

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 MOTIONS TO DISMISS
FILED BY THE SENIOR TRANSEASTERN LENDERS AND THE
SUBORDINATED NOTEHOLDERS**

The Senior Transeastern Lenders have filed a motion to dismiss with prejudice the claims asserted against them in Counts VII through XII of the complaint.¹ A separate but related motion to dismiss the same counts has been filed by a subset of the Senior Transeastern Lenders – the Subordinated Noteholders – in their capacity as holders of the New Subordinated Notes.²

¹ Senior Transeastern Lenders' Motion To Dismiss Adversary Complaint And Memorandum Of Law In Support Of Motion (Adv. Pro. D. E. No. 61) (Sept. 3, 2008) (hereafter "STL Mot."). The Senior Transeastern Lenders are identified in footnote 1 on p. 1 of their motion.

² Deutsche Bank Trust Company Americas, Highland CDO Opportunity Fund, Ltd., Highland Floating Rate Advantage Fund, Highland Floating Rate Limited Liability Company, Highland Legacy Limited, Highland Offshore Partners, L.P., Jasper CLO, Ltd., Loan Funding

The claims against the Transeastern Lenders seek to avoid the payment of more than \$421 million in cash to the Senior Transeastern Lenders, and guarantees on the New Subordinated Notes. In exchange for the cash payment and notes, the Transeastern Lenders released claims against TOUSA and Homes LP, but the Conveying Subsidiaries had no obligations to the Transeastern Lenders and received no benefit from the settlement of their claims against TOUSA and Homes LP. The complaint properly alleges claims against the Transeastern Lenders.

Because the motions filed by the Senior Transeastern Lenders and the Subordinated Noteholders rely on substantially the same arguments, we address both motions in this consolidated response. For the reasons stated below, the motions should be denied in all respects.³

VII LLC, and Quadrangle Master Funding Ltd.'s Motion To Dismiss The Adversary Complaint (Adv. Pro. D. E. No. 62) (Sept. 3, 2008) (hereafter "Subordinated Noteholders' Motion").

³ As described herein, the allegations in the original complaint (which is the subject of the instant motions) are more than sufficient to state a claim upon which relief can be granted. However, plaintiff intends to amend its complaint for other reasons and, in that amendment, plaintiff will restate and add detail to its allegations concerning the Transeastern Lenders, consistent with its description of those claims in this memorandum. Pursuant to the Court's prior ruling granting leave to amend the complaint, plaintiff intends to file this amended complaint on or before October 7, 2008.

At the September 17, 2008 hearing on motions to dismiss filed by other parties, counsel for the Senior Transeastern Lenders expressed understandable concern that the Court's decision to grant leave to amend the complaint might affect this motion. In light of those concerns, we informed the Senior Transeastern Lenders' counsel of plaintiff's intent to amend certain of the allegations to add detail pertaining to the claims against the Transeastern Lenders, and outlined the general nature of the anticipated amendments. In response, counsel for the Senior Transeastern Lenders restated their view that the current motion, based on the allegations in the original complaint, should be briefed and decided, notwithstanding plaintiff's intent to amend the complaint.

FACTUAL BACKGROUND⁴

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 massive borrowing from the Transeastern Lenders. Compl. ¶¶ 2, 18. The Transeastern Credit Agreements included a \$450 million Senior Credit Agreement, a \$137.5 million Senior Mezzanine Credit Agreement, and an \$87.5 million Junior Mezzanine Credit Agreement. Compl. ¶ 19. TOUSA and Homes LP were guarantors of the Transeastern Debt, 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.

As part of the settlement, lenders under the Senior Credit Agreement received cash payments exceeding \$421 million. Compl. ¶ 27. Certain of these lenders (the “Senior Transeastern Lenders”) have now filed one of the motions to dismiss addressed in this memorandum. STL Mot. at 1 n.1. Lenders under the Senior Mezzanine Credit Agreement (the “Subordinated Noteholders”) received the New Subordinated Notes (Compl. ¶¶ 25, 28). The Subordinated Noteholders have filed the other motion to dismiss that is addressed herein. Subordinated Noteholders’ Motion at 2. Lenders under the Junior Mezzanine Credit Agreement

⁴ We use the same terminology and definitions here that were used in the complaint.

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, each Conveying Subsidiary was a guarantor and co-borrower under the \$200 million First Lien Term Credit Agreement and the \$300 million Second Lien Term Credit Agreement – two facilities that, by their terms, were to be used to satisfy the obligations of TOUSA and Homes LP to the Transeastern Lenders. 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 provided guarantees in connection with some \$675 million borrowed to finance the Transeastern Joint Venture and thereafter, using money borrowed under the New Credit Agreements, repaid that debt 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, among other things, to avoid transfers under 11 U.S.C. §§ 544, 548, and 550.

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).

I. THE COMPLAINT SUFFICIENTLY STATES CLAIMS AGAINST THE TRANSEASTERN LENDERS

The Transeastern Lenders seek dismissal of all claims against them, asserting, among other things, that the complaint fails to allege that the Conveying Subsidiaries in fact transferred any of their property to the Transeastern Lenders. As we explain in detail below, that assertion does not fairly reckon with the allegations in the complaint. Taken as a whole, and construed in light of the legal standards that govern a motion to dismiss, the complaint alleges two alternative sets of claims – one against the New Lenders and the other against the Transeastern Lenders. It appropriately reserves for trial, following completion of discovery, the determination of which of these alternative claims are valid.

In particular, Counts I through VI of the complaint allege claims against the New Lenders. Those claims rest on the premise that the proceeds of the New Loans never were the property of the Conveying Subsidiaries, even though the Conveying Subsidiaries incurred obligations to repay the loans and granted liens on their property to secure these New Loans. Counts I through VI seek to avoid those obligations and liens, for which the Conveying Subsidiaries did not receive reasonable equivalent value.⁵

⁵ Plaintiff also alleges and will prove at trial that the Conveying Subsidiaries were insolvent at the time of the July 31, 2007 transactions or were rendered insolvent by them. See *infra* at 13.

Counts VII through XII allege claims against the Transeastern Lenders, and rest on the opposite premise, *i.e.*, that the Conveying Subsidiaries *did* own, or had a property interest in, the proceeds of the New Loans. That property was transferred to the Transeastern Lenders, and Counts VII through XII seek to avoid that transfer.

Figures 1 and 2 illustrate the two alternative explanations of the fraudulent transfers that are alleged in the complaint. Figure 1 illustrates fraudulent transfers to the New Lenders, as alleged in Counts I through VI. Under the scenario illustrated there, the proceeds of the New Loans were transferred to TOUSA and/or Homes LP, and TOUSA and/or Homes LP made the Transeastern Transfers to the Transeastern Lenders, in exchange for the release of claims arising from the Transeastern Acquisition and Transeastern Debt. As Figure 1 indicates, the Conveying Subsidiaries did not receive reasonably equivalent value in exchange for the New Claim and Lien Transfers because the proceeds of the New Loans were used by TOUSA and/or Homes LP for their own benefit (or for the benefit of the Transeastern Lenders), not for the benefit of the Conveying Subsidiaries.

Figure 1

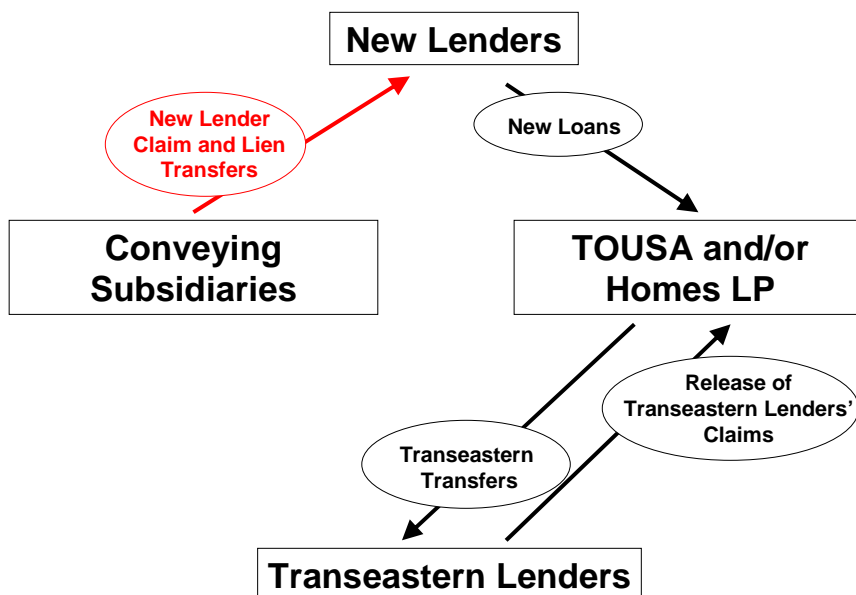
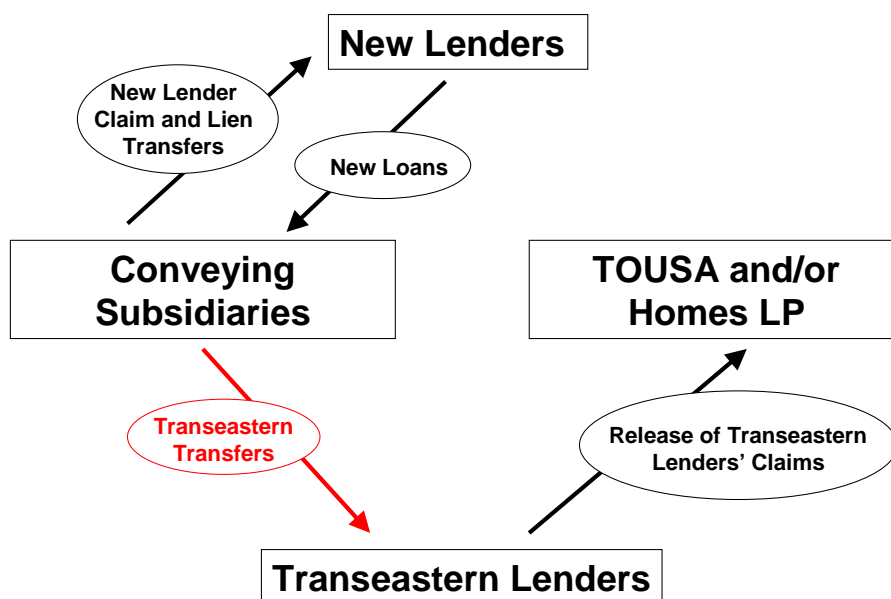


Figure 2 illustrates fraudulent transfers to the Transeastern Lenders, as alleged in Counts VI through XII. Under the scenario illustrated there, the New Loans were transferred to the Conveying Subsidiaries, which then made the Transeastern Transfer to the Transeastern Lenders. As Figure 2 indicates, the Conveying Subsidiaries did not receive reasonably equivalent value in exchange for the Transeastern Transfers; the release of the Transeastern Lenders' claims benefited TOUSA and Homes LP, but not the Conveying Subsidiaries (which were not liable on the Transeastern Debt).

Figure 2



The complaint alleges claims against the New Lenders and the Transeastern Lenders in the alternative because it is not yet clear whether Figure 1 or Figure 2 (or some variant of either) more accurately describes the transactions on July 31, 2007. Plaintiff expects the New Lenders to assert that the New Loans were given to the Conveying Subsidiaries, and that the loans were reasonably equivalent in value to the New Lender Claim and Lien Transfers. Plaintiff expects the Transeastern Lenders to argue that the New Loans were given to TOUSA and Homes LP,

and that those entities received reasonably equivalent value when they used the proceeds to settle their liabilities to the Transeastern Lenders. Perhaps the New Lenders will be right; perhaps the Transeastern Lenders will be right. Those are questions going to the merits of the claims, and cannot be resolved at the pleading stage. What is clear, however, is that the New Lenders and the Transeastern Lenders cannot *both* be right.

That is because of two fundamental facts relating to the Debtors' July 31, 2007 transactions. First, the Transeastern Lenders released hundreds of millions of dollars of claims against TOUSA and Homes LP. In doing so, they conferred a valuable benefit on TOUSA and Homes LP, but *not* on the Conveying Subsidiaries, which had no liability to the Transeastern Lenders. Compl. ¶¶ 2-4, 21-30. Second, the Conveying Subsidiaries incurred hundreds of millions of dollars of new debt, secured by liens on their property, to the New Lenders. Compl. ¶¶ 3, 4, 31-33. The Conveying Subsidiaries were hundreds of millions of dollars "poorer" on account of the July 31, 2007 transactions. Because it is clear that interests in hundreds of millions of dollars of the Conveying Subsidiaries' property were transferred (without reasonably equivalent value in exchange) to *someone*, and because the Conveying Subsidiaries were insolvent when the transactions occurred or were rendered insolvent by them, a fraudulent transfer *must* have occurred.

This is precisely the kind of situation in which it is appropriate to allege claims in the alternative, and Fed. R. Civ. P. 8(d) expressly permits such pleading. Rule 8(d)(2) provides that "[a] party may 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." Rule 8(d)(3) states that "[a] party may state as many separate claims or defenses as it has, *regardless of consistency*" (emphasis added). That is exactly the approach followed here. Rule 8 permits the plaintiff to plead claims against

the New Lenders and the Transeastern Lenders “alternatively or hypothetically” and “regardless of consistency.” It would be inappropriate to dismiss either set of claims on the pleadings, because the question of which premise is correct will rest on facts that can be determined only through discovery,⁶ and on the legal conclusions that are drawn from those facts.⁷

What matters, in deciding a motion to dismiss is whether, assuming the truth of the allegations – even if they are pleaded in the alternative – the complaint states a claim on which relief may be granted. The claims against the Transeastern Lenders meet that standard.

A. The Complaint Sufficiently Alleges A Transfer Of The Conveying Subsidiaries’ Property

The principal arguments of the Senior Transeastern Lenders and the Subordinated Noteholders are that the complaint should be dismissed for failing to allege a transfer (1) by the Conveying Subsidiaries (2) of property that belonged to them. STL Mot. at 9-13; Subordinated Noteholders’ Motion at 4-6. Both arguments are wrong.

The complaint alleges that the Conveying Subsidiaries were co-borrowers and guarantors of the New Loans, that they were jointly and severally liable for those debts, and that their assets were pledged as security for the loans. Compl. ¶ 33. It also alleges that the New Debt credit agreements expressly required that the proceeds of the New Loans would be paid to the Transeastern Lenders. *Ibid.* It alleges that the payments to the Transeastern Lenders

⁶ For example, plaintiff was constrained to file its complaint before it received access to even the most basic information from the Debtors or the defendants identifying the accounts into which the New Loans were transferred or from which the Transeastern Transfers were drawn.

⁷ For example, the Court may need to decide whether it is appropriate to “collapse” the initial lending transaction with the ultimate use of the loan to determine whether the debtors have received fair value. See, e.g., *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35-36 (2d Cir. 1993); *Lippi v. City Bank*, 955 F.2d 599, 612 (9th Cir. 1992); *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206, 212-13 (3d Cir. 1990). That judgment often turns on “the knowledge

“diminished the value of each of the Conveying Subsidiaries’ estates.” *Id.* at ¶¶ 74, 80, 86, 92, 98, 105. These allegations are more than sufficient to state a claim that the Conveying Subsidiaries owned, or had an interest in, money that was borrowed from the New Lenders and transferred to the Transeastern Lenders. To be sure, the complaint does not use the words “property of the Conveying Subsidiaries” to describe the property in the Transeastern Transfer; but those precise words have no talismanic significance, and the complaint’s allegations permit a reasonable inference – perhaps the *only* inference that would be reasonable – that the Conveying Subsidiaries owned or had an interest in the property transferred to the Transeastern Lenders. In ruling on a motion to dismiss, the Court must ““accept all reasonable inferences”” from the complaint’s allegations. *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (quoting *Omar v. Lindsey*, 334 F.3d 1246, 1247 (11th Cir. 2003)).

The complaint also alleges that the Conveying Subsidiaries “entered into” the New Debt credit agreements and that those agreements expressly required payment of proceeds from the New Loans to the Transeastern Lenders. Compl. ¶¶ 31, 33. These allegations suffice even under the erroneous conceptions of “property” and “transferor” advanced by the movants; when they signed the New Debt agreements, the Conveying Subsidiaries acted to “designate the party receiving the property” and exercised “the power to disburse the property to that party.” See STL Mot. at 12. The movants’ contrary contention ignores those factual allegations in the complaint.⁸

of the defendants of the structure of the entire transaction” and “whether its components were part of a single scheme.” *In re Best Prods. Co.*, 157 B.R. 222, 229 (Bankr. S.D.N.Y. 1993).

⁸ These allegations will be set forth in greater detail in the amended complaint that will be filed shortly. See n. 3, *supra*.

The Transeastern Lenders' contention is also wrong for another reason; it rests on conceptions of "transfer" and "property" that are inconsistent with the bankruptcy code. Relying on those misconceptions, the movants argue that because the complaint alleges that *TOUSA* caused the proceeds of the New Loans to be used to extinguish its liabilities to the Transeastern Lenders, the complaint fails to aver that the *Conveying Subsidiaries* were transferors or owners of the property. STL Mot. at 10-13.

The plain language of the statute defeats that argument. Transfer 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*" and encompasses not only the transfer of property of a debtor, but also the transfer of any "*interest of the debtor in property*." 11 U.S.C. § 548(a)(1) (emphasis added). These definitions leave no doubt that a debtor may own property even if the debtor has no power to prevent some other party from transferring the property. They also make it clear that "transferor" must be understood as the party whose property was transferred and *not* (as the movants would have it) the party that directed or caused the transfer. Finally, the statutory definitions make it clear that a debtor's *interest* in property may be fraudulently transferred, even if that interest does not confer control of the property itself. Under these definitions, there is no inconsistency in saying that the Conveying Subsidiaries were the (involuntary) transferors to the Transeastern Lenders and alleging, at the same time, that their parent "TOUSA . . . used the proceeds . . . to satisfy the Transeastern Debt" or that "TOUSA . . . repa[id] a debt" to the Transeastern Lenders. Compl. ¶¶ 1, 3. The motion's contention (STL Mot. at 10) that one is inconsistent with other ignores the

statutory definitions. (In any event, inconsistency would not provide a reason to dismiss the claims. As we have explained, it is entirely permissible to plead alternative – and contradictory – claims.)

The remaining elements of a fraudulent transfer have also been sufficiently pleaded. Indeed, the complaint could not be more specific about the property that was transferred to the Transeastern Lenders. It defines and describes the Transeastern Transfers (Compl. ¶ 4) and alleges that those transfers constituted the fraudulent transfers that are the subject of Counts VII through XII. See, *e.g.*, Compl. ¶¶ 74, 80, 86, 92, 98, 105. It is specific about the identity of the transferees; it alleges that the property was transferred to the Transeastern Transferees, and identifies by name the Senior Transeastern Lenders and Subordinated Noteholders that have filed the motions to dismiss. Compl. ¶ 16 & n.2. It alleges, down to the penny, the value of the property that was transferred to the Senior Transeastern Lenders. Compl. ¶ 27-29. It alleges the precise date on which the transfer occurred and identifies the agreements that reflect the transfer. Compl. ¶¶ 25-30. The Transeastern Lenders have more than sufficient notice of the claims that are asserted against them.

B. The Complaint Sufficiently Alleges That The Transeastern Lenders Are Liable As Subsequent Transferees

As movants acknowledge, the complaint alleges that the Transeastern Lenders knew or should have known that the Conveying Subsidiaries did not receive reasonably equivalent value and that they were insolvent or were rendered insolvent by the July 31, 2007 transactions. Compl. ¶¶ 34, 35. It also alleges that the Transeastern Lenders are initial, immediate, or mediate transferees of the Transeastern Transfers within the meaning of 11 U.S.C. § 550(a). Compl. ¶ 16. Movants argue, however, that the complaint fails to state a claim for subsequent transferee

liability because it alleges only one transaction involving the Conveying Subsidiaries, *i.e.*, “the incurrence by the Conveying Subsidiaries of obligations to the New Lenders.” STL Mot. at 14.

This argument apparently rests on the same false premise as the first argument, namely, the premise that the complaint does not sufficiently allege a transfer of the Conveying Subsidiaries’ property. For the reasons stated above, that is wrong. Once that false premise is cleared away, there is no basis for the movants’ claim. The complaint alleges the Transeastern Transfers and, in the event that the Transeastern Transferees are ultimately deemed to be subsequent transferees, specifically identifies other parties who may have been initial transferees. See, *e.g.*, Compl. ¶ 27 (initial payment to CIT).

C. The Complaint Alleges Sufficient Facts

Next, movants argue that the complaint merely “repeat[s] the language of the applicable statutes” instead of alleging “facts.” The only examples they can offer are the allegations that the Conveying Subsidiaries were insolvent or were rendered insolvent under one or more of the statutory definitions of insolvency. STL Mot. at 15.

Movants are wrong about what the rules require and about what the complaint alleges. “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).

In any event, the allegations of insolvency *are* factual allegations, even if they are allegations that use the language of the statute, because the statutory language describes the facts that must be shown to establish a fraudulent transfer. Those allegations invoke well established standards that have been defined and applied in an untold number of cases. Defendants' protestations notwithstanding, neither "guesswork" nor "conjecture" is required to understand the allegations of insolvency.

D. The Court Should Not Bar Any Amendment Of The Complaint

Finally, the Senior Transeastern Lenders ask the Court to decide, now, that plaintiff may not amend Counts VI through XII of the complaint because any amendment would be futile. That request puts the cart before the horse, and the verdict before the trial. Cf. Lewis Carroll, ALICE IN WONDERLAND ("No, No!" said the Queen. "Sentence first – verdict afterwards.") It is customary for the Court to receive a motion before denying it. The Court usually needs to know what the movant is requesting, and why, before deciding to grant or deny the motion, and most judges have ample work deciding real motions, without deciding hypothetical ones. Plaintiff has not moved to amend the complaint, and there is no need to decide, in the abstract, that a hypothetical amendment would be futile. That is especially true when the claim of futility is based merely on the defendants' untested factual assertions. See, *e.g.*, STL Mot. at 17 ("The payment of antecedent debt by EH/Transeastern, LLC is reasonably equivalent value for any transfer it may be alleged to have made to the Senior Transeastern Lenders."); *id.* at 19 ("[T]he Senior Transeastern Lenders would therefore have a right of recoupment . . . for any damages arising out of the same transaction for which the Committee seeks recovery."). At the pleading stage, it is the plaintiff's factual allegations that must be assumed true, not the defendant's proclamation that there is no factual basis for liability.

II. THE COMPLAINT SUFFICIENTLY STATES CLAIMS TO AVOID THE CONVEYING SUBSIDIARIES' GUARANTEES OF THE NEW SUBORDINATED NOTES, BUT DOES NOT SEEK TO AVOID THE NOTES

The Subordinated Noteholders acknowledge that the complaint alleges (Compl. ¶ 4 & n.1) that the Conveying Subsidiaries “incurred obligations” as guarantors of the New Subordinated Notes. Subordinated Noteholders’ Motion at 4-5. They contend, however, that “it is unclear whether the Complaint seeks to avoid just those obligations . . . or the New Subordinated Notes themselves.” *Id.* at 5.

To dispel any confusion, plaintiff confirms that the complaint seeks to avoid only the Conveying Subsidiaries’ guarantees on the New Subordinated Notes, and does not seek to avoid the notes themselves. As the motion correctly states, the notes were issued by TOUSA, not by the Conveying Subsidiaries on whose behalf this action is brought.

The Subordinated Noteholders also challenge the adequacy of the claims to avoid the guarantees on the notes but, with respect to that aspect of their motion, they merely adopt the arguments advanced by the Senior Transeastern Lenders in their motion. For reasons already explained, those arguments are without merit.

CONCLUSION

The Court should deny the motions to dismiss filed by the Senior Transeastern Lenders and the Subordinated Noteholders.

Dated: September 24, 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]

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2008 a true and correct copy of the foregoing document has been sent via email and first-class, U.S. mail, postage prepaid to the following:

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