UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	: 06-12226 (RDD)
COUDERT BROTHERS, LLP,	: 300 Quarropas Street : White Plains, NY
Debtor.	: June 15, 2010
RETIRED PARTNERS OF COUDERT BROTHERS TRUST,	: Adv. No. 08-01215
Plaintiff,	:
v.	:
DELTOUR, et al,	:
Defendants.	:

MODIFIED AND CORRECTED BENCH RULING ON MOTIONS TO DISMISS ADVERSARY PROCEEDINGS/SECOND AMENDED COMPLAINT
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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[Appearances continue on next page.]

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THE COURT: I have four motions to dismiss in the adversary proceeding before me against the four respective movants. The movants are alleged successor law firms to Coudert Brothers LLP, the debtor in this Chapter 11 case. They're Baker & McKenzie, LLP; Orrick Herrington & Sutcliffe, LLP; DLA Piper, LLP US and Dechert LLP, defendants in the adversary proceeding against those entities as set forth in the second amended complaint.

The plaintiffs jointly assert a cause of action for successor liability under New York law; and plaintiff the Retired Partners of Coudert Brothers Trust alleges a claim for tortious interference with contract against Baker & McKenzie, Orrick and Dechert and against all four defendants, two additional claims of constructive trust and unjust enrichment, all under New York law.

The movants have moved on two bases to dismiss the second amended complaint. First, as to plaintiff the Retired Partners of Coudert Brothers Trust, they contend that the Trust lacks standing to assert any of the claims. Secondly, they assert that the other plaintiff, Development Specialists, Inc., has not asserted a claim based on successor liability against them for purposes of Rule 12(b)(6) and, in the event that the Trust is found to have standing, that it also does not assert a claim for successor liability and, in addition, that the three other claims asserted by the Trust also should be dismissed under Rule 12(b)(6).

Let me address the standing issue first since "standing is one of the essential prerequisites of jurisdiction under Article III and for purposes of this Court's jurisdiction under the referred jurisdiction from the District Court. standing is a threshold inquiry, and an indispensable part of a plaintiff's case; failure to establish standing generally obviates the need to consider the merits of a dispute." WTC Families for a Proper Burial, Inc. v. City of New York, 567 F.Supp.2d 529, 536 (S.D.N.Y., 2008), aff'd 359 Fed. Appx. 177 (2d Cir. 2009).

There are three separate grounds alleged for the Retired Partner Trust's lack of standing. While there is some merit to the first two grounds, I do not believe they are sufficient to deprive the Trust of standing. However, I think the third ground does show that the Trust lacks standing.

The first two arguments are premised on the theory that, based upon their own agreements, the beneficiaries of the Trust cannot and have not conferred upon the Trust the right to bring this adversary proceeding. First, the movants argue that under Schedule 5 of the Coudert Brothers, LLP Partnership Agreement, Section 12(b), the retired partners and/or their heirs and assigns or their heirs have waived the right to assign their interest in their rights under the partnership agreement or to encumber them in any manner. Therefore, since the Trust is acting as the assignee of the rights of the retirees, as its beneficiaries, it is contended that the Trust in fact was barred by Coudert's partnership agreement from doing so.

However, there is not clear language in the anti-assignment provision rendering such assignment void, and I believe that such language would be necessary to, in fact, render it void under New York law, which would govern here. See Sullivan v. International Fidelity Ins. Co., 96 A.D.2d 555, 556 (N.Y. App. Div. 2d Dept. 1983). Therefore, I believe that the partnership agreement's anti-assignment provision cannot be relied upon by the movants as a basis for invalidating the Trust's ability to proceed under Federal Rule 17(a).

In addition, and on its face somewhat more persuasively, some of the movants argue that by its own terms the Retired Partners' Trust Agreement precludes the ability of the Trust to bring this litigation. That is because the granting provision of the Trust Agreement states that the beneficiaries have assigned "all rights, title and interest in and to such Retired Partners' individual rights under the CB Partnership Agreement to pension or retirement rights to be held by the trustees in trust for the uses and purposes and on the terms and conditions set forth herein." Therefore, it is argued that by its own terms the Trust Agreement gives the

Trust the right to pursue only contract claims to enforce pension or retirement rights of the retiree beneficiaries, but not to assert tort claims such as claims for tortious interference with contract, or unjust enrichment or constructive trust claims. Perhaps also cast into doubt by the apparently limited nature of the granting clause is the Trust's ability to bring a successor liability claim, because that claim itself does not reside in the Coudert Brothers LLP Partnership Agreement but under successor liability common law.

This litigation has clearly been brought, however, with the knowledge and consent of each of the Trust's beneficiaries. If the Trust were to win, it would have won on the basis of having first prevailed on the theory that it does have standing under the Trust Agreement -- including contractual standing under the Trust Agreement -- and I believe that any retired partner who's a beneficiary of the Trust would at that point be estopped to argue to the contrary.

In addition, the Trust Agreement contemplates the commencement of "Litigation", as a defined term, to enforce the beneficiaries' rights, more generally, as retired partners. So, all things considered, it appears to me that the Trust is contractually a proper assignee of the retired partner beneficiaries' claims here, such as they are, and, therefore, that the first two arguments against the Trust's standing are unavailing.

That leaves, however, the third argument, which is that the Trust in this bankruptcy case does not have standing to bring the four claims that it is asserting because those claims properly belong solely to the debtor-in-possession (now, after confirmation and the consummation of that debtor-in-possession's plan, the sole successor to Coudert Brothers LLP's rights, the other plaintiff herein, Development Specialists, Inc.).

It is clear under the law of this Circuit, and, frankly, elsewhere, as well, that "when a claim is a general one with no particular injury arising from it and if that claim could be brought by any creditor of the debtor, the trustee [in this case DSI], is the proper person to

assert the claim," Kalb, Voorhis & Co. V. American Financial Corp., 8 F.3d 130, 132 (2nd Cir. 1993), where, of course that claim is an asset of a debtor's estate. In the Kalb case, the Second Circuit held that under Texas law, a veil-piercing action should be brought by the trustee because, if proven, such a claim would inure to the benefit of all creditors. See also In re: Granite Partners, L.P., 194 B.R. 318, 324 (Bankr. S.D.N.Y. 1996), which also states that state law determines which claims belong to the estate and hence can be asserted only by the trustee.

Therefore, in order to determine standing the court must look to the nature of the wrongs alleged in the complaint and the nature of the injury for which relief is brought. Id. See also In re The 1031 Tax Group, LLC, 397 B.R. 670, 679-80 (Bankr. S.D.N.Y. 2008), in which Judge Glenn held that to determine standing the court must look to the underlying wrongs as pleaded in the complaint and whether the plaintiff alleges a particularized injury.

Here, with regard to the successor liability claim, the Trust argues that it has such a particularized injury. It bases that argument on two provisions of the Coudert Brothers LLP Partnership Agreement. (The partnership agreement is referred to in the complaint and, therefore, I can consider it to be, for purposes of this motion, part of the record before the Court.) It provides in Section 6(j) that "profits shall be allocated to the partners in accordance with the following priority" and then lists eight items in order –- the fifth of which, the fifth in priority, is "allocations of retirement income pursuant to Schedule 5."

Then, turning to Schedule 5 to the Partnership Agreement, and in particular to Article 9, the Partnership Agreement provides, in subparagraph 4, "payees of retirement income shall not have any claim for same against any individual partner but shall look for payment only to the partnership or a partnership which may fairly be considered a successor partnership of the partnership by reason of continuity and personnel and clients." It is based upon that last clause that the Trust alleges it has a particularized injury or a particularized right

that gives it standing here (in addition to DSI's standing to assert successor liability on behalf of the creditors generally).

However, it does not appear to me that the Trust's argument succeeds. That is because subparagraph 9.4 of Schedule 5 does not create a contractual obligation by any successor partnership, including the alleged successor defendants in this adversary proceeding. They obviously are not parties to the Coudert Brothers LLP Partnership Agreement upon which the Trust bases its claim. Rather, only the partners in Coudert were parties to that agreement.

Therefore, in order to prevail in requiring an alleged successor partnership to be liable for retirement income under Paragraph 6(j) and Paragraph 9.4 of Schedule 5 to the Partnership Agreement, the Trust would have to prevail like any other creditor of Coudert in establishing that these defendants were in fact a "successor partnership," liable not under the Partnership Agreement (because they're not parties to the agreement) but, rather, under New York common law principles as a successor to Coudert Brothers LLP. In that sense, and that is the only sense that they have a right here, the beneficiaries of the Trust, or the Trust itself, are no different than any other creditor of Coudert Brothers LLP that does not have a claim against individual partners. In light of the case law that I previously cited, therefore, DSI is the sole entity that has standing to bring the successor liability claims asserted in the second amended complaint.

The Trust argues that it is nevertheless different from the other creditors of Coudert Brothers LLP because the retirees gave up valuable rights in return for their rights under the Partnership Agreement. However, again, their rights under the Partnership Agreement are limited to rights that they would have against the partnership in return for giving up those valuable rights under the Partnership Agreement, and, secondly, as against "successor partnerships." (As I've said, since those successor partnerships are not parties to

this Partnership Agreement, to enforce that right would require a showing that would have to be made by any creditor of Coudert Brothers to establish successor liability.) Each of Coudert's other creditors, landlords, trade lessors, malpractice claimants and the like, also, however, gave up value in return for their contractual claims against Coudert Brothers and therefore, I believe, are literally in the same boat as the Trust.

With regard to the other three claims asserted by the Trust -- constructive trust, unjust enrichment and tortious interference with contract -- the analysis of the Trust's standing is slightly different. The Trust's tortious interference with contract claim is based on the contract provision that I have just quoted, which requires in Paragraph 6(j) that Coudert pay retirement income as a fifth priority out of profits to the retiree partners. That right is unique to the retirees. Therefore, depending upon the nature of the alleged breach, the Trust could have standing separate and apart from the other creditors' rights to bring such a claim.

Similarly, depending on the basis for the unjust enrichment and constructive trust claims, the Trust on behalf of the retirees could have standing separate from creditors generally or DSI. However, if the basis for the constructive trust and unjust enrichment claims was solely or simply that the defendants somehow caused Coudert Brothers to have fewer assets to pay Coudert's underlying obligations to the retirees, that basis would be the same as the basis for any other creditor and for DSI to assert an unjust enrichment or constructive trust claim, and, therefore, if that were the basis for the Trust's unjust enrichment and constructive trust claims the Trust would not have standing.

I'll address the underlying bases for these three claims later.

In anticipation of the argument that, in fact, the Trust lacks standing to bring the successor liability claim, the Trust has argued that the issue of its standing does not need to be decided at this time and, more specifically, that because it has been resolved between DSI and the Trust (that is, because DSI has consented to let the Trust be a co-plaintiff in respect of the

successor liability claim), the Court need not address the motions to dismiss on the basis that the Trust lacks standing. The Trust cites in support of that contention In re HouseCraft Indus. USA, Inc., 310 F.3d 64 (2nd Cir. 2002).

In some respects that decision favors the Trust's argument here, but in critical and dispositive respects it does not. In Housecraft, the estate's representative, the trustee for the debtor standing in the same shoes as DSI here, and the estate's secured creditor, BNP, which asserted a lien against the proceeds of the trustee's litigation rights, were co-plaintiffs in respect of admittedly estate causes of action, that is, causes of action that belonged to the trustee. Nevertheless, in the face of an objection that BNP lacked standing to be such a co-plaintiff, the Second Circuit ruled that, in fact, BNP did have standing.

It did so, however, based on reasoning that would argue against the standing of the Trust as a co-plaintiff in this adversary proceeding. In the HouseCraft case not only did the trustee consent to have BNP be a co-plaintiff but also the trustee and BNP had agreed upon an allocation of the litigation proceeds, which had been approved previously by the bankruptcy court. As part of the record of that approval, it had been found that, absent BNP's being a co-plaintiff and funding the litigation, the trustee would have had to abandon the claim, because the estate lacked free funds to pay for the lawsuit.

Secondly, there was a complete overlap of the claims. The claims were entirely the estate's claims, in other words. BNP, unlike the Trust, was not arguing that it had separate non-estate claims, too. As the Second Circuit found, "BNP is not replacing the trustee as the claimant. It is simply assisting him with the litigation." In re Housecraft, 310 F.3d at 71.

Thus, in reviewing whether it was proper to grant BNP standing, the Second Circuit stated that it needed to determine only whether the litigation brought by BNP was both in the best interests of the bankruptcy estate and necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings. Id.

Here, there are substantial, and ultimately dispositive, differences from the HouseCraft case. First, there is no agreement between DSI and the Trust as to the allocation of any proceeds of the litigation. Second, there's no agreement regarding the funding of the litigation by the Trust; rather, each side is devoting the resources to it that it deems appropriate. Relatedly, there is nothing in the record to suggest that DSI would be unable to pursue the successor liability claims without the assistance of the Trust. Fourth, importantly, there is not a complete overlap of the successor liability claims here asserted by DSI and, according to the Trust, the Trust, and, of course, there is no overlap at all in respect to the other three claims asserted by the Trust since DSI has not brought or joined in the other three claims asserted by the Trust. Finally, unlike BNP in Housecraft, the Trust does not assert a lien on the proceeds of this litigation.

With regard to the successor liability claims, the Trust will continue to argue if I defer the ruling on standing that it is entitled uniquely to any proceeds of a victory because of the alleged individual injury to it that is separate and different from any injury to Coudert directly or to Coudert's creditors generally. Again, the Court has not approved any resolution of that issue, and it does not appear to me that deferring the issue on standing and leaving that issue as a live issue would be in the "best interests of the bankruptcy estate or necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." Obviously, DSI welcomes the help of an ally in the litigation, but, on the other hand, there is a risk of loss to the estate if I were to defer a ruling on the Trust's standing. At a minimum, that risk of loss would be money spent in negotiating a sharing of the proceeds, and, in addition to that risk, there is a risk that the estate would have to share some of those proceeds with the Trust at a later time. This is clearly different than the facts in HouseCraft where the Second Circuit stated that the district court recognized the estate incurred no risk of loss in entering into the sharing agreement.

Finally, it appears to me that in addition to considering the interests of the estate and the burden on the estate of having the standing issue continue to be undecided, there is an additional burden on the defendants in having to contend not only with the arguments of DSI on successor liability but also with the continued pursuit by the Trust of the argument that it has a separate basis to assert successor liability. That burden would be felt in discovery as well as in any further motions before the Court and, ultimately, if it got that far, in a trial where the defendants would have to respond to that second batch of arguments.

In light of all those facts and factors, I believe it is appropriate to rule on the standing issue now; and, as I have so ruled, I find that the Trust lacks standing to bring the successor liability claim and, in respect to the other three claims, if the basis for those three other claims is a generalized claim that the three defendants caused harm to Coudert's estate that rendered Coudert less able to pay its debts.

Let me turn then to the 12(b)(6) motion with regard to the successor liability claim asserted by DSI (and, to the extent that an appellate court were to determine that I was incorrect on the standing argument, my conclusions would also apply to the Trust's successor liability claim).

When considering a motion under Rule 12(b)(6), the Court must assess the legal feasibility of the complaint, not weigh the evidence that might be proffered in its support. Koppel v. 4987 Corp., 167 F.3d 125, 133 (2d Cir. 1999). The Court's consideration is "limited to facts stated on the face of the complaint and where the documents appended to the complaint are incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken." Hertz Corp. v. City of New York, 1 F.3d, 121, 125 (2d Cir. 1993) cert. denied 510 U.S. 1111 (1993). The Court accepts the complaint's factual allegations as true and must draw reasonable inferences in favor of the plaintiff. Tellabs Inc. v. Makor Issues & Rights Ltd., 551 U.S. 308, 323 (2007).

Federal Rule of Civil Procedure 8(a) does not, moreover, require a claimant to set forth any legal theory justifying the relief sought, only sufficient factual reference to show that the claimant may be entitled to some form of relief. Newman v. Silver, 713 F.2d 14, 15 (2d Cir. 1983), Tolle v. Caroll Touch Inc., 997 F.2d 1129, 1134 (7th Cir. 1992).

However if a complaint's allegations are clearly contradicted by documents incorporated into the pleadings by reference, the court need not accept them. Labajo v. Best Buy Stores, L.P., 478 F.Supp.2d 523, 528 (S.D.N.Y. 2007).

Moreover, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). Instead, the complaint must state more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Relatedly, while the Supreme Court has confirmed, in light of the notice pleading standard under Federal Rule of Civil Procedure 8(a), that a complaint does not need detailed factual allegations to survive a motion under Rule 12(b)(6), see Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), the complaint's "factual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 555. The complaint must contain sufficient facts accepted as true to state a claim that is "plausible on its face," Id. at 570. In other words, if the claim would not otherwise be plausible on its face, the plaintiff must allege sufficient facts to "nudge the claim across the line from conceivable to plausible." Id. Otherwise, the defendant should not be subject to the burdens of discovery and the worry of overhanging litigation.

Evaluating plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than mere possibility of misconduct the claimant has alleged –- but it has not shown –- that the pleader is entitled to relief." Ashcroft v. Iqbal, 129

S. Ct. 1937, 1950 (2009) (internal citations omitted). Where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to entitlement to relief. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. At 1949.

In sum, therefore, in applying Twombly the Supreme Court has observed that "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned the defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. 1949 (Citations omitted.) Therefore, in determining whether a claim should survive a motion to dismiss a court must first identify each element of the cause of action. Id. at 1947. Next, the court must identify the allegations that are not entitled to the assumption of truth because they are legal conclusions, not factual allegations. Id. at 1951. Finally, the court must assess the factual allegations in the context of the elements of the claim to determine whether they "plausibly suggest an entitlement to relief." Id.

I have reviewed the second amended complaint's allegations in respect of the successor liability claim in that light. It is clear under the law of New York that, with limited exceptions, a buyer of assets, even of all of a seller's assets, does not thereby become liable for the seller's debts. Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 45 (2d Cir. 2003). New York recognizes four common law exceptions to the rule that an asset purchaser is not liable for the seller's debts, however. They apply to (1) a buyer who formally assumes the seller's debts, (2) transactions undertaken to defraud creditors, (3)a buyer who de facto merged with the seller, and (4) a buyer that is a mere continuation of a seller. Id. (citing, among other authorities, Schumacher v. Richards Shear Co., Inc., 59 N.Y.2d 239, 245 (1983)). Here the plaintiffs rely upon the last two exceptions: de facto merger and mere continuation, although they acknowledge that under the law of New York those two doctrines are in all likelihood so

similar that they may be considered a single exception. See again Cargo Partner AG, 352 F.3d at 45 n. 3.

The rationale for the de facto merger/mere continuation exception is to avoid "the patent injustice which might befall a party simply because a merger has been called something else," id. at 46, or where "the form of a transaction does not accurately portray its substance as a merger." Id.

In light of that purpose, it has been held that courts in New York should analyze the facts "in a flexible manner that disregards mere questions of form and asks whether in substance 'it was the intent of the successor to absorb and continue the operation of the predecessor.'" Nettis v. Levitt, 241 F.3rd 186, 194 (2d Cir. 2001), overruled on other grounds by Slayton v. American Exp. Co., 460 F.3d 215 (2d Cir. 2006). See also Miller v. Forge Mench Partnership Ltd., 2005 WL 267551 at *7 (S.D.N.Y. Feb. 2, 2005).

The four basic elements of the de facto merger doctrine are well understood. They are that there must be (1) a continuity of the selling corporation evidenced by the same management, personnel, assets, and physical location, (2) a continuity of stockholders accomplished by paying for the acquired corporation with shares of stock, (3) a dissolution of the selling corporation, and (4) the assumption of liabilities by the purchaser. Cargo Partner AG, 352 F.3d at 46.

Those four elements, though, have been refined by the courts in a number of opinions both in the motion to dismiss and summary judgment contexts. It's recognized that there's a distinction between the need for mere "continuity" as used in the first two of the foregoing factors and the more difficult to establish concept of "uniformity" as far as, at least, ownership is concerned, and, in all likelihood, also with regard to assets, management, personnel and location. Therefore, it has been held, for example, that "continuity" of ownership does not require that the former owners retain their ownership interest in the same

form or that they retain the same percentage of their ownership interest.

In addition, it has been held that, or at least stated that, “continuity” of assets equates only to substantial continuity of assets.

Finally, it has been held that the requirement that the transferor be dissolved or cease its business upon the acquisition not require a formal dissolution. See, for example, Miller v. Forge Mench Partnership Ltd., 2005 WL 267551, and Barrack Rodos and Bacine v. Ballon Stoll Bader and Nadler, P.C., 2008 WL 759353 (S.D.N.Y. Mar. 20, 2008), and the cases it cites at pages 7 through 8.

However, those clarifications or refinements of the basic four-part test do not, I believe, enable the second amended complaint’s successor liability claim to survive the motions to dismiss.

That fundamentally is because the facts as alleged in the second amended complaint simply do not show a continuation of Coudert Brothers, LLP in the four defendants with respect to management, personnel, assets, and physical location; or a continuity of ownership; or a dissolution, even on an informal non-legal basis, of Coudert Brothers, LLP as a result of the transactions alleged in the complaint; or, finally, an assumption of the essential liabilities of Coudert Brothers LLP by the defendants. It simply is not alleged here that there was one purchaser of all or substantially all of Coudert's assets but, rather, four, and those four, as alleged in the complaint in each case purchased less than 50% of the value of Coudert, LLP's business, the highest amount of value being the Baker & McKenzie acquisition, through an Asset Purchase Agreement, of Coudert's New York City and part of Coudert's Washington, DC offices. However, it is alleged only that, as a result of that acquisition, Baker & McKenzie obtained assets that "generated almost 48% of the firm's worldwide profits."

The other three defendants, it is alleged, acquired assets in foreign locations, each of which, it is alleged, generated an even smaller amount of the Coudert firm’s

worldwide profits. While each defendant obtained and used Coudert Brothers locations and obtained Coudert Brothers assets, from the face of the complaint it is clear that none of the defendant firms obtained substantially all of those assets or locations. Rather, it is clear from the face of the complaint that Coudert Brothers LLP and its business fragmented over the course of 2005.

In addition, it is clear from the face of the complaint, including from the Coudert Brothers Partnership Agreement, referenced in the complaint, that the managers of Coudert Brothers dispersed and did not all go to any one of the four defendant firms, and that the partners, the owners of the firm, also dispersed, so that considerably less than a majority of the partners went to any one of the four defendants. Finally, it appears clear from the complaint that Coudert Brothers LLP, while being diminished considerably and perhaps even put on the road to dissolution, did not, in fact, dissolve either as a legal matter or as a functioning entity as a result of the defendants' actions. Instead, Coudert continued to engage in, for example, collecting its obligations as well as, in some contexts (since the four defendants are alleged to have engaged in the transactions at issue not all at once, but, rather, over a period of months), continuing to conduct legal business. Under those circumstances, it is clear that the complaint does not set forth a cause of action for a de facto merger or a continuation of business under New York law.

The movants rely primarily upon Lippe v. Bairnco, 99 Fed. Appx., 274 2004 WL 1109846 (2d Cir. 2004) to support their argument that the fact that a business was acquired by multiple acquirers (assuming, as this complaint does, that those acquirers did not act in concert) defeats a successor liability claim as a matter of law, because the plaintiff cannot show the required elements of continuity of management, personnel, assets, location, and business or continuity of ownership. I believe that, based upon the implicit assumptions in Lippe, that case does stand for that proposition, but it really is not alone. The fundamental

basis, again, of the de facto merger or continuation of business exception is "to recognize the wholesale transformation of one company into another." Lumbard v. Maglia, Inc., 621 F. Supp. 1529, 1536 (S.D.N.Y. 1985), not of one business into several. I have found no case and no case has been cited to me by the plaintiffs, that would suggest that under the facts as alleged in the complaint a de facto merger or continuation of business claim could be established where it is not alleged that substantially all of the assets and locations and management and ownership of the transferor went to a particular transferee but, rather, as here, where those elements were spread among multiple transferees, who, in addition, did not, even in the aggregate, acquire all of the assets and locations, managers and ownership interests.

See generally Miller v. Forge Mench Partnership Ltd., 2005 WL 267551, where all of the assets were transferred, as well as Barrack, Rodos & Bacine, 2008 WL 759353 (S.D.N.Y. March 20, 2008), where there was not a sufficient transfer of the business or ownership, to be distinguished from Glynwed Inc. v. Plastimatic, Inc., 869 F. Supp. 265 (D.N.J. 1994), where the purchaser purchased the assets, all of the assets, of the seller, and the only issue was whether in fact there was a continuity in ownership, as well as Societe Anonyme Dauphitex v. Schoenfelder Corp., 2007 WL 3253592 (S.D.N.Y. November 2, 2007), where the defendants conceded that there was continuity of ownership and continuity of management, location, assets, and operations, unlike here, where the complaint shows just the opposite.

It is clear from reviewing Coudert Brothers LLP's Partnership Agreement that although the partnership was set up in light of the practicalities of conducting business, in certain instances, in foreign countries under a different legal structure (for example, through Coudert Freres, a separate New York partnership in France, and through various separate legal entities in Hong Kong and elsewhere in Asia), those separate legal entities -- as well as, of course, the separate foreign branch offices of Coudert –- nevertheless were treated as part of

one firm, Coudert Brothers LLP. Thus, the schedule of partners in the Coudert Brothers LLP partnership included the partners in those foreign entities and foreign offices. And thus the assets and liabilities of those foreign entities and branch offices also were considered assets and liabilities of the partnership, with certain specific contractual limitations.

Under those circumstances, I believe that it is simply not plausible to assume that DSI and the Trust, if the Trust had standing, could ever show that the acquisition of a foreign office or even of one of the foreign entities by any of the defendants could give rise to the joint and several liability of such defendant for all of Coudert LLP's debts, as is alleged by the complaint, because, again, the acquisitions, as pled, do not show even a substantial continuity with Coudert LLP as a whole but only show substantial continuity with the foreign branch office or entity or with the offices in the U.S., although even there it's acknowledged that only half of the D.C. office was acquired by Baker & McKenzie in addition to the New York office and the total acquisition was of less than 50 percent of the firm. I don't believe any further discovery would change those underlying infirmities in the successor liability cause of action, and, therefore, I'll grant the four defendants' motions to dismiss that cause of action against them.

Turning to the three causes of action brought solely by the Trust, one of which, the tortious interference claim, was brought only against Dechert, Baker & McKenzie, and Orrick, I conclude that in each case the Trust has not asserted a cause of action that can survive the motions to dismiss. The parties agree upon the elements of a claim for tortious interference with contract. I conclude that the complaint does not establish two of the required elements. The first of the four elements is the existence of a valid contract between the plaintiff and a third party. Here, clearly, there's a valid contract, that is, the Partnership Agreement. Second, the plaintiff must show the defendant's knowledge of that contract, and it's alleged that each of the three defendants had knowledge of the Coudert Partnership

Agreement, and that's not disputed here. However, third, the Trust must show defendants' intentional procurement of the third party's breach of the contract without justification and, fourth, actual breach of the contract, with damages resulting therefrom. Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 425 (1996).

Here, I do not see an allegation of either an actual breach of the contract, that is, a breach of Coudert's Partnership Agreement, or an allegation of the defendants' intentional procurement of such breach. I don't believe that oral argument has highlighted any such allegation, either. Recalling the applicable provisions of the Partnership Agreement, it is clear from those provisions, paragraph 6(j) and Schedule 5, that Coudert's obligation to the retirees was limited. It was an obligation to pay them their appropriate retirement income, in the priority established under the Partnership Agreement from profits of the partnership. There is no provision of the Partnership Agreement that requires (for the benefit of any party, including the retirees) that Coudert Brothers LLP remain in business, or that any member of Coudert Brothers LLP remain a member of the firm, or that either Coudert Brothers LLP or its members provide for continued payments to the retired partners upon either the dissolution of the partnership or the transfer of substantially all of its business or substantially all of the partners' exit from the partnership. Therefore, the only breach that could be alleged is the failure of the partnership to comply with its obligation to pay retirement income as required by paragraph 6(j) and Schedule 5.

That breach is never alleged in the complaint, however. The closest that the complaint comes to making such an allegation is paragraph 17, in which it states "at some point in 2005 the incumbent partners of Coudert ceased to make pension payments to the retired partners including to the retired partners of the trust." It is clear that that allegation does not allege a breach since it doesn't do so on its face or allege facts that suggest that paragraph 6(j) and Schedule 5 were breached. It states only that the payments "ceased."

Again, under paragraph 6(j) the partnership had to make payments to the retired partners only under certain circumstances, where there were sufficient profits to do so and the parties entitled to prior payments had received their payments. Satisfaction of those conditions is not alleged. Therefore, the fourth element of tortious interference has not been satisfied.

In addition, the complaint does not allege that any of the three defendants to the tortious interference claim procured any breach. Of course they could not have procured a breach that has not been alleged, but, in addition, the complaint does not allege procurement. At most, the complaint alleges that each of the three defendants lured Coudert partners to leave Coudert and join their firms. But, again, there is no contractual obligation in the Partnership Agreement that the partners remain at Coudert or that Coudert remain in business or that Coudert or the partners ensure the continued payment of the retirees from some source other than the profits specified in paragraph 6(j) and Schedule 5, paragraph 9.

The allegations in the complaint, particularly as pinpointed in the oral argument at paragraph 93 of the complaint, are either simply conclusory allegations that the three defendants engaged in tortious interference or, with regard to the sentence that asserts facts supporting such conclusory allegations, do not allege procurement of the provision of the Partnership Agreement that was capable of being breached, but, rather, again, only that the three firms obtaining Coudert partners and Coudert assets helped to cause Coudert not to be able to pay its obligations. That does not satisfy the third element of tortious interference.

Returning for the moment also to my initial discussion with regard to the Trust's standing to bring the tortious interference claim, it is clear from the foregoing discussion that the Trust's allegations here, separate and apart from not establishing a claim for tortious interference, also are allegations that would be true of any creditor of Coudert, i.e. that the three firms' alleged actions diminished Coudert's ability to pay its debts in general, and, therefore, the Trust does not have standing to bring its tortious interference claim even if

that claim had some merit. Instead, any such claim would belong to the debtor's representative on behalf of all creditors, if it had merit.

The Trust's unjust enrichment and constructive trust claims both hinge upon the same alleged wrongdoing, and therefore, I believe fail because the alleged wrongdoing was not actually wrongdoing, because, as I've just discussed, as set forth in the Complaint, none of the defendant firms breached any obligation or duty to the retiree partners or caused Coudert to do so.

In addition, it appears from my reading of the complaint that the unjust enrichment claim relates to, exclusively, instances where the defendant firms acquired assets and/or practices from Coudert pursuant to contracts, or asset purchase agreements and the like. It is well-recognized in New York that an unjust enrichment claim is barred by a contract governing the subject matter of the dispute, even if one of the parties to the lawsuit is not a party to the contract. Here, in fact, there are two contracts; there is the Coudert Partnership Agreement, which lays out the rights between the retirees, on the one hand, and Coudert and the current partners, on the other, and the APA agreements with the respective firms, which also lay out the obligations that are assumed and the obligations that either expressly or implicitly are not assumed by the buyers pursuant to those agreements. Given the foregoing, the unjust enrichment claim fails. See American Medical Ass'n v. United Healthcare Corp., 2007 WL 683974, at *10 (S.D.N.Y. March 5, 2007), and the cases cited therein.

Unjust enrichment is also a critical element of establishing a constructive trust, as is a promise expressed or implied and a transfer in reliance on that promise. Counihan v. Allstate Ins. Co., 194 F.3d 357, 361-362 (2d Cir. 1999). For the same reason that I just discussed, the complaint therefore does not set forth a claim for unjust enrichment, one of the key elements of a constructive trust cause of action being unjust enrichment. Further, one of the contracts at issue, the Partnership Agreement, sets forth the alleged promise, and it's

simply not the case that the complaint alleges that that promise was breached. So, for those reasons, the Trust's unjust enrichment claim and the constructive trust claims also should be dismissed under Rule 12(b)(6) for failure to state a claim.

My ruling on successor liability has encompassed all four firms equally. I should note, further, however, that DLA US is by far the most remote from any sort of potential successor liability as pled in the complaint, given that "DLA's" acquisition of substantial assets of or partners in Coudert was not by DLA US but by, instead, DLA UK and DLA Singapore, neither of which have been served. Therefore, it appears to me that it is irrelevant, as far as any successor liability claim against DLA US is concerned, to assert any facts related to those other two entities' acquisitions of property or partners or practice groups from Coudert absent any additional allegation that would support a claim that DLA US should be conflated with DLA UK and DLA Singapore beyond the fact that DLA US is an affiliate of those two entities. Simply asserting affiliate status is not sufficient to state a claim on that basis. But other than noting that remoteness, I'll simply reiterate that all four of the defendants acquired only pieces of Coudert and, as per the allegations in the complaint, none of those pieces could be viewed as constituting substantially all of the partners, personnel, assets or locations of Coudert and, therefore, the complaint does not set forth a claim that any of those entities should be liable for all of Coudert's debts.

Therefore, the movants should each submit an order dismissing the complaint for the reasons stated. As you all know, when I give a lengthy bench ruling, as this clearly was, I often review the ruling and correct not only typos and misspelled or incorrect citations but also often fix my grammar or add or subtract sections that I think should be added or subtracted. If I do that, I'll file that amended ruling separately. It won't be a transcript, it will be the amended ruling. But my underlying ruling won't change, which is that the complaint should be dismissed.

It's been requested that the complaint be dismissed with prejudice. Frankly I don't see a basis, given the allegations in the complaint for ever asserting a claim for any of the causes of action. Although there's been no request to file an amended complaint, I would look askance at any such request unless the complaint that would be attached to such motion would assert dramatically different facts that would fit within the case law that I've cited. I simply don't believe that's possible. But I think it's appropriate simply to have the complaint be dismissed and deal with any request to amend if and when it's made. This is something that I can do simply when I review the complaint myself. But it would be remarkable if I would grant leave to amend the complaint unless, again, facts that are simply contrary to everything I know about this from the present complaint would be alleged.

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