

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

FILED & ENTERED

JAN 24 2012

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY egarcia DEPUTY CLERK

In re:)
)
CENTURY CITY DOCTORS HOSPITAL,)
LLC,)
)
)
Debtor.)
)
RICHARD K. DIAMOND)
CHAPTER 7 TRUSTEE,)
)
Plaintiff,)
)
v.)
ROBERT FRIEDMAN,)
)
Defendant.)

Case No. 2:08-bk-25318-PC
Adversary No. 2:10-ap-02401-PC

Chapter 7

MEMORANDUM DECISION

Date: November 15, 2011
Time: 9:30 a.m.
Place: United States Bankruptcy Court
Courtroom # 1539
255 East Temple Street
Los Angeles, CA 90012

This matter comes before the court on a motion by defendant Robert Friedman (“Friedman”) for summary judgment or, in the alternative, summary adjudication of each claim of plaintiff Richard K. Diamond (“Diamond”), the chapter 7 trustee. The court, having considered the pleadings, evidentiary record, and arguments of counsel, makes the following findings of fact and conclusions of law pursuant to F.R.Civ.P. 52(a)(1),¹ as incorporated into FRBP 7052 and applied to adversary proceedings in bankruptcy cases.

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¹ Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). “Rule” references are to the Federal Rules of Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California (“LBR”).

1 I. STATEMENT OF FACTS

2 In 2004, Friedman learned that Century City Doctors Hospital, L.P. (“CCDH”) was
3 offering limited partnership interests in CCDH (“Units”) at \$40,000 per Unit. Mark Bidner
4 (“Bidner”), whom Friedman knew personally and professionally, was then the President of Salus
5 Surgical Group, LLC (“Salus”), the general partner of CCDH.² Friedman inquired about
6 investing in CCDH.

7 In response to Friedman’s inquiry, Bidner sent Friedman a letter dated August 7, 2004
8 (“2004 Letter”). The 2004 Letter was accompanied by certain documents, including: (1) an
9 Amended and Restated Limited Partnership Agreement of the Century City Doctors Hospital,
10 L.P., dated August 6, 2004 (“LP Agreement”); and (2) an Updated Confidential Private
11 Placement Memorandum of Century City Doctors Hospital, L.P., dated August 6, 2004 (“Private
12 Placement Memo”).

13 Although Friedman was interested in investing in CCDH, he had reservations about
14 making a substantial investment in a new hospital project that might not succeed without
15 Bidner’s leadership. To address this concern, Bidner, in his capacity as President of Salus, made
16 the following oral representation: if Bidner ceased to maintain an active, full-time role in
17 managing the hospital project, Friedman would have a right to withdraw from the partnership
18 and receive a refund of his investment in return for relinquishing his limited partnership interest
19 (“Withdrawal Agreement”).³

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21 ² The court overrules Friedman’s objection to Plaintiff’s 1st Set of Request for Judicial
22 Notice in Support of Plaintiff’s Opposition to Defendant’s Notice of Motion and Motion for
23 Summary Judgment or in the Alternative Summary Adjudication of Each of the Plaintiff’s
24 Claims. Diamond has filed evidentiary objections to the Declaration of Robert Friedman in
25 Support of Defendant’s Motion for Summary Judgment or, in the Alternative, Summary
26 Adjudication of Each of Plaintiff’s Claims (“Friedman Decl.”) and to the Declaration of Mark
27 Bidner in Support of Defendant’s Motion for Summary Judgment or, in the Alternative,
28 Summary Adjudication of Each of Plaintiff’s Claims (“Bidner Decl.”). The court overrules these
objections and will specifically address certain hearsay objections and parol evidence objections
in footnotes 3 and 39, respectively.

³ Friedman Decl. 2:1-4. Friedman’s testimony regarding the Withdrawal Agreement is
corroborated by Bidner’s testimony. Compare Friedman Decl. ¶¶ 2-9, with Bidner Decl. ¶¶ 1-10.
Diamond objects to testimony concerning the Withdrawal Agreement on hearsay grounds.

1 In August 2004, Friedman signed a joinder to the LP Agreement and purchased \$450,000
2 in CCDH Units at \$40,000 per Unit (“Investment”), which constituted a 1.2797033% limited
3 partnership interest in CCDH (“LP Interest”).⁴ In December 2004, Bidner resigned as President
4 of Salus. Shortly before resigning, Bidner contacted CCDH investors, including Friedman, to
5 disclose his impending resignation.

6 Once he learned of Bider’s imminent departure, Friedman exercised his right to withdraw
7 under the Withdrawal Agreement. Subsequently, Friedman received a letter from Kerri
8 Nickerson of CCDH, dated January 19, 2005 (“Refund Letter”), which was accompanied by a
9 check, dated January 18, 2005, from CCDH and made payable to Friedman in the amount of
10 \$450,000 (“Transfer”).⁵ The Refund Letter reads in part: “Dear Mr. Friedman, Please find
11 enclosed a check in the amount of \$450,000 refunding your investment in Century City Doctors
12 Hospital per your request.”⁶ On March 3, 2008, CCDH converted from a limited partnership to a
13 limited liability company.

14 On August 22, 2008—more than three and half years after the Transfer was made—
15 CCDH filed a petition for relief under chapter 7 of the Code and Diamond was appointed as
16 trustee in the case. On July 30, 2010, Diamond commenced this adversary proceeding against
17 Friedman seeking to avoid and recover the Transfer. On August 13, 2010, Diamond filed a First
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20 Testimony offered for a purpose other than to prove its truth is nonhearsay. See, e.g., Ortiz v.
21 United States, 318 F.2d 450, 451 (9th Cir. 1963). Verbal acts (e.g., statements of independent
22 legal significance) are admissible nonhearsay to prove the words were spoken or the act was
23 done. Fed. R. Evid. 801(c) advisory committee’s notes; see also N.L.R.B. v. H. Koch & Sons,
24 578 F.2d 1287, 1290–91 (9th Cir. 1978); Mueller v. Abdnor, 972 F.2d 931, 937 (8th Cir. 1992).
25 Testimony regarding the Withdrawal Agreement is not offered by Friedman for the truth of any
26 matter asserted, but solely for the purpose of showing that the making of the agreement and the
27 agreement terms were material inducements to Friedman to invest in CCDH. As such, the court
28 considers the testimony admissible as verbal acts of the contracting parties and overrules
Diamond’s hearsay objections to the admissibility of such testimony.

26 ⁴ Friedman Decl. Exs. D-F.

27 ⁵ Friedman Decl. Ex. I.

28 ⁶ Id. Ex. H (emphasis added).

1 Amended Complaint to Avoid and Recover Value of Fraudulent Transfer; Turnover; Unjust
2 Enrichment; and for Unlawful Distribution (“Complaint”) stating, in pertinent part:

3 Plaintiff is informed and believes and, based thereon, alleges, that the Debtor
4 made a transfer to [Friedman] totaling no less than \$450,000.00 including, but not
5 limited to, the transfer identified in Exhibit “1” attached hereto and incorporated
6 herein by this reference (the “Subject Transfer”).⁷

7 Exhibit “1” to Diamond’s Complaint identifies Friedman and lists the following information:

8 704 01/18/05 01/24/05 450,000 _____ 450,000
9 _____ 0.00 450,000⁸

10 Diamond does not allege in his Complaint any other facts regarding the Transfer, but claims that
11 the Transfer is avoidable for one or more of the following reasons:

- 12 1. CCDH allegedly “made the Subject Transfer [to Friedman] with the actual intent
13 to hinder, delay, or defraud one or more of its creditors.”⁹
- 14 2. CCDH allegedly “received less than reasonably equivalent value in exchange for
15 such transfer or obligation,” and “at the time the Subject Transfer was made,
16 [CCDH] was either insolvent or became insolvent as a result of the Subject
17 Transfer.”¹⁰
- 18 3. CCDH, at the time of the Subject Transfer, allegedly “was engaged, or was about
19 to engage, in business or a transaction or transactions for which their remaining
20 assets were unreasonably small capital.”¹¹

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24 ⁷ Compl. 2:22-25.

25 ⁸ Id. Ex. “1.”

26 ⁹ Id. 3:7-8 (First Claim for Relief).

27 ¹⁰ Id. 3:20-24 (Second Claim for Relief).

28 ¹¹ Id. 4:8-10 (Third Claim for Relief).

1 4. CCDH allegedly “intended to incur, or believed or reasonably should have
2 believed, that it would incur debts that would be beyond the ability to pay as such
3 debts matured.”¹²

4 Diamond also demands a turnover of the Transfer,¹³ asserts that Friedman “received a benefit
5 and unjustly retained that benefit at the expense of [CCDH], unsecured creditors, and each of
6 them,”¹⁴ and claims that the Transfer was “an unlawful distribution under 6 Del. C. § 17-607(b),
7 Cal. Corp. Code § 15905.08(b), Cal. Corp. Code § 15905.09, and other applicable law.”¹⁵

8 Friedman filed his answer to Diamond’s Complaint on February 15, 2011.

9 By this motion, Friedman seeks summary judgment as to all of Diamond’s claims.
10 Friedman argues, among other things, that all of Diamond’s claims are time-barred under
11 applicable Delaware law. Diamond disagrees, arguing that the court should not apply Delaware
12 law; or alternatively, that to the extent the court looks to Delaware law, the statute upon which
13 Friedman relies is not applicable to the facts of this case.

14 II. DISCUSSION

15 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§
16 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E), (H)
17 and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

18 A. Summary Judgment

19 Rule 56(a) authorizes a party to “move for summary judgment, identifying each claim or
20 defense—or the part of each claim or defense—on which summary judgment is sought.”
21 F.R.Civ.P. 56(a). Summary judgment must be granted “if the movant shows that there is no
22 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
23 law.” Id. In determining whether a genuine factual issue exists, “a trial judge must bear in mind

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25 ¹² Id. 4:22-24 (Fourth Claim for Relief).

26 ¹³ Id. 5:10-11 (Fifth Claim for Relief).

27 ¹⁴ Id. 5:17-19 (Sixth Claim for Relief).

28 ¹⁵ Id. 5:25-26 (Seventh Claim for Relief).

1 the actual quantum and quality of proof necessary to support liability” Anderson v. Liberty
2 Lobby, Inc., 477 U.S. 242, 254 (1986). “[T]he judge’s function is not himself to weigh the
3 evidence and determine the truth of the matter but to determine whether there is a genuine issue
4 for trial If the evidence is merely colorable, . . . or is not significantly probative, . . .
5 summary judgment may be granted.” Id. at 249–50. However, the court’s function on a motion
6 for summary judgment is “issue-finding, not issue-resolution.” United States v. One Tintoretto
7 Painting Entitled “The Holy Family with Saint Catherine and Honored Donor,” 691 F.2d 603,
8 606 (2d Cir. 1982). Rule 56 does not permit “trial on affidavits. Credibility determinations, the
9 weighing of the evidence, and the drawing of legitimate inferences from the facts are [fact
10 finder] functions” Anderson, 477 U.S. at 255.

11 When the nonmoving party has the burden of proof at trial, the moving party need only
12 point out “that there is an absence of evidence to support the nonmoving party’s case.” Celotex
13 Corp. v. Catrett, 477 U.S. 317, 325 (1986); see Fairbank v. Wunderman Cato Johnson, 212 F.3d
14 528, 532 (9th Cir. 2000) (stating that the Celotex showing can be made by “pointing out through
15 argument-the absence of evidence to support plaintiff’s claim”). “Once the moving party carries
16 its initial burden, the adverse party ‘may not rest upon the mere allegations or denials of the
17 adverse party’s pleading,’ but must provide affidavits or other sources of evidence that ‘set forth
18 specific facts showing that there is a genuine issue for trial.’ ” Devereaux v. Abbey, 263 F.3d
19 1070, 1076 (9th Cir. 2001) (quoting former F.R.Civ.P. 56(e)); see Celotex, 477 U.S. at 323-24.
20 If the nonmoving party fails to establish a triable issue “on an essential element of her case with
21 respect to which she has the burden of proof,” the moving party is entitled to judgment as a
22 matter of law. Celotex, 477 U.S. at 323.

23 B. Fraudulent Transfer Claim under § 544(b)

24 Section 544(b) of the Code provides that a chapter 7 trustee may avoid transfers or
25 obligations that could have been avoided by an unsecured creditor under nonbankruptcy law had
26 the bankruptcy case not been filed, provided such a creditor actually exists. 11 U.S.C. § 544(b);
27 Barclay v. Mackenzie (In re AFI Holding, Inc.), 525 F.3d 700, 703 (9th Cir. 2008). Applicable
28 state law defenses may be invoked by a defendant in a § 544(b) action, which defenses may

1 reduce or even eliminate the amount recoverable under § 544(b). See, e.g., Decker v. Tramiel
2 (In re JTS Corp.), 617 F.3d 1102, 1120 (9th Cir. 2010).

3 Using § 544(b), Diamond asserts causes of action under California’s Uniform Fraudulent
4 Transfer Act (“CUFTA”). Under CUFTA, a creditor may avoid a transfer that is actually or
5 constructively fraudulent within four years of the transfer. Cal. Civ. Code §§ 3439.04(a)-(b),
6 3439.05. The Transfer was made on January 18, 2005, approximately three and half years prior
7 to the petition date. The filing of the bankruptcy tolls certain nonbankruptcy statutes of
8 limitations—including the claims asserted under CUFTA—by two years. 11 U.S.C § 108(a).
9 Diamond filed this adversary proceeding on July 30, 2010, within two years after the petition
10 date, which means that Diamond’s CUFTA claims are timely.

11 Friedman contends that Diamond cannot assert claims under California law because the
12 LP Agreement contains a choice-of-law provision requiring the application of Delaware law for
13 disputes arising from or concerning the LP Agreement. Friedman believes that, to the extent
14 Diamond seeks to assert applicable nonbankruptcy claims under § 544(b), Diamond must do so
15 under Delaware law.

16 Similar to California, Delaware has adopted the Uniform Fraudulent Transfer Act
17 (“DUFTA”). 6 Del. C. § 1301 et seq. The statute of limitations for bringing a fraudulent transfer
18 claim under DUFTA is also four years. 6 Del. C. § 1309. Thus, a fraudulent transfer claim
19 under DUFTA would also be timely. Viewed from this perspective, there is little difference—
20 either substantively or procedurally—if the court were to apply Delaware law over California
21 law. See, e.g., Mervyn’s LLC v. Lubert-Adler Group IV, LLC (In re Mervyn’s Holdings,
22 LLC), 426 B.R. 488, 496 n. 6 (Bankr. D. Del. 2010) (noting that Delaware, California, and
23 Minnesota “have similarly adopted the [Uniform Fraudulent Transfer Act], and therefore the
24 result [of choosing one state law over another] is the same regardless of the choice of law
25 issue”); Zahn v. Yucaipa Capital Fund, 218 B.R. 656, 666 (Bankr. D.R.I. 1998) (“[I]f there is no
26 conflict between the two states’ laws, then the Court need not engage in a choice-of-law
27 analysis.”).

1 Friedman’s choice of law argument, however, does not end with DUFTA. Friedman
2 seeks to invoke § 17-607(c) of the Delaware Revised Uniform Limited Partnership Act
3 (“DRULPA”). 6 Del. C. § 17-101 et seq. Section 17-607(c) of DRULPA is a statute of repose.
4 Friedman asserts that Delaware law is applicable because the CCDH limited partnership was
5 organized under Delaware law, and that § 17-607(c) effectively bars all of Diamond’s claims
6 against him. To resolve this matter, the court must determine (1) whether it should apply
7 Delaware law to this case; and (2) if so, whether § 17-607(c) of DRULPA, in fact, bars the
8 causes of action set forth in Diamond’s Complaint.

9 1. Choice-of-Law

10 The LP Agreement contains an explicit choice-of-law provision, which states: “This
11 Agreement and the rights of the parties hereunder shall be governed by and interpreted in
12 accordance with the laws of the State of Delaware.”¹⁶ Friedman contends that, under this choice-
13 of-law provision and applicable California law concerning limited partnerships, Delaware law
14 governs all nonbankruptcy law aspects of this adversary proceeding, including nonbankruptcy
15 law fraudulent transfer claims under § 544(b). Diamond, on the other hand, argues that the court
16 should disregard the explicit choice-of-law provision in the LP Agreement for two reasons.
17 First, fraudulent transfer claims “sound in tort” and therefore, are not governed by contractual
18 choice-of-law provisions. Second, the Transfer does not “arise” under the LP Agreement, so
19 Delaware law is inapplicable.

20 a. Diamond’s Fraudulent Transfer Claims Do Not “Sound in Tort”

21 Diamond asserts that “fraudulent transfer actions are not actions based on contracts and
22 are not governed by the choice of law provisions within a contract.”¹⁷ Rather, such claims
23 “sound in tort.”¹⁸ And under applicable federal common law choice-of-law rules concerning
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25 ¹⁶ Friedman Decl. Ex. B, LP Agreement § 22.3.

26 ¹⁷ Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment or, in the
27 Alternative, Summary Adjudication of Each of the Plaintiff’s Claims (“Opp’n”) 7:17-20.

28 ¹⁸ Id. 8:8.

1 claims that “sound in tort,” the court must apply California law to the proceedings. Diamond
2 supports his argument with non-binding authority.¹⁹ Controlling case law, however, compels a
3 different conclusion.

4 The Supreme Court recently reiterated that fraudulent transfer actions in bankruptcy are
5 “quintessentially suits at common law that more nearly resemble state law contract claims
6 brought by a bankrupt corporation to augment the bankruptcy estate” Stern v. Marshall, ---
7 U.S. ----, 131 S.Ct. 2594, 2614, 180 L.Ed.2d 475 (2011) (emphasis added) (quoting
8 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989)). More to the point, the Ninth Circuit
9 has held that “a cause of action to recover fraudulent conveyances” is “an action not founded
10 upon a tort” for purposes of determining the applicable statute of limitations under 28 U.S.C. §
11 2415. United States v. Neidorf, 522 F.2d 916, 917-18 (9th Cir. 1975) (emphasis added), cert.
12 denied, 423 U.S. 1087 (1976). Courts in other districts have held similarly. See, e.g., Desmond
13 v. Moffie, 375 F.2d 742, 743 (1st Cir. 1967) (finding a fraudulent conveyance claim under
14 Massachusetts Uniform Fraudulent Conveyance Law not to be a tort for purposes of choosing
15 appropriate statute of limitations); Branch v. F.D.I.C., 825 F.Supp. 384, 419-20 (D. Mass. 1993)
16 (finding a fraudulent conveyance claim not to be a tort claim for purposes of the Federal Tort
17 Claims Act); F.D.I.C. v. Martinez Almodovar, 671 F.Supp. 851, 871 (D. P.R. 1987) (holding that
18 the applicable statute of limitations in fraudulent conveyance action brought by F.D.I.C. was a
19 six-year term for contract actions, rather than a three-year term applicable to actions for money
20 damages founded upon a tort). Because a fraudulent transfer claim in bankruptcy is not one
21 based in tort, and the Ninth Circuit has declined to characterize such a claim as a tort for statute
22 of limitations purposes, this court will not consider a fraudulent transfer claim as “sounding in
23 tort” in its choice-of-law analysis.

24 _____
25 ¹⁹ See In re Consol. Capital Equities Corp., 143 B.R. 80, 84 (Bankr. N.D. Tex. 1992)
26 (citing Ferrari v. Barclays Bus. Credit, Inc. (In re Morse Tool, Inc.), 108 B.R. 384, 386–87
27 (Bankr. D. Mass. 1989)); Murphy v. Meritor Sav. Bank (In re O’Day Corp.), 126 B.R. 370, 390-
28 91 (Bankr. D. Mass. 1991)); Schlumberger Logelco Inc. v. Morgan Equip. Co., 1996 WL
251951, * 2 (N.D. Cal. 1996); see also Tow v. Rafizadeh (In re Cyrus II P’Ship), 413 B.R. 609,
619 (Bankr. S.D. Tex. 2008) (“avoidance actions under § 544(b) are appropriately characterized
as tort actions” and are actions that “sound in tort”).

1 b. The Transfer “Arises” under the LP Agreement

2 Diamond’s second argument for not applying Delaware law is more tenuous than his
3 first. Diamond repeatedly asserts that the Transfer to Friedman was a breach of the LP
4 Agreement²⁰ and contrary to the terms of the Private Placement Memo.²¹ Diamond refers to the
5 Withdrawal Agreement as an alleged agreement that is neither valid nor enforceable.²² Diamond
6 argues that the court should not apply Delaware law because the Transfer—which Diamond
7 contends was impermissible under both the LP Agreement and the Withdrawal Agreement—
8 does not “arise” under LP Agreement.²³

9 Diamond’s reasoning is perplexing. On the one hand, Diamond asks the court to look at
10 the LP Agreement and various other documents surrounding the purchase of the Units to
11 determine that the Transfer was actually and constructively fraudulent; on the other, Diamond
12 wants the court to treat the Transfer itself as an independent transaction not “arising” under the
13 LP Agreement. To do as Diamond suggests, the court must read the LP Agreement selectively—
14 giving credence to certain sections of the LP Agreement that favor Diamond’s case while
15 completely ignoring its other material provisions, such as Article I of LP Agreement. The court
16 declines to do so. See Porter v. Pathfinder Servs., Inc., 683 A.2d. 40, 42 (Del. 1996) (a “contract
17 must be construed in its context as a whole”); E.I. du Pont de Nemours and Co., Inc. v. Shell Oil

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20 ²⁰ Opp’n 1:15-18 (“[Friedman] had no right to withdraw, and in fact was precluded from
21 withdrawing under . . . the various documents comprising the offering regarding the sale and
22 purchase of [Friedman’s] limited partnership interest”); id. 2:9-10 (“one searches CCDH’s
23 limited partnership agreement in vain to find a provision that allows withdrawal”).

24 ²¹ Id. 2:13-24.

25 ²² See id. 2:4-5 (The Withdrawal Agreement “did not and could not constitute an
26 agreement with or by CCDH, at least one in accordance with applicable law.”)

27 ²³ Id. 11:17-12:1 (“[T]he [T]ransfer did not arise under the CCDH LP Agreement, but in
28 respect of the [Withdrawal] Agreement with Bidner. In fact, . . . , the CCDH LP Agreement
neither contemplates nor allows a withdrawal and refund. And in the absence of such provisions,
such withdrawal and refund are contrary to both Delaware and California law.”) (emphasis
added).

1 Co., 498 A.2d 1108, 1113 (Del. 1985) (“a court must construe the agreement as a whole, giving
2 effect to all provisions therein”).

3 Article I specifically states that “[t]he rights and liabilities of the Partners shall be as
4 provided in the Partnership Act, except as otherwise expressly provided for in this Agreement.”²⁴

5 The LP Agreement defines the “Partnership Act” as “the Delaware Revised Uniform Limited
6 Partnership Act [DRULPA], as forth in the Delaware Code Annotated, Title 6, Chapter 17.”²⁵

7 DRULPA contains numerous provisions concerning both permissible and impermissible
8 distributions and withdrawals, which provisions govern parties’ rights and liabilities in the
9 absence of express terms concerning the same. See 6 Del. C. § 17-601 et seq; Elf Altochem
10 North Am., Inc. v Jaffari, 727 A.2d 286, 291 (Del. 1999) (noting that DRULPA’s “basic
11 approach is to permit partners to have the broadest possible discretion in drafting their
12 partnership agreements and to furnish answers only in situations where the partners have not
13 expressly made provisions in their partnership agreement”) (emphasis added) (quoting another
14 source).

15 Friedman reviewed the LP Agreement prior to investing \$450,000 in CCDH. He
16 purchased \$450,000 in CCDH Units in reliance on the LP Agreement, and owned a 1.2797033%
17 limited partnership interest in CCDH for a period of five months pursuant to the LP Agreement.
18 Friedman withdrew as a limited partner and received a refund of his \$450,000 investment.
19 Because the LP Agreement does not contain express terms governing the refund of an investment
20 upon the withdrawal of a limited partner, the court must look to DRUPLA as directed by Article
21 1 of the LP Agreement to determine if such a distribution was authorized by law. The court’s
22 conclusion is bolstered by its own analysis of federal choice-of-law rules.

23 c. Delaware Law Governs the LP Agreement under Federal Choice-of-Law Rules

24 “In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy,
25 the court should apply federal, not forum state, choice of law rules.” Lindsay v. Beneficial
26 Reinsurance Co. (In re Lindsay), 59 F.3d 942, 948 (9th Cir. 1995) (citations omitted). Federal

27 ²⁴ Friedman Decl. Ex. B, LP Agreement Art. I (emphasis added).

28 ²⁵ Id., LP Agreement, Definitions.

1 common law follows the approach of the Restatement (Second) of Conflict of Laws
2 (“Restatement”). Chuidian v. Philippine Nat. Bank, 976 F.2d 561, 564 (9th Cir. 1992). Two
3 sections of the Restatement are relevant to the court’s analysis: § 6(1), which provides general
4 choice-of-law principles, and § 187, which concerns contractual choice-of-law provisions. In re
5 Gibson, 234 B.R. 776, 779 (Bankr. N.D. Cal. 1999).²⁶ Section 6(1) of the Restatement states:
6 “A court, subject to constitutional restrictions, will follow a statutory directive of its own state on
7 choice of law.” Restatement § 6(1) (emphasis added). Section 15909.01(a)²⁷ of the California
8 Corporations Code provides:

9 The laws of the state or other jurisdiction under which a foreign limited
10 partnership is organized govern relations among the partners of the foreign
11 limited partnership and between the partners and the foreign limited partnership
12 and the liability of partners as partners for an obligation of the foreign limited
13 partnership

14 Cal. Corp. Code. § 15909.01(a) (emphasis added). Section 187(1)²⁸ of the Restatement further
15 states: “The law of the state chosen by the parties to govern their contractual rights and duties
16 will be applied if the particular issue is one which the parties could have resolved by an explicit
17 provision in their agreement directed to that issue.” Restatement § 187(1); see also CMR Mortg.

18 ²⁶ Diamond contends that the court should apply § 145 of the Restatement in this matter.
19 Opp’n 8:8-9. Section 145 concerns the rights and liabilities of parties with respect to issues in
20 tort and requires courts to apply the “the local law of the state which . . . has the most significant
21 relationship to the occurrence [of the tort] and the parties.” Restatement § 145(1). Diamond
22 spends a portion of his opposition discussing the “significant relationship” between California,
the Transfer, and the parties. See id. 8:10-11:10. Fraudulent transfer claims are not torts nor do
they sound in tort. Accordingly, Restatement § 145 is inapplicable to the facts of this case.

23 ²⁷ In 2006, California enacted the Uniform Limited Partnership Act of 2008 (“2008
24 Act”). See Cal. Corp. Code § 15900 et seq. The 2008 Act went into effect on January 1, 2008.
25 See Stats. 2006, c. 495, § 20. As of January 1, 2010, all partnerships are governed by the 2008
Act, subject to a few exceptions that are not applicable here. See Cal. Corp. Code § 15912.06(b).

26 ²⁸ California also follows the Restatement when considering the enforceability of
27 contractual choice-of-law clauses. See Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459,
28 464-65 (1992) (“In determining the enforceability of arm’s-length contractual choice-of-law
provisions, California courts shall apply the principles set forth in Restatement section 187,
which reflects a strong policy favoring enforcement of such provisions.”).

1 Fund, LLC v. Canpartners Realty Holding Co. IV LLC (In re CMR Mortg. Fund, LLC), 416
2 B.R. 720, 729 (Bankr. N.D. Cal. 2009) (“Where . . . the making of a contract is not in dispute,
3 the law chosen by the parties need not have any reasonable relationship to the place of creation
4 or performance of the contract.”)

5 California law specifically directs that foreign limited partnerships²⁹ be governed by the
6 laws under which they are organized. The LP Agreement was organized under Delaware law³⁰
7 and the contracting parties explicitly agreed that their respective rights and liabilities “be
8 governed by and interpreted in accordance with the laws of the State of Delaware.”³¹
9 Accordingly, the court will apply Delaware law to the extent that it is applicable.

10 2. Statutes of Limitations and Statutes of Repose

11 Delaware recognizes that statutes of limitations and statutes of repose are two distinct
12 legal concepts. Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413, 421
13 (Del. 1984). “While the running of a statute of limitations will nullify a party’s remedy, the
14 running of a statute of repose will extinguish both the remedy and the right.” Id. (emphasis
15 added). And while a statute of limitations is a “procedural mechanism,” a statute of repose is a
16 “substantive provision” in that it “bar[s] a right of action even before the injury has occurred if
17 the injury occurs subsequent to the prescribed time period.” Id. (internal citation and quotations
18 omitted). “Moreover, because the statute of repose is a substantive provision, it relates to the
19 jurisdiction of the court; hence ‘any failure to commence the action within the applicable time
20 period extinguishes the right itself and divests the . . . court of any subject matter jurisdiction
21 which it might otherwise have.’ ” Id. (quoting First Sav. & Loan Ass’n v. First Fed. Sav. &
22 Loan Ass’n of Haw., 547 F.Supp. 988, 995 (D. Haw. 1982)).

25 ²⁹ “Foreign limited partnership” is defined as “a partnership formed under the laws of a
26 jurisdiction other than [California] and required by those laws to have one or more general
27 partners and one or more limited partners.” Cal. Corp. Code § 15901.02(k).

27 ³⁰ Friedman Decl. Ex. B, LP Agreement Art. 1.

28 ³¹ Id., LP Agreement § 22.3.

1 Section 17-607 of DRULPA concerns limitations on partnership distributions. 6 Del. C §
2 17-607(a)-(c). Section 17-607(a) provides that a limited partnership cannot make a distribution
3 to a partner if it would cause the liabilities of the partnership to exceed its assets. 6 Del. C § 17-
4 607(a); Freeman v. Williamson, 383 Ill.App.3d 933, 937, 890 N.E.2d 1127, 1132 (2008).
5 Section 17-607(b) provides that “[a] limited partner who receives a distribution in violation of [§
6 17-607(a)], and who knew at the time of the distribution that the distribution violated [§ 17-
7 607(a)], shall be liable to the limited partnership for the amount of the distribution.” 6 Del. C. §
8 17-607(b).

9 Section 17-607(c) of DRULPA states: “Unless otherwise agreed, a limited partner who
10 receives a distribution from a limited partnership shall have no liability under this chapter or
11 other applicable law for the amount of the distribution after the expiration of 3 years from the
12 date of the distribution.” 6 Del. C. § 17-607(c) (emphasis added). “Section 17-607(c) is
13 unambiguous: a limited partner is not liable for any distribution received from a limited
14 partnership, regardless of whether that distribution violated section 17-607(a) or ‘other
15 applicable law,’ if more than three years have passed since the distribution.” Freeman, 383
16 Ill.App.3d at 937.

17 In Freeman, the Appellate Court of Illinois held that § 17-607(c) is a statute of repose.
18 The Illinois court reasoned that the language of § 17-607 “clearly terminates the possibility of
19 the limited partner’s liability after a defined period of time, three years after receiving a
20 distribution, regardless of whether a potential plaintiff knows of his or her cause of action.” Id.
21 at 939-40. That court further stated:

22 Section 17-607(c) defines substantive rights. It does not merely alter or modify a
23 time period within which a cause of action may be brought after accrual but,
24 rather, extinguishes any right a potential plaintiff has to bring a cause of action
25 against a limited partner for a distribution without regard to whether a cause of
26 action has actually accrued or whether any injury has resulted.

27 Id. at 940 (emphasis added). The court finds reasoning of Freeman persuasive and adopts it as
28 its own. Section 17-607(c) is a statute of repose, not simply a statute of limitations.

1 Diamond does not address the distinction between a statute of repose and a statute of
2 limitations in his opposition to Friedman’s summary judgment motion. Rather, Diamond reasons
3 that “the events [forming] the basis of [Diamond’s] unlawful dividend action are, by their nature,
4 concealed,”³² and therefore, “[e]ven if § 17-607(c)’s three-year statute of limitations were to
5 apply to a limited partner who withdraws from a partnership in violation of DRULPA and the
6 [LP Agreement] . . . , that three-year period should be tolled.”³³ Diamond then points out that
7 “Delaware law recognizes three potential sources of tolling: (1) the doctrine of inherently
8 unknowable injuries; (2) the doctrine of fraudulent concealment; and (3) the doctrine of equitable
9 tolling.” EBS Litig. LLC v. Barclays Global Investors, N.A., 304 F.3d 302, 305 (3d Cir. 2002).

10 The notion that CCDH’s refund of Friedman’s \$450,000 investment on January 18, 2005,
11 was concealed is belied by the summary judgment evidence.³⁴ Nevertheless, “[s]tatutes of
12 repose are not subject to equitable tolling.” Munoz v. Ashcroft, 339 F.3d 950, 957 (9th Cir.
13 2003) (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363
14 (1991)). Legal tolling on the other hand, which is derived from a statutory source, is
15 “compatible with tolling a statute of repose.” Arivella v. Lucent Techs., Inc., 623 F.Supp.2d
16 164, 177 (D. Mass. 2009). Of the three kinds of tolling cited by Diamond, all are equitable in
17 nature. See Matthews v. Kidder, Peabody & Co., Inc., 260 F.3d 239, 256 (3d Cir. 2001)
18 (“Fraudulent concealment is an ‘equitable doctrine.’ ”); Krahmer v. Christie’s Inc., 903 A.2d
19 773, 779 (Del. Ch. 2006) (noting that the doctrine of inherently unknowable injury is a judicial
20 doctrine established by the Delaware Supreme Court). Accordingly, the court cannot toll the
21 period to commence an action under § 17-607(c) as a matter of Delaware law.

22 While the court considers § 17-607(c) a statute of repose that is not subject tolling, the
23 court still must address two other issues raised by Diamond. First, Diamond contends that § 17-
24 607 is not applicable because the Transfer is not a “distribution” within the meaning of § 17-
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26 ³² Opp’n 12:23-24.

27 ³³ Id. 12:13-15.

28 ³⁴ Friedman Decl. Exs. H-I.

1 607(c). Second, Diamond believes that DUFTA’s four-year statute of limitation is applicable,
2 irrespective § 17-607(c)’s three-year bar.

3 a. The Transfer is a “Distribution” under § 17-607(c)

4 In his opposition to Friedman’s motion, Diamond denies that the Transfer is a
5 “distribution” for purposes of § 17-607(c), stating that:

6 [Diamond’s] Complaint expressly describes the Transfer as a “transfer”

7 [Diamond] did not label the Transfer a “distribution” but simply alleged that, due
8 to CCDH’s insolvency at the time of the Transfer, it constituted an unlawful
9 distribution.³⁵

10 However, Diamond admits in his Complaint that Friedman received a distribution from CCDH,
11 characterizing CCDH’s refund of Friedman’s \$450,000 investment as “an unlawful distribution
12 under . . . § 17-607(b).”³⁶ Diamond also concedes that the Transfer was a refund of Friedman’s

13 investment in CCDH.³⁷ Partnership distributions are commonly understood to include the

14 “payment of cash or property to a partner out of earnings or as an advance against future
15 earnings, or a payment of the partners’ capital in partial or complete liquidation of the partner’s
16 interest.” Interactive Corp. v. Vivendi Universal, S.A., 2004 WL 1572932, *3 (Del. Ch. 2004)

17 (internal citation and quotations omitted); Black’s Law Dictionary (9th ed. 2009) (same);

18 Rands, LLC v. Young (In re Young), 384 B.R. 94, 101 (Bankr. D.N.J. 2008) (“The typical nature
19 of a distribution is the distribution of profits or the return of capital.”). Cf. 6 Del. C. § 15-101(4)

20 (“ ‘Distribution’ means a transfer of money or other property from a partnership to a partner in
21 the partner’s capacity as a partner or to a transferee of all or a part of a partner’s economic
22 interest.”).

23
24
25 _____
26 ³⁵ Opp’n 12:6-9 (emphasis added).

27 ³⁶ Compl. 5:25.

28 ³⁷ Opp’n 12:11-12.

1 Diamond challenges the validity of the Withdrawal Agreement pursuant to which the
2 refund was made by CCDH to Friedman.³⁸ The court need not reach this issue. The Withdrawal
3 Agreement's validity may be relevant to whether or not the distribution to Friedman was
4 authorized, but it does alter the court's conclusion that a distribution by CCDH was made to
5 Friedman within the meaning of § 17-607.³⁹ Moreover, Diamond concedes CCDH made a
6

7 ³⁸ Diamond contends that the Withdrawal Agreement "is contrary to the terms of the
8 Private Placement Memo . . . [which] states, 'No person other than Dr. Randy Rosen, Mr. Mark
9 Bidner, or Mr. Scott Rein is authorized on behalf of the Partnership to give any information or to
10 make any representation not contained in this Memorandum and you may not rely on such
11 additional information or representations unless it is in writing, signed by such authorized
12 person' and 'any information or representation not contained in this memorandum must not be
13 relied on as having been authorized by the Partnership.'" Opp'n 2:13-22. Diamond points out
14 "[t]here is no evidence in [Friedman's] Motion of a writing making [the Withdrawal] Agreement
15 or representations constituting the same to [Friedman] and signed by Bidner or Rosen or Rein."
16 Opp'n 2:22-24. Finally, Diamond argues that the LP Agreement contains "an integration clause
17 post-dating the [Withdrawal] Agreement," which states: " 'This agreement constitute[s] the
18 entire agreement among the parties hereto with respect to the subject matter hereof, and
19 supersedes all prior written, and all prior and contemporaneous oral, agreements, reps,
20 warranties, statements, promises, and understandings with respect to the subject matter hereof,
21 whether expressed or implied.' " Opp'n 3:1-6.

22 ³⁹ Diamond invokes the parol evidence rule to exclude testimony regarding the
23 Withdrawal Agreement. The parol evidence rule is not an evidentiary rule, but one of
24 substantive contract law. Sellon v. Gen. Motors Corp., 521 F.Supp. 978, 983 (D.C. Del. 1981).
25 Because the court is analyzing the LP Agreement under Delaware law, the court will apply the
26 Delaware version of the parol evidence rule. See Travelers Ins. Co. v. Colo. Spanish Peaks
27 Ranch, Inc. (In re Colo. Spanish Peaks Ranch, Inc.), 661 F.2d 759, 761 (9th Cir. 1981) (noting
28 that bankruptcy court in California correctly applied the Colorado version of the parol evidence
rule when considering a dispute arising from a note and deed of trust executed in Colorado);
accord Sellon, 521 F.Supp. at 983 (citing Three Rivers Motor Co. v. Ford Motor Co., 522 F.2d
885 (3d Cir. 1975)). In Delaware, "[i]f a contract is unambiguous, extrinsic evidence may not be
used to interpret the intent of the parties, to vary the terms of the contract or to create an
ambiguity." Eagle Indus., Inc. v. DeVilbiss Health Care Inc., 702 A.2d 1228, 1232 (Del. 1997).
Ordinarily, under Delaware law, "a stranger to a contract acquires no rights thereunder." Saudi
Am. Bank v. Shaw Group, Inc. (In re Stone & Webster, Inc.), 558 F.3d 234, 241 (3d Cir. 2009)
(quoting Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1386 (Del. Super.
Ct. 1990)). A trustee invoking § 544(b) "stands in the overshoes of the debtor corporation's
unsecured creditors." Hayes v. Palm Seedlings Partners (In re Agric. Research and Tech. Group,
Inc.), 916 F.2d 528, 534 (9th Cir. 1990) (citation omitted); Alberts v. HCA, Inc. (In re Greater
Southeast Cmty. Hosp. Corp. I), 365 B.R. 315, 318 (Bankr. D. D.C. 2007) (trustee invoking §
544(b) "steps into the shoes of an unsecured creditor of the estate"). An unsecured creditor is a
stranger to a contract because the creditor is "a third person, not a party to, nor representing a

1 distribution to Friedman which Diamond characterizes in his Complaint as “unlawful under . . .
2 § 17-607(b).”⁴⁰ Section 17-607(c) focuses “upon an ascertainable category of distributions
3 which are identified as being wrongful and which accordingly should be returned by limited
4 partners pursuant to the provisions of [§] 17-607.” MARTIN I. LUBAROFF & PAUL M. ALTMAN
5 (“LUBAROFF & ALTMAN”), LUBAROFF & ALTMAN ON DELAWARE LIMITED PARTNERSHIPS § 6.10
6 at 6-26 (2011 Supp.) (emphasis added). For all these reasons, the court finds that CCDH’s
7 \$450,000 payment to Friedman upon liquidation of his 1.2797033% interest in the limited
8 partnership was a “distribution” within the scope of § 17-607.

9 b. DRULPA’s Three-Year Statute of Repose Trumps DUFTA’s Four-Year Statute of
10 Limitations

11 Diamond maintains that, even if the court considers the Transfer a distribution, DUFTA’s
12 four-year statute of limitations trumps § 17-607(c). Diamond thinks it an “extraordinary
13 proposition that Delaware’s three-year statute for recovery of unlawful dividends to partners
14

15 party to, the act.” Greater Southeast Cmty. Hosp. Corp., 365 B.R. at 318-19 (internal citation
16 and quotations omitted). Therefore, as a stranger to the contract, an unsecured creditor cannot
17 invoke the parol evidence rule. See id. at 319. Cf. Am. Nat’l Bank & Trust Co. v. Matrix IV,
18 Inc. (In re S.M. Acquisition Co.), 296 B.R. 452, 466 (Bankr. N.D. Ill. 2003) (noting that the
19 stranger exception to the parol evidence rule applies in the Seventh Circuit); Hostmann v. First
20 Interstate Bank of Or. (In re XTI Xonix Techs. Inc.), 156 B.R. 821, 831 (Bankr. D. Or. 1993)
(applying the stranger exception under Oregon law); In re Wolf, 77 B.R. 51, 54 (Bankr. E.D. Va.
1987) (applying the stranger exception under Virginia law).

21 The parol evidence rule is not implicated here. The court is not using testimony
22 regarding the Withdrawal Agreement to interpret intent, to vary terms of a contract, or to
23 otherwise create ambiguity where contract terms are unambiguous. More importantly, the
24 trustee, stepping into the shoes of an unsecured creditor, is a stranger to the LP Agreement and
25 cannot invoke the rule. Here, the court is simply “consider[ing] some undisputed background
26 facts to place the [LP Agreement] in its historical setting,” which is not an impermissible use of
27 parol evidence under Delaware law. See Eagle Indus., 702 A.2d at 1233 n. 7. The court is also
28 mindful that “the ‘very essence’ of a fraudulent transfer suit is to identify the ‘true nature’ of a
transaction” and the parol evidence rule “can[not] function as a false prophet to preclude
consideration of evidence of the true nature of the transaction in question.” Greater Southeast
Cmty. Hosp., 365 B.R. at 318 (quoting Gaudet v. Babin (In re Zedda), 103 F.3d 1195, 1206 (5th
Cir.1997)). For these reasons, Diamond’s parol evidence objections are overruled.

⁴⁰ Compl. 5:25.

1 trumps any other statute of limitations.”⁴¹ According to Diamond, “there is no Delaware
2 authority cited by [Friedman] or disclosed by research which holds that the three year Delaware
3 statute [Friedman] cites precludes a fraudulent transfer claim for relief to recover a transfer made
4 as here”⁴²

5 To address this argument, the court need not look beyond the plain text of the statute,
6 which is where the analysis must begin. Watt v. Energy Action Educ. Found., 454 U.S. 151, 162
7 (1981) (“We begin, as always in a case in which the meaning of a statute is at issue, by
8 examining [the] language.”). Section 17-607(c) states in relevant part: “a limited partnership
9 shall have no liability under this chapter or other applicable law for the amount of the
10 distribution after the expiration of 3 years” 6 Del. C. § 17-607(c) (emphasis added).
11 Section 17-607(c) is unambiguous; it creates no exceptions for § 17-607(c)’s three-year bar and
12 “make[s] clear that no matter what the basis for liability might be, the three-year expiration
13 period applies.” Freeman, 383 Ill.App.3d at 938. Stated differently: “[o]ther applicable law
14 includes the Fraudulent Transfer Act” and, “to the extent that a distribution by a limited
15 partnership violates the Fraudulent Transfer Act, the applicable statute of limitations would be
16 three years.” LUBAROFF & ALTMAN, LUBAROFF & ALTMAN ON DELAWARE LIMITED
17 PARTNERSHIPS § 6.10 at 6-25 to 6-26 (2011 Supp.).

18 The court must presume that the Delaware legislature “says in a statute what it means and
19 means in a statute what it says” See Conn. Nat’l Bank v. Germain, 503 U.S. 249, 254
20 (1992) (citations omitted); see also Estate of Watts v. Blue Hen Insulation, 902 A.2d 1079, 1083
21 (Del. 2006) (“When construing a statute, courts assume that the legislature intended all words in
22 the statute to have meaning.”). “When the words of a statute are unambiguous,” as they are here,
23 “then this first cannon [of statutory construction] is also the last: judicial inquiry is complete.”
24 Conn. Nat’l Bank, 503 U.S. at 254 (citation and internal quotations omitted). The court
25 concludes that § 17-607(c)’s three-year bar trumps DUFTA’s four-year statute of limitations in
26

27 ⁴¹ Opp’n 7:1-3.

28 ⁴² Id. 4:4-6.

1 the context of an alleged wrongful distribution by a limited partnership organized under
2 Delaware law. A contrary reading would offend the plain, unambiguous text of the statute.

3 Based upon the foregoing, the court concludes that Friedman is entitled to summary
4 judgment on Diamond's First, Second, Third and Fourth Claims for Relief with respect to
5 Diamond's actual and constructive fraud claims under § 544(b) and DUFTA on account of the
6 Transfer because the claims are time-barred under § 17-607(c).

7 C. Unlawful Distribution

8 Diamond's Seventh Claim for Relief is for Unlawful Distribution "under Del. C. § 17-
9 607(b), Cal. Corp. Code § 15905.08(b), Cal. Corp. Code § 15905.09, and other applicable law."⁴³
10 Because the court is applying Delaware law to this case, Diamond cannot recover on his causes
11 of action asserted under California law. This leaves § 17-607(b) of DRLUPA as the only
12 remaining statute under which Diamond can prosecute his Unlawful Distribution claim.

13 Section 17-607(b) provides that a limited partner who receives a distribution that violates
14 § 17-607(a) (i.e., a distribution that causes the partnership's liabilities to exceed its assets) is
15 liable to the partnership for the distribution, if the limited partner "knew at the time of the
16 distribution that the distribution violated [§ 17-607(a)]." 6 Del. C. § 17-607(b). "Subject to [§
17 17-607(c)], [§ 17-607(b)] shall not affect any obligation or liability of a limited partner under an
18 agreement or other applicable law for the amount of a distribution." *Id.* As discussed above, a
19 limited partner shall have no liability on a wrongful distribution under § 17-607(c), if three years
20 have passed since the date of the distribution. 6 Del. C. § 17-607(c). Therefore, "if a limited
21 partner knew at the time a distribution was made that the distribution being made to it was
22 wrongful under [§] 17-607(a), after the expiration of the three years from the date of the
23 distribution, the limited partner would not be obligated under [§] 17-607(b) to return the
24 distribution." LUBAROFF & ALTMAN, LUBAROFF & ALTMAN ON DELAWARE LIMITED
25 PARTNERSHIPS § 6.10 at 6-25 (2011 Supp.).

26 Here, the court need not divine Friedman's state of mind at the time of Transfer nor
27 determine whether CCDH was insolvent for purposes of § 17-607(a). Diamond has brought the

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⁴³ Compl. 5:25-26.

1 Unlawful Distribution claim more than three years after the Transfer was made, which means
2 that the claim is time-barred under § 17-607(c). Accordingly, Friedman is entitled to summary
3 judgment on Diamond’s Seventh Claim for Relief.

4 D. Fraudulent Transfer Under § 548

5 To be avoidable under § 548, a transfer must have been made on or within two years
6 prior to the petition date. 11 U.S.C. § 548(a)(1). Diamond admits that the Transfer was made on
7 January 18, 2005,⁴⁴ more than three and a half years after the petition date. Diamond further
8 admits that his “principal claims against [Friedman] are fraudulent transfer claims based on 11
9 U.S.C. § 544(b)”⁴⁵ Diamond’s fraudulent claims under § 548 are time-barred because the
10 Transfer was made more than two years prior to the petition date. Accordingly, Friedman is
11 entitled to summary judgment on Diamond’s First, Second, Third and Fourth Claims for Relief
12 with respect to Diamond’s actual and constructive fraud claims under § 548 on account of the
13 Transfer.

14 E. Unjust Enrichment

15 Diamond’s Sixth Claim for Relief is for unjust enrichment.⁴⁶ Under Delaware law,
16 unjust enrichment is an action for restitution. Fleer Corp. v. Topps Chewing Gum, Inc., 539
17 A.2d 1060, 1062 (Del. 1988). An individual is required to make restitution if he or she is
18 unjustly enriched at the expense of another. Id. To warrant restitution, a plaintiff must show that
19 there was: “1) an enrichment, 2) an impoverishment, 3) a relation between the enrichment and
20 the impoverishment, 4) the absence of justification and 5) the absence of a remedy provided by
21 law.” LaSalle Nat’l Bank v. Perelman, 82 F.Supp.2d 279, 294-95 (D. Del. 2000) (citing Jackson

22 ⁴⁴ Opp’n 1:12.

23 ⁴⁵ Id. 7:10-11.

24 ⁴⁶ The Restatement requires that the court apply Delaware law to Diamond’s restitution
25 claim based on the contractual choice-of-law provision contained in the LP Agreement.
26 Restatement § 221 cmt. d (“The applicable law will be that chosen by the parties if they have
27 made an effective choice under the circumstances stated in § 187.”); Alaska Airlines, Inc. v.
28 United Airlines, Inc., 902 F.2d 1400, 1402-03 (9th Cir. 1990) (issues arising in restitution action
properly resolved under Illinois law in accordance with contractual choice-of-law provision
where enrichment was received in the course of performing the contract).

1 Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377, 393-94 (Del. Ch. 1999)). “The mere fact that a
2 person benefits another is not itself sufficient to require the other to make restitution.” Chrysler
3 Corp. v. Airtemp Corp., 426 A.2d 845, 855 (Del. Super. Ct. 1980) (internal citation and
4 quotations omitted).

5 “Unjust enrichment is an equitable rather than a legal claim; consequently, no action for
6 unjust enrichment lies where a contract governs the parties’ relationship to each other.”

7 McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc., 339 F.3d 1087, 1091 (9th Cir.
8 2003) (applying Delaware law); Wood v. Costal States Gas. Corp., 401 A.2d 932, 942 (Del.
9 1979) (“Because the contract is the measure of plaintiffs’ right, there can be no recovery under
10 an unjust enrichment theory independent of it.”); Kuroda v. SPJS Holdings, L.L.C., 971 A.2d
11 872, 891 (Del. Ch. 2009) (“A claim for unjust enrichment is not available if there is a contract
12 that governs the relationship between parties that gives rise to the unjust enrichment claim.”).

13 Here, Diamond has no claim for restitution as a matter of law. There is a valid,
14 enforceable LP Agreement between CCDH and Friedman, which—as noted by Diamond—
15 contains an integration clause.⁴⁷ There is no evidence that Friedman procured the refund through
16 fraud by making material misrepresentations to Bidner or anyone else at CCDH. Nor is there
17 any evidence that Friedman obtained the refund from CCDH through duress, conversion, or
18 other similar misconduct. Consequently, the fact that the LP Agreement governs the parties’
19 rights is, in itself, reason to hold that there is no claim for restitution on a quasi-contract theory in
20 order to avoid unjust enrichment.

21 Setting aside the express agreement, there is another reason that restitution is unavailable
22 to Diamond: the original parties to the refund transaction (CCDH and Friedman) received
23 exactly what they expected in their dealings with one another. Friedman requested a refund of
24 his Investment after Bidner left the hospital project, and CCDH provided the refund. In
25 exchange, Friedman relinquished his LP Interest. Neither party was surprised by the
26 consequences of this transaction. “There is no equitable reason for invoking restitution when the
27 plaintiff gets the exchange which he expected.” Comet Theatre Enters., Inc. v. Cartwright, 195

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⁴⁷ Opp’n 3:1-2.

1 F.2d 80, 83 (9th Cir. 1952). In this case, CCDH, Diamond’s predecessor in interest, received
2 exactly what it expected: the LP Interest in exchange for a refund of Friedman’s Investment.

3 Diamond, stepping in the shoes of CCDH, cannot now disregard CCDH’s prior conduct
4 towards Friedman, take a position contrary to the one CCDH took prepetition, and expect
5 restitution. Such behavior is inequitable and precludes restitution, which is—by its nature—an
6 equitable remedy. See Fleer Corp., 539 A.2d at 1062 (noting that courts consider “fundamental
7 principles of justice or equity and good conscience” in determining if restitution is warranted).
8 There is no evidence to support a prima facie claim for restitution. Accordingly, Friedman is
9 entitled to summary judgment on Diamond’s Sixth Claim for Relief.

10 F. Turnover

11 Diamond’s Fifth Claim for Relief is for “turnover.” Noncustodial entities with notice of
12 a bankruptcy case holding estate property, or owing a matured debt to the debtor, must deliver
13 that property, or pay the debt, to the trustee, subject to certain exceptions not applicable here. 11
14 U.S.C. § 542(a)-(b). “The duty to turn over the property is not contingent upon any predicate
15 violation of the stay, any order of the bankruptcy court, or any demand by the creditor.” Knaus
16 v. Concordia Lumber Co., Inc. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989) (citation
17 omitted). The turnover duty “arises upon the filing of the bankruptcy petition.” Id. Turnover
18 may be enforced by commencing an adversary proceeding. Fed. R. Bankr. P. 7001(1). A
19 turnover proceeding is “not intended as a remedy to determine the disputed rights of parties to
20 property; rather it is intended as the remedy to obtain what is acknowledged to be property of the
21 bankruptcy estate.” Lauria v. Titan Sec. Ltd. (In re Lauria), 243 B.R. 705, 708 (Bankr. N.D. Ill.
22 2000); MCI Telecomm. Corp. v. Gurga (In re Gurga), 176 B.R. 196, 199 (9th Cir. BAP 1994)
23 (“turnover proceedings involve return of undisputed funds”).

24 Although Diamond seeks “turnover” of the Transfer, he has made no allegations in the
25 complaint or submitted any evidence in opposition to the summary judgment motion to suggest
26 that the transferred funds are indisputably estate property subject to the turnover requirements
27 under § 542. To the contrary, Friedman disputes that the Diamond has any right to the refund
28 under any theory of recovery. Accordingly, Friedman is entitled to summary judgment on the

1 Fifth Claim for Relief because there simply is no legal basis for a stand-alone “turnover” claim in
2 this case.

3 III. CONCLUSION

4 For the reasons stated, Friedman is entitled to a summary judgment against Diamond on
5 Diamond’s First, Second, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief set forth in
6 his Complaint.⁴⁸ A separate order and judgment will be entered consistent with this opinion.

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27 DATED: January 24, 2012

United States Bankruptcy Judge

28 ⁴⁸ Having determined that summary judgment is appropriate for the reasons set forth
herein, the court declines to consider Friedman’s alternative arguments for a summary judgment
on the causes of action set forth in Diamond’s Complaint.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify* MEMORANDUM DECISION) was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 1-23-2012, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- John C Keith jkeith@pwkllp.com
- Louis E Kempinsky lkempinsky@pwkllp.com
- Matthew F Kennedy mkennedy@dgdk.com, DanningGill@gmail.com
- Howard Kollitz hkollitz@dgdk.com, DanningGill@gmail.com
- Walter K Oetzell woetzell@dgdk.com, DanningGill@gmail.com
- Steven J Schwartz sschwartz@dgdk.com, DanningGill@gmail.com
- United States Trustee (LA) ustregion16.la.ecf@usdoj.gov

Service information continued
on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Service information continued
on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

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