UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not For Publication

In re:	:	Chapter 11
ENRON CORP., *et al*.,	:	Case No. 01-16034 (AJG)
Debtors.	:	(Confirmed Case)
ENRON CORP., and EGP FUELS COMPANY,	:	
Plaintiffs,	:	
v.	:	Adv. Proc. No. 03-92511 (AJG)
PORT OF HOUSTON AUTHORITY,	:	(Jointly Administered)
Defendant.	:	

OPINION DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

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Before the Court is a motion filed by the Port of Houston Authority ("PHA" or "Defendant") to dismiss a complaint filed on November 21, 2003 by Enron Corp. ("Enron") and an affiliate of Enron, EGP Fuels Company ("EGP") (together "Plaintiffs"). This complaint (the "Amended Complaint") intended to amend an earlier complaint against PHA (the "Original Complaint") filed by Enron Transportation Services Company ("ETSC"), another affiliate of Enron, on October 14, 2003. The Amended Complaint alleged that a payment from Plaintiffs to Defendant pursuant to a construction contract (the "Transfer") was a preference or, in the alternative, a fraudulent transfer, and sought to avoid and recover the Transfer in application of sections 547, 548 and 550 of title 11 of the United States Code (the "Bankruptcy Code"). As the parties later agreed, Plaintiffs withdrew all preference claims and EGP's fraudulent transfer claim. (Transcript of Oral Argument at 24-27, *Enron Transp. Servs. Co. v. Port of Houston Auth. (In re Enron Corp.)*, Adv. Proc. No. 03-92511 (No. 01-16034) (Bankr. S.D.N.Y. June 8, 2005).) Thus, the Court must rule on PHA's motion to dismiss only as to Enron's fraudulent transfer claim under section 548 of the Bankruptcy Code. PHA's motion is denied as to Enron's fraudulent transfer claim and granted as to all other claims.

JURISDICTION

The Court has subject matter jurisdiction over this proceeding pursuant to sections 1334 and 157(b) of title 28 of the United States Code, under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.), and under paragraph 60 of this

Court's Order Confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors under chapter 11 of title 11 of the United States Code (July 15, 2004). The Court has jurisdiction over "core proceedings" including "proceedings to determine, avoid, or recover preferences" and "proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C. § 157(b)(2)(F), (H) (2000). Venue is properly before this Court pursuant to section 1409(a) of title 28 of the United States Code.

FACTS AND PROCEDURAL BACKGROUND

On or about August 16, 2001, PHA sent an invoice to Enron Clean Fuels Company ("ECFC"), an affiliate of EGP, demanding payment of $75,375 for concrete work at a facility called the Morgan's Point Chemical Company. (Pls.' Objection to Def.'s Mot. for Order Dismissing Pls.' First Am. Compl.¶ 1, Ex. 1.) A check dated August 31, 2001 in the amount of $75,375, which was drawn on account number 3862-1216 at Citibank Delaware, was delivered to PHA as payee. (Id. ¶ 2, Ex. 2.) The check bore the name of EGP and also the name of Enron as part of a logo imprinted in the upper left-hand corner of the check. (Id. Ex. 2.) The check cleared the account on September 10, 2001. (Id. ¶ 2.)

Enron and ETSC filed chapter 11 petitions on December 2, 2001. EGP is also a chapter 11 debtor; EGP filed its petition on June 17, 2003. On July 15, 2004, the Court entered an Order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors in these cases, which became effective on November 17, 2004. All these chapter 11 cases were never substantively consolidated.[1]

[1] "Unlike joint administration (also referred to as procedural consolidation), which does not affect the substantive rights of claimants or the respective debtor estates, substantive consolidation merges the separate estates into one estate for distributive purposes. Usually, the assets and liabilities are shared, with duplicate claims being eliminated and intercompany claims being extinguished." *Moran v. H.K. &*

On November 21, 2003, Plaintiffs filed the Amended Complaint, which purported to amend the Original Complaint filed on October 14, 2003 by ETSC. The Original Complaint stated a preference claim under section 547 of the Bankruptcy Code to avoid and recover the Transfer. The Amended Complaint named Enron and EGP as plaintiffs, apparently intending to replace ETSC without expressly so stating, and added fraudulent transfer actions under section 548 of the Bankruptcy Code. Both the Original and Amended Complaint name PHA, a party to the construction contract, as a defendant. No service of a summons for the Original Complaint is reflected on the docket. Summons for the Amended Complaint was filed and served on Defendant on January 6, 2004.

PHA filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on January 31, 2004. Plaintiffs filed an objection on May 5, 2004. Defendant filed a reply on May 10, 2004. The Court held hearings on May 13, 2004 and June 8, 2005.

DISCUSSION

Standard under Rule 12(b)(6)

Federal Rule of Bankruptcy Procedure 7012(b) makes Federal Rule of Civil Procedure 12(b)(6) applicable to the instant proceeding. In considering a Rule 12(b)(6) motion to dismiss, the court accepts as true all material facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992); *Leslie Fay Cos., Inc. v. Corporate Property Assocs. 3 (In re Leslie Fay Cos., Inc.*), 166 B.R. 802, 807 (Bankr. S.D.N.Y. 1994). The motion to dismiss is granted only if no set of facts can be established to entitle the plaintiff to relief. 974

Shanghai Banking Corp. (In re Deltacorp.), 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995) (footnotes omitted) (citing *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 58-59 (2d Cir. 1992)). The Enron-related bankruptcy cases in this Court have only been procedurally consolidated.

F.2d at 298; 166 B.R. at 807. To survive a motion to dismiss, a plaintiff only has to allege sufficient facts in support of the cause of action, not prove them. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999). A court's role in ruling on a motion to dismiss is to evaluate the legal feasibility of the complaint, not to weigh the evidence that may be offered to support it. *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998).

Although a court accepts all the factual allegations in the complaint as true, 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). Thus, where more specific allegations of the complaint contradict such legal conclusions, "[g]eneral, conclusory allegations need not be credited." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995). Rather, to withstand a motion to dismiss, there must be "specific and detailed factual allegations," not stated in "wholly conclusory terms," to support the claim. *Friedl v. City of New York*, 210 F.3d 79, 85-86 (2d Cir. 2000) (internal citations omitted).

"Although bald assertions and conclusions of law are insufficient, the pleading standard is nonetheless a liberal one." *Cooper*, 140 F.3d at 440. Pursuant to Federal Rule of Civil Procedure 8(a), which is made applicable to adversary proceedings by Bankruptcy Rule 7008, in asserting a claim, the pleader need only set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). The purpose of the statement is to provide "fair notice" of the claim and "the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The simplicity required by the rule recognizes the ample opportunity afforded for discovery and other pre-trial procedures, which permit the parties to obtain more detail as to the basis of the claim and as to the disputed facts and issues. *Id*. at 47-48. Based upon the liberal

pleading standard established by Rule 8(a), even the failure to cite a statute, or to cite the correct statute, will not affect the merits of the claim. *Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 46 (2d Cir. 1997). In considering a motion to dismiss, it is not the legal theory but, rather, the factual allegations that matter. *Id*.

In reviewing a Rule 12(b)(6) motion, a court may consider the allegations in the complaint, exhibits attached to the complaint or incorporated therein by reference, matters of which judicial notice may be taken, *Brass v. Am. Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993), and documents of which plaintiff has notice and on which it relied in bringing its claim or that are integral to its claim, *Cortec Indus. v. Sum Holding, L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).[2] However, mere notice or possession of the document is not sufficient. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Rather, a necessary prerequisite for a court's consideration of the document is that a plaintiff relied "on the terms and effect of a document in drafting the complaint." *Id*. As such, the document relied upon in framing the complaint is considered to be merged into the pleading. *Id*. at 153 n.3 (citation omitted). In contrast, when assessing the sufficiency of the complaint, the Court does not consider extraneous material because

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[2] The standard the Court applies is not in contradiction with *Rothman v. Gregor*, 220 F.3d 81 (2d Cir. 2000), cited by Defendant as governing what the Court may consider in deciding the motion. There, the Second Circuit stated the following:

> For purposes of a motion to dismiss, we have deemed a complaint to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference, *see Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989), as well as public disclosure documents required by law to be, and that have been, filed with the SEC, *see Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991), and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit, *see Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991).

Rothman, 220 F.3d at 88 - 89.

considering such would run counter to the liberal pleading standard which requires only a short and plain statement of the claim showing entitlement to relief. *Id*. at 154.

A motion to dismiss invites a response in opposition, which the court may then consider when weighing the sufficiency of the complaint. *Brandon v. Dist. of Columbia Bd. of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); *Nietzke v. Williams*, 490 U.S. 319, 329-30. However, affidavits and exhibits submitted by a defendant in support of its motion to dismiss are deemed by Rule 12(b)(6) to be outside the record that the court may consider. *Kopec v*. *Coughlin*, 922 F.2d 152, 154 (2d Cir. 1991).

Amendment under Rule 15(a)

Defendant contends that the complete substitution of one plaintiff for another is not an amendment under Rule 15(a) of the Federal Rules of Civil Procedure. Defendant asserts that ETSC abandoned its action and that, as a consequence of that abandonment, Enron and EGP could not amend an action in which they were not originally named. Defendant further contends that the amendment cannot be viewed as an attempt to effect a joinder of new plaintiffs since that would require retention of ETSC as a plaintiff. According to Defendant, the action would be procedurally proper only if commenced by Enron and EGP in a new and properly filed adversary proceeding, including payment by Plaintiffs of a filing fee.

Additionally, Defendant contends that, because Plaintiffs have not yet properly commenced the action, Plaintiffs claims are now time-barred under section 546(a) of the Bankruptcy Code.

Federal Rule of Civil Procedure 15(a), made applicable to the instant proceeding by Federal Rule of Bankruptcy Procedure 7015, allows a party to amend a "pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). "The purpose of the amendment as of right is to avoid judicial involvement in the pleading process when there is little reason for doing so." 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1480 (Westlaw 2005). Further, an as of right amendment cannot prejudice the opposing party, who "probably has not relied to any appreciable extent on the contents of the original pleading." *Id*. "The better view . . . rejects the notion that a motion to amend is required to add or drop parties before the filing of a responsive pleading. The more persuasive cases hold that before the time a responsive pleading is filed, all amendments are allowed as a matter of course, including amendments to drop or add parties." 3 James Wm. Moore et al., *Moore's Federal Practice*, § 15.16[1] (3d ed. 1997); *see, e.g., First City Nat'l Bank and Trust Co. v. FDIC*, 730 F. Supp. 501, 515 (E.D.N.Y. 1990).

No responsive pleading to the Original Complaint was required because the docket reflects that no summons was issued regarding this Original Complaint. The filing of the Amended Complaint did not prejudice Defendant, who at the time had not yet filed an answer. Therefore, Plaintiffs did not need judicial permission to amend and could properly substitute Enron and EGP for ETSC.

Defendant further asserts that the Amended Complaint does not comport with Rule 20, governing permissive joinder of parties, or Rule 21, governing misjoinder, presumably because Plaintiffs did not file a motion premised on either rule. The Court

found that Rule 15(a) is applicable, and therefore no motion was necessary under other Rules.

Defendant contends that Rule 25, governing substitution of parties, applies to this situation. However, none of the enumerated circumstances covered by that rule apply here. *See* Fed. R. Civ. P. 25(a)-(d).

Lastly, Defendant contends that *Family Golf Centers, Inc. v. Acushnet Co. (In re Randall's Island Family Golf Centers, Inc.),* 288 B.R. 701 (Bankr. S.D.N.Y. 2003) governs the alteration of the plaintiff names and requires Plaintiffs to obtain a new case number and pay the appropriate filing fee. In *Acushnet*, on a defendant's motion to dismiss a preference action, the court had dismissed without prejudice the debtor plaintiff's adversary proceeding on procedural grounds, leaving the debtor plaintiff free to correct the procedural defects and file a new action with payment of the required fee. *Acushnet*, 288 B.R. at 703-04. The present matter is, however, distinguishable. There, the question decided was whether equitable tolling applied to save the re-filed adversary proceeding from the time limitations applied to preference actions. *Id.* at 704. Here, there is no issue of equitable tolling because Plaintiffs' Amended Complaint was timely.

Therefore, the Court rejects Defendant's contentions that the Amended Complaint violates procedural rules.

Enron's Fraudulent Transfer Claim

As for the remaining action, Enron's fraudulent transfer claim, the applicable statutory language provides the following:

> The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or

> defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a)(1) (2000), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402, 119 Stat. 23, 214.

There is no allegation that Enron had any actual fraudulent intent at the time of the Transfers. *See* 11 U.S.C. § 548(a)(1)(A) (2000). Enron seeks to state a claim for constructively fraudulent transfer under § 548(a)(1)(B). (Am. Compl. ¶¶ 19-25.) "A transaction may be avoided as a constructively fraudulent transfer under federal bankruptcy law if it is proved that (1) the debtor had an interest in the property transferred; (2) the transfer occurred within one year of the petition date; (3) the debtor was insolvent at the time of the transfer or became insolvent as result of it; and (4) the debtor received less than a reasonably equivalent value in exchange for the transfer." *Breeden v. L.I. Bridge Fund, L.L.C. (In re Bennett Funding Group, Inc.)*, 232 B.R. 565, 570 (Bankr. N.D.N.Y. 1999) (citing 11 U.S.C. § 548(a)(1)(B); *Mellon Bank v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 144 (3d Cir. 1996)).

The Transfer occurred in September 2001, within a year before Enron filed for bankruptcy on December 2, 2001. Enron may have been insolvent at the time of the Transfer or become insolvent as a result of them. In any event, this Court will not decide

the issue of insolvency, which requires weighing the evidence, in the context of a motion to dismiss. *Cooper*, 140 F.3d at 440. The Court must only determine whether the Transfer involved "an interest of the debtor [Enron] in property," 11 U.S.C. § 548(a)(1) (2000), and whether Enron can prove no set of facts supporting the conclusion that Enron did not receive reasonably equivalent value for the Transfer. *Walker*, 974 F.2d at 298; *Leslie Fay*, 166 B.R. at 807.

Enron's Property Interest in the Transfer

PHA contends that Enron's fraudulent transfer claim fails because the Transfer involved no property of Enron. Defendant asserts that because the name on the check is EGP's, the funds transferred by the check were property of EGP and not the property of Enron.

In opposition, Plaintiffs assert that the transferred property was Enron's because Enron opened and initially funded the bank account. Plaintiffs further contend an inference can be drawn that the account was the property of Enron at the time of the Transfer because Enron transferred the ownership of the account to a third party, ETSC, after the Transfer to PHA. Plaintiffs urge that Enron's ownership of the account and the funds held therein meets the initial threshold for a constructive fraudulent transfer action.

The preliminary requisite for a fraudulent transfer action is whether the interest transferred involved the property of the debtor's estate. 11 U.S.C. § 548(a)(1) (2000). The definition of "property of the estate" contained in section 541 of the Bankruptcy Code determines the scope of interests in property recoverable under sections 547 and 548. *Begier v. IRS*, 496 U.S. 53, 58-59 (1990).

Evidence of an interest in a bank account is found where the party asserting the interest holds the legal title thereto, all other indicia of ownership, and the "unfettered discretion to pay creditors of its own choosing," even where the account contains commingled funds. *In re Southmark Corp.*, 49 F.3d 1111, 1116 (5th Cir. 1995). For the purposes of section 548(a) of the Bankruptcy Code, it is the transferor's control of the funds in the account and not the actual ownership that is dispositive. *Id*. at 1117; *In re Regency Holdings (Cayman), Inc.*, 216 B.R. 371, 376; *Cassirer v. Herskowitz (In re Schick)*, 234 B.R. 337, 342 (Bankr. S.D.N.Y. 1999); *Stevenson v. J.C. Bradford Co. (In re Cannon)*, 277 F.3d 838, 849 (6th Cir. 2002). The key inquiry for the estate is whether the funds the debtor transferred reduced what the estate could pay to all of the debtor's creditors as a single group. *In re Southmark Corp.*, 49 F.3d at 1118.

Where the account is a cash management account, with proper bookkeeping allocations, the holder of all the indicia of control is the holder of the interest. *In re Regency Holdings (Cayman), Inc.*, 216 B.R. at 377. In contrast, a parent's control, through an ownership structure or other corporate governance mechanism, of a subsidiary entity does not constitute control of the subsidiary's assets, such as a bank account, where there is no legal title to a subject asset held by the parent. *Id.* at 376. A bankruptcy trustee has the burden of demonstrating that the debtor held the legal title to a bank account and control over the use of the account. *In re Schick*, 234 B.R. at 343.

The Fifth Circuit held that when the check in question was drawn on a general bank account, which may have contained commingled funds, but which was under the legal control of the debtor, the preference action belonged to the debtor's estate. *In re Southmark Corp.*, 49 F.3d at 1114, 1116.

As noted above, Plaintiffs and Defendant admit that the Transfer was in the form of a check. The Court notes that the check is imprinted with both the name of EGP Fuels Company and a logo incorporating the name of Enron.

Enron contends that it both owned and funded the subject account. Account opening documents are attached to Plaintiffs' objection. (Pls.' Objection to Def.'s Mot. for Order Dismissing Pls.' First Am. Compl., Ex. 3.) A November 26, 2001 letter attached to the objection informs Citibank Delaware that the owner of Account No. 3862-1216 has changed from Enron Corp. to Enron Transportation Services Company. (Id. Ex. 4.) As noted above, the Transfer occurred in September 2001, before this account ownership change.

The Court does not need to decide whether specific funds in the bank account belong exclusively to Enron or EGP. Given the instructions to the bank contained in the documents attached to the Plaintiffs' objection, Enron's complaint provides an adequate inference that Enron could direct the funds in the account to be paid to any creditor. *In re Regency Holdings (Cayman), Inc.*, 216 B.R. at 377. Therefore, the submissions related to Enron's ownership of the subject account are of sufficient detail to plead adequately that Enron had a property interest under section 548.

Reasonably Equivalent Value

PHA contends that, because the Amended Complaint admits to the satisfaction of an antecedent debt, Enron cannot claim that no reasonably equivalent value was received in exchange for the Transfer. PHA contends that the payment of the debt yielded the required reasonably equivalent value through the discharge of that debt.

PHA contends that *Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981) and *Moran v. Hong Kong & Shanghai Banking Corp. (In re Deltacorp, Inc.),* 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995) state the applicable principles. *Rubin*, decided under the former Bankruptcy Act, dealt with the effect of a three-sided transaction on the debtor's estate. 661 F.2d at 991. The *Rubin* Court found that, when a corporation has filed a bankruptcy petition, if the pre-petition actions of the corporation included the repayment of a debt of an affiliate, the discharge thereof ultimately must have benefited, even if indirectly, the corporation's estate; otherwise, the transaction is avoidable by the corporation's bankruptcy trustee. *Id*. at 991-92. Additionally, Defendant argues that the situation in the instant matter is analogous to substantive consolidation because, according to Defendant, the Amended Complaint alleged the Transfer involved EGP and Enron's assets. Pointing to the *Deltacorp* case, Defendant argues that when the subject corporation and the affiliate are both debtors whose cases are substantively consolidated the ultimate benefit of the corporation's repayment of the affiliate's debt would return to the parent's estate.

However, the Court notes first that the *Rubin* court required an examination of the facts to determine if a parent corporation's estate benefited from paying an affiliate's debt. *Rubin*, 661 F.2d at 993 (requiring the lower court to "attempt to quantify the indirect benefits"). Again, such an examination is not proper when the Court must rule on a motion to dismiss. *Cooper*, 140 F.3d at 440. Second, the *Deltacorp* case makes clear that in a case of joint administration, as in the instant case, the ultimate benefit of the parent's payment does not automatically inure to the parent's bankruptcy estate. *In re Deltacorp, Inc.*, 179 B.R. at 777 (in presence of parent and affiliate debtors, debtor

estates remain separate under joint administration, which provides only procedural consolidation).

Plaintiffs contend that EGP sold the Morgan's Point Chemical Company facility to EOTT Energy Partners, L.P. ("EOTT") on June 29, 2001, before the completion of the construction contract and the date of the Transfer. (Pls.' Objection to Def.'s Mot. for Order Dismissing Pls.' First Am. Compl. ¶¶ 3, 14, Ex. 5.) Plaintiffs' objection describes EOTT as an "unrelated third-party entity," which is a chapter 11 debtor in the Southern District of Texas. (Id. ¶ 14 n.3.) Therefore, Enron contends that, because the services rendered by PHA inured to the benefit of EOTT, Enron did not receive reasonably equivalent value in exchange for the Transfer. The Court holds that these contentions are sufficient to show that Enron, an entity distinct from EOTT, may have not received reasonably equivalent value for the Transfer.

CONCLUSION

Enron's allegations at this point are sufficient to state a claim for constructively fraudulent transfer against PHA. Therefore, PHA's motion to dismiss is denied as to Enron's fraudulent transfer claim. All other claims are dismissed. Plaintiffs are to settle an order consistent with this Opinion.

Dated: New York, New York
June 2, 2006

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE