IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
RC SOONER HOLDINGS, LLC, *et al.*,	:	Case No. 10-10528 (BLS)
Debtors.	:	(Jointly Administered)
RC SOONER HOLDINGS, LLC, *et al.* and OLD SOUTH APARTMENTS, LLC,	:	
Plaintiffs,	:	
v.	:	Adv. Pro. No. 10-50723 (BLS)
REMYCO., INC.; *et al.*,	:	
Defendants.	:	

PLAINTIFFS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO THE REMY DEFENDANTS' AND SPERRY'S MOTIONS TO DISMISS

Dated: May 20, 2010

Tobey M. Daluz, Esquire (No. 3939)
Sean J. Bellew, Esquire (No. 4072)
Christopher S. Chow, Esquire (No. 4172)
David A. Felice, Esquire (No. 4090)
BALLARD SPAHR LLP
919 N. Market Street, 12th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
Email: daluzt@ballardspahr.com
bellews@ballardspahr.com
chowc@ballardspahr.com
Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

Federal Rules

Other Authorities

NATURE AND STAGE OF PROCEEDINGS

The Debtors[1] filed voluntary petitions under Chapter 11 of the Bankruptcy Code on February, 22, 2010. The cases are jointly administered. The Debtors continue to operate as debtors-in-possession. No official committee of unsecured creditors has been formed. On February 24, 2010, the Plaintiffs commenced this Adversary Proceeding. On March 13, 2010, the Plaintiffs filed an Amended Complaint against: (i) Home Realty Ventures, Inc., Bradford Creek Properties, LLC, Landrun Design and Development Co., Inc., Diamond Pointe, LLC, Bluechip Holdings LP, (collectively "Selling Defendants") for breach of contract (Count I), fraud (Count II), civil conspiracy (Count III), Racketeering Influences Corrupt Organization violation (Count IV) and fraudulent transfer (Count V); (ii) Tim L. Remy, Tim J. Remy, Sherry E. Remy, L. Leon Remy, Robin E. Remy, Mona Remy Burke, Sherry E. Remy Revocable Trust DTD July 14, 1997 and L. Leon Remy Revocable Trust DTD July 14, 1997, RemyCo., Inc., The Remy Companies, Inc (collectively "Remys " and together with the Selling Defendants, the "Remy Defendants") for fraud (Count II), civil conspiracy (Count III), Racketeering Influences Corrupt Organization violation (Count IV), and fraudulent transfer (Count V); and (iii) against Sperry Van Ness/William T. Strange Associates, Inc. ("Sperry") for fraud (Count II), civil conspiracy (Count III), and fraudulent transfer (Count V). (D.I. 5) The Amended Complaint added the claims for rescission, rescissionary damages (under Count I), and fraudulent transfer (Count V). The Remy Defendants filed their Motion to Dismiss and supporting brief (the "Remy Brief") on

[1] The Debtors are: RC Sooner Holdings, LLC; RC Brixton Square Owner, LLC; RC Cedar Crest Owner, LLC; RC Fulton Plaza Owner, LLC; RC Magnolia Owner, LLC; RC Pomeroy Park Owner, LLC; RC Salida Owner, LLC; RC Savannah South Owner, LLC; RC Southern Hills Owner, LLC; Brixton Square Apartments, LLC; CC Apartments, LLC; Fulton Plaza Apartments, LLC; Magnolia Manor Apartments, LLC; Pomeroy Park Apartments, LLC; Salida Apartments, LLC; Savannah South Apartments, LLC; and Southern Hills Villa Apartments, LLC. Non-debtor Old South Apartments, LLC is also a plaintiff in this adversary.

April 15, 2010. (D.I. 15, 16). Sperry filed their Motion to Dismiss and supporting brief (the "Sperry Brief") on April 23, 2010 (D.I. 19, 20). This is Plaintiffs' combined answering brief in opposition to Defendants' motions to dismiss.

SUMMARY OF THE ARGUMENT

1. Plaintiffs have stated a viable claim for fraud because the Amended Complaint specifically alleges materially false representations or material omissions and injects the requisite precision required to enable the Defendants to answer and defend. In addition, the Economic Loss Doctrine is not applicable here because it applies to products liability cases and, even assuming *arguendo* it was applicable, it is not dispositive on a motion to dismiss.

2. Plaintiffs' civil conspiracy claim survives Defendants' motions to dismiss because, although fraud must be pleaded with particularity under Rule 9, conspiracy allegations need only comply with Rule 8(a). Plaintiffs have adequately alleged the requisite elements, including composition of the conspiracy, its objectives and Defendants' roles in the conspiracy.

3. Plaintiffs meet the pleading standards for fraudulent transfers under 11 U.S.C. §§ 548 and 550 by alleging a transfer in which the Debtors did not receive reasonably equivalent value, and which resulted in the Debtors becoming insolvent. Specifically, Debtors transferred more than $1.1 million in cash to various Defendants and assumed mortgage liability in excess of $28 million for interests in entities that were effectively worthless based on Defendants' prior conduct and default. Furthermore, Sperry, as an initial transferee who participated with knowledge of the fraud, is not entitled to the protections of 11 U.S.C. § 550.

STATEMENT OF FACTS

At the time this proceeding was first commenced, the Apartment LLCs[2] collectively held, operated and maintained nine separate apartment complexes comprising approximately 850 multi-family residential units for lease in Tulsa, Oklahoma. (Amended Complaint at ¶ 21 (hereinafter referred to as "A. Cmpt.")). The Remys, as owners and managers of the Selling Defendants and the Apartment LLCs, hired Sperry to act as a broker to market the Apartments in hopes of finding a purchaser. (*Id.* at ¶ 20). The Remys, through Sperry (through its agent Strange), commenced marketing the Apartments for sale. (*Id.* at ¶ 31). The Remys and Sperry started negotiations with Daniel Gordon ("Gordon"), who would later become manager of Sooner Holdings, the sole member of the RC LLCs. (*Id.* at ¶ 31). Negotiations between the Remys, Sperry and Sooner Holdings continued, and the Remys and Sooner Holdings resolved to complete the purchase of the Apartments by having Sooner Holdings form the RC LLCs and acquire all of the membership interests in the Apartment LLCs from the Selling Defendants. (*Id.* at ¶ 32).

The Remys and Sperry knew and understood that the information and documentation they were providing to Gordon and Sooner Holdings and later, RC LLCs, was for the purpose of enabling Sooner Holdings and later RC LLCs to evaluate the Apartments, the Loans and the Mortgages to determine whether to proceed with the transaction. (*Id.* at ¶¶ 33).

The Selling Defendants, the Remys, and Sperry acted collectively as agents and authorized representatives for each other. (*Id.* at ¶¶ 19, 20). Each of the Remy Defendants owned, was employed by, or participated in the events subject to the Amended Complaint. (*Id.*

[2] Capitalized terms herein have the same meaning as defined in the Amended Complaint.

at ¶¶ 19–30). The Remy Defendants acted as authorized agents and representative for each other during the pre-sale default of the Mortgages, the marketing of the Apartment LLCs, the sale of the Apartment LLCs, the execution of the Forbearance Agreements, and the concealment of material facts from both the Plaintiffs and Fannie Mae. (*Id.* at ¶¶ 19, 31-49).

Throughout the negotiations between the parties, it was never disclosed by the Selling Defendants, the Remys or Sperry that any one or more of the Loans or Mortgages were in default or that there was any threat of litigation. (*Id.* at ¶¶ 33). The Remys and Sperry knowingly provided false documentation and exchanged communications that included intentional material misrepresentations about the financial status of the Apartment LLCs and the accompanying Mortgages. (*Id.* at ¶¶ 31–33, 43, 44).

The Remys, the Selling Defendants and Sperry negotiated a transaction for the purchase of the Apartment LLCs' interests predicated upon intentional misrepresentations. (*Id.* at ¶¶ 32–34, 43). Under the Agreements, the RC LLCs were obligated to pay – by assumption of approximately $28,581,661.00 in Loans and Mortgages on the Apartments and cash payout to the Selling Defendants, Sperry and the closing agent of approximately $1,196,000.00 – total consideration of $29,772,661.00 for the purchase of the interests in the Apartment LLCs. (*Id.* at ¶¶ 36). Sooner Holdings caused the cash payout of approximately $1,196,000.00 to be delivered to the Selling Defendants, Sperry and the closing agent. (*Id.* at ¶¶ 37).

The Agreements the parties executed at Closing contained materially false Warranties and Representations. (*Id.* at ¶¶ 35–40, 44). All the while, the Selling Defendants, the Remys and Sperry knew the representations were false. (*Id.* at ¶¶ 40, 43, 45, 48, 50, 53–55, 63, 64, 67, 69). In fact, the Mortgages were in default. (*Id.* at ¶¶ 33, 43). The purpose of the coordinated

conspiracy of intentional misrepresentation was to defraud the Plaintiffs and conceal Defendants' unlawful activities from Plaintiffs and Fannie Mae. (*Id.* at ¶¶ 45, 46, 48, 53, 56).

Shortly after the Closing on the Agreements, the Forbearance Agreements were executed to further delay and mask Defendants' unlawful activities. (*Id.* at ¶¶ 45–48). The Forbearance Agreements were executed on behalf of the Selling Defendants in an attempt to change the financing terms of the Fannie Mae Mortgages, purportedly on behalf of the transferred Apartment LLCs. (*Id.*). The Selling Defendants, the Remys and Sperry failed to notify and actively concealed the transaction from Fannie Mae to further conceal the fact that the loans were in default prior to Closing. (*Id.*).

The Selling Defendants, the Remys and Sperry acted in a coordinated and orchestrated pattern, conspiring to defraud the Plaintiffs. (*Id.* at ¶¶ 31–33, 35, 38, 40, 43–45, 48, 53–56, 63, 64, 66–78). The intentional misrepresentation of the Apartment LLCs' finances, the intentional material omissions regarding the default of the Mortgages, the intentional misrepresentation in the Agreements, the intentional failure to notify Fannie Mae, and the unauthorized execution of the Forbearance Agreements constitute a pattern of immoral and illegal business practices. (*Id.*). The continuous pattern of deceit through repeated lies and obfuscation is, reprehensibly, a normal business practice of these Defendants. (*Id.*).

ARGUMENT

The Defendants argue that Counts Two through Five of the Amended Complaint fail to state claims upon which relief can be granted. Except in one instance, the Amended Complaint adequately pleads the required elements of each claim to survive the motions to dismiss.

I. The Rule 12(b)(6) Standard

In considering a motion to dismiss under Rule 12(b)(6), the Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). This rule does not compel a litigant to supply "detailed factual allegations" in support of his claims for relief, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), "but it demands more than an unadorned, the-defendant–unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). As the Supreme Court recently explained: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly*, 550 U.S. at 570. Plaintiffs have exceeded this burden.

II. Count II Properly States a Claim for Fraud

The Remy Defendants and Sperry contend that Count II should be dismissed because it is not pleaded with the requisite specificity. In addition, the Remy Defendants contend that Count II should be dismissed because the claim is barred by the Economic Loss Doctrine. Neither argument withstands scrutiny.

A. Plaintiffs Have Adequately Alleged Actionable Fraud

To state a claim for fraud under Oklahoma law, a plaintiff must allege: (1) that the defendant made a material representation; (2) that the misrepresentation was false; (3) that the defendant knew it was false when made, or made it recklessly; (4) that he made it with the

intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff thereby suffered injury. *Occidental Hoteles Mgt., S.L. v. Hargrave Arts*, LLC, 2010 WL 1416718 (N.D. Okla. 2010) (citing *Southwestern Bell Tel. Co. v. Brown*, 519 P.2d 491, 495 (Okla. 1974)).

The heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply to such a claim, requiring that: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To meet this requirement, "the plaintiff must plead or allege the date, time and place **or** otherwise inject precision **or** some measure of substantiation into a fraud allegation." *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d. Cir. 2007) (emphasis added).

Plaintiffs have satisfied this standard by alleging each element of the offense with precision. The Amended Complaint alleges with particularity and precision, facts sufficient to place the Defendants on notice as to the material misrepresentations at issue. First, the Amended Complaint alleges that the marketing information communicated to the Plaintiffs stating that none of the Loans, Mortgages, Apartments or Apartment LLC's were in default was false. (A. Cmpt. at ¶¶ 31–33, 43, 44, 48, 53). Second, the Amended Complaint alleges that the Representation and Warranties contained in the Limited Liability Purchase Agreements were false and identifies the exact documents and representations alleged to be false. (*Id.* at ¶¶ 34, 35, 38, 43, 44, 53). Third, the execution of the Forbearance Agreements is a precise factual allegation supporting the assertion that the Remy Defendants knew the information provided to the Plaintiffs was false. (*Id.* at ¶¶ 43– 49). Fourth, the Amended Complaint states that the Plaintiffs and Gordon relied upon the marketing information and the Representation and Warranties. (*Id.* at ¶¶ 39, 58). Fifth, the Amended Complaint further alleges that the Defendants

Remys intended for the information to be relied upon. (*Id.* ¶¶ 31, 33, 38, 56). Finally, the Amended Complaint alleges that the Plaintiffs relied upon the material misrepresentations and were damaged by doing so. (*Id.* at ¶¶ 58, 60).

Despite this precision, the Defendants assert that the fraud claim must be dismissed because the Amended Complaint lumps all the Defendants together rather than stating what each defendant did separately. However, the case the Remy Defendants cite in support of this contention is inapposite. In *Lillard v. Stockton,* a securities fraud case, the court found that plaintiffs had failed to allege specific misrepresentations, why those misrepresentations were material and who had made them. *Lillard v. Stockton*, 267 F. Supp. 2d 1081 (N.D. Okla. 2003). In contrast, here Plaintiffs allege the specific misrepresentations at issue and that the various Defendants, who were acting in concert with one another, as authorized representatives and agents of each other, made the specific, material misrepresentations. (A. Cmpt. at ¶ 19). When taken as true, the allegations that the Defendants acted collectively as representatives and agents of each other, along with the specific conduct of each agent and representative acting in a coordinated manner on each other's behalf demonstrates a collective undertaking. In addition, the Amended Complaint alleges that the Defendants coordinated the execution of the Agreements and, surreptitiously, the Forbearance Agreements. (*Id.* at ¶¶35, 45). Such allegations represent precise factual support suggesting that the Defendants acted both in concert and as agents and representatives for one another.

The other cases cited by the Defendants also are inapposite. In *Frederico*, the court held that the pleadings were insufficient because they did not allege a particular false statement made by the defendant. *Frederico*, 507 F.3d at 200-201. In contrast, here the Amended Complaint alleges that the marketing materials and the Representations and Warranties were materially

false,stating specifically that the mortgages were not in default when in fact the mortgages were in default. (A. Cmpt. at ¶¶ 43-45). In *Occidental*, the court dismissed the complaint after finding no reliance was alleged. *Occidental*, 2010 WL 1416718 at *3. Here, the Amended Complaint not only alleges that the Plaintiffs relied on the Defendants' misrepresentations, but further states that the negotiated Warranties and Representations were part of the bargained for exchange in the transaction. (A. Cmpt. at ¶¶ 35, 38, 50, 58). Therefore, as described above, the Plaintiffs have adequately pleaded fraud.

B. Count II is Not Barred by the Economic Loss Doctrine

The Economic Loss Doctrine does not apply to the facts of this case, and even if it did, under Oklahoma law, the doctrine would not bar tort claims as a matter of law. Defendants admit that no Oklahoma case can be cited in which the Economic Loss Doctrine applies to the sale of Limited Liability Company membership interests. (Remy Brief at 13). All of the Oklahoma cases cited apply the Economic Loss Doctrine in the context of products liability cases. The genesis of the Economic Loss Doctrine comes from product liability cases in which parties attempt to circumvent the limited remedies available by contract or supplied by the Uniform Commercial Code by asserting tort causes of action for simple breaches of contract. *See* R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789 (2000). States have applied, inconsistently, the Economic Loss Doctrine nearly always in cases involving a products-liability type analysis. *See generally id.* The cases cited by the Remy Defendants involve either (i) products liability cases applying the Economic Loss Doctrine or (ii) non-controlling authority in states with more expansive applications of the doctrine. (Remy Brief at 12–15).

In addition, the non-controlling cases cited by the Remy Defendants fail to support the application of the Economic Loss Doctrine here. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 219 (Wis. 2005) (recognizing the fraud exception to the Economic Loss Doctrine in a sale of goods case); *See Freedom Props., L.P. v. Landsdale*, C.A. No. 06-5469, 2007 WL 2254422 (E.D. Pa. 2007) (holding that a breach of performance under a lease agreement cannot be the basis to maintain a claim for fraud under the Economic Loss Doctrine). As one court explained:

> [T]he [Economic Loss Doctrine] was primarily intended to limit the action in the product liability context, and its application should be generally limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product-liability type analysis.

Indem. Ins. Co. v. Am. Aviation, Inc., 891 So. 2d 532, 542 (Fla. 2004) (recognizing limits to the Economic Loss Doctrine).

Under Oklahoma law, even in a products liability case the Economic Loss Doctrine will not bar tort claims as a matter of law on a motion to dismiss. *See Cimarron Trailers, Inc. v. Amerimax Building Prods., Inc.*, 2005 WL 3242264 (N.D. Okla. 2005) (refusing to hold Economic Loss Doctrine barred tort claims as a matter of law in products liability case). Thus Defendants' reliance on the doctrine is misplaced here.

III. Plaintiffs Have Met The Pleading Standards For Civil Conspiracy

Defendants argue that the Plaintiffs' conspiracy claim is insufficiently pleaded because it does not state the necessary elements and fails to "allege any conspiracy with the particularity required by Rule 9(b)." (Motion at 17.) These arguments misstate both the law and the facts of this case.

Under Oklahoma law, a civil conspiracy is "a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means" and an underlying unlawful or overt act. *Roberson v. PaineWebber, Inc.*, 998 P.2d 193, 201 (Okla. 1999). Here, Plaintiffs have properly alleged the elements of civil conspiracy.

The Remy Defendants baldly assert that the civil conspiracy claim must be pled in accordance with the heightened pleading requirements of Fed. R. Civ. P. 9(b). While the underlying fraud must be, and, as discussed *infra*, has been pleaded with particularity, "Rule 8(a) governs the sufficiency of pleadings alleging conspiracy." *China Resources Products (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 788 F. Supp. 815, 819- 20 (D. Del. 1992) (citing *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir.1989)). Civil conspiracy has no "particularized pleading requirement." *Eames v. Nationwide Mut. Ins. Co.*, 412 F. Supp. 2d 431, 438-39 (D. Del. 2006). Instead, a plaintiff is simply required to include allegations of specific facts. *See Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385, 1400 (D. Del. 1984) (citing *Black & Yates, Inc. v. Mahogany Ass'n*, 129 F.2d 227 (3d Cir. 1942)). Here, Plaintiffs allege both specific facts and cite particular misconduct on the part of the Defendants.

Specifically, the object to be accomplished was the sale of the Apartment LLCs. (A. Cmpt. at ¶ 64). Plaintiffs also allege a meeting of the minds. (*Id.* at ¶ 63). The meeting of the minds is supported throughout the Amended Complaint with the following allegations: (i) the Remys acted as agents and authorized representatives of each other (*Id.* at ¶ 19); (ii) that Sperry is the agent and representative of the Remys (*Id.* at ¶ 20); and (iii) the Selling Defendants, the Remys and Sperry collectively engaged in fraudulent conduct (*Id.* at ¶¶ 21– 49, 53-56). Thus, Plaintiffs have properly stated a claim for civil conspiracy under Rule 8(a).

IV. The RICO Violation

The Remy Defendants contend that Plaintiffs have failed to adequately allege a RICO claim. Rather than address their arguments at this time, Plaintiffs withdraw the RICO claim, Count Four, without prejudice to refiling it after discovery has been conducted.

V. Plaintiffs Have Properly Pleaded a Fraudulent Transfer

The Defendants claim that Plaintiffs have failed to support their claim of fraudulent conveyance with any facts. Sperry additionally argues that they were not an initial transferee. In the alternative, they contend that even if they are deemed to be an initial transferee, they provided fair market value for their services. None of these argument has merit.

A. Plaintiffs Have Pleaded Sufficient Facts to Support their Claim

A claim for fraudulent transfer pursuant to 11 U.S.C. § 548 allows a trustee in bankruptcy to "avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor . . . received less than a reasonably equivalent value in exchange for such transfer or obligation;" and, *inter alia*, the debtor (1) "was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (2) was engaged in business or a transaction, or was about to engage in a business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;" or (3) "intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured." 11 U.S.C. § 548; *see also, In re Fedders North Amer., Inc.*, 405 B.R. 527, 546 (Bankr. D. Del. 2009) (citing *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 210 (3d Cir. 2006)). In making a determination whether a debtor received reasonably equivalent value, "a court looks to the 'totality of the circumstances' of the transfer . . . ." *Id.* at 547.

Neither the Remy Defendants nor Sperry contend that Plaintiffs have failed to properly plead a claim for fraudulent transfer. Nor could they as Plaintiffs allege each of the elements of a claim pursuant to 11 U.S.C. § 548. (*see* A. Cmpt. at ¶¶ 79-83.)

Instead, the Defendants argue that Plaintiffs fail to support the allegations in the Amended Complaint with any facts. (Remy Brief at 24; Sperry Brief at 12). A plain reading of the Amended Complaint negates this claim. Specifically, Plaintiffs allege that the Apartment LLCs were in default on their mortgage obligations prior to the transfers. (A. Cmpt. at ¶ 43). The Amended Complaint gives details of each separate transfer and states that the Plaintiffs "transferred cash and incurred mortgage debt obligations in the amount of $29,772,661.00. (*Id.* at ¶¶35, 36, 79). Plaintiffs further allege that, unbeknownst to them, certain of the Defendants had entered into agreements obligating the affected Apartment LLCs to pay forebearance payments. (*Id.* at ¶45). These facts, taken as true, show that the transferring Debtors received less than equivalent value while at the same time incurring debts beyond the transferring Debtors' ability to pay. (*Id.* at ¶¶ 81, 82). Plaintiffs have adequately pleaded their claim and supported it with the facts necessary to withstand a motion to dismiss. The sufficiency of proof in meeting Plaintiffs' ultimate burden of persuasion is not at issue in this motion.

B. Sperry is Not Entitled to the Protections of Section 550(b)

Sperry claims that Plaintiffs cannot recover from it because it was not the initial transferee, and that even if it is deemed to be an initial transferee, "it would nonetheless be entitled to retain its commissions because they constitute fair market value for the services it provided." (Sperry Brief at 13). Neither the facts nor the law support these arguments.

Under 11 U.S.C. § 550(a)(1), "the trustee may recover, for the benefit of the estate, the property transferred" from an "initial transferee" or "any immediate or mediate transferee of

such initial transferee." However, the trustee may not recover from any immediate or mediate transferee if that transferee "takes for value" and "in good faith." 11 U.S.C. § 550(b)(1).

While the Bankruptcy Code does not define "initial transferee" or "immediate or mediate transferee," the Fourth, Fifth, Sixth, and Tenth Circuits have recognized that the minimum requirement to be a transferee, as opposed to a mere conduit, is dominion over or the right to use the money for one's own purposes. *See Collier on Bankruptcy*, 15th ed., ¶ 550.02[4][a] fn.47 (citing *Bowers v. Atlanta Motor Speedway (In re Southeast Hotel Properties L.P.)*, 99 F.3d 151 (4th Cir. 1996); *Rupp v. Markgraf*, 95 F.3d 936, 939 (10th Cir. 1996); *In re Coutee*, 984 F.2d 138 (5th Cir. 1993); and *First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 714, 721–22 (6th Cir. 1992)). The transferee/conduit distinction under § 550 has also been recognized in Delaware and New York Bankruptcy Courts. *In re Mervyn's Holdings, LLC*, Adv. Proc. No. 08-51402(KG), 2010 WL 908490 (Bankr. D. Del. 2010); *Gropper v. Unitrac, S.A. (In re Fabric Buys of Jericho, Inc.)*, 33 B.R. 334 (Bankr. S.D.N.Y. 1983).

Here, Plaintiffs have alleged facts showing that Sperry was an initial transferee. Plaintiffs alleged that Sperry received cash funds at the Closing as is customary for real estate transactions. (A. Cmpt. at ¶¶ 36, 37). The transfers went through a conduit - the closing agents who had no right to use the funds - directly to Sperry. The transfer of money to Sperry did not happen through the Remys, rather Plaintiffs alleged a straight line from themselves through the conduit to Sperry. (*Id.*). Regardless of which party has a duty to pay a real estate broker's commission or which column the charge appears on a settlement sheet, under § 550, Sperry is an "initial transferee." As such, Sperry is not entitled to the good-faith protections of § 550(b).

Moreover, even if Sperry were considered an immediate or mediate transferee, Plaintiffs would still be entitled to recover against it because the well pleaded allegations of fraud and

conspiracy in Counts Two and Three as discussed above, when taken as true, support the premise that Sperry did not take in "good faith" as required by § 550(b)(1). Plaintiffs alleged that Sperry was the broker and agent shepherding this fraudulent transaction to closing. The allegations that Sperry is a broker suggest that Sperry possesses some expertise in the field of real estate. (A. Cmpt. at ¶ 20, 31). Sperry, as the agent, was the fiduciary and confidant of the Remys. (Id.). Therefore, the Amended Complaint alleges, suggests, and supports the premise that, at the very least, Sperry failed to act in good faith under § 550(b)(1).

Sperry's contention that it provided fair market value for the services it provided is irrelevant here. Where, as alleged here, a transferee possesses knowledge of facts that suggest a transfer may be fraudulent, and further inquiry would reveal facts sufficient to alert him that the property is recoverable, he cannot sit on his heels, thereby preventing a finding that he has knowledge. In such a situation, the transferee is held to have knowledge of the voidability of the transfer. *Brown v. Third Nat'l Bank (In re Sherman)*, 67 F.3d 1348, 1357 (8th Cir. 1995); *see Collier on Bankruptcy*, 15th ed., ¶ 550.03[2]–[3]. Thus, even assuming, *arguendo*, that Sperry's conduct did not rise to the level of fraud, the mere knowledge of facts that if investigated would have revealed a fraud defeats Sperry's claim of good faith under § 550(b)(1).

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Defendants' motions to dismiss should be denied.

Dated: May 20, 2010
Wilmington, Delaware

Respectfully Submitted,

Ballard Spahr LLP

By: */s/ Sean J. Bellew*

Tobey M. Daluz, Esquire (No. 3939)
Sean J. Bellew, Esquire (No. 4072)
Christopher S. Chow, Esquire (No. 4172)
David A. Felice, Esquire (No. 4090)
919 N. Market Street, 12th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
Email: daluzt@ballardspahr.com
bellews@ballardspahr.com
chowc@ballardspahr.com
feliced@ballardspahr.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, David T. May, Esquire, do hereby certify that, on May 20, 2010, I electronically filed the foregoing with the Clerk of Court using CM/ECF which will send notification of such filing to counsel of record. I also caused to be served on May 21, 2010, a copy of the foregoing to be served on the following counsel of record, as indicated:

Via Hand Delivery
Natalie D. Ramsey, Esquire
Montgomery, McCracken, Walker & Rhoads
1105 North Market Street, 15th Floor
Wilmington, DE 19801

Gary H. Kaplan, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
1220 N. Market Street, 5th Floor
Wilmington, DE 19801

Dated: May 20, 2010
Wilmington, Delaware

By: */s/ David T. May*
David T. May, Esquire (No. 5359)