STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

AKOURI INVESTMENTS, LLC,
Plaintiff,

v. **Case No. 13-135638-CB**
Hon. James M. Alexander

PEOPLE PLUS MGMT SVCS GROUP, LLC, ET AL,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on motions for summary disposition filed by (1) Plaintiffs, (2) Defendants Richard Mark & ABO-Mark ("Mark Defendants"), and (3) Defendants Administrative Employer Services, AES-APEX Employer Solutions, AES-APEX Employer Services, and David Otto ("AES Defendants").

Plaintiff alleges that it loaned monies to Defendant People Plus that was guaranteed by Defendant Apex Administrative Services, LLC and secured by the assets of People Plus and Apex. Plaintiff claims that it is owed $1.4 million in total. In its summary pleadings, Plaintiff (for the first time) claims that this amount is comprised of $300,000 on loans made to People Plus and another $1.1 million owing under the terms of an Advisory Agreement.

The Advisory Agreement was allegedly made between **non-party** James Akouri and People Plus, whereby Mr. Akouri was to be paid $20,000 monthly for five years for certain services. Plaintiff claims, however, that it received $100,000 in payments under said agreement – leaving a balance of $1.1 million. The Court will note, however, that Mr. Akouri is not a party to this case, and it is unclear under what theory Plaintiff is suing on his behalf.

In any event, on March 25, 2012, Defendants People Plus, Apex Administrative, Pinnacle

HR, Apex HR, AS Holdings, and AS South acknowledged that there was an outstanding balance under the Note totaling $1.4 million. And in May 2011, Plaintiff filed UCC Financing Statements that secured its debts against "all assets of debtor[s]" People Plus and Apex Administrative.

Subsequently, on March 30, 2012, Defendant Richard Mark loaned People Plus some $1.35 million that was purportedly also secured by the same assets (People Plus and Apex Administrative).

While Plaintiff claims that the Mark loan is subordinate to its loan, the Mark Defendants claim otherwise. In any case, Plaintiff claims that Dino Rotondo sold certain assets (including customer accounts) of People Plus, Apex Administrative, and other Rotondo entities to Defendant David Otto and his company, AES. These assets were allegedly the same assets that secured Plaintiff's loans, and the sale occurred before Plaintiff's loans were repaid.

Based on the foregoing, Plaintiff filed a 33-page, 15-Count Complaint against a variety of individuals and companies. Some of these claims and parties have since been dismissed.

The four remaining claims against the Mark Defendants are: (1) Declaratory Judgment/ Lein Subordination (Count II); (2) Tortious Interference (Counts VIII and IX); and (3) Civil Conspiracy (Count XII).

Against the AES Defendants, Plaintiff alleges claims of: (1) Declaratory Judgment / Void Sale (Count III); (2) Fraudulent Conveyance (Count V); (3) Tortious Interference (Counts X and XI); (4) Conversion (Count XIV); and (5) Unjust Enrichment (Count XV).

All parties now move for summary disposition under MCR 2.116(C)(8) or (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint. When analyzing such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the

nonmovant. *Wade v Dept of Corrections*, 439 Mich 158 (1992). A motion under this subrule may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

A. Plaintiff's and the Mark Defendants' motions.

Initially, Plaintiff moves for partial summary disposition of its Count II – seeking a declaration that it holds a valid, senior, perfected security interest in all the assets of People Plus and Apex Administrative (and, further, Plaintiff never agreed to subordinate the same).

The Mark Defendants, on the other hand, argue that they are entitled to dismissal of Plaintiff's remaining claims because its loans "were repaid more than two times over." As a result, the Mark Defendants argue that Plaintiff has no valid claims because all of said claims **necessarily** flow from its loans not being repaid.

Resolution of both motions turn on seemingly simple issues: (1) was Plaintiff's loan repaid; and (2) if not, did Plaintiff agree to subordinate its loans?[1]

1 The Court notes that the AES Defendants filed Responses to Plaintiff's and the Mark Defendants' motions. But these motions solely deal with claims directed at the Mark Defendants. As a result, the Court will not consider the AES Responses when deciding said motions.

With respect to whether Plaintiff's debts were paid, the Mark Defendants argue that Plaintiff can only account for $300,000 in payments to People Plus. It is apparent that the Mark Defendants were unclear how Plaintiff arrived at the $1.4 million figure – and rightfully so. Plaintiff's Complaint does not appear to break down how it arrived on said amount. And it was not clear to this Court that Plaintiff included $1.1 million owing under an Advisory Agreement between non-party James Akouri and People Plus in said figure. And as previously stated, it is unclear what theory Plaintiff relies on to bring a claim for this amount in its name. But in any event, this new theory does not appear to be properly pled.

That said, even if the Court considers only the $300,000 outstanding loan balance, summary disposition is still inappropriate. This is so because the Mark Defendants entirely fail to establish that the loan balance was repaid – much less twice over.

In support of their flawed argument, the Mark Defendants claim that every penny paid "to or for Akouri Investments" should be credited toward the $300,000 loan principal. But even their own accounting establishes that they paid only $34,999 in "loan payments." The remaining ~$650,000 were funds paid for apparently different reasons – such as "insurance payments" or "car payments." Defendants do not cite to any agreement that such payments were to be credited toward the loan balance.

The Mark Defendants also present the Affidavit of Dino Rontondo, who claims that the Plaintiff's loan was "fully repaid." But Plaintiff responds with the Affidavit of James Akouri, who claims that no payments were ever made toward the principal loan balance of $300,000.

Because the parties present competing evidence regarding payment on the $300,000 loan, summary disposition is wholly inappropriate under (C)(10). Further, because the Mark Defendants base their summary request of Plaintiff's remaining claims on the notion that

Plaintiff's loan was repaid, the remainder of their motion is similarly DENIED.

Next, Plaintiff argues that it never agreed to subordinate its loans. In support of its argument, Plaintiff cites to the March 30, 2012 Mark Security Agreement, which acknowledges that the Mark Loan security interest was "subject only to the Unsubordinated Akouri Security Interest." Further, although the parties discussed Plaintiff subordinating its interest, they could not come to an agreement.

Plaintiff argues that because there is no valid and enforceable subordination agreement, it is entitled to a declaration that it holds a valid, senior, perfected security interest in all the assets of People Plus and Apex Administrative.

The Mark Defendants respond that Plaintiff verbally agreed to subordinate its interest, citing *Rood v Gen Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993) for the notion that "unless a statute of frauds applies, an oral contract is enforceable." And, Defendants claim, "[t]here is no statute of frauds applicable to subordination agreements."

But in its Reply Brief, Plaintiff cites MCL 566.1, which provides (emphasis added):

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That **the agreement changing, modifying, or discharging such** contract, obligation, lease, mortgage or **security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge**.

Based on this statute, Plaintiff argues that the Mark Defendants cannot succeed on their theory that Plaintiff subordinated its interest absent a writing so indicating – and no such writing exists. The Court agrees.

For the foregoing reasons, the Court finds that there are no material questions of fact, whereby Plaintiff is entitled to summary disposition of its Count II and a declaration that

Plaintiff holds a valid, senior, perfected security interest in the assets of People Plus and Apex Administrative. The Court notes, however, that there remain questions of fact as to the outstanding balance of said debt.

B. The AES Defendants' motion.

Next, the AES Defendants argue that they are entitled to dismissal of all of Plaintiff's claims. With respect to these Defendants, Plaintiff alleges claims of: (1) Declaratory Judgment / Void Sale (Count III); (2) Fraudulent Conveyance (Count V); (3) Tortious Interference (Counts X and XI); (4) Conversion (Count XIV); and (5) Unjust Enrichment (Count XV).[2]

As stated, the AES Defendants purchased the certain assets of AS Holdings, AS South, Pinnacle HR, and Apex HR (the "Directional Entities"). Plaintiff claims that these entities were all solely owned by Apex Administrative – and, therefore, assets that are subject to Plaintiff's perfected security interest.

It is apparent that Plaintiff's allegations against AES are founded on the premise that it has a security interest in **the assets** of the Directional Entities. As argued by the AES Defendants, however, there is a difference between a **security interest in a membership interest** of these entities (as an asset of Apex Administrative) and a **security interest in the assets** of the entities themselves.

Plaintiff filed UCC financing statements that perfected its security interest in "all assets" of both People Plus and Apex Administrative. The Directional Entities were wholly owned by Apex Administrative. As a result, Plaintiff had a security interest in a membership interest of the

2 The Court will note that the AES Defendants' Reply Brief in support of their motion exceeded 5 pages (it is 12 pages) – despite the Court's January 27, 2015 Order limiting the same. As a result, the Court will only consider the first five pages of the AES Defendants' Reply Brief.

Directional Entities. But neither the language of the Security Agreements, nor the UCC Financing Statement, gave Plaintiff a security interest in the actual assets (such as the customer lists) of the Directional Entities.[3]

As a result, because each of Plaintiff's claims against the AES Defendants hinges on a claim that AES purchased assets subject to Plaintiff's perfected security interest, and the Court has concluded otherwise, Plaintiff's Complaint against the AES Defendants must be dismissed. Plaintiff simply advances no alternative theory for the AES Defendants (as purchasers of assets not subject to Plaintiff's security interest) being included in this case.

For the foregoing reason, the Court GRANTS the AES Defendants' motion for summary disposition under (C)(10) and DISMISSES Plaintiff's Complaint only as to Defendants Administrative Employer Services, AES-APEX Employer Solutions, AES-APEX Employer Services, and David Otto.

IT IS SO ORDERED.

February 11, 2015 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge

3 Under the Michigan Limited Liability Company Act, MCL 450.4504 (emphasis added):

> (1) **A membership interest is personal property and may be held in any manner in which personal property may be held.** A husband and wife may hold a membership interest in joint tenancy in the same manner and subject to the same restrictions, consequences, and conditions that apply to the ownership of real estate held jointly by a husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.
> (2) **A member has no interest in specific limited liability company property**.