fargo also fails to show that it has authority to act in a

representative capacity to protect rights or interests of the Second Lien Doe Defendants. Wells Fargo offers only vague hints that it might have such authority. See, *e.g.*, Mot. ¶ 44 (stating that Second Lien Lenders are “represented by the Second Lien Agent” and analogizing the agent to a trustee). But it does not purport to file its motion in the name of the Second Lien Doe Defendants, nor does it make any explicit claim that it has been authorized by them to litigate on their behalf. Instead, Wells Fargo states that it is filing the motion “solely in its capacity as successor administrative agent” under the Second Lien Term Loan Credit Agreement and, in such capacity, as a named defendant in this proceeding. Mot. at 1. The Second Lien Term Loan Credit Agreement, which defines the role of the Administrative Agent, states in Section 9.1(c) that the duties of the Administrative Agent “are entirely administrative in nature” and that the Administrative Agent “does not assume and shall not be deemed to have assumed any obligations other than as expressly set forth herein or in the other Loan Documents or any other relationship as the agent, fiduciary or trustee of or for any Lender.” Acting under similar provisions in the First Lien Term Loan Credit Agreement, Citicorp North America, Inc. (the First Lien Administrative Agent) asserts that it is merely “an intermediary and conduit for the actual lenders in the First Lien Term Loan.” Answer To The Complaint And Third-Party Complaint By Citicorp North America, Inc. In Its Capacity As Administrative Agent For The First Lien Term Loan (Adv. Pro. D. E. No. 28) at 22.

Because the motion does not concern any legally protected interest belonging to Wells Fargo, or seek a remedy that would protect any such interest, and because Wells Fargo has not shown that it has authority to act as a representative of the lenders or on their behalf, Wells Fargo does not have standing to bring this motion to dismiss on behalf of the Lenders under the Second Lien Term Credit Agreement.

B. Wells Fargo Has Not Argued That The Complaint Fails To State A Claim Upon Which Relief Can Be Granted

Even if Wells Fargo had standing, its motion should be denied on the merits. Rule 12(b)(6) authorizes dismissal only if a complaint fails “to state a claim upon which relief can be granted.” Wells Fargo has not identified, and does not even purport to identify, any respect in which the complaint has failed to state a cognizable claim against the Second Lien Doe Defendants. That failure is no accident; the complaint alleges each of the elements of a fraudulent transfer claim. It alleges that the Conveying Subsidiaries transferred interests in their property (Compl. ¶¶ 1, 3, 32, 33); that the transfers took place less than two years before the petition was filed. (Compl. ¶¶ 1, 8); that the Conveying subsidiaries were or became insolvent (Compl. ¶¶ 1, 4, 5); and that they did not receive reasonably equivalent value for the transfers (Compl. ¶¶ 4, 21, 33).

Instead of arguing that the complaint fails to state a claim upon which relief can be granted, Wells Fargo’s motion asserts something entirely different: that the Second Lien Doe Defendants are not “necessary” parties. Mot. ¶ 41. That assertion cannot possibly support dismissal of claims under Rule 12(b)(6) because the rule does not authorize dismissal of a claim merely because it is asserted against parties that are not “necessary.”

Rule 12 addresses necessary parties only in subsection (b)(7), and that provision provides for the opposite of what Wells Fargo seeks here. Rule 12(b)(7) authorizes dismissal of a claim if a *necessary* party has *not* been joined; Wells Fargo asserts that a party that is *not* necessary *has* been joined. Whatever its merits, that assertion cannot support dismissal under Rule 12. If a defendant has been improperly joined, the appropriate course is a motion to drop that party under Fed. R. Civ. P. 21, not a motion to dismiss a claim under Rule 12(b)(6). See Fed. R. Civ. P. 21 (“Misjoinder of parties is not a ground for dismissing an action.”).

C. Dismissal Under Rule 21 Would Be Improper Because Joinder Of The Doe Defendants Is Permitted By Rule 20

Even if this were a Rule 21 (not a Rule 12(b)(6)) motion, Wells Fargo's argument would be entirely lacking in merit. Wells Fargo claims that Rule 21 permits a party to be dropped because that party is not necessary. That is plainly wrong. The federal rules draw a clear distinction between parties that must be joined, *i.e.*, necessary parties, and parties whose joinder is permitted but not required. Necessary parties are addressed in Rule 19; parties whose joinder is permitted are addressed in Rule 20. And *permissive* joinder under Rule 20 is exactly that; it is joinder that the rules permit, but do not require. To urge that a party whose joinder is permitted should be dropped merely because that party is not necessary would negate the very concept of permissive joinder; it would mean that a party must be joined, or cannot be joined at all. Rule 21 says nothing of the sort. Instead, Rule 21 addresses misjoinder, *i.e.*, the joinder of parties that "fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." 7 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE ¶ 1683, at 475 (3d ed. 2001).

Even Wells Fargo does not argue that joinder of the Second Lien Doe Defendants is impermissible under Rule 20(a), and with good reason. The requirements for permissive joinder under that rule are clearly satisfied: A "right to relief is asserted against [the defendants] jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and "question[s] of law or fact common to all defendants will arise in the action."

D. The Factual Defense Proffered By Wells Fargo – That No Payments Were Made To The Second Lien Doe Defendants – Cannot Be Advanced In A Motion To Dismiss

Plaintiff seeks a judgment that would, among other things, avoid the New Lender Claim and Lien Transfers; disallow or reduce the claims by the New Lenders; and grant recovery of all payments made on the debt obligations (including the First Lien Term Loan Credit Agreement and the Amended Revolver Agreement, as well as the Second Lien Term Loan Credit Agreement) incurred by the Conveying Subsidiaries. Compl. ¶¶ 1, 5, 42, 48, 54, 60, 66, 72. With respect to the last of these, Wells Fargo prematurely asserts a factual defense that cannot properly be resolved on a motion to dismiss, contending that some of the Doe defendants did not receive any payments.

The complaint does not seek to “recover” payments that have not been made and if, after the completion of discovery, the litigation reveals that a defendant received no payment, plaintiff will not recover any payment from that defendant. But that merits defense requires factual determinations that must be made on a defendant by defendant basis, after discovery reveals which defendants received payments and which did not. Even if discovery were to confirm Wells Fargo’s contention that no payments were made pursuant to the Second Lien Term Loan Credit Agreement, (and disregarding the payments that Wells Fargo acknowledges (Mot. ¶ 46) have been made) some (or even all) of the Second Lien Lenders may have received payments under the First Lien Term Loan Credit Agreement or the Amended Revolver Agreement. For that reason, as explained previously, dismissing “all claims” for recovery of payments from a Second Lien Doe Defendant would be improper, even if Wells Fargo’s factual contentions were credited – as they certainly should *not* be – at this time. The issue cannot properly be resolved on a motion to dismiss, when the Complaint’s allegations must be accepted as true. The same is true with respect to plaintiff’s claim to recover interest on those payments. See Mot. ¶ 71.

E. Plaintiff Properly Named “Doe” Defendants

Finally, Wells Fargo states that Eleventh Circuit courts have “held” that fictitious party practice is impermissible in federal court. Mot. ¶ 50. The only “fiction” here is Wells Fargo’s statement.

The Doe New Lenders Nos. 1-100, of course, are not fictitious. They are real parties whose identities were not known to plaintiff when the complaint was filed. The complaint described those parties with sufficient precision to permit their eventual identification by name: “the original lenders under the New Loans and signatories thereunder, their successors, assigns, and participants.” Compl. ¶ 12. At the appropriate time, to the extent necessary to eliminate any doubt that those parties will be bound by the judgment entered in this litigation, plaintiff will move to amend the complaint to replace unnamed “Doe” defendants with defendants identified by name.⁷

The suggestion by Wells Fargo, the Administrative Agent under the Second Lien Term Credit Agreement, that it “has no way of identifying them” (Mot. ¶ 51) is disingenuous, at best. Section 10.2 of the Second Lien Term Loan Credit Agreement provides that any lender assigning its rights must deliver the assignment to the Administrative Agent; that the Agent must maintain a register of such assignments; and that the assignment shall not be effective until it is recorded in the register. That section also provides that any lender that chooses to sell participations in its rights must maintain its own register identifying the name and address of

⁷ Plaintiff is certainly amenable to any procedure that would obviate the joinder of a large number of individually named New Lenders, if that procedure will avoid any doubt that those defendants will be bound by the judgment in this action. Although we oppose Wells Fargo’s motion to dismiss claims against those defendants – because such dismissal would leave those defendants with an opportunity to argue that they would not be bound by a judgment – we would

each participant. Under these provisions, the Administrative Agent will know the identity of each lender and its successors and assigns, and each of those persons will know the identity of each participant in its rights under the credit agreement. Thus, even though plaintiff could not identify the Doe defendants by name when it filed the complaint, those defendants were unmistakably identified by description and can be identified by name through the records maintained by Wells Fargo and the Second Lien Lenders.

There is no rule against using a description, rather than a name, to identify a defendant, in the Eleventh Circuit or elsewhere. See *Dean v. Barber*, 951 F.2d 1210, 1215-1216 (11th Cir. 1992) (emphasizing distinction between fictitious parties and real parties identified by description rather than name). Countless examples can be found. See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390 n.2 (1971) (suit involving warrantless search by FBI agents whose identities were unknown to plaintiff); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (allowing use of unnamed defendant where it was clear that discovery would uncover the defendant's identity); *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995) (“[A]ction may proceed against a party whose name is unknown if the complaint makes allegations specific enough to permit the identity of the party to be ascertained after reasonable discovery.”); *Plant v. Does*, 19 F. Supp. 2d 1316, 1320 (S.D. Fla. 1998) (use of fictitious names is permissible “when the only way a plaintiff can obtain the name of a defendant who has harmed him is through the discovery process in a case filed against that defendant as an unnamed party.”). The practice occurs frequently in bankruptcy cases. See, e.g., *In re Florida West Gateway, Inc.*, 182 B.R. 595 (Bankr. S.D. Fla. 1995) (naming “John

welcome a proposal from Wells Fargo (or any other party) to simplify the litigation in a manner that would not prejudice plaintiff in that manner.

Does 1 Through 10” as defendants in an adversary proceeding); *In re VonGrabe*, 332 B.R. 40 (Bankr. M.D. Fla. 2005) (naming “John Does 1 Through 12” as defendants in an adversary proceeding). And the practice is explicitly acknowledged with approval by 28 U.S.C. § 1441(a), which states that “[f]or purposes of removal . . . the citizenship of defendants sued under fictitious names shall be disregarded.”

Wells Fargo cites only two cases to support its claim that courts in the Eleventh Circuit have “repeatedly held” to the contrary. What Wells Fargo describes as a “holding” in one of those cases is actually the description of a *litigant’s* statement concerning matters not before the court. *New v. Sports & Rec., Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997). The other “authority” cited by Wells Fargo is a magistrate’s order suggesting that a John Doe complaint would be *permitted* if it provided a sufficient description of the then-unknown defendant.

There is no merit to the argument that the claims against the Doe defendants must be dismissed because those parties are not identified by name. The motion also lacks merit for the other reasons discussed above. The motion to dismiss claims against the “Second Lien Doe Defendants” should be denied.

II. THE COURT SHOULD NOT DISMISS CLAIMS AGAINST THE TRANSEASTERN LENDERS

Wells Fargo also moves to dismiss the claims against the Transeastern Lenders, and requests that argument on this portion of its motion be consolidated with argument on a motion to dismiss that the Transeastern Lenders intend to file on September 3, 2008. See Mot. ¶ 53 n.11; Agreed Motion To Extend Deadline To Respond To Complaint (Adv. Pro. D. E. No. 9). If any argument concerning Wells Fargo’s motion is necessary, we join in the request that such argument be consolidated with argument on the Transeastern Lenders’ motion. For the Court’s convenience, we will address the merits of both motions to dismiss – Wells Fargo’s motion and

the motion to dismiss that the Transeastern Lenders intend to file on their own behalf – in a single response to the latter motion, rather than addressing those matters in duplicative submissions. However, we address here a threshold defect that requires denial of Wells Fargo’s motion. Wells Fargo does not have standing to seek dismissal of claims against the Transeastern Lenders.

Wells Fargo is right when it acknowledges that defendants typically do not have standing to assert the rights of third parties; it is wrong when it argues that the facts here permit a departure from that rule. As is the case with the motion to dismiss claims against the Second Lien Doe Defendants, Wells Fargo has failed to show either (1) that it has a legally protected interest of its own that is threatened by claims against the Transeastern Lenders, *or* (2) that the remedy it seeks – dismissal of those claims – will protect that interest. Both elements are required for standing, for the reasons previously explained.

Wells Fargo asserts that it satisfies the first of those requirements because it has claims and liens against the estates of TOUSA and Homes L.P. But this alleged indirect interest arising from the claims and liens can support Wells Fargo’s standing only if TOUSA and Homes L.P. themselves have a legally protected interest that is threatened by plaintiff’s claims against the Transeastern Lenders. TOUSA and Homes L.P. have no such interest.

TOUSA and Homes LP cannot possibly recover assets based on the claims asserted by plaintiff. Plaintiff has alleged a fraudulent conveyance of assets that belonged to the Conveying Subsidiaries; the appropriate remedy for that claim is to return those assets to the Conveying Subsidiaries, for the benefit of their creditors, *not* to give those assets to TOUSA or Homes L.P. For that reason, the suggestion that Wells Fargo and the Second Lien Lenders would benefit if avoided payments were recovered by TOUSA and Homes L.P, rather than by the Conveying

Subsidiaries, is irrelevant. TOUSA and Homes L.P. have no legally protected interest that would permit a recovery to be diverted from the Conveying Subsidiaries to them. Wells Fargo admits this, saying “[T]here is no sustainable claim for recovery by TOUSA or Homes L.P.” Mot. ¶ 62 n. 14. And because TOUSA and Homes L.P. have no legally protected interest in the assets transferred by the Conveying Subsidiaries, Wells Fargo and the Second Lien Lenders have no indirect interest in those assets arising from their claims and liens against TOUSA and Homes L.P.

Second, even on the assumption (which Wells Fargo disclaims) that TOUSA and Homes L.P. do have a cognizable basis for recovering assets that were fraudulently transferred by the Conveying Subsidiaries, Wells Fargo fails to satisfy the second prerequisite for standing, because it does not seek a remedy that would redress the (assumed) injury to its indirect interest in those assets. This is not a situation in which both the plaintiff (on one side) and TOUSA or Homes L.P. (on the other side) are asserting competing and mutually exclusive claims to recover the same assets from the Transeastern Lenders. Therefore, the remedy that Wells Fargo seeks through its motion – dismissal of the Conveying Subsidiaries’ claims against the Transeastern Lenders – cannot possibly provide any direct benefit to TOUSA or Homes L.P., or any indirect benefit to Wells Fargo. If granted, the motion would prevent the Conveying Subsidiaries from recovering assets from the Transeastern Lenders, but it would confer no benefit on Wells Fargo (or the Second Lien Lenders).

Wells Fargo has no personal stake in this matter and is seeking a remedy that will not redress the illusory interest it purports to have. Wells Fargo’s motion to dismiss claims against the Transeastern Lenders should be denied because Wells Fargo does not have standing.

III. THE COURT SHOULD NOT DISMISS THE PRAYER FOR EQUITABLE SUBORDINATION

Finally, Wells Fargo asks the Court to excise equitable subordination from the list of remedies that plaintiff may seek in this litigation. Wells Fargo criticizes this attempt to put defendants on notice of a remedy that plaintiff may (or may not) request at the appropriate time, depending on the evidence revealed during discovery.

Even if Wells Fargo were correct that the remedy of equitable subordination would not be available to plaintiff – a question that cannot properly be decided at this preliminary stage of the litigation – its motion should be denied. It is improper to grant a motion to dismiss under Rule 12(b)(6) because of a “demand of an improper remedy . . . if the statement of the claim is otherwise sufficient to show entitlement to a different form of relief.” *Doss v. South Central Bell Telephone Co.*, 834 F.2d 421, 423 n.3 (5th Cir. 1987). That principle is a direct corollary of Fed. R. Civ. P. 54(c), which requires a final judgment to “grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Both propositions reflect the fact that, although Fed. R. Civ. P. 8(a)(3) requires a complaint to include “a demand for judgment for the relief the pleader seeks,” the prayer for relief “is not itself a part of the plaintiff’s claim” and is therefore is not subject to challenge under Rule 12(b)(6). *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) (quoting *Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 841-42 and n. 69 (5th Cir. 1990)).

Wells Fargo fails to cite any case or statute that requires equitable subordination to be pleaded as a distinct cause of action. Its attempt to impose such a pleading requirement whenever that remedy is mentioned in a prayer for relief would circumvent the general pleading rules discussed above. It would also fly in the face of the statutory provision that authorizes the remedy of equitable subordination in bankruptcy cases. The statute, in 11 U.S.C. § 510(c),

merely requires “notice and a hearing” before the remedy of equitable subordination may be imposed. It does not impose the additional pleading requirements urged by Wells Fargo. And if Wells Fargo were correct that equitable subordination must be pleaded in a complaint as a distinct cause of action, the statute’s requirement of notice and hearing would be completely superfluous.

The motion to “dismiss” the prayer for equitable subordination should be denied.

CONCLUSION

Wells Fargo’s motion to dismiss should be denied.

Dated: September 3, 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)

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]

/s/ Patricia A. Redmond

/s/ Lawrence S. Robbins

PATRICIA A. REDMOND
(Florida Bar No. 303739)
DAVID C. POLLACK
(Florida Bar No. 362972)
**STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.**
150 West Flagler Street
Miami, FL 33130
Telephone: (305) 789-3553
Facsimile: (305) 789-3395
predmond@swmwas.com

LAWRENCE S. ROBBINS *pro hac vice*
(D.C. Bar No. 420260)
ALAN D. STRASSER *pro hac vice*
(D.C. Bar No. 967885)
MICHAEL L. WALDMAN *pro hac vice*
(D.C. Bar No. 414646)
**ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP**
1801 K Street N.W., Suite 411-L
Washington, DC 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510
lrobbins@robbinsrussell.com
astrasser@robbinsrussell.com
mwaldman@robbinsrussell.com

*Local Counsel to the Fraudulent
Conveyance Adversary Proceeding Counsel
for the Official Committee of Unsecured
Creditors of TOUSA, Inc., et al.*

*Fraudulent Conveyance Adversary
Proceeding Counsel for the Official
Committee of Unsecured Creditors of
TOUSA, Inc., et al.*

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2008 a true and correct copy of the foregoing document is being served electronically via email or via the Court's CM-ECF Program to each person named on the attached Service List.

 /s/ Patricia A. Redmond
Patricia A. Redmond

OCUC OF TOUSA, Inc., et al. v. Citicorp North America, Inc., et al.
SERVICE LIST

Paul Steven Singerman, Esq. singerman@bergersingerman.com
BERGER SINGERMAN P.A., Local Counsel
200 S. Biscayne Blvd., Suite 1000
Miami, FL 33131
Telephone: 305.775.9500 Facsimile: 305.714.4340
– and –

Paul M. Basta, Esq. pbasta@kirkland.com
Richard M. Cieri, Esq. rcieri@kirkland.com
M. Natasha Labovitz, Esq. nlabovitz@kirkland.com

KIRKLAND & ELLIS, LLP
153 East 53 Street
New York, NY 10022
Telephone: 212.446.4800 Facsimile: 212.446.4900
– and –

Jeffrey S. Powell, Esq. jpowell@kirkland.com
KIRKLAND & ELLIS, LLP
655 15 Street, NW
Washington DC 20005
Telephone: 202.879.5000 Facsimile: 202.879.5200

Counsel for TOUSA, Inc., et al., Debtors / Third Party Defendants

Allan E Wulbern, Esq. awulbern@smithhulsey.com
Stephen D. Busey, Esq. busey@smithhulsey.com

SMITH HULSEY & BUSEY
225 Water Street, Suite 1800
Jacksonville, FL 32202
Telephone: 904.359.7700 Facsimile: 904.359.7708
– and –

Richard Craig Prosser, Esq. rproser@srbp.com
Harley Edward Riedel, Esq. hriedel@srbp.com
Amy D. Harris, Esq. aharris.ecf@srbp.com
Edward Peterson, Esq. epeterson@srbp.com

STICHTER, RIEDEL, BLAIN & PROSSER, P.A.
110 East Madison Street, Suite 200
Tampa, FL 33602-4718
Telephone: 813.229.0144 Facsimile: 813.229.1811
– and –

Joseph H. Smolinsky, Esq. jsmolinsky@chadbourne.com
Thomas J. Hall, Esq. thall@chadbourne.com
Seven R. Rivera, Esq. sriveera@chadbourne.com
Thomas J. McCormack, Esq. tmccormack@chadbourne.com

CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, NY 10112
Telephone: 212.408.5100 Facsimile: 212.541.5369

Counsel for Citicorp North America, Inc., in its capacity as Administrative Agent for the First Lien Revolver and First Lien Term Loan Credit Agreement, Defendant

Scott L. Baena, Esq. sbaena@bilzin.com
Matthew I. Kramer, Esq. mkramer@bilzin.com
Jeffrey I Snyder, Esq. jsnyder@bilzin.com

BILZIN SUMBERG BAENA PRICE & AXELROD LLP, Local Counsel

200 S. Biscayne Blvd., Suite 2500
Miami, FL 33131
Telephone: 305.374.7580 Facsimile: 305.374.7593

– and –

Evan D. Flaschen, Esq. evan.flaschen@bgllp.com
Gregory W. Nye, Esq. gregory.nye@bgllp.com
Richard Whiteley, Esq. richard.whiteley@bgllp.com
Heath A. Novosad, Esq. heath.novosad@bgllp.com

BRACEWELL & GIULIANI LLP

225 Asylum Street, Suite 2600
Hartford, CT 06013
Telephone: 860.947.9000 Facsimile: 860.246.3201

Co-Counsel to Wells Fargo, as Successor Administrative Agent under that Certain Second Lien Term Loan Credit Agreement, and an Informal Group of Holders of Second Lien Term Loan Lenders, Defendants

John H. Genovese, Esq. jgenovese@gjb.com
Paul J. Batista, Esq. pbattista@gjb.com
Heather L. Yonke, Esq. hyonke@gjb.com

GENOVESE JOBLOVE & BATTISTA, P.A., Local Counsel

100 SE 2 Street, 44 Floor
Miami, FL 33131
Telephone: 305.349.2300 Facsimile: 305.349.2310

– and –

David S. Rosner, Esq. drosner@kasowitz.com
Andrew K. Glenn, Esq. aglenn@kasowitz.com
Jeffrey R. Gleit, Esq. jgleit@kasowitz.com
Daniel A. Fliman, Esq. dfliman@kasowitz.com
John Minsker, Esq. jminsker@kasowitz.com

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

1633 Broadway
New York, NY 10019
Telephone: 212.506.1700

Counsel to Aurelius Named-Entities, GSO Named-Entities, and Carlyle Strategic Partners (collectively, the "Noteholders"), Defendants

Michael I Goldberg, Esq.
AKERMAN SENTERFITT, *Local Counsel*
350 East Las Olas Blvd., Suite 1600
Fort Lauderdale, FL 33301-2229
Telephone: 954.463.2700 Facsimile: 954.463.2224
– and –

michael.goldberg@akerman.com

Dennis F. Dunne, Esq.
Andrew M. LeBlanc, Esq.
Andrew Beirne, Esq.
Dennis C. O'Donnell, Esq.
David R. Eastlake, Esq.

ddunne@milbank.com
aleblanc@milbank.com
abeirne@milbank.com
dodonnell@milbank.com
deastlake@milbank.com

MILBANK, TWEED, HADLEY & MCCLOY LLP

1 Chase Manhattan Plaza
New York, NY 10005
Telephone: 212.530.5287 Facsimile: 212.530.5219

*Counsel for 3V Capital Master Fund Ltd., Atascosa Investments LLC, Aurum CLO 2002-1 Ltd., Bank of America, N.A., Bear Stearns Investment Products, Inc., Black Diamond Clo 2005-1 Burnet Partners, LLC, Centurion Named-Entities, Deutsche Bank Trust Company Americas, Distress High Yield Trading Ops. Fund Ltd., Eaton Named-Entities, Farallon Named-Entities, Flagship Named-Entities, Gleneagles CLO Ltd., Goldman Sachs Credit Partner L.P., Grand Central Asset Trust Named-Entities, Hartford Mutual Funds, Inc., Highland Named-Entities, JPMorganChase Bank, N.A., Jasper CLO Ltd., Loan Funding VII LLC, Merrill Lynch Credit Products LLC, Ocean Bank, Quadrangle Master Funding Ltd., Riversource Floating Rate Fund, Rockwall CDO LTD., Sequils-Centurion V, Ltd., Silver Oak Capital LLC, Stedman CBNA Loan Funding LLC, The CIT Group/Business Credit Inc., The Foothills Group Inc., Van Kampen Named-Entities, **Defendants***

Steven Schneiderman, Esq.
OFFICE OF THE ASSISTANT UNITED STATES TRUSTEE
51 SW 1 Avenue, Suite 1204
Miami, FL 33130
Telephone: 305.536.7285
Facsimile: 305.536.7360

steven.d.schneiderman@usdoj.gov

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