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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
Orion HealthCorp, Inc., *et al.*,	:	Case No. 18-71748-67 (AST)
	:	Case No. 18-71789 (AST)
Debtors.	:	Case No. 18-74545 (AST)
	:	(Jointly Administered)
Howard M. Ehrenberg in his capacity as Liquidating Trustee of Orion Healthcorp, Inc., *et al.*,	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 18-08048 (AST)
Richard Ian Griffiths, VT Garraway Investment Fund Series IV (f/k/a City Financial Investment Fund Series IV), Legal & General Investment Management Limited, L&G Linked PF, Legal & General (Unit Trust Managers) Limited, Legal & General UK Alpha Trust, The Bankers Investment Trust PLC, Marlborough Fund Managers Limited, Marlborough UK Micro-Cap Growth Fund, Jarvis Investment Management Limited, JIM Nominees Limited, Herald Investment Trust PLC, Milkwood Capital Limited, The Milkwood Fund, Sir Rodney Malcolm Aldridge, Edale Capital LLP, Credit Suisse Client Nominees (UK) Limited, Goldman Sachs Group UK Limited, Miton UK MicroCap Trust PLC, Jefferies International Limited, Pershing Nominees Limited, Merrill Lynch International, JPMorgan Smaller Companies Investment Trust PLC, Skandinaviska	:	

Enskilda Banken AB (Publ), Brewin Dolphin Limited, :
AJ Bell Securities Limited, Pershing Securities Limited, :
Pershing Nominees Limited, JPMorgan Trust I, ABN :
AMRO Clearing Bank N.V., London Branch, THESIS :
Unit Trust Management Limited, Thesis Headway A :
Sub-Fund, Tilney Asset Management Services Limited :
(f/k/a Towry Asset Management Limited), Platform :
Securities Nominees Limited, Freedom Global Funds :
PCC Limited, Interactive Investor Services Limited, :
Interactive Investor Services Nominees Limited, :
Matthew Max Edward Royde, Montlake UCITS :
Platform ICAV, Elite Webb Capital Fund, Raymond :
James Investment Services Limited, Pershing Nominees :
Limited, Rathbone Investment Management Limited, :
Credo Capital Limited, Pershing Nominees Limited, :
UBS Private Banking Nominees Limited, Linear :
Investments Limited, Credit Suisse (Channel Islands) :
Limited, Stifel Nicolaus Europe Limited, Walker Crips :
Investment Management Limited (f/k/a Walker Crips :
Stockbrokers Limited), W.B. Nominees Limited, Gabelli :
Investor Funds, Inc. (a/k/a The Gabelli ABC Fund), :
Charles Stanley & Co. Limited, Rock (Nominees) :
Limited, finnCap Ltd, Megan Amelia Elizabeth Royde, :
John Joseph Johnston, Interactive Investor Limited, :
Investec Wealth & Investment Limited, Ferlim :
Nominees Limited, CFS Management Ltd (f/k/a CFS :
Portfolio Management Ltd), David Andrew Clark, Karin :
Johnston, and The United States of America, Department :
of Treasury, Internal Revenue Service, :
:
Defendants. :
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DEFENDANTS LEGAL & GENERAL ASSURANCE SOCIETY LIMITED AND UK ALPHA TRUST'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS THE SECOND AMENDED ADVERSARY PROCEEDING COMPLAINT

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Defendants Legal & General Assurance Society Limited ("LGAS") and Legal & General UK Alpha Trust ("Alpha") (collectively "Legal & General") submit this reply memorandum in support of their motion to dismiss the Second Amended Adversary Proceeding Complaint under Rule 12(b)(1), 12(b)(3), 12(b)(6), and 12(b)(7) of the Federal Rules of Civil Procedure as incorporated by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.[1]

INTRODUCTION

Legal and General's motion to dismiss had two basic themes. First, Legal and General argued that this case has virtually nothing to do with New York, or the United States for that matter. Instead, this dispute involves matters and parties that are overwhelmingly linked to the United Kingdom. Therefore, the law of England and Wales should be applied to this dispute, and the case should be dismissed as a result of the doctrine of *forum non conveniens*. Second, even if the law of the United States does apply to this dispute, as the Trustee argues, this case should still be dismissed. The Section 546(e) Safe Harbor applicable to securities transactions bars all but the "actual fraud" type of fraudulent transfer claims. It also mandates dismissal of the preempted state common law causes of action. The last remaining claim, for the so-called "actual fraud" type of fraudulent transfer, is precluded under the "*Wagoner* Rule" and the doctrine of *in pari delicto*. Thus, if the Court applies the law of the United States, as the Trustee argues it should, this case must be dismissed on the merits and with prejudice.

The Trustee's opposition to Legal and General's motion largely ignores the issues about whether the law of England and Wales should apply to this dispute and whether New York is an improper forum for this litigation. Instead, the Trustee focuses almost entirely on the issues

[1] LGAS was substituted as a defendant in this case as the real party in interest for the allegations made against Legal & General (Unit Trust Managers), Legal & General Investment Management and L&G Linked PF [ECF #264].

related to the application of the Bankruptcy Code and state common law to his claims. Those arguments are puzzling and seem to come from an almost alternate universe where there is no guidance provided by the Second Circuit on those matters. Happily, in this reality, there actually is clear, controlling guidance from the Court of Appeals.

The controlling law on Section 546(e) in this Circuit – including how one should read and apply the Supreme Court's 2018 decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018) – is *In re Tribune Company Fraudulent Conveyance Litigation*, 946 F.3d 66 (2d Cir. 2019) ("*Tribune II*"). The Trustee virtually ignores *Tribune II* because he does not like the outcome if this Court treats it as the binding precedent that it is.

In reading his argument, it appears that the Trustee believes that the Second Circuit misapplied *Merit Management* in *Tribune II*. His brief invites this Court to "correct" the Second Circuit on its mistake. That, of course, is not how the federal judicial system works. This Court is bound to follow the controlling law of this Circuit with respect to both Section 546(e) and the "*Wagoner* Rule." *See Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). Of course, the Trustee will be able to seek *en banc* review at the Second Circuit and seek *certiorari* from the Supreme Court of the United States in an effort to overturn *Tribune II* or *Wagoner*. In the meantime, all of the Courts in the Second Circuit – including this Court – have the obligation to treat *Tribune II* and *Wagoner* as binding precedent. Accordingly, this case should be dismissed with prejudice, if the Court applies the law requested by the Trustee. Alternatively, this case should be dismissed on the grounds of *forum non conveniens*. In either situation, this lawsuit should end now for Legal and General, without the opportunity for further attempts at amendment for the Trustee.

ARGUMENT

I. CLEAR SECOND CIRCUIT PRECEDENT HOLDS THAT SECTION 546(e) OF THE BANKRUPTCY CODE DEFEATS THE TRUSTEE'S CLAIMS.

In its motion to dismiss, Legal & General submits that all of the Trustee's claims brought pursuant to the Bankruptcy Code should be dismissed with prejudice pursuant to the Safe Harbor Provision set forth in 11 U.S.C. § 546(e) of the United States Bankruptcy Code. The Trustee's argument in response essentially asks this Court to hold that the Second Circuit wrongly decided the case of *In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66 (2d Cir. 2019) ("*Tribune II*") and misinterpreted *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2017). Despite the Trustee's attempt to ignore precedent he does not like, the Second Circuit has confirmed that Section 546(e) has broad application, barring a trustee from recouping payments made by financial institutions or their customers in connection with securities transactions. *See Tribune II*, 946 F.3d 66. That is the exact analysis followed in Legal & General's memorandum in support of the motion to dismiss.

Ultimately, the Trustee's argument comes down to a request for this Court to ignore or overrule *Tribune II* because the Trustee believes it was wrongly decided. That is a power not even a panel on the *Second Circuit* possesses, let alone the lower courts. Unless and until the Second Circuit overturns *Tribune II* through *en banc* review, or the Supreme Court grants *certiorari* and overrules it, it is binding precedent throughout this Circuit, including on this Court. *See, e.g.*, *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) ("As we have explained, '[t]his court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*.'"). Accordingly, the Court should reject the Trustee's invitation to overrule the Second Circuit.

The Trustee's meandering response can be distilled into two main points: (1) that the Safe Harbor Provision does not apply because the relevant transfer is the "overarching transfer" as between CHT and the Shareholder Defendants as opposed to the purported "intermediary transfer;" and (2) neither CHT nor the Shareholder Defendants are "financial institutions." Nevertheless, each argument fails on its face. (Resp. at 15).

First, while asserting that it is the "overarching transfer" that must be examined to determine whether the Safe Harbor provision applies, the Trustee fails to describe concretely what this "overarching transfer" is in the context of this case. Instead, the Trustee focuses without reason or support on the first part of the transaction from the "CC Holdco Bank Account held in the name of CC Holdco" to Capita. In doing so, the Trustee criticizes Legal & General's Motion stating that the transfer of the Merger Proceeds from CC Holdco through Capita's account at the Royal Bank of Scotland ("RBS") was an "intermediary transfer." (Resp.at 9). Yet, the Trustee does not explain how its chosen transfer is not similarly an "intermediary transfer," as it does not follow the Merger Proceeds to the Shareholder Defendants. In fact, the pleadings are clear that it is the transfer analyzed by Legal & General in its motion that is the transfer that the Trustee is seeking to avoid and, therefore, is the pertinent transfer for purposes of the Safe Harbor Provision analysis.

Still, even if the Trustee's purported "overarching transfer" is the appropriate transfer to analyze, the transfer would still fall within the Safe Harbor Provision as a "settlement payment" to or for the benefit of a "financial institution" under the broad application of Section 546(e) in the Second Circuit. *See In re Nine W. LBO Sec. Litig.*, 20 MD. 2941 (JSR), 2020 WL 5049621, at *1 (S.D.N.Y. Aug. 27, 2020) (following *Tribune II*, ruling that Section 546(e) shielded former shareholders from avoidance actions seeking to unwind prior redemption payments). Both CHT

and Capita, the entities involved in the Trustee's "overarching transfer," qualify as "financial institutions."

As Judge Rakoff noted in the recent *Nine West* Southern District opinion analyzing the Second Circuit's ruling in *Tribune II*, "the Second Circuit has held that when a bank serves as a paying agent to help a company effectuate payments to its shareholders in connection with a securities contract, all payments made in connection with that securities contract are safe harbored from a bankruptcy trustee's avoidance powers." *In re Nine W. LBO Sec. Litig.*, 20 MD. 2941 (JSR), 2020 WL 5049621, at *1 (S.D.N.Y. Aug. 27, 2020). In *Nine West*, the court determined that the debtor qualified as a "financial institution" because "during the merger, Nine West was a 'customer' of Wells Fargo, a 'commercial bank', and that Wells Fargo acted as Nine West's 'agent' in the merger by serving as its paying agent to effectuate the payments to the shareholder defendants." *Id.* at *8.

Similarly, in the present matter, the RBS was the "paying agent" that assisted with "effectuating payments" to the shareholders. *See* Dkt. 295-1, ¶ 143. RBS (which the Trustee admits is a "financial institution") was, therefore, acting as an agent of the debtor (CHT) and Capita when it distributed the Shareholder Redemption Payments. That is sufficient to make both CHT and Capita "financial institutions" and bring the transfer within the Safe Harbor Provision.

However, this Court does not even need to embrace the broad application of the holdings in *Tribune II* adopted by its sister courts in cases such as *Nine West* to find that the Trustee's "overarching transfer" falls within the Safe Harbor Provision. In fact, it need look no further than the Trustee's own pleadings. The Trustee specifically pleads that Bank of America acted as the "administrative agent" for the "Merger Proceeds" for CHT. *See* Dkt. 295-1, ¶ 8. Therefore,

CHT was a "customer" of Bank of America, a "commercial bank," which was its "Administrative Agent" in effectuating payments to the shareholder defendants, and, therefore, CHT qualifies as a "financial institution." Whether this Court focuses on the transfer identified by Legal & General, the transfer now urged by the Trustee, or the Trustee's own pleadings, the result is the same.

The Second Circuit is clear: in the context of a leveraged buyout, constructive fraudulent conveyance claims cannot survive if a bank (or other qualifying institution) is involved as an agent of the purchase of the shares. No matter how the Trustee attempts to slice or characterize the transaction, the entirety of the transaction the Trustee seeks to avoid falls squarely within the Safe Harbor provision, and as such all related claims – including the preempted state law claims – must be dismissed. *See, e.g.*, *Nine West*, 2020 WL 5049621, at *2, *15; *In re Boston Generating*, 2020 WL 3286207 at *25-27 (dismissing all state causes of action related to a transfer that fell within the scope of the Safe Harbor provision).

II. THE TRUSTEE CANNOT ESCAPE APPLICATION OF THE *WAGONER* RULE.

The Trustee attempts to escape application of the *Wagoner* Rule by asserting, for the very first time after more than two years of litigation and multiple pleadings, that it is actually bringing certain claims on behalf of the creditors rather than the debtors. This argument ignores the Trustee's own pleadings. However, even if the Trustee were allowed to amend his pleadings to bring claims on behalf of the creditors, he still would not have standing to do so.

The genesis of the *Wagoner* Rule derives from the *in pari delicto* doctrine and provides that a "claim against a third party for defrauding a corporation with the corporation management accrues to creditors, not to the guilty corporation." Thus, a trustee standing in the shoes of the debtor does not have standing to pursue such a claim. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991). Stated more simply, a trustee "lacks standing under

the Bankruptcy Code . . . to pursue claims that properly belong to creditors . . . [i]nstead, he is empowered to pursue only those claims that properly belonged to the debtor before it entered bankruptcy." *Picard v. J.P. Morgan Chase & Co.*, 460 B.R. 84, 91 (S.D.N.Y. 2011) (holding that, because the management's misconduct caused the corporation to enter bankruptcy, the trustee could not pursue common law claims that sought to recover those funds "either as a representative of the creditors or as the successor of the debtor" under the *Wagoner* Rule).

Despite a lengthy discussion of the basis for the *Wagoner* Rule, the Trustee does not contest that he cannot bring claims on behalf of the Debtors for the alleged wrongful conduct of the Debtors. Rather, he now tries to escape application of the *Wagoner* Rule by claiming that he is bringing the claims on behalf of the creditors, pursuant to limited powers of the Trustee under the Bankruptcy Code. (Resp. at 53). This argument ignores his own pleadings, as the Trustee pleads that he stands in the shoes of "Constellation Healthcare Technologies, Inc. and certain of their affiliated debtors and debtors-in-possession." Dkt. 295-1. The Trustee cannot point to any allegation that he is bringing any claims on behalf of the creditors. This unsupported argument should be rejected.

Regardless, even if the Trustee were permitted to amend his pleadings yet again to include allegations that he was bringing claims on behalf of the creditors, this amendment still would not solve his problem. The Trustee simply has no standing to bring claims on behalf of the creditors if the claim belongs only to the creditors. The Trustee ironically relies on a case that confirms his lack of standing. In *In re Hampton Hotel Inve'rs, L.P.*, 289 B.R. 563, 574 (Bankr. S.D.N.Y. 2003) (citing *Hirsch v. Arthur Andersen & Co.*, 178 B.R. 40, 43 (D.Conn.,1994)), the trustee was found only to have standing to bring a claim on behalf of the others where the debtor was also injured: "A trustee has standing to sue third parties only if the

debtor itself was damaged by the conduct of the third parties." Where the debtor is not harmed, because it was the wrongful actor (such as here), the *Hampton Hotel* court makes clear that the *Wagoner* Rule still applies where the Trustee is only pursuing claims that are solely on behalf of the creditors. *Id.* That is true even in circumstances where a confirmed plan has transferred creditors' claims to a bankruptcy trust. *See, e.g.*, *In re Bennet Funding Grp., Inc.*, 336 F.3d 94, 102 (2003) ("As the [*Wagoner*] Court noted, 'even when defrauded creditors assigned to the trustee their claims against another for aiding and abetting the fraud the trustee lacked capacity to sue.'"); *Wagoner*, 944 F.2d at 118.

The only other case the Trustee cites in support of his position, *Picard v. Taylor (In re Park S. Securities, LLC),* also demonstrates that the Trustee's state law claims are barred pursuant to the *Wagoner* Rule. 326 B.R. 505, 514(Bankr. S.D.N.Y. 2005) (ruling that pursuant to the *Wagoner* Rule, "absent another basis for standing, the Trustee may not pursue a claim on the estate's behalf if it is particular only to certain creditors" including a claim for unjust enrichment). "When creditors have a claim for injury that is particularized to them, they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so." *Id*. at 514 (citing *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1093 (C.A.2 (Conn.),1995)). Here, the Trustee makes clear in his brief that "in seeking to avoid and recover the fraudulently conveyed Shareholder Redemption Payments and IRS Funds" he "stands in the shoes of the Debtor's creditors." (Resp. at 53). Yet, he simply does not have standing to do so.

With the facts as they are, the Trustee faces a Catch-22 from which he cannot escape. If he attempts to bring claims on behalf of the wrongdoing Debtors (whether just on their behalf or in conjunction with others), as is currently pled, such claims are barred by the *Wagoner* Rule. If he attempts to bring those same claims solely on behalf of the creditors to escape the *Wagoner*

Rule, the clear precedent in the Second Circuit provides that he has no standing. There is no way for the Trustee to argue or plead his way out of the facts in the present matter. As such, all of the Trustee's claims based on the alleged wrongdoing of the Debtors must be dismissed, with prejudice.

III. THE PROPER BALANCING OF ALL OF THE FACTORS DEMONSTRATES THAT THIS CASE SHOULD BE DISMISSED PURSUANT TO THE DOCTRINE OF FORUM NON CONVENIENS.

1. The Trustee Cannot Escape that the Private and Public Interest Factors Overwhelmingly Support Dismissal of this Case.

Leaving aside the obvious hurdles the Trustee must overcome to prove his case, the fact remains that this forum is not the appropriate venue for resolving this dispute. The Trustee's argument for keeping this case here is the bare assertion that he is not forum shopping because this Court is in the Debtor's home district. He makes that argument despite the fact that the vast majority of the Defendants are located in the UK and conducted all of the relevant transactions in that country. As discussed in Legal & General's opening brief, it is evident that the Trustee is in fact forum shopping, choosing to file in the jurisdiction whose law is – in the Trustee's eyes – more favorable to his claims and hoping that this Court does not apply the appropriate law of England and Wales. However, even ignoring this blatant forum shopping, the Trustee misstates the true balancing test this Court must undertake.

The propriety of the chosen forum and the lack of evidence of forum shopping comprise only the first step in this Court's analysis. As the court stated in *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 (2nd Cir. 2001), a case relied on by the Trustee for the proposition that his choice of forum should be given great deference:

> The deference given to a plaintiff's choice of forum does not dispose of a *forum non conveniens* motion. It is only the first level of inquiry. Even after determining whether the plaintiff's choice is entitled to more or less deference, a district court must still conduct the analysis set out in *Gilbert, Koster,* and *Piper.* Initially, the

> court must consider whether an adequate alternative forum exists. If so, it must balance two sets of factors to ascertain whether the case should be adjudicated in the plaintiff's chosen forum or in the alternative forum proposed by the defendant.

The Trustee attempts to contradict the showing made in Legal & General's opening brief that the public and private interest factors laid out in cases such as *Iragorri* considered as a whole demonstrate that this case must be dismissed under the doctrine of *forum non conveniens*. However, the Trustee's attempt proves unsuccessful when analyzing the facts as a whole.

Perhaps acknowledging that the factors, when taken together, weigh in favor of dismissal, the Trustee instead endeavors to poke holes in Legal & General's analysis by inappropriately atomizing the relevant test. That is not the law. In fact, no one factor is determinative. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981). It is also ineffective, as the Trustee's attempts to gloss over the actual facts of this matter only serve to highlight the lack of connections this case has to the Trustee's chosen forum.

For example, the Trustee cites to *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) for his argument that "forcing the Liquidating Trustee to go to England to recommence this action would be more burdensome than Legal & General having to defend itself here." (Resp. at 28). However, in *Wiwa*, an individual plaintiff suing Royal Dutch Shell, and Royal Dutch Shell was arguing that it would be cheaper for it to fly one witness from Nigeria to London than from Nigeria to New York. This case will require a great deal more than simply flying one person to the United States.

Similarly, the Trustee argues that the use of international letters rogatory has been held to be a "viable" alternative to a *forum non conveniens* dismissal, citing *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F.Supp.2d 348 (S.D.N.Y. 2002). No one is arguing that the Hague Convention will be of no use. That is simply a strawman. The fact that the Hague

Convention may be used to facilitate discovery does *not* mean that the burdens of the process should not be considered in the *forum non conveniens* analysis.

In *Generali*, the evidence was required from a host of jurisdictions, some of which were a party to the Hague Convention and some of which were not. There was no one forum that predominated over all others, as there is here: the UK. This Court need only look at the pending motions where numerous defendants assert that this Court does not have personal jurisdiction over them, delayed indefinitely by the need to utilize the Hague Convention to secure the necessary evidence, to determine that the present forum is not the correct forum. It has taken more than two years to secure the necessary evidence to determine even the most basic threshold issue of jurisdiction. If this matter ever gets to issue, discovery will take immeasurably longer and be commensurately more complex.

Nevertheless, the Trustee tries to gloss over the analysis of the private interest factors by arguing that "some" of the Defendants are located in the United States. (Resp. at 27). Again, that is not test. As pointed out in Legal & General's Motion and not disputed by the Trustee in his response, the Trustee's own pleadings identify only *one* entity located in the United States (the Gabelli Fund) and two individual directors residing in the United States (Moshe Feuer and Dr. Shawn Zimberg). Dkt. No. 295-1 at ¶¶ 73, 67, 74. The Trustee evades the fact that, pursuant to his own pleadings, the Defendants constitute more than seventy foreign entities, the vast majority of which either reside in or have their principal place of business in the United Kingdom.

Notably, the Trustee fails even to attempt to distinguish the cases cited by Legal & General, where the court balanced all of the relevant factors in similar cases and granted similar motions to dismiss on *forum non conveniens* grounds. Unlike the selective citations to cases in

the Trustee's brief, the entirety of the cases cited by Legal & General are on all fours with this matter, and the Trustee has made no attempt to argue why this Court should not simply follow the compelling logic of those cases and dismiss this matter.

As with much else in his Response, the Trustee's arguments miss the forest for the trees. No one factor is dispositive. This Court must balance the *entirety* of the factors. As discussed in depth in Legal & General's Motion, this matter should have been brought in the location where the transactions that the Trustee seeks to void took place, where the vast majority of the defendants are located, where almost every witness is located, and where almost all of the relevant evidence is located: the United Kingdom. As such, this case should be dismissed pursuant to the doctrine of *forum non conveniens*.

2. The Trustee's Choice of Law Arguments Demonstrate Why This Case Should Be Dismissed.

The Trustee faults Legal & General for mentioning choice of law in its discussion of the appropriate forum, but then creates an entirely different section for his argument as to the appropriate law. As Legal & General detailed in its opening brief, this Court need not engage in a full choice of law analysis at this time. It is important only to understand that the choice of law analysis with respect to whether the Trustee has pled a cognizable claim and in connection with the *forum non conveniens* standard. Ironically, the Trustee's choice of law arguments are belied by his own pleadings and highlight why this case is the procedural mess that it is—and why it should be dismissed under the doctrine of *forum non conveniens*.

The Trustee first argues that the United States Bankruptcy Code applies to all of his claims. This argument is contradicted by his own pleadings, which contain numerous causes of action that do not involve the Bankruptcy Code. These non-bankruptcy causes of action should be dismissed, as discussed in more depth in Legal & General's opening brief and in this reply, a

point that the Trustee seemingly acknowledges by arguing repeatedly that only the Bankruptcy Code applies to his claims. In any case, the Trustee loses even under the Bankruptcy Code.

The Trustee has failed to demonstrate that the Bankruptcy Code is the proper law for this action, rather than the law of England and Wales. He argues that the Debtors are all United States incorporated entities and are victims of the alleged fraud. Like so many of the Trustee's other arguments, that misstates the test under the controlling choice of law rules. Those rules apply the most significant contacts analysis of the *Restatement (Second) of Conflict of Laws*. *See e.g., In re Hellas Telecommunications (Luxembourg) II SCA*, 524 B.R. 488, 518 (Bankr. S.D.N.Y. 2015). The fact that the Debtors were incorporated in the United States is only one factor of comparatively minor importance. Likewise, the fact Debtors borrowed and pledged a lien on assets in the United States to fund the Merger Proceeds is insignificant.

Finally, the Trustee asserts the alleged fraudulent conduct by Parmar, the other board Members, and Bahkshi occurred in the United States. While the Trustee does not cite to any allegations in support of this broad statement, even if true, such allegations are again of no import. The Trustee has chosen to bring a separate action against those individuals and has not included them in the present action (also a subject of Legal & General's Motion). As such, the actions of those individuals do not provide a sufficient link to the transactions the Trustee is seeking to avoid in this case. The Trustee has chosen to file two separate actions and carve out those alleged individual wrongdoers from the other shareholders. Whatever the reason for the Trustee's decision, the ramification of that decision is this case has only superficial links to the United States and should proceed in the United Kingdom.

Again, this Court need not engage in a full choice of law analysis at this stage. However, the procedural and pleading gymnastics in which the Trustee is engaged demonstrate exactly

why this case should be dismissed. This Court should end the Trustee's attempts to force this litigation to proceed in a location that is only making it more difficult and complicated—and will only make it even more difficult and complicated in the future.

IV. DESPITE THE TRUSTEE'S ATTEMPT TO ARGUE OTHERWISE, HE HAS FAILED TO PLEAD VALID CAUSES OF ACTION IN COUNTS I-IV AND XI.

Even if this Court determines that this is the appropriate for this case to proceed and that the Trustee's causes of action are able to survive the Safe Harbor Provision and the *Wagoner* Rule, the Trustee is still unable to meet the most basic pleading standards to avoid dismissal under Rule 12(b)(6). For the reasons stated below, Counts I-IV and XI must be dismissed pursuant to Rule 12(b)(6).

1. The Trustee Has Failed to State a Claim Under the Turnover Statute.

In Count I, the Trustee asserts a cause of action under Section 542 of the United States Bankruptcy Code, commonly referred to as the Turnover Statute. The case law is explicit – in order for a Trustee to recover under the Turnover Statute, the Trustee must establish that the property is "*already* property of the estate." *In re Pali Holdings, Inc.*, 488 B.R. 841, 851–52 (Bankr. S.D.N.Y. 2013). In instances where property has been fraudulently or preferentially transferred, such property "does not become property of the estate until it has been recovered." *In re Andrew Velez Const., Inc.*, 373 B.R. 262, 273 (Bankr. S.D.N.Y. 2007) (*quoting Savage & Assocs., P.C. v. Mandl (In re Teligent Inc.)*, 325 B.R. 134, 137 (Bankr. S.D.N.Y. 2005)).

In an effort to avoid this basic pleading standard, the Trustee – in a somewhat confusing fashion – argues in his response that "[o]nce [the Trustee] establishes the elements for a constructive trust, such trust will serve to bring such property back into the Debtors' estates." Brief. P. 35. By this statement alone, the Trustee concedes that as currently pled the allegations are insufficient to establish a cause of action under the Turnover Statute and that the claim is not

ripe. Accordingly, this claim must be dismissed. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (internal citations omitted).

2. The Complaint Fails to State a Claim for Unjust Enrichment.

Count II of the Trustee's complaint seeks relief under the theory of unjust enrichment. In response to Legal & General's Motion, the Trustee weaves a long and complicated argument supporting the position that a plaintiff can seek alternative relief in a complaint. Legal & General does not disagree that pleading in the alternative can be appropriate. For instance, "[w]here a bona fide dispute exists as to the existence of a contract, the plaintiff may proceed on both breach of contract and quasi-contractual theories." *See Beth Israel Medical Center v. Horizon Blue Cross and Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 587 (2d Cir. 2006) (internal citations omitted). However, where the Trustee clearly pleads throughout the Complaint that the Shareholder Redemption Payments were distributed pursuant to the Merger Agreement (Dkt. No. 295-1 at ¶¶ 121, 127, 130, and 151) then he cannot establish the elements of a claim for unjust enrichment. Accordingly, Count II of the Trustee's Complaint must be dismissed with prejudice.

3. The Complaint Fails to State Claims for Replevin and Conversion.

Counts III and IV of the Complaint assert causes of action for replevin and conversion. As Legal & General previously asserted, in order to proceed on such causes of action a party asserting conversion and replevin must identify the specific, identifiable funds at issue. See Motion p. 23. In defense of Counts III and IV claims, the Trustee simply asserts that his identification of the "Merger Proceeds" is sufficient enough to meet the pleading standards as

"specific identifiably property" for conversion and replevin under the relevant state law. *See Heckl v. Walsh*, 996 N.Y.S.2d 413, 416 (App. Div. 2014) (dismissing a claim for replevin on the basis that the plaintiff failed to "specifically identif[y] money that [they sought] to recover").

It is insufficient merely to state that the Trustee seeks to recoup "Merger Proceeds," that consists of "approximately $130 million in debt . . . owed to Bank of America, N.A. . . . and an equity contribution of $82,502,160.25 from CC Capital CC Holdco LLC." *See* Dkt. 295-1, ¶¶ 6, 8. Nowhere in the Complaint does the Trustee identify a "specific, identifiable fund" that can be "identified as a segregated chattel and traced to a specific bank account." *Sec. Inv'r. Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 328 (Bankr. S.D.N.Y. 1999). Again, a case cited by the Trustee in his own brief supports Legal & General's position. In *Stratton*, the court did find that the trustee could maintain an action for conversion because the trustee in *Stratton* not only identified the "specific amounts of cash and stocks" and further identified an offshore trust to which the funds were eventually deposited. *Id.* The key is whether the Trustee can identify "specific money" that was involved; a mere allegation of "approximately $130 million" and an "equity contribution" is insufficient to meet the elements to establish a cause of action for conversion and replevin. Therefore, Counts III and IV must be dismissed with prejudice.

4. <u>The Trustee Has Failed to Remedy His Improper Application of the Declaratory Judgment Act.</u>

Finally, despite the Trustee's arguments to the contrary, Count XI of the Complaint must be dismissed because the Trustee attempts improperly to employ the Federal Declaratory Judgment Act 28 U.S.C. § 2201 *et seq*. As noted in the motion to dismiss, "declaratory relief is intended to operate prospectively. There is no basis for declaratory relief where past acts are involved." *In re Enron Corp.*, 297 B.R. 382, 387 (Bankr. S.D.N.Y. 2003). Currently as pled, the Trustee seeks a declaration that the Debtor is entitled to the Shareholder Redemption Payments

and IRS Funds. What Count XI attempts to do is have this Court enter a ruling that the Trustee "wins." That is simply not the point of the Declaratory Judgment Act. Moreover, none of the cases cited by the Trustee are applicable given the facts of this case.[2] For these reasons and those previously asserted in Legal & General's Motion, Count XI must be dismissed with prejudice.

V. CONSOLIDATION FOR DISCOVERY DOES NOT RELIEVE THE TRUSTEE FROM HIS RULE 19 OBLIGATIONS.

Finally, the Trustee has failed to provide a colorable argument as to why he has chosen not to join all necessary parties to this litigation as required under Rule 7019. As Legal & General previously noted in its brief, Rule 7019 requires dismissal where the absence of an indispensable party may leave the other parties subject to a substantial risk to duplicative or inconsistent obligations. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968) (*citing* Fed. R. Civ. P. 19(a)(1)(A)).

In response to Legal & General's argument, the Trustee asserts three baseless defenses: (1) that the current adversary proceeding was consolidated pursuant to court order on July 5, 2018 (prior to naming Legal & General as a party in this action) ; (2) that there is no risk of prejudice or inconsistent/duplicative rulings or obligations because Parmar and the Parmar Shareholder Entities did not receive the same redemption funds; and (3) that Legal & General failed to join those indispensable parties when raising its Rule 7019 argument.

First, that the adversary actions have been consolidated for "all procedural purposes" is not only surprising to Legal & General, but also inconsistent with how this case has been

[2] Several cases cited by the Trustee in support of Count XI are insurance matters where the parties seek a declaration as to the rights and obligations under an insurance policy. *See generally, Cont'l Cas. Co. v. Coastal Sav. Bank*, 977 F.2d 734, 737 (2d. Cir. 1992); *Great Am. Ins. Co. v. Bally Total Fitness Holding Corp.* (*In re Bally total Fitness of Greater N.Y., Inc.*), No. 09-012023

litigated up and until now. The fact that the Trustee even asserts this as his main defense suggests that the Trustee believes that the Parmar Defendants are necessary parties to this action.

Even so, while this case may be consolidated for "pretrial purposes" with the Parmar Action, such non-substantive does not relieve the Trustee of his obligations under Rule 7019. Notably, the consolidation order only consolidates the Parmar Litigation and the current Adversary proceeding for "pretrial purposes," but does not include the Director Litigation Adv. Pro. No. 20-08039, that was only recently filed in this Court. Thus, the consolidation order, even if applicable, still does not resolve the Trustee's failure to join all necessary parties in this litigation.[3]

Second, the Trustee's argument that the Parmar Defendants did not receive the "same redemption funds" from the Merger is rebutted by his own allegations asserted in the Second Amended Complaint. The Trustee's attempt to escape his own pleading should not be countenanced. If the Trustee is correct that these are not the same redemption funds, then this only provides further support to Legal & General's argument that this case should be dismissed on grounds for *forum non conveniens,* as any link to the United States is either superficial or non-existent.

Finally, in what appears to be a futile attempt to turn the tables on Legal & General's arguments, the Trustee suggests that the burden is placed on Legal & General to join the indispensable parties into the litigation. (Resp.at 59). In support of this position, the Trustee relies upon an unpublished case that does not have precedential effect and is not factually

[3] Somewhat surprisingly, the Trustee fails to even rebut Legal & General's reliance on the applicable case law in this jurisdiction that has held that a transferee that retains title to or an interest in the property conveyed is a necessary party to the fraudulent transfer action. *See In re M. Fabrickant & Sons, Inc.*, 394 B.R. 721, 744 (Bankr. S.D.N.Y. 2008).

similar. *Tae H. Kim v. Ji Sung Yoo*, 776 F. App'x 16, 20 (2d Cir. 2019). Significantly, the Trustee's selected quote from this case does not appropriately analyze the burden-shifting inquiry that exists under Rule 19(c) applicable to this case. *See generally, U.S. v. Sweeny*, 418 F. Supp.2d 492, 499 (S.D.N.Y. 2006) ("If the initial assessment reveals the possibility that an unjoined party is required to be joined under Rule 19, the burden shifts to the opposing party to negate this conclusion."). Here, Legal & General has met the initial burden explaining why the Parmar Defendants are indispensable parties to this litigation. Accordingly, the burden now shifts to the Trustee to rebut this argument, a burden that, based on his response brief, the Trustee clearly cannot meet. For these reasons, this action must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court should dismiss this action and grant such other and further relief as the Court deems just and proper.

Dated: September 14, 2020
New York, New York

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