STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: October 15, 2019]

RICHARD L. GEMMA, as Receiver for BR Asset Management, LLC f/k/a Benrus, LLC, ***Plaintiff,***	:	
v.	:	**C.A. No. PC-2018-3635**
MICHAEL F. SWEENEY, DUFFY & SWEENEY, LTD., PALMLAKE GROUP, LLC, Barry Gertz, ***Defendants.***	:	

DECISION

STERN, J. Richard L. Gemma, as Receiver for BR Asset Management, LLC, f/k/a Benrus, LLC (BRAM or Plaintiff), filed this suit, alleging Michael F. Sweeney (Sweeney), Duffy & Sweeney, Ltd. (D&S), PalmLake, Group, LLC (PalmLake), and Barry Gertz (Gertz) (collectively Defendants) engaged in actionable lending practices. Before this Court are Defendants' respective motions to dismiss Plaintiff's Second Amended Complaint (Complaint or SAC) pursuant to Super. R. Civ. P. 12(b)(6).[1]

I

Facts

This Court will briefly summarize the facts as alleged in the Complaint. BRAM was a retailer that designed, marketed, branded, and sold consumer products, including watches and

[1] Defendant Sweeney has moved to dismiss all counts except Count II. Defendants Gertz and D&S have moved to dismiss all counts. PalmLake has moved to dismiss Counts I, IV, V, VI, and VII.

backpacks. SAC ¶ 7. In or around 2014, and all relevant times thereafter, Defendants Sweeney and D&S provided legal counsel and representation to BRAM. *Id.* ¶¶ 8, 9. In or around April of 2016, BRAM was projecting $1,000,000 in sales but lacked the cash flow to pay expenditures relating to production costs; Defendants Sweeney and D&S were aware of BRAM's financial situation. *Id.* ¶¶ 10-11. By April 20, 2016, Defendants Sweeney, D&S, and BRAM had reached a financing agreement, in principle, pursuant to which BRAM would receive $499,621.14 to fund the production of backpacks. *Id.* ¶ 12. According to Plaintiff, the parties understood the financing arrangement was a "bridge loan." *Id.* Defendants internally referred to the financing transaction as a loan. *Id.* ¶ 13.

On April 22, 2016, Defendants Sweeney and D&S notified BRAM that some of the funds had been advanced in the amount of $149,886.34. *Id.* ¶ 15. On that same day, Defendant Sweeney signed and submitted PalmLake's Articles of Organization to the Florida Secretary of State, identifying himself as the authorized Manager of PalmLake. *Id.* ¶ 14.[2] On April 23, 2016—after having already advanced funds—BRAM and Defendant Sweeney, purportedly on behalf of PalmLake, executed a financing transaction styled as a sale of BRAM's backpack purchase orders to Defendant PalmLake, for a total purchase price of $499,621.14 (Agreement). SAC, Ex. A ¶ 2. Defendants Sweeney and D&S negotiated and drafted the Agreement, which provided for an initial advance of $149,886.34, a "fee" to PalmLake equal to 15% of the advances within ninety (90) days, and a Florida choice-of-law provision. SAC ¶¶ 19, 21, 44, 45.

On May 5, 2016, Defendant Sweeney personally advanced $22,500 to BRAM in addition to the purchase price to fund BRAM's production of watches. *Id.* ¶ 23. On or about May 20, 2016, BRAM and Defendant Sweeney, purportedly on behalf of PalmLake, entered into a supplemental

[2] Defendants Sweeney and Gertz are members of PalmLake. SAC ¶¶ 2, 5.

financing agreement (First Addendum), drafted by Defendants Sweeney and D&S, which like the Agreement, contained a Florida choice-of-law provision and provided for a 15% "fee" due to PalmLake. *Id.* Ex. B ¶¶ 1, 2, 7. The First Addendum reflected the additional $22,500 advance. *Id.* ¶ 1. On May 20, 2016, the balance of the original purchase price was purportedly advanced. *Id.* Ex. B ¶ 1.[3]

On June 23, 2016, Expeditors, a shipping and delivery company, emailed a request for $77,533.00 to BRAM, copying Defendant Sweeney, who in turn forwarded the email to Defendant Gertz, writing, "[w]e need to advance this for shipping and duties for the large backpack order we funded . . . I will wire today so not to delay and you can send me half." *Id.* ¶¶ 32, 33. On June 23, 2016, Defendant Sweeney responded to Expeditors, stating that he would be "wiring the $77,553 . . . from [his] UBS account." *Id.* ¶ 34. Defendant Gertz replied to Defendant Sweeney, stating, "I will write [sic] half to your personal account." *Id.* ¶ 35. Defendant Sweeney did, in fact, wire the money on June 23, 2016. *Id.* ¶ 34. On or about June 28, 2016, BRAM and Defendant Sweeney, purportedly on behalf of PalmLake, entered into a supplemental financing agreement (Second Addendum, together with First Addendum, "Addenda"), drafted by Defendants Sweeney and D&S, which like the Agreement, contained a Florida choice-of-law provision and provided for a 15% "fee" due to PalmLake. *Id.* Ex. C ¶¶ 2, 7. The Second Addendum reflected the additional $77,533 advance. *Id.*

Beginning in July of 2016, Defendants Sweeney, D&S, and D&S employees (acting on their behalf) demanded and collected payments from BRAM and subsequently deposited amounts collected into D&S's "Client Trust Account" for BRAM. *Id.* ¶¶ 49-52. Most of the payments

[3] Plaintiff has not directed this Court to an allegation in the Complaint regarding who advanced the balance. Apparently, this was an oversight on Plaintiff's part.

came from BRAM's account debtors. *Id.* ¶ 51. After entering the Trust Account, D&S caused substantially all funds to be distributed directly to Defendants Sweeney and Gertz, individually, and not to PalmLake. *Id.* ¶ 53. BRAM repaid a total of $689,625.26, plus an additional $4,000 "legal fee." *Id.* ¶ 56.

Plaintiff filed suit in the above-captioned matter on May 25, 2018, and an amended complaint on July 30, 2018. Plaintiff filed the operative Second Amended Complaint on April 25, 2019. Defendants filed their respective 12(b)(6) motions. On July 19, 2019, this Court heard oral argument on those motions and reserved decision.

II

Standard of Review

'"The sole function of a motion to dismiss is to test the sufficiency of the complaint.'" *Palazzo v. Alves*, 944 A.2d 144, 149 (R.I. 2008) (quoting *Rhode Island Affiliate, ACLU, Inc. v. Bernasconi*, 557 A.2d 1232, 1232 (R.I. 1989)). A court must assume the truth of a complaint's allegations and "examine the facts in the light most favorable to the nonmoving party." *A.F. Lusi Construction, Inc. v. Rhode Island Convention Center Authority*, 934 A.2d 791, 795 (R.I. 2007) (citations omitted). This Court may only grant a motion to dismiss upon being convinced that a plaintiff would not be "entitled to relief under any conceivable set of facts." *Estate of Sherman v. Almeida*, 747 A.2d 470, 473 (R.I. 2000). Our Supreme Court has yet to adopt the federal courts' recently altered interpretation of the legal standard employed with respect to a Rule 12(b)(6) motion to dismiss. *Chhun v. Mortgage Electronic Registration Systems, Inc.*, 84 A.3d 419, 422 (R.I. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Nevertheless, allegations that are "more in the nature of legal conclusions rather than factual assertions are not necessarily assumed to be true." *DiLibero v.*

Mortgage Electronic Registration Systems, Inc., 108 A.3d 1013, 1016 (R.I. 2015) (citation omitted).

III

Analysis

A

Usury (Rhode Island Law)

Count II asserts usury claims against all Defendants pursuant to Rhode Island's Interest and Usury statute set forth in G.L. 1956 §§ 6-26-1 *et seq.* Plaintiff alleges "Defendants Sweeney, Gertz, and purportedly PalmLake loaned money to BRAM at an interest rate in excess of the maximum rate of interest in Rhode Island . . . ." SAC ¶ 74. The applicable statute provides,

> "no person, partnership, association, or corporation loaning money to or negotiating the loan of money for another, except duly licensed pawnbrokers, shall, directly or indirectly, reserve, charge, or take interest on a loan, whether before or after maturity, at a rate that shall exceed the greater of twenty-one percent (21%) per annum." Sec. 6-26-2(a).

"Contracts in violation of § 6-26-2 are usurious and void, and the borrower is entitled to recover any amount paid on the loan." *NV One, LLC v. Potomac Realty Capital, LLC*, 84 A.3d 800, 805 (R.I. 2014).

1

Gertz

Gertz moves to dismiss Count II, arguing that he did not loan money or receive interest in connection with the subject financing transactions; this argument runs counter to the well-settled principles applicable on a 12(b)(6) motion. This Court must assume the truth of all facts alleged by Plaintiff at this stage of the litigation—even those made with "great generality." *See Haley v. Town of Lincoln*, 611 A.2d 845, 848 (R.I. 1992). "Vagueness, lack of detail, conclusionary

statements, or failure to state facts or ultimate facts" will not justify dismissal at the pleadings stage. *Butera v. Boucher*, 798 A.2d 340, 353 (R.I. 2002). Plaintiff has repeatedly alleged Gertz, *in his individual capacity*, loaned money at usurious interest rates. For example, Plaintiff alleges "Defendants Sweeney, *Gertz*, and purportedly PalmLake loaned money to BRAM" at a usurious rate (SAC ¶ 74); "*[a]ll Defendants* reserved, charged, demanded and took from BRAM interest in excess of the maximum rate" (SAC ¶ 75) (emphasis added); and "Defendants Sweeney, *Gertz*, and purportedly PalmLake willfully and knowingly reserved, charged, or took for a loan or advance of money." SAC ¶ 79 (emphasis added). Determining which parties extended credit and in what capacity is a fact-based inquiry not appropriate for resolution on a motion to dismiss. *Cf. Federated Capital Corp. v. Lushinks*, No. CV136034997S, 2013 WL 3315766, at *3 (Conn. Super. Ct. June 11, 2013) (citation omitted) (opining that determination of whether defendants contracted in individual capacity was a question properly reserved for the jury).

That the Agreement and its Addenda list PalmLake as the supposed financier does not alter this Court's analysis. Plaintiff has alleged such documentation "did not accurately reflect the true arrangement between the parties and was intended to disguise a usurious transaction." SAC ¶ 18.[4] Under strikingly analogous circumstances, courts have credited a complainant's allegations that the actual lender was not, in fact, the one identified in the financing documents. *Eul v. Transworld Systems*, No. 15 C 7755, 2017 WL 1178537, at *7 (N.D. Ill. Mar. 30, 2017) ("It is plausible to infer from Plaintiffs' allegations that the identification of Chase or Bank One as lender on the loan documents was a self-serving statement, insofar as it facilitated the alleged [] scheme."); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012). A court need not accept the truth of

[4] Plaintiff has also alleged the parties entered the financing transactions "purportedly on behalf of PalmLake" but in actuality "on behalf of Sweeney and Gertz." *Id.* ¶¶ 39-42, Exs. A-C.

matters asserted in appended documents without considering, among other things, who authored the documents, their reliability, and the plaintiff's purpose for attaching the documents in the first instance. *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 455 (7th Cir. 1998). Particularly considering our Supreme Court's recent warning against relying on a loan's face to assess whether a transaction, in substance, functioned as a usurious one, *NV One, LLC*, 84 A.3d at 805, this Court must proceed with skepticism in relying on the purported financing documents at this juncture. The Complaint sufficiently alleges Gertz loaned money and received usurious interest. Thus, Gertz's motion is denied.

2

D&S

Much like Gertz, D&S moves to dismiss Count II, contending, among other things, that D&S did not profit from the alleged loan and served merely as PalmLake's agent and Plaintiff's attorney. Yet, this argumentation assumes the Agreement and Addenda conclusively establish PalmLake acted as the sole financier; the Court is not at liberty to make this factual assumption. *See supra*, § III(A)(1). Therefore, the Court cannot determine if D&S acted as a lender receiving usurious proceeds or an attorney receiving reasonable attorney's fees.

Indeed, Plaintiff has alleged facts directly contrary to the ones D&S would have this Court adopt. Plaintiff alleges, "Defendant Sweeney was acting for himself and on behalf of D&S" (SAC ¶ 61), and that Defendant Sweeney loaned money to BRAM. *Id.* ¶ 74. Plaintiff has also alleged "[a]ll Defendants acted in concert in (i) making the loans; (ii) demanding payment on the loans; and (iii) achieving receipt of funds in excess of the 21% per annum maximum interest rate . . . ."

Id. ¶ 76.[5] The agency and grouping issues embedded in Plaintiff's allegations simply cannot be resolved through a 12(b)(6) motion. *Scarvalone v. Kowalewicz*, 26 A.D.2d 885, 885-86 (N.Y. App. Div. 1966) (affirming denial of motion to dismiss by co-owner of property where complaint alleged dealings with one co-owner conducting for and on behalf of other co-owner). At this stage of the proceedings, this Court cannot discern the parties' respective roles without drawing impermissible inferences against Plaintiff. D&S's motion is accordingly denied.

3

Sweeney

Defendant Sweeney moves to dismiss Count II, arguing that the Agreement upon which the Receiver predicates his usury claim contains a Florida choice-of-law provision, thereby precluding Plaintiff from maintaining a Rhode Island-based usury claim. He argues that the Agreement and its Addenda reasonably designate Florida law because "the financier, PalmLake, is a Florida company organized under Florida law and PalmLake and BRAM are two sophisticated companies with the ability to choose the law that would govern their relationship." Mem. Supp. of Def. Sweeney's Mot. Dismiss 21. Plaintiff counters by asserting, *inter alia*, that the choice-of-law provision is unenforceable because the individual Defendants organized PalmLake "for the sole purpose of evading Rhode Island law and never treated [PalmLake] as a separate legal entity . . . ." SAC ¶ 71.

"As a general rule, parties are permitted to agree that the law of a particular jurisdiction will govern their transaction." *Sheer Asset Management Partners v. Lauro Thin Films,* Inc., 731

[5] Plaintiff has additionally alleged "[a]ll Defendants reserved, charged, demanded, and took from BRAM interest." *Id.* ¶ 75.

A.2d 708, 710 (R.I. 1999). However, Rhode Island law places certain limitations on a party's right to have a contract enforced in accordance with the law of his or her choosing. *Id*.

> "It is almost universally held that the parties, in exercising the power to select the jurisdiction whose law they intend to have control the obligations, rights, and duties under their contract, must act in good faith and with no purpose of evasion or of avoiding some provision of the law of the place of making." *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 173, 192 A. 158, 164 (1937).

Furthermore, the parties may not contrive or create fictitious contact with an otherwise non-interested jurisdiction to validate a choice-of-law provision. *Id.* (explaining the chosen state's laws must have a "real, and not a mere fictitious, connection with the subject-matter of the transaction"); *see also* 125 A.L.R. 482 § 1 (noting a court must apply the parties' chosen law "provided it is the law of a place with which some of the vital elements of the transaction are connected . . . and provided it has not been selected by the parties as a means of evading the usury law of the state to which the transaction would otherwise be referable"). Our Supreme Court has cited the Restatement, which provides,

> "'the law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice.'" *Sheer Asset Management Partners*, 731 A.2d at 710 (quoting Restatement (Second) of *Conflicts of Laws* § 187(2)(a) (1971)).[6]

[6] Defendant Sweeney seems to suggest *Sheer* overturned or limited the various grounds for striking a choice-of-law provision outlined in *Owens*. However, the *Sheer* Court itself cites *Owens* three times. Additionally, in introducing the applicable Restatement provision, the Court used the word "moreover" suggesting an expansion, as opposed to a limitation, of pre-*Sheer* jurisprudence. Finally, our Supreme Court cited *Owens* well after issuing the *Sheer* Decision, indicating *Owens* is still valid law. *See DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474, 481 (R.I. 2004). Thus, in referencing the Restatement, *Sheer* supplemented, rather than supplanted, previous cases dealing with choice-of-law analysis.

If Plaintiff can establish sufficient facts to support its allegation that the individual Defendants organized PalmLake solely to avoid Rhode Island law—and PalmLake itself played no substantial role in the underlying financing transactions—Plaintiff may be able to successfully argue the parties selected Florida law in bad faith and created a "fictitious connection" with Florida, rendering the choice-of-law provision unenforceable. *See Owens*, 58 R.I. at 173, 192 A. at 164. This Court is mindful that in *Sheer* our Supreme Court upheld a choice-of-law provision selecting the application of Connecticut law where the transaction otherwise would have been usurious under Rhode Island law. *Sheer Asset Management Partners*, 731 A.2d at 710. However, in that case, the parties apparently did not dispute that the lender was a Connecticut corporation. Plaintiff alleges "Defendants Sweeney and Gertz, *purportedly on behalf of PalmLake (but in fact on behalf of Sweeney and Gertz)* advanced a total of $599,674.14 in funds towards BRAM's production and shipping costs." SAC ¶ 42 (emphasis added); *see also* ¶¶ 39-41 (similarly referring to PalmLake as the "purported" lender). Because Plaintiff contests whether PalmLake was the true lender, at this early stage in the litigation, *Sheer* does not govern the case *sub judice*.

If the choice-of-law provision is unenforceable for any reason, the Court would need to engage in a protracted choice-of-law analysis to determine whether Rhode Island or Florida law applies.[7] Some courts have conducted the choice-of-law analysis at the motion to dismiss stage.

[7] Our Supreme Court has "abandon[ed] the *lex loci delicti* rule and adopt[ed] the new interest-weighing approach" in choice-of-law cases, thereby allowing the "forum court . . . to apply the substantive laws of a state, other than the locus, when it finds that such state has the significant interest in the outcome of those issues." *Woodward v. Stewart*, 104 R.I. 290, 297-99, 243 A.2d 917, 922-23 (1968). Accordingly, "[i]n carrying out that approach, 'we look at the particular . . . facts and determine therefrom the rights and liabilities of the parties in accordance with the law of the state that bears the *most significant relationship* to the event and the parties.'" *Harodite Industries, Inc. v. Warren Electric Corp.*, 24 A.3d 514, 534 (R.I. 2011) (emphasis in original) (quoting *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997)). The *Woodward* Court set out the policy considerations that Rhode Island courts must take into account when making a choice of law determination: (1) Predictability of results; (2) Maintenance of interstate and international

See Burdick v. Air & Liquid Systems Corp., No. PC 11-3431, 2012 WL 5461184, at *4 (Gibney, P.J.) (R.I. Super. Nov. 2, 2012) (collecting cases). Nevertheless, a choice-of-law determination is not appropriate until the presiding court receives an adequate amount of factual briefing. *See id.* at *5. Only with the benefit of a fuller record can the Court assess the subject choice-of-law provision's enforceability, and, if necessary, engage an interest-weighing analysis. Accordingly, the Court denies Sweeney's motion to dismiss with the understanding that the Court will need to revisit the issues raised.

B

1

Usury (Florida Law)

Count III asserts usury claims against all Defendants under Florida law. Plaintiff alleges "Defendants Sweeney, D&S, Gertz, and purportedly PalmLake willfully and knowingly reserved, charged, or took for a loan or advance of money, at a rate of interest greater than the equivalent of 45% per annum interest" in violation of Florida usury law. SAC ¶ 79. Florida law provides statutory causes of action which allow a borrower to seek affirmative relief against a lender who has made a usurious loan. *Velletri v. Dixon*, 44 So.3d 187, 189 (Fla. Dist. Ct. App. 2010). "Civil usury involves loans of $500,000 or less with an interest rate greater than 18 percent and less than 25 percent." *Id.* (citing F.S.A. § 687.03(1)). "Criminal usury involves any loan amount with an interest rate greater than 25 percent." *Id.* (citing F.S.A. § 687.071(2)). "The penalties for civil usury include forfeiture of double the interest actually charged and collected," whereas the penalty for criminal usury includes "forfeiture of the right to collect the debt at all." *Id.* (citing F.S.A.

order; (3) Simplification of the judicial task; (4) Advancement of the forum's governmental interests; (5) Application of the better rule of law. *Woodward*, 104 R.I. at 300, 243 A.2d at 923; *see also Najarian v. National Amusements, Inc.*, 768 A.2d 1253, 1255 (R.I. 2001).

§ 687.071(7)). Gertz and D&S have moved to dismiss Count III. Incorporating the same reasoning outlined *supra* with respect to Count II, the Court denies the parties' respective motions.

2

RICO (Rhode Island and Florida Law)

Counts IV and V assert RICO claims against all Defendants pursuant to Rhode Island's Racketeer Influenced and Corrupt Organizations Act (RICO) statute, G.L. 1956 § 7-15-2(c), and Florida law Civil Remedies for Criminal Practices statutes, F.S.A. § 772.103(3).[8] Rhode Island's RICO statute makes it "unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt." Sec. 7-15-2(c). An "unlawful debt" is one "incurred or contracted in an illegal gambling activity or business or that is unenforceable under state law in whole or in part as to principal or interest because of the law relating to usury." Sec. 7-15-1(d). Plaintiff alleges RICO violations based on the collection of usurious debt (outlined in Counts II and III) through alternative enterprises: the PalmLake enterprise, the D&S enterprise, and the Sweeney-Gertz enterprise. SAC ¶¶ 81-90. All Defendants have moved to dismiss Counts IV and V, arguing Plaintiff fails to sufficiently allege the existence of a RICO "enterprise."

[8] Florida statute provides, "[i]t is unlawful for any person . . . [e]mployed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt. Section 772.103(3). Because the Florida statute is substantially similar to Rhode Island's version and Plaintiff's RICO claims fails regardless of which law applies, the Court will not distinguish between the two for purposes of analysis.

C

1

PalmLake and D&S as the Enterprises

A RICO enterprise "includes 'any sole proprietorship, partnership, corporation, association, or other legal entity, and any union or group of individuals associated for a particular purpose although not a legal entity."' Sec. 7-15-1(a). Courts have outline two types of enterprises: (1) legal enterprises, or formal entities, and (2) so-called "association-in-fact" enterprises, or informal entities. *See, e.g.*, *Aetna Casualty Surety Co. v. P & B Autobody*, 43 F.3d 1546, 1558 (1st Cir. 1994). "[I]n order to qualify as a RICO enterprise, the 'enterprise must form an entity "separate and apart" from the . . . racketeering activity with which it is charged.'" *Carlsten v. The Widecom Group, Inc.*, No. C.A. PC 97-1425, 2003 WL 21688263, at *7 (R.I. Super. July 1, 2003) (quoting *Lares Group II v. Tobin*, 47 F. Supp. 2d 223, 229 (D.R.I. 1999)).

Both PalmLake and D&S are clearly legal entities, which would appear to satisfy the enterprise element. However, "to establish liability . . . one must allege . . . the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) (applying federal law); *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 448 (1st Cir. 2000) ("[I]t is well settled in this circuit that the 'person' identified . . . must be distinct from the 'enterprise.'"). Linguistically speaking, the statute's language mandates a distinctiveness requirement because "one speaks of employing, being employed by, or associating with others, not oneself." *Cedric*, 533 U.S. at 161; Sec. 7-15-2(c). At least as alleged, for purposes of the RICO claims, neither PalmLake nor D&S can serve as the RICO enterprise without violating the distinctiveness requirement.

This Court starts from the premise that the RICO "person" is the one alleged to engage in the predicate act—in this case the collection of debt at an illegal interest rate. *See Zavala v. Wal-Mart Stores, Inc.*, 447 F. Supp. 2d 379, 383 (D.N.J. 2006) ("The 'person' conducts the enterprise . . . [w]hen Plaintiffs allege that the contractors engaged in the predicate acts that constitute racketeering activity, as they do at numerous points in the Second Amended Complaint, this confirms that the contractors are within the meaning of 'person.'"). Any individual the Complaint named as a RICO person cannot, as a matter of law, serve as the RICO enterprise; to hold otherwise would be to enable the RICO persons to work "double duty" and violate the distinctiveness requirement. *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) ("We have consistently interpreted the statutory requirement that a culpable person be 'employed by or associated with' the RICO enterprise as meaning that the same entity cannot do double duty as both the RICO defendant and the RICO enterprise."); *see also Inner City Recycling Service LLC v. SMM New England Corp.*, No. 13-648-ML, 2014 WL 4956228, at *10 (D.R.I. Oct. 2, 2014) (citation omitted); *Arzuaga–Collazo v. Oriental Federal Savings Bank*, 913 F.2d 5, 6 (1st Cir. 1990).

Here, Plaintiff has alleged all Defendants are RICO persons who engaged in the collection of unlawful debt (usury); this means that unless Plaintiff can distinguish between Defendants' respective roles, Plaintiff's form of pleading violates the distinctiveness requirement. *See Zavala*, 447 F. Supp. 2d at 383; *see, e.g.*, SAC ¶ 75 ("All Defendants reserved, charged, demanded, and took from BRAM interest in excess of the maximum rate of interest in Rhode Island of 21% per annum, in violation of § 6-26-2."); ¶ 76 ("All Defendants acted in concert in (i) making the loans; (ii) demanding payment on the loans; and (iii) achieving receipt of funds in excess of the 21% per annum maximum interest rate, in violation of § 6-26-2."); ¶ 77 ("All Defendants willfully and

knowingly violated § 6-26-2, and are guilty of criminal usury, pursuant to § 6-26-3, and consequently are liable for punitive damages."). Convoluting the parties' respective roles even further, Plaintiff has alleged "Defendant Sweeney was acting for himself and on behalf of Defendants Gertz, D&S, and purportedly PalmLake" (SAC ¶ 61), and that "D&S was acting on behalf of all other Defendants." *Id.* ¶ 62. Regardless of whether Plaintiff's "group pleading" is permissible, the fact remains that if Plaintiff cannot distinguish between Defendants' various acts and roles, the Court certainly cannot be expected to do so.[9] Yet, because Plaintiff has treated Defendants as a "single, undifferentiated mass" at various times throughout the Complaint, the Court has been unable to assess when, where, and how Defendants participated in the allegedly illegal collection practices to consider whether the allegations satisfy the distinctiveness requirement. *Bates v. Northwestern Human Services, Inc.*, 466 F. Supp. 2d 69, 87 (D.D.C. 2006). The Court has no choice but to assume the distinctiveness requirement has not been met based on the Complaint as alleged.

Additionally, PalmLake cannot be considered the legal enterprise because Plaintiff has asked the Court to assume PalmLake has no legal independence and is nothing more than "an association of Defendants Sweeney, D&S, and Gertz."[10] *Id.* ¶ 67. Plaintiff has specifically argued that his alter-ego allegations "are incorporated into every other Count." Pl.'s Mem. Supp. Obj. to

[9] Plaintiff cannot escape the distinctiveness issues by reference to Superior Court Rules of Civil Procedure 8(e)(2)—allowing for alternative pleading—because the Court must assume both D&S and PalmLake participated in the predicate acts (at all times) based on the grouping and agency allegations of the Complaint, along with the fact that all Defendants are named in the usury counts.

[10] Plaintiff cites a series of inapplicable cases, all of which suggest a plaintiff can maintain a RICO claim based on an "association-in-fact" enterprise, while simultaneously asserting alter-ego liability. *See, e.g., David Antoniono Investments, LLC v. Hutchens*, Case No. 15-61233-CIV-ZLOCH, 2018 WL 7636331, at *3 (S.D. Fla. Sept. 24, 2018). Plaintiff has not directed the Court to a single case in which an entity alleged to have no separate legal existence has been allowed to serve as the "legal" enterprise.

Michael F. Sweeney's Mot. Dismiss 28. These alter-ego allegations destroy the possibility of PalmLake serving as the legal enterprise. *Physicians Mutual Insurance Co. v. Greystone Servicing Corp., Inc.*, No. 07 Civ. 10490 (NRB), 2009 WL 855648, at *7 (S.D.N.Y. Mar. 25, 2009); *Friedlander v. Rhoades*, 962 F. Supp. 428, 432 (S.D.N.Y. 1997) (finding that plaintiff's allegation that the alleged RICO enterprise and the individual defendants were alter egos of one another was "fatal" to plaintiff's RICO claim). Therefore, neither PalmLake nor D&S can function as a legal enterprise for purposes of Counts IV and V.

2

Sweeney and Gertz as an Association-in-Fact Enterprise

Plaintiff alleges in the alternative that Defendants Sweeney and Gertz, together, were an "association-in-fact" enterprise, while D&S and PalmLake served as the RICO persons conducting or participating in the purported enterprise's affairs.[11] SAC ¶¶ 85, 89; Trial Tr. (Tr.) 67:8-9, July 19, 2019. This alternative theory potentially alleviates the distinctiveness problem explained above because "a defendant may be a RICO person and one of a number of members of the RICO enterprise." *Moss v. BMO Harris Bank, N.A.*, 258 F. Supp. 3d 289, 298-99 (E.D.N.Y. 2017). If the Sweeney-Gertz enterprise has an identity of its own, the distinctiveness rule may be evaded.

"[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009) (Stevens, J. and Breyer, J., dissenting). Establishing these structural features distinguishes RICO claims from simple conspiracies and prevents a merger of a RICO claim with the underlying

[11] PalmLake argues that the Court should view the enterprise as an association-in-fact enterprise between *all* Defendants. However, as will be shown, this distinction does not ultimately impact the Court's analysis.

predicate offense. *See Shire Corporation, Inc. v Rhode Island Department of Transportation*, No. PB 09-5686, 2012 WL 756991, at *25 (R.I. Super. Mar. 2, 2012) (Silverstein, J.) (quoting *United States v. Cianci*, 378 F.3d 71, 82 (1st Cir. 2004) (‘“[A]ctors who jointly engage in criminal conduct that amounts to a pattern of ‘racketeering activity’ do not automatically thereby constitute an association-in-fact RICO enterprise simply by virtue of having engaged in the conduct.”’)); *see also See Jazbec v. Hirsh*, No. 08 CV 7275, 2009 WL 3366970, at *3 (N.D. Ill. Oct. 14, 2009) (citing *Jennings v. Emry*, 910 F.2d 1434, 1439-40 (7th Cir. 1990)) (“Any RICO enterprise must consist of more than a group of people who allegedly got together to engage in RICO activities.”)).

Without any allegations of a structure—especially where, as here, the RICO claims do not allege a long-term pattern of predicate acts—a plaintiff could defeat a motion to dismiss by alleging “in wholly conclusory terms” that defendants committed a predicate act (*i.e.*, usury) and tack on the self-serving legal conclusion that defendants “constituted an enterprise.” *Carlsten*, 2003 WL 21688263, at *7 (citing *Feinstein v. Resolution Trust Corp*., 942 F.2d 34, 41 n.7 (1st Cir. 1991)). However, ‘“civil RICO [] is not simply an action to recover excessive interest or to enforce a penalty for the overcharge. RICO is concerned with evils far more significant than the simple practice of usury.”’ *Robidoux v. Conti*, 741 F. Supp. 1019, 1022 (D.R.I. 1990) (quoting *Durante Bros. & Sons, Inc. v. Flushing National Bank*, 755 F.2d 239, 250 (2d Cir. 1985)). Therefore, this Court cannot countenance the transmogrification of garden-variety usury allegations into RICO allegations which, by their very pendency, can be stigmatizing and costly. *Miranda*, 948 F.2d at 44. Successful RICO claims entitle the prevailing plaintiff to treble damages and attorney’s fees, so this Court has an obligation to draw clear lines between RICO and simple usury. *See* § 7-15-4(c); F.S.A. § 772.104(1).

Here, Plaintiff has not alleged *any* facts suggesting Defendants Sweeney and Gertz, together, constituted an entity "separate and apart" from the alleged collection of an unlawful debt. *Carlsten*, 2003 WL 21688263, at *7. Rather, Plaintiff's counsel essentially concedes that he is relying on the usury allegations alone to simultaneously establish the collection of illegal interest *and* the existence of an enterprise. At oral argument, Plaintiff's counsel cited language from the *Boyle* Court: '"evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce."' Tr. 76:15-17 (quoting *Boyle*, 556 U.S. at 947). Hypothesizing about when such a coalescence may occur, the dissenting opinion explained a jury could imply the existence of a structure "when the pattern of activity is so complex that it could not be performed in the absence of structures or processes for planning or concealing the illegal conduct beyond those inherent in performing the predicate acts." *Boyle*, 556 U.S. at 955). On the facts of the *Boyle* case, the evidence established that "the core group was responsible for more than 30 night-deposit-box thefts." *Id.* at 940. From that complexity and repetition a jury could have inferred a structure.

This Court does not quarrel with the rule laid down in *Boyle*. However—because Plaintiff has not alleged Defendants engaged in a "pattern of racketeering activity" from which one could infer the existence of a structure—*Boyle* is inapposite. Plaintiff has alleged Defendants made three advances to the *same* debtor to fund the debtor's "backpack production, watch production, and shipping and delivery costs." SAC ¶ 47. These related advances do not arise to the sort of complex structure presented in the *Boyle* case. The Court is mindful that neither § 7-15-2(c) nor F.S.A. § 772.103(3) require a pattern of predicate acts in RICO cases involving the collection of unlawful debt. *See United States v. Weiner*, 3 F.3d 17, 24 (1st Cir. 1993) (adopting view that "single collection of an unlawful debt satisfies 'collection of unlawful debt' requirement"); *Heise v.*

Porcelli, No. 8:07-Civ-1866-T-24-MAP, 2008 WL 4190270, at *4 (M.D. Fla. Sept. 8, 2008). Indeed, Plaintiff has emphasized the argument that a single debt will suffice. However, allegations of a single debt cannot logically amount to allegations sufficient to satisfy all RICO's elements, including the critical enterprise element. Faced with no allegations of a pattern, a description of a usurious loan, and threadbare allegations of a structure, this Court must intervene to prevent the simple practice of usury from becoming the logical equivalent of RICO based on the collection of an unlawful debt.

In cases such as the instant one, involving alleged RICO activity of an episodic nature, courts have required factual allegations beyond merely describing the predicate act to establish an enterprise. *Crichton v. Golden Rule Insurance Co.*, 576 F.3d 392, 400 (7th Cir. 2009) (dismissing RICO claim which "begins and ends" by describing fraud constituting the predicate act); *Jenkins v. Mullen*, No. CIVA 05-513, 2006 WL 2950489, at *3 (D.R.I. Oct. 16, 2006) ("Plaintiff's Complaint alleges only facts that narrowly concern the fraud allegedly perpetrated against him in the one real estate transaction at hand. Plaintiff's failure to describe any conduct beyond the fraud at issue means Plaintiff has not successfully alleged that Defendants are an entity separate and apart from the pattern of activity in which it engages."); *Shire Corporation, Inc.*, 2012 WL 756991, at *25 ("[T]here is no evidence of racketeering activity, if at all, towards anyone other than [Plaintiff]. This can not constitute an ongoing effort separate and apart from the alleged extortion."); *Carlsten*, 2003 WL 21688263, at *7 ("[A]lthough Plaintiff summarily asserts that '[the RICO persons] were individuals who were associated for the purposes of a private placement of [a corporation's stock]' and that '[t]his constitutes an "enterprise" under RICO,' Plaintiff has not succeeded in proving the existence of an enterprise distinct from the alleged racketeering activity.").

This Court may draw all reasonable inferences from the facts alleged. However, even under our Supreme Court's lenient standard applicable on a motion to dismiss, this Court need not accept Plaintiff's *legal* conclusions as true. *DiLibero*, 108 A.3d at 1016. If a complaint does not contain "specific statements" from which the necessary elements of the claim may be inferred, the Court is not "at liberty to presume" that Plaintiff has a claim. *See Berberian v. Solomon*, 122 R.I. 259, 262, 405 A.2d 1178, 1180 (1979). Plaintiff has not alleged any facts which, if assumed true, would allow this Court to conclude there existed an association-in-fact necessary for Plaintiff's RICO claims to survive. The Complaint contains no factual allegations relating to the rules, routines, or processes through which the purported Sweeney-Gertz enterprise maintained operations. Therefore, the Court dismisses Counts IV and V in their entirety as against all Defendants.

D

Fraudulent Transfer

Count VI asserts fraudulent transfer claims against all Defendants pursuant to Rhode Island's Uniform Fraudulent Transfer Act (RIUFTA) codified at G.L. 1956 §§ 6-16-1 *et seq.*[12] Plaintiff alleges "Defendants Sweeney, D&S, Gertz, and PalmLake fraudulently transferred the money received from BRAM directly to Defendants Sweeney, Gertz, and D&S." SAC ¶ 92. Plaintiff alleges Defendants made the alleged transfers with the "actual intent to hinder, delay, or

[12] Rhode Island recently adopted the Uniform Voidable Transactions Act (RIUVTA). *See* P.L. 2018, ch. 141 (18-H 7334). The RIUVTA only applies to transfers made after the effective date (July 18, 2018). Accordingly, Plaintiff's fraudulent transfer claims are governed by the RIUFTA, not the RIUVTA.

defraud any creditor or future creditor of PalmLake, including BRAM, in violation of § 6-16-4(a)(1)." *Id.* ¶ 93.[13] All Defendants have moved to dismiss.

Rhode Island's Uniform Fraudulent Transfer Act provides,

> "(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (ii) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." Sec. 6-16-4(a).

In an action for relief, a creditor's remedies include "[a]voidance of the transfer . . . to the extent necessary to satisfy the creditor's claims." Sec. 6-16-7(a)(1). Summarizing the necessary showing under the RIUFTA, Plaintiff would need to establish the following: (1) a debtor-creditor relationship with PalmLake; (2) a transfer made by PalmLake; and (3) an intention on PalmLake's part in making the transfer to "hinder delay or, defraud" Plaintiff.[14]

The Court finds Plaintiff has stated a fraudulent-transfer claim against all Defendants. First, Plaintiff is appropriately considered PalmLake's creditor. As defined by the RIUFTA, a "creditor" means a person who has a "claim," and a "claim" means "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

[13] Plaintiff also alleges Defendants made the relevant transfers "without PalmLake receiving a reasonably equivalent value in exchange for the transfer, and Defendants Sweeney, D&S, Gertz, and PalmLake believed or reasonably should have believed that PalmLake would incur debts beyond its ability to pay as they became due, in violation of § 6-16-4(a)(2)(ii)." *Id.* ¶ 94.

[14] Because Plaintiff has satisfied § 6-16-4(a)(1), the Court reserves judgment on the applicability of subsection (2).

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Sec. 6-16-1(3)-(4). As explained *supra*, Plaintiff has brought usury claims against all Defendants, making Plaintiff PalmLake's creditor and PalmLake a "debtor." Second, Plaintiff properly alleges PalmLake made a "transfer." The RIUFTA's definition of what constitutes a "transfer" is an expansive one, including "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or **parting with an asset or an interest in an asset**, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance." Sec. 6-16-1(16) (emphasis added). As alleged, PalmLake, the purported "financier" in the underlying financing transactions, never received any monies in connection with the Agreement or its Addenda. Instead, payments from BRAM's account debtors flowed first to D&S's IOLTA account and subsequently to Defendants Sweeney, Gertz, and D&S, individually. SAC ¶ 53. These transfers, completely exclusive of PalmLake, Plaintiff's debtor, may properly be considered transfers made by PalmLake. No money ever reached PalmLake that could have potentially satisfied Plaintiff's claim. Because PalmLake received no money, PalmLake can be said to have "part[ed] with an asset"—the right to receive payments from BRAM's account debtors—in favor of Defendants Sweeney, Gertz, and D&S. Sec. 6-16-1(16).[15] Third, in terms of satisfying the RIUFTA's intent requirement, Plaintiff has expressly alleged the transfers were made "to hinder, delay, or defraud"; these general averments are sufficient at the motion to dismiss stage even under particularized pleadings standards required for fraud claims. *See* Super. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").

[15] Even though PalmLake itself does not seemingly play a unique role in these transfers, Plaintiff alleges "Defendants Sweeney, D&S, and Gertz dominated the finances and practices of Defendant PalmLake, and for all practical purposes dealt with it as if it had no separate legal existence," and PalmLake is merely "an association of Defendants Sweeney, D&S, and Gertz." SAC ¶¶ 66, 67; *see also* ¶ 91 (incorporating this allegation into Count VI).

Plaintiff can proceed on the fraudulent transfer claim against any entity that is "liable to it on a claim." *See Rohm & Haas Co. v. Capuano*, 301 F. Supp. 2d 156, 161 (D.R.I. 2004). Therefore, Plaintiff can certainly proceed against PalmLake. Moreover, judgment may typically enter against "the first transferee of the asset" or "an immediate or mediate transferee of the first transferee." Sec. 6-16-8(b)(1)(i)-(ii). Because Defendants D&S, Sweeney, and Gertz are all alleged to be transferees, judgment may potentially be entered against them if the transfers are avoidable. No more is required at this stage, and the Court denies Defendants' respective motions.

E

Alter Ego/Piercing the Corporate Veil[16]

Count I asserts alter ego/veil-piercing claims against all Defendants.[17] Plaintiff asserts the individual Defendants (i) formed PalmLake solely to enter into the subject financing transactions; (ii) organized PalmLake in Florida and included a Florida choice-of-law provision in the Agreement and Addenda to evade Rhode Island's usury and RICO laws; and (iii) dominated PalmLake's finances and practices, treating PalmLake as if, for all intent and purpose, it had no independent legal existence. SAC ¶¶ 63-67. All Defendants have moved to dismiss.

"[A]n attempt to pierce the corporate veil is not itself a cause of action but rather a means of imposing liability on an underlying cause of action, such as a tort or breach of contract."

[16] "[P]rinciples of corporate 'veil piercing' can apply to strip an LLC member of protection." *Daley v. Falaye*, No. 06-2774, 2007 WL 2344028 (R.I. Super. Aug. 10, 2007). "As the law stands currently, except for the continuing importance of the formalities test in corporate cases, the articulated veil-piercing tests for corporations and LLCs are substantially the same." Mark J. Loewenstein, *Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry*, 41 Seton Hall L. Rev. 839, 843 (2011).

[17] Veil piercing itself does not constitute a separate cause of action; however, the Court will view the veil-piercing count as having been incorporated into the other counts as a basis for imposing liability on the individual Defendants should the Court enter judgment against PalmLake. *See in re Glick*, 568 B.R. 634, 651 (Bankr. N.D. Ill. 2017) (allowing veil piercing to be pled separately as a matter of convenience).

Vasquez v. Sportsman's Inn, Inc., 57 A.3d 313, 321 (R.I. 2012); *see also Turner Murphy Co. v. Specialty Constructors, Inc.*, 659 So.2d 1242, 1245 (Fla. Dist. Ct. App. 1995).

> "Although the criteria for piercing the corporate veil of limited liability vary with the particular circumstances of each case, *see Miller v. Dixon Industries Corp.*, 513 A.2d 597, 604 (R.I. 1986), one overriding factor is omnipresent: 'the corporate entity should be disregarded and treated as an association of persons [] when the facts of a particular case render it unjust and inequitable to consider the subject corporation a separate entity.'" *Doe v. Gelineau*, 732 A.2d 43, 48 (R.I. 1999) (quoting *R & B Electric Co., Inc. v. Amco Construction Co.*, 471 A.2d 1351, 1354 (R.I. 1984)).

For example, veil piercing may be appropriate "when the corporate entity 'is used to defeat public convenience, justify wrong, protect fraud, or defend crime.'" *R & B Electric Co., Inc.*, 471 A.2d at 1354 (quoting *Vennerbeck & Clase Co. v. Juergens Jewlry Co.*, 53 R.I. 135, 139, 164 A. 509, 510-11 (1933)); *see also United Transit Co. v. Nunes*, 99 R.I. 501, 508, 209 A.2d 215, 219 (1965).[18]

[18] Gertz argues the Court should apply Florida law to the veil-piercing analysis. The Court fails to see how applying the law of either Florida or Rhode Island in this case would make a difference in determining whether Plaintiff has sufficiently alleged his veil-piercing claim. *See Scully Signal Co. v. Joyal*, 881 F. Supp. 727, 737 (D.R.I. 1995) ("Nevertheless, the laws of these jurisdictions pertaining to piercing the corporate veil are not in conflict, but instead are congruous, thus saving us from trekking down the arduous path of interest analysis."). Gertz points to a Florida statute, which provides, "failure of a limited liability company to observe formalities . . . is not a ground for imposing liability on a member . . . ." F.S.A. § 605.0304(2). The Court recognizes the relative insignificance of observing formalities in the LLC context (as opposed to the corporate context). However, F.S.A. § 605.0304(2) does not immunize members of an LLC from having an LLC's veil pierced. *See, e.g., P & S & Co. LLC v. SJ Mak, LLC*, 254 So.3d 535, 538 (Fla. Dist. Ct. App. 2018). Gertz also points to a decision dealing with whether to strike a choice-of-law provision in a usury context based on public policy to somehow extrapolate a Florida court, as a matter of law, would not pierce PalmLake's veil on the facts alleged. *See Mazzoni Farms, Inc. v. E.I. Dupont De Nemours & Co.*, 761 So.2d 306 (Fla. 2000). Not only is the case cited inapposite in that it does not deal with piercing, Gertz himself goes on to argue the rationale set forth in *Mazzoni Farms* is "no different than the rationale set forth by the Rhode Island Supreme Court." Gertz's Mot. Dismiss 7.

Plaintiff invokes the "alter-ego" theory as a basis for piercing PalmLake's veil. To invoke the theory, our Supreme Court has erected a two-part test:

> "there must be a concurrence of two circumstances: (1) there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." *Heflin v. Koszela*, 774 A.2d 25, 30 (R.I. 2001).

The second prong of the alter-ego test "is addressed to the conscience of the court, and the circumstances under which it will be met will vary with each case." *Id.*

1

Sweeney and Gertz

Here, Plaintiff has sufficiently pled "unity of interest and ownership" between Defendants Sweeney, Gertz, and PalmLake. Plaintiff alleges a series of transfers, whereby "substantially all funds" were distributed directly to PalmLake's individual members, as opposed to passing through PalmLake to be distributed. SAC ¶ 53. The direct transfers suggest the individual Defendants treated PalmLake as if it had no independent identity and Defendants Sweeney and Gertz, were, in fact, the true financiers. *Id.* ¶ 53. Moreover, Plaintiff alleges Defendant Sweeney advanced monies from his personal account, only later feigning to have extended this money through PalmLake. *Id.* ¶¶ 14, 15, 18, 23, 34. Considering PalmLake is alleged to be a single-purpose entity established solely to enter loans with Plaintiff (SAC ¶¶ 53, 64)—along with the procedure employed by the individual Defendants in terms of advancing and collecting/disbursing payments—the Court is convinced Plaintiff has sufficiently pled a unity of interest sufficient to survive the pleadings stage.

Turning to the second prong, Plaintiff has alleged a viable basis for piercing; namely, that Defendants organized PalmLake "for the purpose of evading Rhode Island's Interest and Usury and RICO laws." SAC ¶ 65. Courts have specifically found veil piercing appropriate "[w]here the corporate form is adopted or asserted in an attempt to evade a statute or modify its intent." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 41.34 (Sept. 2019 Update)[19]; *see also Vasquez*, 57 A.3d at 321 (citing *Fletcher* with approval). Specifically, in the usury context, piercing is appropriate where individuals abuse usury laws. 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 45:20 (Sept. 2019 Update); *see Gilbert v. Doris R. Corporation*, 111 So.2d 682, 685 (Dist. Ct. App. Fla. 1959) (use of corporate shell to cloak a loan which is actually being made to an individual borrower). Rhode Island's usury laws are intended to protect Rhode Island debtors; an intent to evade these laws may support a basis for veil piercing. *See NV One, LLC*, 84 A.3d at 807-10 (discussing policy behind usury statute and striking usury savings clause intended to avoid strictures of statute).

In addition to Plaintiff's allegations regarding Defendants' impermissible intent, the Court is troubled by the Complaint's allegations that "substantially all funds" were distributed directly to PalmLake's members, leaving PalmLake itself, for all intents and purposes, an undercapitalized, empty-shell: these allegations alone support piercing. *Id.* ¶ 53; *National Hotel Associates ex. rel. M.E. Venture Management, Inc. v. O. Ahlborg & Sons, Inc.*, 827 A.2d 646, 652 (R.I. 2003) (reversing trial justice's decision not to pierce corporate veil where the evidence disclosed, *inter alia*, that although defendants observed corporate formalities, the corporation itself "wound up an

[19] For additional cases concerning veil piercing to evade a statutory scheme, *see Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946); *Casanova Guns, Inc. v. Connally*, 454 F.2d 1320 (7th Cir. 1972) (circumvention of federal statute restricting issuance of firearms licenses); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965) (evasion of federal statute); *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337 (N.D. Ill. 1983) (liability under federal pension laws).

empty shell, unable to pay [a] judgment because its assets were dissipated for the benefit" of the stockholder and second corporation).

Without intervention from this Court to pierce the veil under circumstances as alleged, individuals could simply incorporate an entity, make a loan known to be usurious, and completely avoid liability so long as the individuals divert loan payments directly to themselves. *Cf. Baby Phat Holding Company, LLC v. Kellwood Co.*, 123 A.D.3d 405, 407-08, 997 N.Y.S.2d 67, slip. op. 08364 (N.Y. App. Div. 2014) ("Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory."). Considering the foregoing, the Court finds, based on the facts alleged, that recognizing PalmLake's separate existence very well may "justify wrong" and otherwise "result in injustice." *R & B Electric Co., Inc.,* 471 A.2d at 1354; *National Hotel Associates ex rel. M.E. Venture Management, Inc.*, 827 A.2d at 652. Accordingly, the Court denies Defendants Sweeney and Gertz's motions.

2

D&S

The same analysis does not follow with respect to D&S because Plaintiff has not alleged D&S has an ownership interest in PalmLake. As explained by our Supreme Court, "there must be such a unity of interest ***and ownership*** that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals." *Heflin*, 774 A.2d at 30 (emphasis added). The "individual" referred to by the *Heflin* Court is the person with an ownership interest. Therefore, the governing rule can be restated as follows: "there must be such a unity of interest and ownership that the separate personalities of the corporation

and the [owner] no longer exist, viz., the corporation is, in fact, the alter ego of [an owner] or a few [of the owners]." *Id.*

Plaintiff has not cited a single Rhode Island case allowing piercing as to a non-owner. Instead, Plaintiff has directed the Court's attention to our Supreme Court's general statement that piercing is appropriate if a corporation "'is used to defeat public convenience, justify wrong, protect fraud, or defend crimes."' *R&B Electric Co., Inc.*, 471 A.2d at 1354 (quoting *Vennerbeck & Clase Co.*, 53 R.I. at 139, 164 A. at 510-11). This general proposition describes *why* veil piercing might be appropriate but makes no suggestion about *who* might be liable once the veil is pierced. Thus, because ownership interest is a prerequisite to attaching alter-ego liability—and Plaintiff has not alleged D&S held an ownership interest in PalmLake—the Court dismisses Count I as against D&S.

F

Declaratory Judgment Based on Estoppel

Count VII asserts a claim for declaratory judgment pursuant to G.L. 1956 §§ 9-30-1 *et seq.*, the Uniform Declaratory Judgments Act (UDJA), based on principles of estoppel. Plaintiff alleges that Defendants Sweeney and D&S, in connection with their legal representation of BRAM, represented to BRAM that the financing transaction at issue was a "loan." SAC ¶¶ 96, 98. Plaintiff alleges that BRAM relied on this characterization of the financing transaction; thus, Defendants should be estopped from characterizing the financing transaction as a "factoring" agreement. *Id.* ¶¶ 98, 100, 102.

Count VII fails to state a basis for the entry of a declaratory judgment. A declaratory judgment "'is neither an action at law nor a suit in equity but a novel statutory proceeding . . . ."' *Northern Trust Co. v. Zoning Board of Review of Town of Westerly*, 899 A.2d 517, 520 n.6 (Mem.)

(R.I. 2006) (quoting *Newport Amusement Co. v. Maher*, 92 R.I. 51, 53, 166 A.2d 216, 217 (1960)). The UDJA provides that the Superior Court '"shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."' *P.J.C. Realty, Inc. v. Barry*, 811 A.2d 1202, 1207 (R.I. 2002) (quoting § 9-30-1). Here, Plaintiff has not, in fact, asked the Court to "declare rights, status, and other legal relations" of the parties. For instance, Plaintiff has not asked the Court to determine, through an assessment of the Agreement and the Addenda, whether the financing transaction is a loan or a factoring agreement. Therefore, the UDJA is clearly inapplicable. Instead, Plaintiff has asked the Court to preemptively estop Defendants from asserting a legal theory based on prior representations.

Count VII also fails to state a claim for estoppel. Equitable estoppel, the theory Plaintiff apparently seeks to invoke, is not an independent action: estoppel functions as a legal shield rather than a sword. *Rubano v. DiCenzo*, 759 A.2d 959, 968 (R.I. 2000). In other words, equitable estoppel is an affirmative defense. *See, e.g., Smith v. JPMorgan Chase Bank, N.A.*, No. 3:14-CV-2402-M-BN., 2014 WL 6790749, at *8 (N.D. Tex. Dec. 2, 2014) (quoting *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex. 1988) ('"Waiver and estoppel are defensive in nature and operate to prevent the loss of existing rights. They do not operate to create liability where it does not otherwise exist."')). Our Supreme Court has explained that, "[u]nder the doctrine of equitable estoppel, a party may be precluded from enforcing an otherwise legally enforceable right because of previous actions of that party." *Retirement Board of Employees' Retirement System of State v. DiPrete*, 845 A.2d 270, 284 (R.I. 2004). However, Plaintiff is not seeking to prevent Defendants from enforcing an otherwise enforceable right. Plaintiff does not allege the financing transaction was a factoring agreement, but Defendants should be prevented from enforcing their rights as the purchaser because of certain representations. Instead, Plaintiff is

attempting to prevent Defendants from arguing their legal position; namely, that the subject transaction is a factoring agreement.

Certainly, whether Defendants previously treated the subject financing transaction as a loan may be relevant in conducting the loan-versus-factoring-agreement analysis. Such evidence would theoretically be admissible as a statement by a party opponent under Rule 801(d)(2)(A) of the Rhode Island Rules of Evidence. In determining whether a transaction is a loan, the finder of fact must "examine all the facts and circumstances," including "whether the parties intended to create a debtor-creditor relationship." *Holden v. Salvadore*, 964 A.2d 508, 513 (R.I. 2009); *see also Oregrund Limited Partnership v. Sheive*, 873 So.2d 451, 457 (Fla. Dist. Ct. App. 2004). However, neither the doctrine of estoppel nor the UDJA has any place in this ultimate analysis. Accordingly, the Court dismisses Count VII in its entirety.

IV

Conclusion

For the foregoing reasons, the Court grants Defendants' respective motions to dismiss Counts IV, V, and VII in their entirety and Count I as to D&S, without prejudice. The Court denies Defendants' remaining motions. Counsel for the Receiver shall prepare and submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE: Richard L. Gemma, as Receiver for BR Asset Management, LLC f/k/a Benrus, LLC v. Michael F. Sweeney, et al.

CASE NO: PC-2018-3635

COURT: Providence County Superior Court

DATE DECISION FILED: October 15, 2019

JUSTICE/MAGISTRATE: Stern, J.

ATTORNEYS:

For Plaintiff: Max Wistow, Esq.

For Defendant: John B. Daukas, Esq.; William Mark Russo, Esq.; William M. Dolan, Esq.