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Fulton County Superior Court

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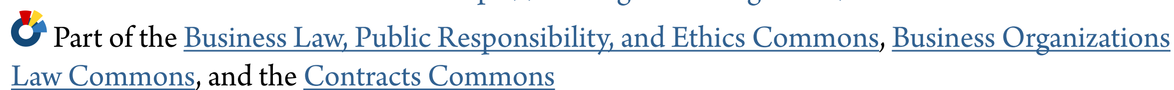
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Fulton County Superior Court
EFILEDQW
Date: 10/13/2017 11:38 AM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT
STATE OF GEORGIA

UAS INVESTMENTS, LLC,	§	
	§	CIVIL ACTION
Plaintiff,	§	FILE NO. 2015CV256036
	§	
v.	§	
	§	
ROBERT MILLER,	§	
	§	
Defendant.	§	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The above styled action is before the Court on the parties' cross motions for summary judgment. Having considered the record, argument of counsel, and supplemental briefing, the Court finds as follows:

SUMMARY OF UNDISPUTED FACTS

In 2013, Defendant Robert Miller ("Miller") and Sean Frisbee ("Frisbee") were members and officers of Leucadia Group, LLC ("Leucadia"), a California limited liability company that focused on commercial and government contract work in aerospace engineering. Miller, a 50% owner, was also a director and Leucadia's president and in that role oversaw day-to-day operations of the company, handled the negotiation of contracts, and pursued new business. Frisbee, the other 50% owner, was the chairman and had primary responsibility for business development. Leucadia owned two subsidiaries: Leucadia Engineering, which focused primarily on aerospace engineering and design projects that included various governmental contracts, and Leucadia Solutions, which focused primarily on commercial, non-government business opportunities.

In the second half of 2013, Miller began discussing with Daryl Moody ("Moody") of Mast Nine, Inc. ("Mast Nine") potential opportunities for Mast Nine to invest in Leucadia. Those discussions culminated in an agreement executed on Dec. 5, 2013 titled: "Binding agreement between Mast Nine, Inc. and Leucadia Group, LLC [sic] between Mast Nine, Inc. and Leucadia Engineering, LLC and between Mast Nine, Inc. and Robert Miller and Sean Frisbee" (hereinafter "Binding Agreement"). Under the

Binding Agreement, Mast Nine obtained options to invest up to $1,575,000 in Leucadia through convertible debt split into three tranches, including an initial $500,000 convertible loan and options to subsequently loan/invest $500,000 and $575,000 respectively. Sums invested would "initially be debt secured by the assets of Leucadia" which "ha[d] priority over everyone, including but not limited to, all other owners, employ [sic] investors and debt providers", with the exception of a previous $50,000 debt and another potential $50,000 debt, which would share priority with Mast Nine's initial loan up to $100,000. With each investment option Mast Nine had the option to convert the debt into an ownership stake in Leucadia.

Mast Nine loaned Leucadia the full amount of the first tranche, $500,000. If not converted this initial loan was to be repaid within thirty-six months after closing with interest calculated at five percent annually, payable on a quarterly basis. In March 2014, Mast Nine assigned its interest and rights under the Binding Agreement to Plaintiff UAS Investments, LLC ("UAS"), a Georgia limited liability company. In July 2014, UAS exercised a portion of the second option by loaning an additional $150,000 to Leucadia, with UAS having the option to convert the debt into an additional ownership interest. In connection with that loan, the parties executed a document titled "Binding Amendment to the Binding Agreement" (hereinafter "Binding Amendment").

By fourth quarter 2014 and early 2015, the parties' relationship soured, Leucadia was insolvent, and the parties disagreed on how to proceed with the business. In mid-January 2015, upon Miller indicating he intended to shut down the company, Frisbee and Moody took action to appoint Moody to the Leucadia board of directors, to purportedly terminate Miller as President of Leucadia and to issue new ownership shares.[1]

UAS alleges during this period Miller, *inter alia*: wrongfully used and disposed of Leucadia's assets for his personal benefit when it was insolvent, leaving Leucadia unable to pay its debt to UAS; and breached the Binding Agreement and Binding Amendment by failing to repay the loans, taking a salary

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[1] In a separate case litigated in California, the court ultimately determined these actions were void. *See* Robert Miller et al. v. Sean Frisbee et al., Superior Court of the State of California for the County of San Diego, Case No. 37-2015-00004680-CU-BC-C, Hon. Earl H. Maas, III (hereinafter "California Action").

before first repaying Leucadia's expenses, improperly taking assets belonging to Leucadia which secured UAS' loans and otherwise would have been available to repay the debt, and failing to obtain UAS' approval before implementing changes to Leucadia's financial and strategic plan. Based on the foregoing, UAS asserts claims against Miller for: conversion; breach of fiduciary duty; breach of contract; and attorneys' fees and expenses of litigation.

ANALYSIS

A. Motion for Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. 9-11-56(c). "When...the parties file cross-motions for summary judgment, 'each party must show [that] there is no genuine issue of material fact regarding the resolution of [the essential] points of inquiry and that each, respectively, is entitled to summary judgment; either party, to prevail by summary judgment, must bear its burden of proof." Plantation Pipe Line Co. v. Stonewall Ins. Co., 335 Ga. App. 302 (2015) (citing Morgan Enterprises, Inc. v. Gordon Gillett Business Realty, 196 Ga. App. 112 (1990)).

B. Preclusions doctrines and judicial estoppel

Miller argues UAS' claims are barred by the doctrines of res judicata and collateral estoppel because (a) UAS previously dismissed Leucadia from this action with prejudice, and (b) the judgment issued in the California Action in favor of Miller serves as an adjudication on the merits as to most of the claims here asserted and many dispositive issues with respect to those claims such that the California judgment bars UAS' claims under the preclusion doctrines. The Court disagrees.

> The doctrine of res judicata prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action.... Three prerequisites must be satisfied before res judicata applies—(1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. *Karan, Inc. v. Auto–Owners Ins. Co.*, 280 Ga. 545, 546, 629 S.E.2d 260 (2006) (citation omitted).

> On the other hand, [t]he related doctrine of collateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies. Like res judicata, collateral estoppel requires the identity of the parties or their privies in both actions. However, unlike res judicata, collateral estoppel does not require identity of the claim—so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim. Id. (citation omitted).

Body of Christ Overcoming Church of God, Inc. v. Brinson, 287 Ga. 485, 486 (2010). *See* O.C.G.A. §9-12-40. *See also* Glen Oak, Inc. v. Henderson, 258 Ga. 455, 458 (1988) ("Since res judicata and collateral estoppel are affirmative defenses, [the party asserting those defenses bears] the burden of proof...The identity between the cause of action or issues raised in the present suit and those adjudicated in the prior action can not [sic] be uncertain, indefinite, or based upon inferences") (citations and footnote omitted).

1. Effect of the dismissal of Leucadia

Miller contends the dismissal with prejudice of Leucadia constitutes an adjudication on the merits which bars most of UAS' claims under Georgia's res judicata statute, O.C.G.A. §9-12-40. The Court disagrees.

"[T]he doctrine of res judicata cannot be invoked in the absence of a final judgment upon the matter in question." Costanzo v. Jones, 200 Ga. App. 806, 810 (1991). Thus, "[t]he entry of a judgment as to one or more but fewer than all of the claims [o]r parties [i]s [n]ot a final judgment... and lacks res judicata effect unless the trial court makes an express direction for the entry of the final judgment and a determination that no just reason for delaying the finality of the judgment exists." Wise v. Georgia State Bd. for Examination, Qualification & Registration of Architects, 244 Ga. 449, 449 (1979). Here, no final judgment has been entered and the dismissal of Leucadia can have no res judicata effect as to claims asserted in the same action against Miller.

Further, insofar as UAS voluntarily asked the Court to dismiss Leucadia and did so *with Miller's consent* and without releasing any of its claims, the Court discerns no basis for the resulting dismissal of Leucadia to bar the claims asserted separately against Miller regarding Miller's individual conduct, *i.e.* Miller's alleged conversion of an asset securing UAS' loan, Miller's alleged breach of his obligations

under the Binding Agreement and Binding Amendment, and Miller's alleged breach of fiduciary duty owed to UAS as a creditor. *See* Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 272 Ga. 209, 212 (2000) ("[T]he effect of a voluntary dismissal does not extend to any party not named therein"); Rowland v. Vickers, 233 Ga. 67, 67 (1974) ("The dismissal of an action against a defendant with prejudice,... does not, as a matter of law, adjudicate all issues in the case. Such a dismissal merely means that the same plaintiff cannot again sue that same defendant on that same cause of action"). *See also* Hardaway Co. v. Amwest Sur. Ins. Co., 263 Ga. 698, 699 (1993) ("[T]he release of the principal debtor, *without the consent of the surety*, releases the surety, unless the right to go against the surety is reserved in the instrument of release, or it appears from the whole transaction that the surety should remain bound") (citing Schwitzerlet-Seigler Co. v. C & S Bank, 155 Ga. 740, 746 (1923); emphasis added).

2. California Action

Miller also argues the judgment entered in the California Action bars UAS' claims in this case. The Court disagrees and finds Miller is judicially estopped from asserting that the California Action and this case involve the same causes of action and same parties.

In Pew v. One Buckhead Loop Condo. Ass'n, Inc., 305 Ga. App. 456 (2010), the Court of Appeals of Georgia summarized the equitable doctrine of judicial estoppel:

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.... [The purpose of judicial estoppel is] to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.

Id., at 459. The circumstances under which the doctrine is appropriate "are not reduced to any general formula or rule." Bank of Am. v. Cuneo, 332 Ga. App. 73, 80 (2015), reconsideration denied (Apr. 14, 2015) (citation omitted). However, Georgia courts generally consider three factors in determining whether a party is judicial estopped from taking a particular position:

> (1) the party's later position must be "clearly inconsistent" with its earlier position; (2) the party must have succeeded in persuading a court to accept the party's earlier position; ... and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 80-81 (citation omitted).

In February 2016, the defendants in the California Action moved to stay those proceedings based on the doctrine of exclusive concurrent jurisdiction, arguing this Court was the first to assume jurisdiction. In response, Miller argued the California Action should not be stayed because the two actions involved different subject matters, different parties, and different legal duties:

> Defendants contend that because UAS filed suit against Miller, the Georgia Court asserted jurisdiction first. This argument is flawed. **Both the subject matter and the parties are different.** The *UAS v. Miller* litigation in Georgia involves two parties: UAS and Miller. This lawsuit involves five parties: Miller, Frisbee, Moody, Leucadia Group, LLC, and Leucadia Investment Holdings, Inc. UAS is not a party to this litigation, so there are no duplicative claims amongst these two cases. . . . **Further, the issues presented in the two suits are also quite distinct.** *UAS v. Miller* is an action by a creditor for the alleged breach of a financing agreement, along with a purported breach of fiduciary duty by Miller against UAS, as Leucadia's creditor... On the other hand, the Amended Cross-Complaint filed by Frisbee and Leucadia against Miller in California while the UAS action was pending, involves claims for alleged breaches of fiduciary duty by Miller against Frisbee and Leucadia, as well as a claim for tortious interference with Leucadia's prospective economic relationships. **These are different duties and obligations than those in the UAS Action.**[2]

(Bold emphasis added). Ultimately, Miller was successful and the motion to stay the California Action was denied and the case proceeded to trial, notwithstanding the defendants' attempts to stay the trial.

Nevertheless, in its summary judgment papers Miller argues res judicata and collateral estoppel apply, now asserting that most of UAS' allegations in this action are materially identical to allegations in the California Action against Miller, UAS and Leucadia are privies, and the judgment entered in the California Action bars UAS' claims in this action under the doctrines of res judicata and collateral estoppel. The Court finds Miller is now taking a position "clearly inconsistent" with an earlier position successfully advanced in the California Action and which ultimately allowed that action to proceed to

[2] Plaintiff's Responses to Defendant's SOF and Additional Supporting Material Facts, Exhibit 4 at pp. 5-6.

trial and a judgment in Miller's favor, notwithstanding the pendency of this action. In light of the previous position taken by Miller, the Court exercises its discretion and finds Miller is judicial estopped from now asserting UAS and Leucadia are privies or that UAS' claims are barred by the judgment entered in the California Action.

Moreover, the Court finds the preclusion doctrines inapplicable because UAS was not a party to the California Action and UAS and Leucadia are not privies. "A privy has generally been defined as one who is represented at trial and who is in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." Butler v. Turner, 274 Ga. 566, 568 (2001). "Before privity can be established, the interests of the party must fully 'represent' the interests of the privy and be fully congruent with those interests." Pinkard v. Morris, 215 Ga. App. 297, 298 (1994) (citing Miller v. Charles, 211 Ga. App. 386, 388(1) (1993)). *See also* Smith v. AirTouch Cellular of Georgia, Inc., 244 Ga. App. 71, 74 (2000) ("For res judicata to bar a subsequent action, there must be the identity of parties or their privies so that they were before the same court at the same time when the judgment was rendered").

Here, the relationship between Leucadia and UAS is that of debtor and creditor, with different rights to advance and different interests that cannot be said to be "fully congruent". Although Miller contends UAS controlled Leucadia's actions in the California Action through Moody, prior to the California trial Moody was only one of three directors and at the time of the trial Moody was no longer a director or member of Leucadia. Ultimately, the record does not demonstrate that Leucadia, whether independently or through Moody, fully represented and advanced nor could it have advanced the same legal rights of UAS in the California Action as UAS now asserts in this action.

C. Substantive Claims

1. Conversion

UAS argues Miller converted Leucadia's assets for his personal use; specifically, a Toyota Land Cruiser that was identified in financial documents as a Leucadia asset at the time the initial loan was made and which allegedly served as collateral for the loans. Miller claims UAS has no valid security interest

and, thus, its conversion claim fails. The Court agrees the Binding Agreement does not contain a sufficient description of collateral for the security interest to be valid.

> A secured creditor has a right of action for conversion if property subject to its security interest is disposed of without the creditor's authorization. The elements of such a claim include the showing of a valid security interest in the debtor's property, disposition of that property, absence of the creditor's authorization for the disposition, and resulting damage to the creditor.

William Goldberg & Co. v. Cohen, 219 Ga. App. 628, 640 (1995).

"All assets" grants are invalid as a matter of law under the Uniform Commercial Code which has been adopted in Georgia and California. Specifically, O.C.G.A. §11-9-203(b) and Cal. Comm. Code §9203(b) require that a security agreement provide a description of the collateral. O.C.G.A. §11-9-108(c) and Cal. Comm. Code §9108(c) provide: "A description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using words of similar import does not reasonably identify the collateral" (emphasis added). *See also* Comment 2 to UCC §9-108 ("Subsection (b) is subject to subsection (c), which follows prevailing case law and adopts the view that an "all assets" or "all personal property" description for purposes of a *security agreement* is *not* sufficient...The purpose of requiring a description of collateral in a security agreement under Section 9-203 is evidentiary. The test of sufficiency of a description under this section, as under former Section 9-110, is that the description do the job assigned to it: make possible the identification of the collateral described") (emphasis in original).

Here, the Binding Agreement provides that each exercised investment option "will initially be secured by the assets of Leucadia Group, LLC" but the agreement does not specify any particular asset that would serve as collateral. Such is an "all assets" grant that is unenforceable as a matter of law under either Georgia or California law.

Although UAS cites to Tech. Distributors, Inc. v. Am. Computer Tech., Inc., 199 Ga. App. 785 (1991) for the proposition that "all assets" grants are enforceable, that case is inapposite. First, while the security interest at issue in Tech. Distributors referenced "all assets" of the appellee, it also contained additional descriptive information identifying particular assets that would secure the debt, including "all

personal property, furniture, fixtures, intangible property, inventory, contract rights, accounts receivable, and all other property of any kind and all proceeds thereof." Id. at 786. Additionally, Tech. Distributors predates the Uniform Commercial Code §9-108, which is the basis for O.C.G.A. §11-9-108 and Cal. Comm. Code §9108, both of which were enacted in 2001.

Moreover, although UAS asserts parole evidence should be allowed to clarify which assets were intended to act as security for the loans, no authority is cited for the proposition that parole evidence is admissible to correct the deficiency of an "all assets" grant. Here, the language of the Binding Agreement purporting to grant a security interest in "the assets of [Leucadia]" is not ambiguous, rather, it is impossibly imprecise. Such cannot be cured by parole evidence as it would essential allow the introduction of a new term and would undermine O.C.G.A. §11-9-108 and Cal. Comm. Code §9108. *Compare* Polyloom Corp. of Am. v. Varsity Carpet Servs., Inc., 175 Ga. App. 806 (1985) (parole evidence admissible to explain ambiguity of term "finished goods inventory" in security agreement between carpet manufacturer and creditor); Farmers & Merchants Bank of Trenton v. State, 167 Ga. App. 77 (1983) (parole evidence admissible to explain ambiguity of term "67-402-Cessna"). Thus, the Court finds Miller is entitled to summary judgment on UAS' claim for conversion of the Toyota Land Cruiser.

2. Breach of fiduciary duty

UAS claims that, as the creditor of an insolvent company, Miller breached his fiduciary duty by making preferential, self-dealing payments to himself or others and by taking an asset of Leucadia, the Toyota Land Cruiser, that otherwise could have been used to repay the debt owed to UAS. Miller contends UAS' claim fails as a matter of law because it cannot be asserted directly but rather must be asserted as a derivative claim.

a. Choice of Law

UAS argues Georgia law applies to its fiduciary breach claim. Miller "does not concede that Georgia law applies" and cites both Georgia and California case law in support of his position.[3] Further, Miller asks that if the Court finds that Georgia law is different than as summarized by him that the Court

[3] Miller's Motion for Summary Judgment Brief, pp. 32-40.

then apply California law since the alleged tortious conduct was committed in and damages were sustained in California and because the fiduciary breach claim touches upon the internal affairs of Leucadia such that the internal affairs doctrine mandates application of California law.[4]

In accordance with the choice of law rule of *lexi loci delicti*, in Georgia a tort action is governed by the substantive law of the state where the tort was committed. Dowis v. Mud Slingers, Inc., 279 Ga. 808, 809 (2005). "The general rule is that 'the place of wrong, the locus delicti, is the place where the injury sustained was suffered rather than the place where the act was committed, or, as it is sometimes more generally put, it is the place **where the last event necessary to make an actor liable for an alleged tort takes place**." Risdon Enterprises, Inc. v. Colemill Enterprises, Inc., 172 Ga. App. 902, 903 (1984) (citing 15A C.J.S. Conflict of Laws, § 12(2)(b), 459) (emphasis added). Georgia follows the general rule. Id. *See also* Schinazi v. Eden, 338 Ga. App. 793, 798 (2016), cert. denied (May 15, 2017) ("A claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty, (2) breach of that duty, and (3) damage proximately caused by the breach").

Here, UAS alleges Miller's breaches of his fiduciary duty "have left Leucadia unable to pay its debt to UAS" such that "UAS has suffered damages as a result of Miller's conduct."[5] Thus, although Miller's allegedly tortious conduct occurred in California, the damage to UAS and the "last event necessary" to make Miller liable occurred in Georgia, *i.e.,* the failure to pay UAS, a Georgia limited liability company with its principal place of business in Georgia.[6] *Cf.* Int'l Bus. Machines Corp. v. Kemp, 244 Ga. App. 638, 641 (2000) (insofar as "[o]nly fraud which results in damages is actionable", the "last event necessary" to make an actor liable is damage to plaintiff; in putative class action brought by former employees alleging employer defrauded them by wrongfully cancelling reimbursement benefits under an education assistance program, the employer's decision in New York to suspend benefits was not the "last event" for conflicts purposes but rather the injury or "economic damage" was the last event which occurred in the state of residence of each potential class member when employer failed to reimburse

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4 Miller's Motion for Summary Judgment Brief, p. 40.

5 Plaintiff's Third Amended Complaint, ¶¶ 54-56.

6 Plaintiff's Third Amended Complaint, ¶5; Moody Aff., (Jun. 5, 2017), ¶3.

them). Further, although under the internal affairs doctrine Georgia courts generally apply the laws of the state of incorporation "whenever the issue concerns the relations inter se of the corporation, its shareholders, directors, officers or agents...." (*see* Diedrich v. Miller & Meier & Assocs., Architects & Planners, Inc., 254 Ga. 734, 735 (1985)), that doctrine does not apply as to claims involving the rights of a third party external to the corporation as is the case here with respect to the rights asserted by UAS as a creditor of Leucadia. *See* Multi-Media Holdings, Inc. v. Piedmont Ctr., 15 LLC, 262 Ga. App. 283, 286 (2003). Thus, the Court finds Georgia law governs UAS' breach of fiduciary duty claim.

b. Direct vs. Derivative Claim

In Georgia, "[t]he general rule is that actions for breach of fiduciary duties are to be brought in derivative suits." Phoenix Airline Servs., Inc. v. Metro Airlines, Inc., 260 Ga. 584, 585 (1990) (citing Cole v. Ford Motor Co., 566 F.Supp. 558, 569 (W.D.Pa.1983)). *See* Matthews v. Tele-Sys., Inc., 240 Ga. App. 871, 872 (1999) (breaches of fiduciary duty asserted against shareholders are generally causes of action belonging to the corporation and may be asserted by a shareholder only in a derivative action) (citing Phoenix Airline Servs., 260 Ga. at 585).

> The reasons underlying the general rule are that 1) it prevents a multiplicity of lawsuits by shareholders; 2) it protects corporate creditors by putting the proceeds of the recovery back in the corporation; 3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and 4) it adequately compensates the injured shareholder by increasing the value of his shares. See, Comments, Corporations-Shareholders' Derivative and Direct Actions-Individual Recovery, 35 N.C.L.Rev. 279 (1957); *Kirk v. First National Bank of Columbus,* 439 F.Supp. 1141(9) (M.D.Ga.1977).

Thomas v. Dickson, 250 Ga. 772, 774 (1983). However, there are two exceptions to the general rule:

> First, a shareholder has standing to bring a direct action, seeking recovery on behalf of the shareholder individually, "if the suit alleges a special injury separate and distinct from that suffered by other shareholders, or alleges a wrong involving a shareholder contractual right existing apart from any right of the corporation...Second, "a direct action may ... be proper in the context of a closely held corporation where the circumstances show that the reasons for the general rule requiring a derivative suit do not apply."

Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 64 (2007) (citations, footnote, and emphasis omitted).

Here, the central question presented is whether UAS as a creditor can maintain a direct claim for breach of fiduciary duty against Miller, as a director and officer of insolvent Leucadia. Georgia courts have long held that

> [w]hen a corporation becomes insolvent, its directors are 'bound to manage the remaining assets for the benefits of its creditors, and cannot in any manner use their powers for the purpose of obtaining a preference or advantage to themselves'... The abuse of this duty gives rise to an action against the directors to recover sums improperly paid out by the corporation.

Hickman v. Hyzer, 261 Ga. 38, 40 (1991) (citing *Ware v. Rankin,* 97 Ga. App. 837 (1958)).

Thus, Georgia courts recognize that the creditors of an insolvent company may assert claims against a director or managing member alleged to have made improper, preferential payments or transfers. *See* Georgia Commercial Stores, Inc. v. Forsman, 803 S.E.2d 805 (Ga. Ct. App. 2017) ("We therefore conclude that if a managing member of an insolvent limited liability company breaches his fiduciary duty to the company's creditors by making an improper preferential transfer of company assets to himself, a creditor may bring an action against the member to set aside the transfer and recover the funds impermissibly paid to that member") (citations omitted); Hodge v. Howes, 260 Ga. App. 107, 110(4) (2003) ("Officers/directors of corporations may be held personally liable for corporate indebtedness when they make preferential transfers of corporate assets to themselves while the corporation is insolvent") (citation omitted). *Cf.* McEwen v. Kelly, 140 Ga. 720, 79 S.E. 777, 779 (1913) ("[It] has often been held that in cases of insolvency all of the assets are applicable to the payment of debts and are not for distributton [sic] among stockholders, and that accordingly the directors stand in a trust relation toward creditors"). *See, e.g.,* Randall & Neder Lumber Co. v. Bowen-Rogers Hardware Co., 202 Ga. App. 497, 499(1) (1992) (affirming jury verdict in favor of creditors in action brought against directors of insolvent corporation to set aside transfers of property and monies deemed impermissible payments); Hickman, 261 Ga. at 40 (abuse of duty to manage remaining assets of insolvent corporation for the benefit of creditors gives rise to an action to recover the sums paid out by the corporation but such does not pierce corporate veil, rather it "rescinds improper payments to shareholders or directors so that funds are available for

payment of corporate debts"); Fountain v. Burke, 160 Ga. App. 262, 263-264(2) (1981) (physical precedent only) (in action brought by creditor of insolvent corporation against the corporation and its sole shareholder, holding creditor could recover from sole shareholder as he, as sole owner and president of corporation, could not seize all of its remaining assets after the corporation became insolvent and apply them to a debt owed to himself); Ware v. Rankin, 97 Ga. App. 837 (1958) (affirming denial of general demurrers, allowing action by trustee in bankruptcy against vice president to recover sums paid out by insolvent corporation to a creditor in order to extinguish a debt on which vice president and codefendant director were personally liable as endorsers); McDonald v. Redding Lumber Co., 43 Ga. App. 656 (1931) (conveyance by insolvent corporation to officer to enable officer to pay corporation's debt for which he was surety held void as against corporation's creditor; allowing creditor in garnishment proceeding to attack as fraudulent corporation's assignment of property to officer). *See also* United States Capital Funding VI v. Patterson Bankshares, 137 F.Supp.3d 1340, 1375(II)(C) (S.D. Ga. 2015) ("[A]ny scheme or device the purpose of which is to indemnify [the owners, officers, or directors of a corporation] against loss, whether as creditors or as endorsers of notes given by the corporation or otherwise, constitutes legal fraud" and "[c]reditors thus have a right to sue the officers and directors of the corporation' when this type of misconduct occurs"; analyzing Georgia law) (citations and punctuation omitted); Tindall v. H & S Homes, LLC, No. 5:10-CV-044 CAR, 2011 WL 5827227, at *3 (M.D. Ga. Nov. 18, 2011) (holding plaintiff creditor may bring a claim asserting that defendant officers breached a duty still recognized by Georgia common law, which required them hold corporate property in trust for the benefit of the corporation's creditors; collecting Georgia cases and noting "Georgia law has long recognized the type of common law 'preference claim' stated in [the] [c]omplaint"). Therefore, the duty owed by directors, officers and managing members of an insolvent company to its creditors to manage the remaining assets for the benefits of creditors and the concomitant right to assert claims against those individuals for breach of that duty through improper, preferential payments is hardly novel.

The most recent Georgia case to consider the duty of a director of an insolvent company to "manage the remaining assets for the benefit of its creditors" and to analyze Georgia case law on this

point is Georgia Commercial Stores, Inc. v. Forsman, 803 S.E.2d 805. In Georgia Commercial Stores, a judgment creditor brought an action against the managing member of a debtor limited liability company alleging the member had improperly authorized the company to make a preferential payment to him while the company was insolvent to repay an unsecured loan the member had made to the company. Id. at *2. After obtaining a judgment against the company, the judgment creditor first learned of the preferential payment and challenged the member's conduct, alleging it had been unable to collect on its judgment in part because of the improper, preferential payment. Id. The judgment creditor asserted various causes of action against the member, including breach of fiduciary duty and an intentional fraudulent transfer under the (former) Uniform Fraudulent Transfers Act ("UFTA"). Id.

The Court of Appeals reversed the trial court's grant of summary judgment on the fiduciary claim, reiterating Georgia common law providing "the managing members of an insolvent limited liability company owe a fiduciary duty to the company's creditors to conserve and manage the remaining assets of the company in trust for the benefit of those creditors" and finding a question of fact remained as to whether the preferential payment to the member was a proximate cause of the judgment creditor's injury. In so holding, the appellate court summarized Georgia case law and thoroughly considered the nature of the duty owed to creditors in this context:

> [W]hen a company becomes insolvent, the directors stand in a trust relation toward creditors...Hence, the directors of an insolvent corporation, who originally stood in a fiduciary relation to the company, become placed in a fiduciary relation to its creditors... Relevant here is that Georgia courts have recognized that the managing officers and directors of a corporation are charged with the duty of conserving and managing the remaining assets of an insolvent corporation in trust for the creditors. Accordingly, when a corporation becomes insolvent its directors are bound to manage the remaining assets for the benefits of its creditors, and cannot in any manner use their powers for the purpose of obtaining a preference or advantage to themselves. Thus, corporate officers and directors may not give preference to existing debts which the corporation owed to other persons, and for which such officers and directors were primarily liable unless a preference or payment is made in the performance of an agreement entered into at or prior to the time when the liabilities to the creditors were incurred, or before the insolvency of the corporation...

Id. at *4 (citations and punctuation omitted).

The appellate court held the managing members of an insolvent limited liability company likewise owe a fiduciary duty to creditors to conserve and manage the remaining assets of the company in trust for the benefit of creditors. Id. Thus, the Court of Appeals concluded that "if a managing member of an insolvent limited liability company breaches his fiduciary duty to the company's creditors by making an improper preferential transfer of company assets to himself, a creditor may bring an action against the member to set aside the transfer and recover the funds impermissibly paid to that member. Id. (citing Hodge, 260 Ga. App. at 110; Randall & Neder Lumber, 202 Ga. App. at 499; McEwen, 140 Ga. at 724).

Although the appellate court did not expressly hold that such a claim may be asserted directly, rather than derivatively, the rights of other creditors not named in the action were nevertheless addressed. Specifically as to creditors not named in the action, the Court of Appeals found:

> The claims of a creditor that diligently pursues a cause of action challenging a preferential transfer made to an officer, director, or managing member of an insolvent company are not reduced or defeated by the hypothetical claims of other creditors who have slept on their rights and have failed to challenge the preferential transfer... And, here, there is no evidence of record that any creditor other than Georgia Commercial has pursued any claims against Forsman for the alleged preferential payment.

Georgia Commercial Stores at *6.

Given the Court of Appeals' ruling in Georgia Commercial Stores and the long line of Georgia cases allowing claims to be brought by creditors of insolvent companies against officers, directors and managing members for breaching the duty owed to creditors, the Court is compelled to hold that, under the current state of Georgia law, such claims of breach of fiduciary duty may be maintained directly.[7] However, whether there were improper, preferential salary payments and use of company assets and whether UAS knew and consented to Miller's salary payments remains a question of fact such that summary judgment is inappropriate.

[7] Miller argues a creditor's breach of fiduciary duty claim against a director for preferential payments must be asserted derivatively, citing North American Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 103 (Del. 2007). Although Gheewalla presents compelling arguments on this point, insofar as it analyzes Delaware law, it is inapplicable.

3. Breach of contract

UAS argues Miller signed the Binding Agreement and Binding Amendment in his individual capacity, thereby guaranteeing Leucadia's performance under those agreements, such that the failure to pay the monies loaned and quarterly interest payments constitute breaches of contract actionable against Miller individually. Miller contends that contract claim fails because the obligation to repay the loans is owed by Leucadia only, no suretyship was established as to Miller and, even if Miller could be deemed a surety, UAS previously dismissed Leucadia from this action with prejudice constituting a release of Miller as the alleged surety.

"The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." Norton v. Budget Rent A Car System, Inc., 307 Ga. App. 501, 502 (2010).

> The construction of contracts involves three steps. At least initially, construction is a matter of law for the court. First, the trial court must decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.

Record Town, Inc. v. Sugarloaf Mills Ltd. P'ship of Georgia, 301 Ga. App. 367, 368 (2009). *See* Borders v. City of Atlanta, 298 Ga. 188, 197 (2015) ("The cardinal rule of contract construction is to ascertain the intention of the parties; however, when the contract terms are clear and unambiguous, the reviewing court looks solely to the contract itself to determine the parties' intent").[8]

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[8] Georgia courts apply the traditional *lex loci contractus* in contract actions, under which "contracts are to be governed as to their nature, validity, and interpretation by the law of the place where they were made, except where it appears from the contract itself that it is to be performed in a State other than that in which it was made, in which case, the laws of that sister State will be applied." Int'l Bus. Machines Corp. v. Kemp, 244 Ga. App. 638, 641 (2000). Here, although Miller asserts California law governs Leucadia's "payments" to Miller as an employee and bars the breach of contract claim, the parties appear to agree that otherwise Georgia law applies to this claim as both parties cite to Georgia case law in arguing their respect positions. In any event, California law is substantially similar. *See* Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 821 (2011) ("And the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff"); Kavruck v. Blue Cross of California, 108 Cal. App. 4th 773, 780 (2003) ("The fundamental goal of contractual interpretation is to give effect to the mutual

The Court finds, under the unambiguous language of the Binding Agreement and Binding Amendment, Miller did not personally guarantee repayment of the loans or make himself liable as a surety. Although Miller was a party to the Binding Agreement and executed it on behalf of Leucadia, Leucadia Engineering, and himself, "agree[ing] to be bound by its terms", the contract itself defines the obligations of the contracting parties. It expressly defines UAS' predecessor in interest (Mast Nine) as "BUYER" and Leucadia as "SELLER". The terms of the loans and the rights and obligations incurred thereby are expressly directed to BUYER and SELLER and in some instances specifically name Leucadia:

> C. Details of investment
> [As to the initial $500,000 invested by UAS,] **Leucadia Group, LLC will pay** BUYER 5% annual interest over the lifetime of this debt…If the BUYER does not exercise its option to convert its debt into ownership, **SELLER will repay** the principal to BUYER in 36 months…
>
> BUYER Right to Second Investment
> … BUYER will have an option to make another $500,000 investment into Leucadia Group, LLC… **Leucadia Group, LLC will pay** BUYER 5% annual interest over the lifetime of this debt… If the BUYER does not exercise its option to convert its debt into ownership, **SELLER will repay** the principal to BUYER in 46 months…
>
> BUYER Right to Third Investment
> … BUYER will have an option to make another $575,000 investment into Leucadia Group, LLC… **Leucadia Group, LLC will pay** BUYER 5% annual interest over the lifetime of this debt… If the BUYER does not exercise its option to convert its debt into ownership, **SELLER will repay** the principal to BUYER in 56 months…

(Emphasis added). Similarly, the Binding Amendment repeatedly references Leucadia's obligation to pay: "4. Leucadia Promise to Repay $150,000… Leucadia promises to repay to UAS the total $150,000 Invested Amount on or before July 22, 2017… If Leucadia has repaid all or part of the $150,000 Invested Amount… 5. $350,000 Remaining Investment Amount…Leucadia will pay to UAS interest on such on

intention of the parties. (Civ.Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ.Code, § 1638.) On the other hand, '[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it'") (citation omitted).

such amount at the rate of five percent… Leucadia will pay UAS the $350,000 principal on or before the date which is three (3) years after the investment is made…"

This language is unambiguous—Leucadia was the entity that promised to repay the debt if UAS/Mast Nine did not exercise the options to convert the debt into ownership. Although Miller signed the contract in his own name, the language of the contract (which is bound by a merger provision) does not show that the parties ever intended Miller would personally guaranty repayment of the loans. Rather, by signing in his individual capacity, Miller personally undertook separate obligations as detailed in the contract, including, *inter alia*, "agree[ing] to take the entirety of [his] payments from Leucadia Group, LLC in disbursement based on the ratio of ownership." Thus, the plain language of the Binding Agreement and Binding Amendment does not evidence any intent to create a suretyship with respect to the repayment of the loans. *See* O.C.G.A. §§ 10-7-1, 10-7-3. *See also* York v. RES-GA LJY, LLC, 336 Ga. App. 253, 255–56 (2016), review granted (Oct. 3, 2016), aff'd, 300 Ga. 869 (2017) ("[C]ontracts [of suretyship] must be strictly construed, and a surety's liability **will not be extended by implication or interpretation**. Ultimately, however, construction of a surety contract is a question of law for the court based on the intent of the parties **as set forth in the contract**") (citations, footnotes and punctuation omitted; emphasis added).

UAS cites to Am. Associated Companies v. Vaughn, 76 Ga. App. 121 (1947) for the proposition that when a corporate officer or director signs a contract in both a representative capacity and individual capacity, that individual has then personally guaranteed the company's performance and is liable for the company's breach. The Court finds that case inapposite. There, the president of a corporation signed a written employment agreement granting an employee a monthly salary and a share of company profits. Id. at 125. The president "signed both as president of the corporation and again in his individual capacity" and was "designated in the body of the writing as a party to the contract." Id. at 124-25 (emphasis added). The appellate court affirmed the denial of the defendants' general demurrers, reasoning: "No good reason is advanced why [the president] could not individually undertake to see that the corporation carried out its

agreement, in the nature of a suretyship, and no authority whatever is cited which is in [sic] point on the subject." Id.

However, the fact that on general demurrers "no good reason [was] advanced" and "no authority whatsoever [was] cited" that would bar the employee's claims against the president as a matter of law, would appear to confine the appellate court's holding to the particular facts of that case. Indeed, Am. Associated Companies has never been cited for the proposition here presented. Further, there is no indication that the president otherwise undertook any other personal obligation under the employment agreement. Logically this begs the question, what other reason would the president have to sign a contract twice, for himself and his company, and to name himself a party to a contract under which he, personally, made no specific promises, unless he intended to guarantee the company's performance?[9] Here, Miller in his individual capacity made specific promises related to the influx of funds provided by UAS' loans, including agreeing in the Binding Agreement that payments from Leucadia would be entirely through disbursements.[10]

Given the plain and unambiguous language of the Binding Agreement and Binding Amendment under which Leucadia, alone, promised to make interest payments and repay the unconverted loans, the Court finds Miller is entitled to summary judgment on the breach of contract claim as it relates to the failure to repay the loans and the failure to make interest payments.

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[9] Carroll v. Stauffer, 200 Ga. App. 255 (1991), also cited by UAS in its papers, is distinguishable on the same grounds. In Carroll, the trial court found and the appellate court agreed that a promissory note signed twice by an individual who was president of a corporation established that the individual intended to individually obligate himself to repay the note insofar as he signed once as president and then again with his own name under his signature. Insofar as the obligation owed under the note was to repay the loan, the appellate court logically held that "it is plain beyond dispute that appellant would not have signed the note again...unless he intended to obligate himself equally in stature and form to [the company]." Id. at 255. *See also* Elwell v. Keefe, 312 Ga. App. 393, 395 (2011) (promissory note did not also constitute personal guarantees of the debt by personal representatives who signed document on behalf of corporate borrower, where plain language of the document established that it constituted a promissory note between lender and corporate borrower, the document contained no language of personal guarantee, and document contained only a single signature by the representative).

[10] UAS suggests the fact that Miller also signed the Binding Amendment (where he allegedly did not expressly undertake any separate personal obligations) on behalf of Leucadia, Leucadia Engineering and himself individually, shows that he was personally guaranteeing Leucadia's performance under the agreements. The Court disagrees. It hardly seems remarkable that Miller, who signed the initial agreement individually would also sign an amendment thereto. Moreover, in the Binding Amendment Miller did undertake separate, personal obligations, including acknowledging the assignment from Mast Nine to UAS and provisions related to salaries.

Miller also moves for summary judgment in his favor on UAS' contract claim that he personally guaranteed Leucadia's obligation to obtain UAS' approval of Leucadia's financial and strategic plan and breached that provision when he failed to do so. That portion of the Binding Agreement is found under the "Miscellaneous" section of the contract and it provides: "BUYER must approve the financial and strategic plan of Leucadia Group, LLC and Leucadia Engineering, LLC. The President of Leucadia Group, LLC will be responsible for day to day decision making and operations."

Unlike the payment provisions discussed above, this obligation is not directed to Leucadia, specifically, but rather appears to be directed to all the parties to the Binding Agreement, including Miller. This is logical given Miller's and Frisbee's roles as officers and directors of Leucadia who would be involved in such planning. Insofar as there is at least some evidence Miller failed to abide by that provision and that UAS suffered damages as a result, summary judgment as to that alleged contractual breach is not appropriate.

Additionally UAS asserts Miller, as a director, breached the Binding Agreement by taking unauthorized salary payments. Miller contends governing California labor law voids any agreement that purports to waive salary payments and, in any event, there remain questions of fact regarding whether UAS knew and consented to or otherwise waived the issue of the salary payments.

The Court finds California law does not bar this claim. While California law may protect an executive's wages, here, Miller was more than just an employee or executive. He was a controlling officer, member, and 50% owner of Leucadia. Prior to executing any employment agreement, Miller, in those roles negotiated the Binding Agreement and therein expressly "agree[d] to take the **entirety of [his] payments** from Leucadia Group, LLC in disbursement based on the ratio of ownership" (emphasis added). Whether Miller would be entitled to salary payments from Leucadia under California labor law as an employee and executive is a separate issue from whether Miller, as owner, by taking salary payments from the sums loaned breached an agreement with UAS under which he promised to only receive payments from distributions in exchange for considerable loans intended to capitalize the business.

Nevertheless, the Court finds material questions of fact remain as to whether Miller breached the Binding Agreement by directing salary payments to himself. The above language in the Binding Agreement notwithstanding, the Binding Amendment suggests salary payments to Miller were previously allowed and would be allowed moving forward subject to certain limitations:

> 6. Continued Salary Payments Allowed. Pursuant to the Binding Agreement, certain funds were to be used to pay each of Robert Miller and Sean Frisbee [sic] salaries of $180,000 per year out of Leucadia's revenues. Leucadia's revenues are insufficient at this time to support such salaries. The parties agree that Leucadia may use the amounts being invested by UAS… to pay such salaries for the next calendar year ending July 22, 2015; provided that, such salaries shall only be paid after all other expenses and salaries necessary for Leucadia to continue to function in its current line of business are paid first…

Moreover, the record reflects a factual dispute as to whether UAS knew that Miller was receiving salary payments from the loaned sums and consented to such payments.[11] Consequently, summary judgment is inappropriate as to this breach of contract claim.

CONCLUSION

Having considered the entire record and given all of the above, the Court hereby: GRANTS summary judgment in favor of Miller on the claim for conversion of the Toyota Land Cruiser; DENIES summary judgment to both UAS and Miller on the breach of fiduciary duty claim, finding genuine disputes of material fact remain; GRANTS summary judgment in favor of Miller regarding the breach of contract claim arising from Miller's failure to repay UAS' loan and to make interest payments; and DENIES summary judgment to both Miller and UAS on the breach of contract claims related to salary payments and Miller's alleged failure to obtain UAS' approval regarding Leucadia's financial and strategic plan, triable issues regarding those allegations remain.

SO ORDERED this 13th day of October, 2017.

CHIEF JUDGE GAIL S. TUSAN
on behalf of
ELIZABETH E. LONG, SENIOR JUDGE
Metro Atlanta Business Case Division

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[11] *See* Miller Aff. (Jul. 20, 2017), ¶5 *Compare* Moody Depo. (Aug. 29, 2016), pp. 154 -68.

Fulton County Superior Court
Atlanta Judicial Circuit

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