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United States District Court,  
 S.D. New York.  
**NETWORK ENTERPRISES, INC.**, Plaintiff,  
 v.  
**REALITY RACING, INC.**, Patrick Schaefer, Lee  
 Schaefer, & Craig Leitner, Defendants.  
 No. 09 Civ 4664(RJS).

Aug. 24, 2010.

William B. Fleming and Sara J. Daugherty of Gage  
 Spencer & Fleming, New York, NY, for Plaintiff.

David S. Tannenbaum and Jonathan Kotler of Stern  
 Tannenbaum & Bell, LLP, New York, NY, for De-  
 fendants.

#### MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge.

\*1 Plaintiff Network Enterprises, Inc. brings this diversity action against Defendants Patrick Schaefer, Lee Schaefer, and Craig Leitner ("Defendants"), seeking to hold them personally responsible under an alter ego theory for a default judgment entered by this Court against Reality Racing, Inc., a corporation in which they hold stock and for which they formerly served as officers and directors. (Am.Compl.¶¶ 83-88.) Plaintiff specifically alleges that Defendants dominated the corporation and used their position to commit fraud by selling media content and other assets owned by Reality Racing to a corporate insider in order to avoid payment of a debt. (*Id.* ¶¶ 85, 87.) Plaintiff also makes common law claims under New York law for unjust enrichment and fraudulent conveyance. (*Id.* ¶¶ 97, 102.)

Before the Court is Defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil

Procedure 12(b)(6). For the reasons stated below, the Court holds that Plaintiff has failed to state a claim for which relief may be granted. The motion to dismiss is therefore granted in its entirety.

#### I. BACKGROUND

##### A. Facts <sup>FN1</sup>

FN1. Plaintiff's factual allegations are assumed to be true, and all reasonable inferences are drawn in its favor. *See In re Ades & Berg Group Investors*, 550 F.3d 240, 243 n. 4 (2d Cir.2008).

Plaintiff is a Tennessee corporation and a division of New York-based MTV Networks, itself a subsidiary of Viacom International, Inc. (*Id.* ¶ 8.) Defendants are shareholders and former officers and directors of Reality Racing, a Nevada corporation they created to launch a reality television show in which amateur drivers compete for a place on a professional racing team. <sup>FN2</sup> (*Id.* ¶¶ 11-13, 17; Schaefer Aff., Ex. C.) Defendants Patrick Schaefer and Craig Leitner are residents of Florida, and Defendant Lee Schaefer is a resident of Kentucky. (Am.Compl.¶¶ 11-13.)

FN2. The complaint identifies Reality Racing as a Florida corporation. (Am.Compl.¶ 9.) The Stock Agreement indicates that Reality Racing is in fact a Nevada corporation. (Schaefer Aff., Ex. C.)

##### 1. The Time Buy Agreement

Reality Racing, acting through an agent, signed a contract in 2006 to purchase air time from Plaintiff for its reality television program. (*Id.* ¶ 20.) Under the terms of the Time Buy Agreement (the "Agreement"), Reality Racing would supply thir-

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teen episodes to air on Plaintiff's Spike channel between May and August of 2007. (*Id.* ¶ 21.) Plaintiff charged \$100,000 per episode less a fifteen percent agency discount, for a total fee of \$1,105,000. (*Id.* ¶¶ 22, 23.) As part of the Agreement, Reality Racing obtained the right to sell twelve minutes of commercial advertising during each hour-long episode. (*Id.* ¶ 24.)

The Agreement naturally included protections for Plaintiff. Reality Racing stipulated that it would not assign rights to the television program without written permission from Plaintiff. (*Id.* ¶ 27.) Reality Racing also agreed to pay damages if it breached the contract. (*Id.* ¶ 26.) Plaintiff retained the right to cancel the broadcast and substitute in other programming in the event of a breach. (*Id.* ¶ 25.) Plaintiff did not, however, secure an agreement that Defendants would be personally liable for any damages incurred by Reality Racing. (*See* Schaefer Aff., Ex. A.)

\*2 Of the thirteen episodes it promised, Reality Racing supplied seven. Plaintiff aired those episodes between May 19 and July 7, 2007.<sup>FN3</sup> (Am.Compl.¶¶ 29, 32.) Reality Racing tendered two payments totaling \$340,000, an amount sufficient to cover Plaintiff's fee for airing four episodes. (*Id.* ¶ 30.) Reality Racing ceased making payments after July 11, 2007, and it also notified Plaintiff that it would not provide a new episode for the week of July 14. (*Id.* ¶¶ 31, 32.) Plaintiff and Reality Racing began negotiations around that time in an attempt to cure the latter's breach of the Agreement.

FN3. The complaint states that Plaintiff broadcast the show on consecutive Saturdays between May 19 and July 14, 2007, with the exception of June 23. (Am.Compl.¶¶ 21, 29.) Later portions of the complaint clarify that Reality Racing did not provide a new episode for July 14, 2007. (*Id.* ¶¶ 32, 34.)

## 2. The July Agreement

On or about July 10, 2007, Plaintiff and Reality Racing executed a new agreement (the "July Agreement") in which Plaintiff agreed to air a repeat episode on July 14 and Reality Racing pledged to provide new programming thereafter. (*Id.* ¶¶ 34, 35.) Reality Racing also agreed to remit the \$765,000 it owed Plaintiff by July 31. (*Id.* ¶ 35.) In addition, Reality Racing "ratified and confirmed" the provisions of the original Agreement and acknowledged that they "remain in full force." (*Id.* ¶ 34.) Defendant Patrick Schaefer signed the July Agreement in his role as chief executive officer of Reality Racing. (*Id.* ¶ 36.) Once again, the July Agreement did not provide that Defendants would be personally liable for any damages in the event of a breach.

Reality Racing never complied with the terms of the July Agreement. The company failed to pay its outstanding debt to Plaintiff and to provide any new episodes, thereby forcing Plaintiff to seek substitute programming for the Spike channel. (*Id.* ¶ 37.) On or about July 27, 2007, Plaintiff's in-house counsel wrote a letter to Reality Racing notifying the company that it was in breach of both the original Agreement and the July Agreement. (*Id.* ¶ 38.)

## 3. Defendants' Sale of Shares in Reality Racing

Defendants served as corporate officers and directors of Reality Racing, and they collectively owned 67 million shares of stock in the corporation. (*Id.* ¶ 44.) On or about September 5, 2007, Defendants sold 61 million of those shares to a Texas corporation called Sandler Communications ("Sandler"), whose president had served as the investor relations officer for Reality Racing.<sup>FN4</sup> (*Id.* ¶¶ 44, 47; Schaefer Aff., Ex. C.) Those shares represented roughly thirty-eight percent of the 159,759,286 shares of Reality Racing common stock issued and outstanding. (Schaefer Aff., Ex. C.) At closing, Sandler delivered \$5000 in cash along with a \$50,000 promissory note to each of the three De-

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defendants, for a total purchase price of \$165,000. (Am.Compl.¶ 45.) As part of the Stock Purchase Agreement (the "Stock Agreement"), Defendants pledged that they would be "liable to the Purchaser [Sandler] for any matter (liability) discovered after closing that [Defendants] were aware of prior to closing but did not disclose to [P]urchaser." (*Id.* ¶ 49; Schaefer Aff., Ex. C.) Defendants continue to own two million shares each of Reality Racing stock. (Am .Compl. ¶ 44.)

FN4. September 5, 2007 is the sale date noted on the Stock Purchase Agreement. The complaint asserts that the sale date was "[o]n or about October 1, 2007." (*Id.* ¶ 44.)

\*3 Gabriel Sandler, president of Sandler, joined Reality Racing's board of directors as vice president and secretary shortly before the stock sale. (*Id.* ¶ 52.) Around the same time, Defendants resigned their positions as corporate officers and directors. (Schaefer Aff., Ex. C.) In a news release issued on or about October 2, 2007, Gabriel Sandler said he organized the transition in response to "shareholder activism." (Am.Compl.¶ 55.) He also professed his own "undying enthusiasm for the show's core concept." (*Id.*)

On or about October 24, 2007, Plaintiff sent a letter to Sandler seeking payment for the \$765,000 debt owed by Reality Racing. (*Id.* ¶ 56.) According to Plaintiff, Sandler has not paid any of the outstanding debt. (*Id.* ¶ 58.)

In November 2008, about a year after the stock sale, Defendants organized a corporation called 3 Players Sports Group, Inc. ("3 Players") to create and promote a reality television show called "Racer" that is similar in nature to "Reality Racing." (*Id.* ¶¶ 59, 61.) A news release describes "Racer" as a program that "combines two of the most popular on-air entertainment concepts—auto racing and reality television." (*Id.* ¶ 60.) Lee Schaefer serves as chief executive officer of 3 Players, while Patrick Schaefer serves as president and Craig Leit-

ner serves as vice president and chief financial officer. (*Id.* ¶ 63.)

## B. Procedural History

Plaintiff filed the complaint against Sandler and Defendants on May 18, 2009. (Doc. No. 1.) Plaintiff amended the complaint and added Reality Racing as a Defendant on August 14, 2009. (Doc. No. 13.)

Neither Sandler nor Reality Racing answered the complaint, and the Court entered an order on October 30, 2009 directing them to show cause why a default judgment should not be entered against them pursuant to Federal Rule of Civil Procedure 55(b)(2). (Doc. No. 22 .) They once again failed to respond, and on December 23, 2009, the Court granted default judgment against each of them in the amount of \$765,000, plus interest and costs, for a total judgment each of \$930,719.25. (Doc. No. 38.)

Defendants filed the instant motion on November 25, 2009 (Doc. No. 26), and the motion became fully submitted on January 20, 2010. (Doc. No. 39.)

## II. LEGAL STANDARD

In deciding a motion to dismiss under Rule 12(b)(6), this Court must accept all well-pleaded allegations contained in the complaint as true, and it must draw all reasonable inferences in favor of the plaintiff. <sup>FNS</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A plaintiff need not include "heightened fact pleading of specifics" to survive a Rule 12(b)(6) motion, *id.* at 570, but the "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the allegations in the complaint are true." *Id.* at 555 (citation omitted). Therefore, this standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173

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L.Ed.2d 868 (2009).

FN5. The Court declines Plaintiff's request to convert the motion to dismiss into a motion for summary judgment. In considering the motion, the Court relied solely on the facts alleged in the complaint, the Agreement, the July Agreement, and the Stock Agreement. All of these agreements were incorporated by reference in the complaint and, as such, were appropriate for the Court to review in deciding a motion to dismiss pursuant to Rule 12(b)(6). See *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir.2002).

\*4 Ultimately, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. By contrast, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555) (citations omitted). If a plaintiff "ha [s] not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

### III. DISCUSSION

Plaintiff alleges that Defendants are alter egos of Reality Racing and seeks to hold them personally liable for the default judgment the Court entered against the corporation on December 23, 2009. Plaintiff also brings claims under New York common law for unjust enrichment and fraudulent conveyance. For the reasons that follow, the Court holds that Plaintiff has failed to state a claim for which relief may be granted.

#### A. Alter Ego Liability

Under New York law, the alter ego doctrine is not recognized as an independent cause of action.<sup>FN6</sup> "The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation." *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993) (citation omitted). Accordingly, to the extent Plaintiff attempts to allege alter ego liability as an independent cause of action, the claim fails without any need for further analysis. (See Am. Compl. ¶¶ 83-88 (stating that Plaintiff's "fourth claim for relief" is "alter ego" liability).)

FN6. The Agreement contains a choice-of-law clause providing that "[t]his agreement shall be governed by New York law." (Schaefer Aff., Ex. A.) Although Defendants were not parties to the Agreement, Plaintiff and Defendants both rely solely on New York law in their moving papers. Where the parties' briefs assume that New York law controls, such "implied consent" is sufficient to establish choice of law. *Nat'l Utility Serv., Inc. v. Tiffany & Co.*, No. 07 Civ. 3345(RJS), 2009 WL 755292, at \*6 n. 6 (S.D.N.Y. Mar.20, 2009). Accordingly, the Court applies New York law.

As to whether Plaintiff can successfully pierce the corporate veil in order to hold Defendants personally liable for the default judgment against Reality Racing, the case law is clear that Plaintiff faces a "heavy burden" in seeking such relief. *White v. Nat'l Home Prot., Inc.*, No. 09 Civ. 4070(SHS), 2010 WL 1706195, at \*3 (S.D.N.Y. Apr.21, 2010) (citation omitted). Courts applying New York law are generally "reluctant to disregard the corporate entity," *Wm. Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600 (2d Cir.1989), and "owners are normally not liable for the debts of the corporation," *Morris*,

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82 N.Y.2d at 140, 603 N.Y.S.2d 807, 623 N.E.2d 1157. Indeed, owners may incorporate “for the express purpose” of limiting their liability. *Id.*

Nevertheless, a court will pierce the corporate veil if the “facts and equities” of a situation justify doing so. *Morris*, 82 N.Y.2d at 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157. Generally, a plaintiff must show that “(1) the owner exercised complete domination over the corporation with respect to the transaction at issue, and (2) such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil.” *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 63 (2d Cir.2001) (citations and quotation marks omitted). To determine whether a defendant “exercised complete domination” over a corporation, a court must assess factors such as:

\*5 “(1) the absence of the formalities ... that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, [4] whether the [allegedly dominating parties] deal with the dominated corporation at arms length, [5] the payment or guarantee of debts of the dominated corporation by [allegedly dominating parties], and [6] whether the corporation in question had property that was used by [the allegedly dominating parties] as if it were its own.”

*White*, 2010 WL 1706195, at \*4 (quoting *Wm. Passalacqua Builders, Inc. v. Resnick*, 933 F.2d 131, 139 (2d Cir.1991)). Courts do not follow a “set rule” for how many of these factors must be satisfied but will instead pierce the corporate veil when necessary to “achieve an equitable result.” *Wrigley*, 890 F.2d at 600-01.

If a plaintiff can establish that a defendant exercised complete domination over the corporation, it must then show that “this control was used to commit wrong, fraud, or the breach of a legal duty, or a

dishonest and unjust act in contravention of plaintiff’s legal rights, and that the control and breach of duty proximately caused the injury complained of.” *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1053 (2d Cir.1997) (citation and internal quotation marks omitted).

With respect to the domination inquiry, Plaintiff must allege facts that plausibly suggest Defendants dominated Reality Racing when the company executed and then breached the Agreement and the July Agreement. The Court considers not whether Defendants exhibited behavior at any time that might indicate domination and control, but whether they exhibited such behavior “with respect to the transaction at issue.” *MAG Portfolio Consultant*, 268 F.3d at 63; *see also Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir.1988) (emphasizing that, to pierce the corporate veil, a court must examine domination and control “in respect to the transaction attacked”) (citation omitted); *Passalacqua*, 933 F.2d at 138 (clarifying that control must be exercised “at the time of the transaction complained of in order to pierce the corporate veil”) (citation and quotation marks omitted). The Agreement and the July Agreement are the transactions from which Plaintiff’s injury arises, so they are the transactions at issue in this case. Plaintiff, however, has alleged no facts suggesting that Defendants dominated Reality Racing with respect to these agreements

Rather, the complaint alleges, first, that Defendants, as directors and “controlling” shareholders, fraudulently sold rights, assets, and media content to Sandler in order to shirk payment of a debt owed to Plaintiff. Second, it contends that Defendants displayed this domination by giving a personal guarantee in the Stock Agreement.

\*6 None of these allegations supports the inference that Defendants were alter egos of Reality Racing. First, there is little in the complaint to suggest that Defendants were controlling shareholders of Reality Racing, as they collectively owned roughly 40% of the issued and outstanding shares of the com-

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pany. (Am.Compl.¶ 44.) Second, even if Defendants could be deemed to have operated as controlling shareholders, that fact alone is insufficient to support the inference that Defendants were alter egos of Reality Racing. See *Tycoons Worldwide Group (Thail.) Pub. Co. v. JBL Supply, Inc.*, No. 08 Civ. 10391(RJH), 2010 WL 2465476, at \*9 (S.D.N.Y. June 16, 2010) (“The fact that Matza is the majority shareholder and an officer of JBL is not, in itself, a basis for piercing the corporate veil”) (collecting cases); *Bellomo v. Pa. Life Co.*, 488 F.Supp. 744, 745 (S.D.N.Y.1980) (“Control through 100% stock ownership does not in itself constitute a subsidiary the alter ego of the parent.”). Third, the complaint alleges no facts to suggest the absence of corporate formalities or that Defendants appropriated the company's assets for personal uses as if the property were their own. Fourth, Plaintiff's allegations concerning the Stock Agreement have no bearing whatsoever on Defendants' personal liability for the breach of the Agreement and the July Agreement. To the contrary, the Stock Agreement provides that Defendants were to be “liable to [Sandler] for any matter (liability) discovered after closing that [they] were aware of prior to closing but did not disclose.” (Am. Compl. ¶ 49; Schaefer Aff., Ex. C.) With this personal guarantee, Defendants assumed liability to Sandler stemming from Defendants' nondisclosure or breach of fiduciary duty to Sandler.<sup>FN7</sup> They did not agree, as a general matter, to cover Reality Racing's debts if the corporation's creditors came knocking.

FN7. Notably, the Agreement and the July Agreement contain no personal guarantees.

Plaintiff alleges no other facts to suggest domination of any kind. Put simply, there is nothing in the complaint to indicate that Defendants exercised any more control over Reality Racing than would be expected of the directors or shareholders of any corporation.

Even if Plaintiff could prevail on the domination component of New York's veil-piercing test, Plaintiff has not pled any facts suggesting that De-

fendants “commit[ted] a fraud or wrong that injured” Plaintiff. *MAG Portfolio Consultant*, 268 F.3d at 63. The complaint alleges that Defendants sold rights, assets, and/or media content to a corporate insider in a transaction that “did not reflect a bona fide, arm's-length price for the assets.” (Am.Compl.¶ 46.) The complaint further alleges that Defendants conveyed those assets in order to shield them from Plaintiff. (*Id.* ¶ 87.) The Stock Agreement itself, however, belies these assertions. That document shows that Defendants conveyed only shares of stock personally held by them, not assets belonging to Reality Racing. Because Defendants never personally guaranteed Reality Racing's agreements with Plaintiff, their decision to sell stock had no bearing on Plaintiff's ability to collect the debts owed by Reality Racing. Defendants had every right to sell their stock and committed no fraud in so doing.

\*7 Accordingly, the Court will not pierce the corporate veil in order to hold Defendants personally liable for the debts of Reality Racing.

#### B. Unjust Enrichment

An unjust enrichment claim “rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.” *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 134, 879 N.Y.S.2d 355, 907 N.E.2d 268 (2009). To recover on a theory of unjust enrichment under New York law, a plaintiff “must establish (1) that the defendant was enriched; (2) that the enrichment was at the plaintiff's expense; and (3) that the circumstances are such that in equity and good conscience the defendant should return the money or property to the plaintiff.” *Golden Pacific Bancorp v. Fed. Deposit Ins. Comm'n.* ¶ 273 F.3d 509, 519 (2d Cir.2001). To plead a plausible claim to relief on a theory of unjust enrichment, plaintiffs must show a causal “nexus” between a defendant's enrichment and their own expense that goes beyond mere “correlation.” *DeBlasio v. Merrill Lynch & Co.*, No. 07 Civ. 318(RJS), 2009 WL

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2242605, at \*40 (S.D.N.Y. July 27, 2009).

Unjust enrichment is a quasi contract theory. *Hamlet at Willow Creek Dev. Co. v. Ne. Land Dev. Co.*, 64 A.D.3d 85, 115, 878 N.Y.S.2d 97 (2009). Under New York law, “[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987); see also *In re First Cent. Fin. Corp.*, 377 F.3d 209, 213 (2d Cir.2004) (recognizing the rule enunciated in *Clark Fitzpatrick* as one of the “well-settled principles of New York law”). Where there is a bona fide dispute over the validity or enforceability of a written agreement, plaintiffs may plead unjust enrichment as an alternative theory of recovery. *Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I LLC*, 637 F.Supp.2d 185, 195 (S.D.N.Y.2009). However, unjust enrichment “may not be plead [sic] in the alternative alongside a claim that the defendant breached an enforceable contract.” *King's Choice Neckwear, Inc. v. Pitney Bowes, Inc.*, No. 09 Civ. 3980(DLC), 2009 WL 5033960, at \*7 (S.D.N.Y. Dec.23, 2009); see also *Air Atlanta*, 637 F.Supp.2d at 196 (granting defendants' motion to dismiss an unjust enrichment claim where plaintiff failed to allege that the contracts at issue were invalid or unenforceable).

At one time, courts in this district allowed litigants to bring unjust enrichment claims against non-signatories to a contract even when the validity of the contract was not in dispute. See *Seiden Assocs. v. ANC Holdings, Inc.*, 754 F.Supp. 37, 40 (S.D.N.Y.1991). The law has, however, unmistakably tacked in the other direction. Today, “the existence of a valid and binding contract governing the subject matter at issue in a particular case does act to preclude a claim for unjust enrichment even against a third party non-signatory to the agreement.” *Law Debenture v. Maverick Tube Corp.*, No. 06 Civ. 14320(RJS), 2008 WL 4615896, at \*12

(S.D.N.Y. Oct.15, 2008) (collecting cases); see also *Air Atlanta*, 637 F.Supp.2d at 196 (“[A] quasi contractual claim against a third party must be dismissed when an undisputedly valid and enforceable written contract governs the same subject matter.”).

\*8 The complaint offers several theories for how Defendants were unjustly enriched at Plaintiff's expense. First, it alleges that Reality Racing received a benefit when Plaintiff aired its program on the Spike channel, yet neither the company nor Defendants, as its controlling shareholders, ever fully compensated Plaintiff for that service. (Am.Compl.¶¶ 90, 91.) This theory fails as a matter of law. Plaintiff essentially claims that Defendants were unjustly enriched because the company in which they owned stock failed to make payments due under a valid contract. It is clear that the existence of the valid and binding Agreement between Plaintiff and Reality Racing precludes claims sounding in quasi contract, even when they are brought against non-signatories such as Defendants. *Law Debenture v. Maverick Tube Corp.*, 2008 WL 4615896, at \*12. Plaintiff's first theory is therefore dead on arrival.

Second, the complaint ventures that Defendants were unjustly enriched when they sold their “controlling interest” in Reality Racing, along with the company's “rights, assets, and/or media content,” to Sandler for \$165,000. (Am.Compl.¶¶ 92, 97.) Plaintiff claims that the “undying enthusiasm for the show's core concept” that Gabriel Sandler expressed at the time of the stock sale would not have existed but for the exposure Plaintiff gave the program on the Spike channel. (*Id.* ¶¶ 94, 96.) As noted in the preceding section, however, Defendants did not sell rights, assets, or media content belonging to Reality Racing, but shares of stock held personally by them. Absent a finding of alter ego liability, Plaintiff could not seek to satisfy the debt owed by Reality Racing by tapping into Defendants' personal assets, including shares of stock they owned as individuals. Plaintiff cannot claim that Defendants were enriched at its expense when it had no entitlement to the stock in the first place.

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Furthermore, it is entirely speculative whether Gabriel Sandler would have had "undying enthusiasm" for the racing show if Plaintiff had never aired it. As such, the assertion does not support a plausible claim for relief. See *Gurvey v. Cowan, Liebowitz, & Latman, P.C.*, No. 06 1202(BSJ), 2009 WL 1117278, at \*8 (S.D.N.Y. April 24, 2009) ("Plaintiff has provided only assertion and speculation as to the benefit that was taken from her by Defendants. Even under the low threshold that plaintiffs must meet under Rule 12(b)(6), the unjust enrichment claim must be dismissed as against all Defendants.")

Finally, Plaintiff alleges that Defendants were unjustly enriched because the broadcast of "Reality Racing" on the Spike channel enhanced the credibility of their next project, a reality show called "Racer." (Am.Compl.¶¶ 95, 96.) This claim is a non-starter. Plaintiff has not alleged facts suggesting Defendants were in fact enriched. The complaint asserts only that Defendants created a new corporation to launch a reality show, not that they have filmed any episodes or found a television network that has agreed to air the program. If anything, the abrupt demise of "Reality Racing" is likely to have diminished Defendants' reputations and the prospects for their new program. Even if "Racer" were to succeed, however, Plaintiff has no claim against Defendants because they never signed a non-compete agreement, nor are they bound personally by the contracts between Plaintiff and Reality Racing.

\*9 Accordingly, Plaintiff has failed to allege facts sufficient to support a claim for unjust enrichment.

### C. Fraudulent Conveyance

A fraudulent conveyance is any transfer of property made "with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors." N.Y. Debt. & Cred. Law § 276. "A party seeking to set aside a fraudulent conveyance under § 276 must plead an

actual intent to defraud with particularity sufficient to meet the heightened standard of Rule 9(b)." *Royal Palm Senior Investors, LLC v. Carbon Capital II, Inc.*, No. 08 Civ. 4319(BSJ), 2009 WL 1941862, at \*6 (S.D.N.Y. July 7, 2009). Because direct proof of fraudulent intent is usually difficult to obtain, such intent may be inferred from circumstantial evidence, or "badges of fraud." *Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 315 (S.D.N.Y.1999). This evidence may consist of:

- (1) the lack or inadequacy of consideration;
- (2) the family, friendship or close associate relationship between the parties;
- (3) the retention of possession, benefit or use of the property in question;
- (4) the financial condition of the party sought to be charged both before and after the transaction in question;
- (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and
- (6) the general chronology of the events and transactions under inquiry.

*Stratton Oakmont*, 234 B.R. at 315-16 (citing *In re Kaiser*, 722 F.2d 1574, 1582-83 (2d Cir.1983)).

A plaintiff may also allege a claim of constructive fraudulent conveyance under New York Debtor and Creditor Law § 273. Such a claim may be made without regard to the actual intent of the transferor. *Id.* A plaintiff making a claim under § 273 must allege that (1) there was a conveyance without fair consideration; (2) the transferor was "insolvent at the time of the conveyance or will be rendered insolvent by the transfer in question"; and (3) plaintiff is a creditor of the transferor. *Smith v. Pali Capital, Inc.*, No. 06 Civ. 3362(SAS), 2006 WL 3240578, at \*4 (S.D.N.Y. Nov.7, 2006). Plaintiff also must plead that it was prejudiced as a result of the transfer. *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 637 n. 10 (2d Cir.1995). Because intent to defraud is not an element of constructive fraudulent conveyance, such claims, as opposed to claims of actual fraud, are not subject to the heightened



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pleading requirements of Fed.R.Civ.P. 9(b). *Pali Capital*, 2006 WL 3240578, at \*4.

Because Plaintiff has not pled facts sufficient to demonstrate that Defendants were alter egos of Reality Racing, its claim for fraudulent conveyance must fail. Under §§ 273 and 276, a plaintiff making a claim of fraudulent conveyance must be a creditor of the transferor. Plaintiff is a creditor of Reality Racing, which has failed to remit the payments it promised in both the Agreement and the July Agreement. To establish itself as a creditor of the individual Defendants, Plaintiff must pierce the corporate veil. As noted above, Plaintiff has not alleged facts that suggest Defendants were alter egos of Reality Racing when the corporation entered into the Agreement and the July Agreement. Plaintiff's claim of fraudulent conveyance is therefore dismissed.

#### IV. CONCLUSION

\*10 For the foregoing reasons, Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is granted and Plaintiff's complaint is dismissed with prejudice. The Clerk of the Court is directed to terminate the motion located at Doc. No. 26 and close this case.

SO ORDERED.

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