IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALAN D. HALPERIN, as Litigation Trustee of the Instant Brands Litigation Trust, Plaintiff, v. CORNELL CAPITAL LLC, CORNELL CAPITAL PARTNERS LP, CC WK CO-INVEST LP, AGATE INFORMATICS CORP., 4060288 CANADA INC., 7326998 CANADA INC., HENRY CORNELL, JUSTINE CHENG, RODRIGO BRAVO, YOUNGHOON PARK, ROBERT WANG, YI QIN, CHRISTOPHER LAROCQUE, BENOIT GADBOIS, NICHOLAS HEWITT, JEFFREY KIST, WILLIAM HESS, CATHERINE LANDMAN, KENNETH WILKES, LAWRENCE MCRAE, and JOHN DUBEL, Defendants.	Chapter 11 Case No. 23-90716 (MI) Jointly Administered Adv. Proc. No. 24-03232 (MI)

CORNELL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS

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Defendants Cornell Capital LLC ("Cornell"), Cornell Capital Partners LP, CC WK Co-Invest LP, Henry Cornell, Justine Cheng, and Rodrigo Bravo, by and through their undersigned attorneys, respectfully submit this Memorandum of Law in Support of their Motion to Dismiss.

PRELIMINARY STATEMENT

The Trustee fails to state any claim against Defendants. His Complaint is built around the theory that, in February 2020, certain Defendants resolved a dispute over Instant Brands' 2017 and 2018 financials by entering into a "Restructuring Agreement," and that more than a year later, this restructuring was not disclosed to lenders before they made a $450 million loan to Instant Brands. But this fraudulent inducement claim (Count XI) fails as a matter of law: the very documents that the Trustee alleges did not mention the restructuring—including a lender presentation and Instant Brands' 2020 Financial Statements—*expressly disclosed it*. And the Trustee fails to allege with specificity any misrepresentation in materials provided to lenders, much less their reliance on them, or any effective assignment of this tort claim to him from the allegedly defrauded lenders.

The Trustee next claims that Defendants received actual fraudulent transfers when Instant Brands used the proceeds of the 2021 loan to fund a "Special Dividend" (Counts I-II). These claims fail because the Complaint demonstrates that lenders knew of and approved that dividend. Their Credit Agreement, which is pleaded in the Complaint, states on its first page that Instant Brands "will use the proceeds of such borrowing to fund all or a portion of the . . . Special Dividend." Ex. M at 1 (Credit Agm't).[1] Therefore, no actual fraudulent transfer has been pleaded. *See Austin v. Baker & Hostetler, LLP (In re Uplift RX, LLC)*, 2024 WL 5086012, at *10 (Bankr. S.D. Tex. Dec. 11, 2024) (Isgur, B.J.).

[1] "Ex." references are to the Declaration of Marc Ayala (Feb. 14, 2025).

The Trustee's attempt to craft constructive fraudulent transfer and illegal dividend claims from the Special Dividend (Counts IV-V, VII) fails because the Trustee does not, and cannot, plead insolvency. The Complaint lacks any facts showing that the dividend left Instant Brands balance sheet insolvent or operating with unreasonably small capital, or that it intended to incur debts beyond its ability to pay. While the Trustee alleges (falsely) that Instant Brands' balance sheet was "inflated" by "approximately $270 million" (Cplt. ¶¶ 12, 84), the Complaint also shows that even after subtracting that alleged $270 million, the dividend left Instant Brands with a positive balance sheet, adequate capital, and no liabilities it could not pay.

The Trustee's claims that Defendants received actual and constructive fraudulent transfers in 2023, as part of the so-called "Unsub Transaction" (Counts III, VI), also fail. The Complaint confirms that the UnSub Transaction was permitted under the Credit Agreement, provided necessary funding for Instant Brands, and did not deplete the Debtors' estates. Each step of the transaction, as alleged in the Complaint, involved an exchange for reasonably equivalent value: the $55 million loan from Cornell to Instant Brands; the transfer of assets by one Instant Brands entity to its wholly owned subsidiaries, and the placement of a $55 million lien on those assets to secure the loan. As a matter of law, the UnSub Transaction was not a fraudulent transfer.

The Trustee also fails to state a claim that Defendants tortiously interfered with the lenders' Credit Agreement (Count X). The Trustee fails to allege facts showing that either the Special Dividend or the UnSub Transaction breached the Credit Agreement. And even if he had alleged breach, Cornell, as Instant Brands' controlling shareholder, was not a stranger to the Credit Agreement and therefore cannot be liable for tortious interference with it.

Finally, the Trustee's breach of fiduciary duty claims (Counts VIII-IX) fail, including because they ignore the exculpation provisions in the Debtors' certificates of incorporation, do not

plead facts showing gross negligence, fail to show the unfairness of any challenged transaction, ignore Defendants' good faith reliance on management and advisors, and erroneously rely on New York law, when Debtors are Delaware entities governed by Delaware law.

The Trustee's eleven causes of action can be dismissed for the above reasons and more described below. The Complaint should be dismissed in its entirety.

BACKGROUND

A. Cornell Acquires Instant Brands

In March 2019, Cornell acquired Instant Brands Inc. from co-founders Robert Wang and Yi Qin (with their affiliates, the "Founder Defendants") and others for $615 million. Cplt. ¶¶ 54-55. "[M]ost of the purchase consideration comprised of [sic] non-cash equity in the combined entity, the Seller Notes, an earnout obligation, and a loan to one of the sellers . . . ." *Id.* ¶ 55.[2] The acquired companies merged with Corelle Brands Holdings Inc. and its affiliates—entities controlled by Cornell—and the combined enterprise adopted the name "Instant Brands." *Id.* ¶ 54.

Instant Brands Acquisition Holdings Inc. ("TopCo") became the parent of the new enterprise. Cplt. ¶ 56. TopCo owned and controlled the enterprise through Instant Brands Acquisition Intermediate Holdings Inc. ("Intermediate HoldCo"). *Id.* Intermediate HoldCo, in turn, (i) directly owned the operating company Instant Brands Holdings Inc. ("OpCo"), and (ii) indirectly owned other entities comprising "Instant Brands." *Id.* TopCo, Intermediate HoldCo, and OpCo were each Delaware corporations. *Id.* (chart). Cornell took a majority share (64%) of TopCo and the Founder Defendants received the remaining shares. *Id.*

[2] The "Seller Notes" were notes issued by TopCo (defined immediately below) to certain Founder Defendants, with an alleged original amount of nearly $239 million. Cplt. ¶¶ 2, 64.

Soon after, according to the Complaint, Cornell learned of inaccuracies in the 2017 and 2018 financial statements of the companies it had acquired. Cplt. ¶¶ 3, 57. It retained Grant Thornton to conduct a new audit, leading to restated financials for 2017 and 2018 being issued in 2019. *Id.* ¶¶ 57-60. Based on the restated financials, Cornell concluded that it had overpaid for legacy Instant Brands. *Id.* ¶ 61. Cornell thus sought to restructure the purchase.

In February 2020, after extended negotiations, Cornell and the Founder Defendants entered into a settlement, embodied in a "Restructuring Agreement" in which the Trustee alleges the "purchase price was [] reduced to reflect the alleged approximately $270 million overpayment." *Id.* ¶ 12; *see id.* ¶ 17. The agreement (i) reduced the Founder Defendants' minority share in TopCo, (ii) canceled a majority of the Seller Notes (reducing them to $100 million), and (iii) waived the Founder Defendants' entitlement to any portion of the first $200 million of any dividends that might later be made by TopCo. *Id.* ¶¶ 62-64. Then in May 2020, Cornell filed a $268 million representations and warranties ("R&W") claim with insurers from whom it had purchased such coverage. Cplt. ¶¶ 55, 66. The Trustee alleges that the insurance claim, like the Restructuring Agreement, reflects that Cornell initially overpaid approximately ~$270 million for Instant Brands. *Id.* In 2022, the R&W insurers ultimately settled Cornell's claim for $55 million. *Id.* ¶ 67.

On October 13, 2020, Moody's issued a press release announcing a downgrade of Instant Brands debt "to Ba3 from Ba2" "because of the reduction of the unsecured seller notes due 2024 (unrated) to USD 100m" as called for in the Restructuring Agreement. Ex. E at 1.

B. With Business Improving, Management Pursues a Dividend Recap

Under new management introduced by Cornell, the Instant Brands businesses quickly began to turn around. Following a 2019 performance that fell below expectations, new

"management emphasized" the "need to get back on track quickly." Cplt. ¶ 73 (original brackets omitted); *see also id.* ¶¶ 70-72. In 2020, financial performance markedly improved:

- Adjusted EBITDA increased 10% from $82 million in 2019 to $90 million in 2020, *id.* ¶ 125 (chart);
- Free cash flow ("FCF") for debt service increased from *negative* $9 million in 2019 to *positive* $132 million in 2020—a more than 1500% increase, *id.* ¶ 129 (chart); and
- Disregarding what the Complaint characterizes as "one-off cash generation," FCF for debt service increased to $27 million in 2020—a four-year high, *id.* ¶ 131.

In February 2021, "several investment banks" were solicited for financial advice regarding a dividend recapitalization (the "Dividend Recap"). Cplt. ¶ 92. Jefferies was engaged. *Id.*

In March 2021, Jefferies, Cornell, and Instant Brands management created "a set of marketing materials, including a confidential information memorandum, a lender presentation, a private supplement, and a projection model (together, the 'Marketing Materials')" that "were distributed to prospective lenders." *Id.* ¶ 101. The lender presentation included in these Marketing Materials (the "Lender Presentation") stated that each lender should conduct its own due diligence and that each lender "acknowledge[d] and agree[d]" not to hold Defendants liable for "any obligation to update or supplement any [material provided to them] or otherwise provide additional information." *Id.*; Ex. H at 2 (Lender Presentation).[3]

The Lender Presentation disclosed that the proposed loan would fund a dividend to shareholders: "Net proceeds, in combination with cash from the Company's balance sheet, will be used to refinance its existing debt ***and pay a dividend to common equity shareholders***." Ex. H at 6 (emphasis added). It stated how the $450 million loan and the $100 million from OpCo's existing

[3] The Court "can consider documents integral to and explicitly relied on in the complaint, that the defendant appends to his motion to dismiss, as well as the full text of documents that are partially quoted or referred to in the complaint." *Tow v. Amegy Bank N.A.*, 498 B.R. 757, 765 (S.D. Tex. 2013) (quotation marks omitted). The Lender Presentation, and the other documents relied on, partially quoted, or referred to in the Complaint, are properly before the Court under this standard.

balance sheet cash would be used: $294 million to "Refinance Existing Debt"; up to ***$245 million as a "Dividend to Shareholders"***; and $11 million in "Estimated Fees & Expenses." *Id.* at 7 (emphasis added). And the Lender Presentation noted that the Company had "[r]estructure[d]" the "Seller Note[s] due 2024 to reduce [them] to $100 million." *Id.* at 36.

That same month, OpCo and its subsidiaries issued and filed audited 2020 Financial Statements (the "2020 Financials"). Cplt. ¶¶ 17, 88; Ex. G (2020 Financials); *see* n.3, above. The 2020 Financials also identified the "February 2020 restructuring agreement," explaining that it is "an agreement to restructure the initial" purchase of Instant Brands. Ex G (2020 Financials) at 21.

Consistent with the disclosures to prospective lenders, "[o]n March 21, 2021, while the marketing process for the Dividend Recap was underway," TopCo's "board of directors signed a Unanimous Written Consent . . . (the 'March Resolution')." Cplt. ¶ 108. All nine board members signed the March Resolution—including independent board member Lawrence McRae, who is not alleged to have had any interest in any potential dividend. *Id.* ¶ 9; Ex. J (March Resolution); *see* n.3, above. The March Resolution authorized TopCo both to "refinance its existing indebtedness" and "pay a dividend to common equity shareholders" in the form of a "Special Distribution." Ex. J at 1. The resolution left TopCo's board to determine the "date" and "amount" of any distribution. Cplt. ¶¶ 9, 108; Ex. J at 2. Following this resolution, management "started preparing the financial analysis for [a] Solvency Memo," to guide the boards' determination on any dividend to be agreed upon. Cplt. ¶ 110.

C. The Solvency Memo

By April 8, 2021—before the lender documentation for the Dividend Recap was executed and before the board determined the amount and timing of any dividend—management completed its Solvency Memo. Cplt. ¶ 113. That Memo incorporated solvency advice from Davis Polk &

Wardwell and it contemplated a dividend of $345,000,000 by OpCo (and then Intermediate HoldCo) to enable a dividend of $245,000,000 to shareholders by TopCo. Ex. L at 1 (Solvency Memo); *see* n.3, above. The Memo's "Assets/Liabilities Analysis" "included a balance sheet and a representation that '[n]o material contingent off balance sheet liabilities exist[ed].'" Cplt. ¶ 119.

According to the Complaint, the Solvency Memo overstated Instant Brands' assets by "$268 million"; specifically, "a significant portion of the assets on the balance sheet included goodwill and intangible assets largely representing Instant Pot's brand value[,] which did not account for the overpayment and purchase price reduction as provided for by the R&W Claim and Restructuring Agreement," which was $268 million *Id.* ¶¶ 4, 119. Exhibit B of the Solvency Memo states that, "after giving effect to the contemplated debt refinancing and subsequent applicable Dividend," OpCo's "Total Stockholder's Equity" would amount to $309,796,000. Ex. L (Solvency Memo, at Ex. B). Thus, even if one subtracted *the entirety* of the $268 million that the Trustee asserts was overstated—and the Complaint makes no case as to why that would be appropriate—OpCo *still* would have had $41,796,000 in equity cushion. The Solvency Memo contained a "Positive Cash Flow Analysis," and a representation that "management concluded it is reasonable to expect [that OpCo would] be able to meet its operating and financing obligations over the period of time that [its obligations] will mature." Cplt. ¶ 120. On April 12, management provided a model and sensitivity analysis regarding the dividend, concluding that the business could sustain poor performance for "4-5 quarters." *Id.* ¶¶ 135, 137.

D. The Dividend Recap Is Agreed Upon and Dividends Are Approved

On April 12, 2021, OpCo as "Borrower," and Intermediate HoldCo as "Guarantor," entered into the $450 million term loan "Credit Agreement" to fund the Dividend Recap. *See* Ex. M (first page); Cplt. ¶¶ 17, 92. Other parties to the agreement included Jefferies Finance LLC, Citigroup,

Bank of America, Royal Bank of Canada, and Bank of Montreal. *See id*. The agreement states on its first page that OpCo "*will use* the proceeds of such borrowing to fund all or a portion of *the Refinancing, the Special Dividend*, and the other Transactions." *Id.* at 1 (first whereas clause) (emphasis added). The "Refinancing" in the Credit Agreement refers to paying off the Seller Notes and a prior secured loan. *Id.* § 1.01 (definition of "Transactions"). The Credit Agreement provides that the Special Dividend can be as large as $245 million, and that the "Seller Note Repayment" can be up to "(x) $100,000,000 plus (y) accrued and unpaid interest (including capitalized interest)." *Id.* (definitions of "Special Dividend" and "Seller Note Repayment Dividend"). The agreement also required OpCo to have ongoing third-party review of this Dividend Recap—*i.e.,* "use commercially reasonable efforts to (a) cause the Initial Loans to be continuously rated (but not any specific rating) from at least two of Fitch, S&P and Moody's." *Id.* § 6.17.

The boards of OpCo, Intermediate HoldCo, and TopCo met two days later, on April 14, 2021, and approved a cash dividend of $345 million from OpCo to Intermediate HoldCo, to be immediately followed by a $345 million dividend from Intermediate HoldCo to TopCo, *see* Cplt. ¶¶ 114-17, which the board resolution defines as the "Subsidiary Dividend," Ex. N at 1 (April 14, 2021 TopCo Resolution); *see also* n.3, above. Immediately thereafter, TopCo paid a $206 million cash dividend (defined as the "Special Dividend")—less than the total amount permitted under the Credit Agreement—to "holders of shares of [TopCo's] common stock." *Id.* at 1; *see* Cplt. ¶ 224. In determining to approve the dividends, the board "consider[ed] advice of advisors" and "reli[ed] upon" the April 8 Solvency Memo. Ex. N at 2.

E. Instant Brands Obtains Financing with the UnSub Transaction

After exceeding expectations in 2020, a series of significant and unforeseeable economic changes began to affect the Instant Brands enterprise. *First*, inflation surged worldwide beginning

in the middle of 2021.[4] *Second*, global shipping fell into crisis: "By yearend 2021, dry bulk shipping rates had surged to their highest levels since the 2008 financial crisis while container rates also shot up . . . .".[5] *Third*, Russia's February 2022 invasion of Ukraine, "caus[ed] significant global economic disruptions, adding stresses to a global economy that was only beginning to recover from the pandemic and work through supply-demand mismatches."[6] The Complaint acknowledges none of this, yet emphasizes that Instant Brands missed its revenue projections over the same period. Cplt. ¶ 142.

On January 10, 2023, management "advised the Board" that "Instant Brands" needed $55 million to cover certain then-existing obligations: $35 million "to pay down the company's asset-based revolver" and $20 million "to pay suppliers and fulfill obligations to retailers." Cplt. ¶ 148. At that meeting, a proposal was raised whereby Cornell would loan that $55 million to "Instant Brands" to fulfill the company's needs. *Id.* On January 12, 2023, the TopCo board created a special committee of independent directors Lawrence McRae and John Dubel. *Id.* ¶ 149. The resolution creating the special committee, Ex. O at 1-2 (Jan. 12, 2023 Resolution),[7] provided:

> that the Board hereby delegates to the Special Committee ***the exclusive power and authority*** (subject to applicable law) to (i) ***review, evaluate and authorize a***

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[4] *See* Federal Reserve, Inflation Perceptions During the Covid Pandemic and Recovery (Jan. 19, 2024), https://www.federalreserve.gov/econres/notes/feds-notes/inflation-perceptions-during-the-covid-pandemic-and-recovery-20240119.html) (Federal Reserve staff report that while,"[o]n net, the dominant pressure on inflation was clearly downward at the beginning of the pandemic[,] [i]n the spring of 2021 . . . prices for some items turned up sharply, and by the fall of 2021 the price increases had become widespread," and "[b]y 2022, inflation had risen to levels not seen in 40 years"). This court may take judicial notice of U.S. government websites. *See Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (taking judicial notice of the content on the National Mediation Board's website).

[5] *See* Int'l Trade Comm'n, *The 2021 Commodity Price Surge* (last visited Feb. 12, 2025), https://www.usitc.gov/research_and_analysis/tradeshifts/2021/special_topic.

[6] *See* Dep't of the Treasury, G7 Finance Ministers and Central Bank Governors' Statement (Oct. 12, 2022), https://home.treasury.gov/news/press-releases/jy1016.

[7] *See* n.3, above.

> ***Potential Transaction*** (or any offer or indication of interest therefor); (ii) ***reject a Potential Transaction or, if applicable, to negotiate terms, structure and conditions of a Potential Transaction*** and, subject to the limitations of applicable law, to approve the execution and delivery of documents setting forth a Potential Transaction; . . . and (viii) ***to decide which legal counsel and other advisors (including financial advisors) the Company and its subsidiaries should retain with respect to a Potential Transaction and to oversee and manage such advisors***.

On January 13, 2023, the Special Committee met, Cplt. ¶ 149, confirmed that it "was charged with not being beholden to any particular shareholder, and instead considering only what was in the best interests of the Company as a whole," and concluded that it would approve the UnSub Transaction only if the terms were "at least as favorable to the Company as those that would reasonably be expected to result from an arm's-length negotiation with a third party," Ex. P at 2 (Jan. 13, 2023 Minutes). The Special Committee also appointed Guggenheim, Kroll, and Davis Polk as advisors. Cplt. ¶ 149; Ex. P at 2.

It met again on January 14, 2023, during which Guggenheim led a discussion on how the terms offered by Cornell were more "favorable" than "Instant Brands" could obtain from a third party, including because, "third-party financing would be more expensive than the financing affiliates of Cornell Capital LLC is proposing in connection with the Potential Transaction," and "the terms of any third-party financing would be less favorable to the Company, since a new third-party would include covenants, whereas the Cornell Financing is 'covenant-lite.'" Ex. Q at 2-3 (Jan. 14, 2023 Minutes).

After discussing the UnSub Transaction with management—and after concluding that the UnSub Transaction would not violate "the existing debt documents" because such transaction was a "Permitted Investment[]" under the Credit Agreement—the Special Committee approved the UnSub Transaction. *Id.* at 3; *see also* Credit Agreement § 7.13. According to the Complaint, the UnSub Transaction resulted in "Instant Brands" obtaining $55 million dollars from Cornell and agreeing to later repay that $55 million dollars to Cornell. Cplt. ¶ 147. To secure the purported

loan, "Instant Brands" moved certain tangible assets of Instant Brands into Charleroi URS and Corning URS, both wholly owned subsidiaries of "Instant Brands." Cplt. ¶¶ 14, 56, 147, 184.

Later in 2023, Instant Brands experienced "severely tightening credit terms" and "tightening terms" from suppliers, leading to a "drain[]" on liquidity. Cplt. ¶ 156. On June 12, 2023, fifteen Instant Brands entities filed bankruptcy petitions. *Id.* at 161. Subsequently, the UnSub Transaction was unwound and all claims arising from that unwinding were released in this Court's final debtor-in-possession financing order. *See* Main Case Dkt. 257, p.28 ¶ 5.

F. The Complaint

Plaintiff is the Trustee of the Instant Brands Litigation Trust. Cplt. ¶¶ 18, 45. The Combined Plan[8] for the Instant Brands Debtors vested in the Trustee the power to bring certain estate causes of action relating to the Dividend Recap and the UnSub Transaction that are asserted in Counts I-IX of his Complaint. The Trustee, however, asserts that he is also "the assignee of claims of lenders who participated in the Dividend Recap (the 'Assigned Lenders')." *Id.* ¶ 18. Although he brings two claims on their behalf (Counts X-XI), the Trustee does not identify those Assigned Lenders or describe the terms by which their claims were purportedly assigned to him.

Defendants include Cornell, as well as CC WK Co-Invest LP and Cornell Capital Partners LP, two entities controlled by Cornell. *Id.* ¶¶ 20-22. Defendants Henry Cornell, Justine Cheng, and Rodrigo Bravo held roles at Cornell and served as directors of TopCo. *Id.* ¶¶ 23-25. This Motion to Dismiss is brought by these six Defendants together (the "Cornell Defendants"). Other Defendants include Instant Brands' co-founders Robert Wang and Yi Qin, and their affiliated companies (the "Founder Defendants"), as well as certain former directors and officers of TopCo, Intermediate HoldCo, and/or OpCo. *Id.* ¶¶ 27–31.

[8] As defined in the Court's Confirmation Order dated February 23, 2024. Main Case Dkt. 1146.

ARGUMENT

I. The Purported "Assigned Lender" Claims (Counts X and XI) Should Be Dismissed

A. The Trustee Lacks Standing to Assert Counts X and XI

As a threshold matter, the Trustee fails to allege facts showing that he has standing to bring Counts X and XI on behalf of the so-called "Assigned Lenders." Cplt. ¶¶ 249–263, 264–271.

First, the Trustee fails to identify his purported assignors, and that failure is fatal. Article III of the Constitution and Federal Rules of Civil Procedure 8(b) and 17(a) all require assignors of claims to be identified in a complaint. *See, e.g.*, *MSP Recovery Claims Series LLC v. Pfizer, Inc.*, 728 F. Supp. 3d 89, 100-01 (D.D.C. 2024) (dismissing claims asserted on behalf of unnamed assignors at pleading stage because "'to establish standing,' the plaintiffs must 'name' or otherwise identify every entity whose claims they assert") (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *Zazzali v. Eide Bailly LLP*, 2013 WL 6045978, at *35 (D. Idaho Nov. 14, 2013) (dismissing complaint under Rule 8(b) because defendants are "entitled to know the identity of each assigning investor"); *Pathways Psychological Support Ctr. v. Town of Leonardtown*, 1999 WL 1068488, at *4 (D. Md. July 30, 1999) ("A defendant cannot defend against a plaintiff that it cannot identify, which is exactly what Rule 17(a) seeks to prevent.").

This basic, but omitted, information is necessary at the pleading stage to evaluate (1) whether any assigning lenders were owed any duty of disclosure and by whom, (2) whether disclosures or omissions were, in fact, made to them, and (3) whether they ratified any of the challenged transactions. Indeed, one struggles to understand how Defendants even could file Answers without such information where it is impossible to determine, among other things, what specific defenses are applicable to the unidentified assignees.

Second, the Trustee fails to identify the terms of the alleged assignments, which is independently fatal to Counts X and XI. Rule 17(a) requires that "[i]n an action involving an

assignment, a court must ensure that the plaintiff-assignee is the real party in interest with regard to the particular claim involved by determining: (1) what has been assigned; and (2) whether a valid assignment has been made." *Carter v. Brooms (In re Brooms)*, 447 B.R. 258, 265 (B.A.P. 9th Cir. 2011), *aff'd*, 520 F. App'x 569 (9th Cir. 2013). That means that even at the pleading stage, "[t]he Court is not obliged to accept as true Plaintiffs' legal conclusions that the assignments exist and are valid; Plaintiffs must allege facts sufficient to support these contentions, such as the identity of the [assignors] whose . . . rights they claim to own, the dates of the assignments, and the[ir] essential terms." *MAO-MSO Recovery II, LLC v. Mercury Gen.*, 2017 WL 5086293, at *4 (C.D. Cal. Nov. 2, 2017).

To determine an assignment's validity, "a court must turn to the substantive state law governing the assignability of the action at issue," *In re Brooms*, 447 B.R. at 265, which, here, is New York law under the Credit Agreement, Ex. M § 10.14(a). Under New York law, tort claims must be expressly assigned—they do not automatically travel with the assignment of a contractual right. *See Commonwealth of Pa. Pub. Sch. Emps. Ret. Sys. v. Morgan Stanley & Co.*, 35 N.E.3d 481, 485-86 (N.Y. 2015) (citing N.Y. Gen. Oblig. Law § 13-101 (McKinney)).

The Complaint makes no such allegations here, stating only that: (1) the Trust is "the assignee of claims of lenders who participated in the Dividend Recap," Cplt. ¶ 18, (2) the Trustee "has standing to pursue claims founded on breaches of the Credit Agreement pursuant to an assignment of said claims by certain parties to the Credit Agreement," *id.* ¶ 262, and (3) the Trustee "has standing to pursue these claims [in Count XI] pursuant to an assignment of said claims," *id.* ¶ 270. Such vague allegations fail to establish the Trustee's standing. *See, e.g.*, *Cortlandt St. Recovery Corp. v. Deutsche Bank AG, London Branch*, 2013 WL 3762882, at *2 (S.D.N.Y. July 18, 2013) (plaintiff's allegations "that it is the assignee of the owners of Subordinated Notes" were

"plainly insufficient to demonstrate standing"); *Morgan Stanley*, 35 N.E.3d at 486 (noting that New York law "requires either some expressed intent or reference to tort causes of action").

Moreover, the bankruptcy docket shows that claims under the Credit Agreement have changed hands.[9] The Trustee is thus required to allege that subsequent holders were actually assigned tort claims with their contract claims and, if so, that the tort claims were then assigned to him. *See MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 581 (7th Cir. 2019) (without valid underlying assignment, subsequent assignment "conveyed nothing, and thus the plaintiffs had no rights to enforce and no standing to sue").

B. The Complaint Fails to State a Claim for Fraudulent Inducement or Negligent Misrepresentation (Count XI)

The Trustee's fraudulent inducement claim also fails on the merits. The animating theory of the entire Complaint is that, in 2021, Cornell fraudulently induced lenders to fund the Dividend Recap, which then left Instant Brands insolvent and unable to repay the money it had borrowed. *See* Cplt. ¶¶ 5, 8, 12–13, 96–107, 124, 141–146. But—despite having had access to Instant Brands' documents for almost a year—the Trustee: (i) does not and cannot identify a single material misstatement; (ii) does not and cannot identify a single material omission; (iii) and has failed to allege any reasonable reliance. *See id.* ¶¶ 96, 265. Indeed, the Complaint itself demonstrates that the parties to the Credit Agreement were sophisticated entities that knew they were funding a dividend, that pursued extensive due diligence, and who cannot claim to have relied on any

[9] *Compare* Verified Statement of the Ad Hoc Group of Unaffiliated Holders of Term Loans Issued by Instant Brands Holdings Inc. Pursuant to Bankruptcy Rule 2019 [Dkt. No. 67], *with* Verified Statement of the Ad Hoc Group of Crossover DIP and Prepetition Term Lenders Pursuant to Bankruptcy Rule 2019 [Dkt. No. 587] (showing that the term loan holdings of Citadel Advisors LLC increased from $7.4 million to $188 million from June 13, 2023 to September 26, 2023).

misrepresentation or fraudulent omission, of which there were none. *See* Ex M at 1 (Credit Agreement listing "Joint Lead Arrangers" and "Joint Bookrunners").

Under New York law, the elements of fraudulent inducement are: "(1) that defendant made a material false representation, (2) with the intent to defraud the plaintiff, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of that reliance." *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 497 (S.D.N.Y. 2003) (citing *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 153 (2d Cir. 1995)).[10] To plead an omission-based fraud claim, a plaintiff must also allege a duty to disclose. *Banque Arabe*, 57 F.3d at 153. "Under New York law, each element of a fraud claim must be shown by clear and convincing evidence." *Id.* In the Fifth Circuit, fraudulent inducement claims must be pled with particularity under Fed. R. Civ. P. 9(b), which requires that the Trustee "state with particularity the circumstances constituting the fraud." *See Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010) (per curiam).

1. The Complaint Fails to Allege Any Misrepresentation

The Trustee's fraud claim cannot satisfy Rule 9(b) because it does not specify "the who, what, when, where and how" of any alleged misstatement. *Shandong*, 607 F.3d at 1032.

First, the Complaint vaguely refers to "misstatements in Instant Brands' financials" (Cplt. ¶ 83); "repeated misstatements . . . regarding the value of the company" (Cplt. ¶ 96); "material misstatements caused by overstated revenue, understated expenses, overstated assets, and understated liabilities as detailed in the R&W Claim, which led to the $268 million loss and purchase price reduction" (*id.* ¶ 105); and "the making of representations to lenders that they knew to be false" (*id.* ¶ 265). The Complaint fails, however, to identify any single such statement or

[10] Section § 10.14(a) of the Credit Agreement (Ex. M) specifies that New York law governs.

representation, who the speaker was, when it was made, to whom, and what made it false. *See Scalercio-Isenberg v. Goldman Sachs Mortg. Co.*, 2022 WL 3227875, at *10 (S.D.N.Y. Aug. 9, 2022) (dismissing fraud claim because "Plaintiff does not allege with specificity what actual statement" Defendant made). Indeed, the Trustee's allegations do not even identify whether these misrepresentations were made *to the lenders* in 2021. That falls far short of satisfying Rule 9(b). *Clark v. PHH Mortg. Corp.*, 2024 WL 4849083, at *2 (W.D. Tex. Nov. 18, 2024).

The Complaint also refers generally to purported deficiencies in the "Marketing Materials" provided to lenders but it fails to identify any specific misstatement therein. Cplt. ¶ 101. These allegations therefore also fail under Rule 9(b). *See Dexia SA/NV v. Deutsche Bank AG*, 2013 WL 98063, at *4 (S.D.N.Y. Jan. 4, 2013) (dismissing fraud claim because plaintiffs merely alleged that "there were unspecified fraudulent statements in the 'Offering Materials'" but did not "specify where" in the documents the allegedly false statements were located).

In the one instance where the Trustee identifies a particular statement, the Complaint does not allege falsity or reliance. He alleges that Instant Brands "did not impair either goodwill or the intangible assets relating to the Instant Pot brand value in the 2020 financial statements." Cplt. ¶ 88. The Trustee fails to allege how these "statements about the value" of abstract assets are anything other than "nonactionable opinion that provides no basis for a fraud claim." *MAFG Art Fund, LLC v. Gagosian*, 998 N.Y.S.2d 342, 343 (App. Div. 2014); *see Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011) (explaining that "estimates of goodwill" are "statements of opinion"). The 2020 Financials caution that the "fair value of newly acquired *intangibles* as a result of the Instant Brands acquisition" represent "*estimates*" and that "*actual results could differ materially from those estimates*." Ex. G at 13 (emphasis added). The 2020 Financials also made clear that "management identified a triggering event for goodwill impairment testing but

determined that no goodwill impairment was required." Cplt. ¶ 17 (emphasis added). Thus, prospective lenders were on notice that opinions could differ on whether an impairment or lower valuation was appropriate. Moreover, the 2020 Financials disclosed the Restructuring Agreement, Ex. G, at 21, and lenders could therefore decide for themselves whether to value those assets differently given the restructuring of the initial purchase.

2. The Complaint Fails to State a Fraudulent Inducement Claim Based on Alleged Omissions

Unable to identify a single specific misstatement, the Trustee's fraud theory instead focuses on alleged omissions. This theory likewise fails.

a. Defendants Had No Duty to Disclose

For an omission to be actionable, the party accused of fraud must have a duty to disclose. *Banque Arabe*, 57 F.3d at 153*; see also Bombardier Cap. Inc. v. Naske Air GmbH*, 2003 WL 22137989, at *3 (S.D.N.Y. Sept. 17, 2003) ("Under New York law, in order for an omission to be fraudulent, the party accused of fraud must have had a duty to speak."). A duty to disclose does not exist unless the parties "are in a fiduciary or other relationship signifying a heightened level of trust." *Bombardier*, 2003 WL 22137989, at *3. Where "parties deal at arms' length in a commercial transaction, no relation of trust or confidence sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances." *Id.* "In transactions between sophisticated financial institutions, 'no extra-contractual duty of disclosure exists.'" *UniCredito*, 288 F. Supp. 2d at 498 (quoting *Banque Arabe*, 57 F.3d at 158).

The Trustee does not (and cannot) allege that Defendants owed a duty of disclosure to the Assigned Lenders here. The parties to the Credit Agreement were sophisticated financial institutions, including Jefferies Finance LLC, Citigroup, Bank of America, Royal Bank of Canada, and Bank of Montreal. *See* Ex. M (first page) (listing "Joint Lead Arrangers" and "Joint

Bookrunners"). Defendants had no fiduciary or similar relationship to the Assigned Lenders—the transaction was a classic arm's length deal, and the Trustee does not allege otherwise. In fact, the March 2021 Lender Presentation states that each lender should conduct its own due diligence and will not hold Defendants liable for "any obligation to update or supplement any Evaluation Material or otherwise provide additional information." Ex. H at 2 (Lender Presentation).

b. The Trustee Does Not Adequately Plead Fraud by Omission

The Trustee's fraud-by-omission theory fails for the independent reason that the documents he incorporates into the Complaint confirm there were no omissions.

First, the Trustee alleges that the Restructuring Agreement and "the purchase price reduction pursuant to the Restructuring Agreement" "was never disclosed to the Assigned Lenders in the March 2021 marketing process." Cplt. ¶¶ 5, 100. The documents on which these allegations rely, however, show that those items repeatedly were disclosed to the Lenders. Indeed, the 2020 Financials explicitly refer to the "February 2020 restructuring agreement." *See* Ex. G at 21 (2020 Financials). That disclosure alone puts an end to the Trustee's omission theory.

The restructuring was disclosed elsewhere too. The March 2021 Lender Presentation, which the Trustee claims omitted the restructuring (Cplt. ¶¶ 99-101, 106, 113), discloses it. It states that "IN 2020" the company took "ACTION" to "Restructure Seller Note due 2024 to reduce to $100 million." Ex. H at 36 (Lender Presentation). That is what the Complaint alleges the "Restructuring Agreement" did: it "reduced the purchase price by," among other things, "cancelling $139 million of the $239 million of Seller Notes," thereby reducing those notes to $100 million. Cplt. ¶ 64.

The Credit Agreement also refers to the Restructuring Agreement in documents that it incorporates by reference. The Credit Agreement contains a clause acknowledging the terms of

the Second Amended and Restated Shareholders Agreement ("Shareholders Agreement") and mandating that the Shareholders Agreement not "be amended" "in a manner [] materially adverse to the Lenders." Ex. M § 1.01 (definition of "IB Exchangeable Shares"). The Shareholders Agreement's terms—which were so critical to the Lenders that they bargained for protection against adverse amendments to them—expressly reference the "Restructuring Agreement." *See* Ex. D (Restructuring Agm't, Ex. C, Shareholders Agm't at 4 (first whereas clause)). The Credit Agreement also incorporates by reference the "Series 1 Seller Promissory Notes dated as of February 7, 2020," *see* Ex. M § 1.01 (definitions of "Seller Note Repayment Dividend" and "Transactions"), and those Seller Notes, on their first page, refer to the "Restructuring Agreement," *see* Ex. D (Restructuring Agm't, Ex. F-1, Feb. 6, 2020 Series 1 Seller Promissory Notes at 1).[11]

Second, the Trustee alleges that Cornell's and Instant Brands' former owners' dispute over, and insurance claim regarding, the accuracy of Instant Brands' representations and warranties regarding the 2017-2018 financials were purportedly concealed from the Lenders. Cplt. ¶¶ 92, 96, 101. But the Restructuring Agreement—which, again, was disclosed to the Assigned Lenders—describes that dispute. *See* Ex. D § 3.06(a) (release covering "any inaccuracy in or misstatement relating to (A) the Audited Company Financial Statements [of Instant Brands] or (B) the financial projections, forecast or other financial information of the Instant Brands")). The Restructuring Agreement also refers to Cornell's related insurance claims by carving the insurer out of the release. *See id.* (stating that the release does not modify "the Insurer's…rights or liabilities under the Parent R&W Insurance Policy").

[11] The restructuring was also public knowledge: Moody's issued a press release on Instant Brands in October 2020, six months prior to the Dividend Recap, discussing the "reduction of the unsecured seller notes due 2024 (unrated) to USD 100m." Ex. E at 1.

Third, the Trustee alleges that "when faced with questions about differences in the *historical financial* statements," Cornell "did not reveal the magnitude of its losses and the results of the reaudited *2017 and 2018 financial statements*." Cplt. ¶¶ 104-05 (emphasis added). But the email exchange the Trustee quotes includes no questions about those financial statements. Rather, the potential lender asked about "Q2'19, Q3'19, FY'19 and Q1'20" financials. Ex. K at 3 (Mar. 25, 2021 Email from Richard Hogarth to Alexander Tretner and Emma Johns). The potential lender therefore did not seek any information about the 2017-2018 financials and, as a matter of law, Defendants had no obligation to volunteer information about that subject. *See HSH Nordbank AG v. UBS AG*, 941 N.Y.S.2d 59, 68 (App. Div. 2012) (dismissing fraud claim where defendant had no duty to disclose information plaintiff did not request).

Last, the Trustee alleges that, during a "board meeting in January 2021," Defendants were made aware of an "investigation" by the Consumer Product Safety Commission and that Defendants nonetheless "failed to disclose" to the lenders "that the Consumer Product Safety Commission ('CPSC') had commenced an investigation into Instant Brands" that posed "significant potential recall and personal injury liabilities." Cplt. ¶¶ 7, 81. The January 2021 Board materials that the Trustee relies on reflect merely a CPSC "inquiry on Instant Pot," not an investigation, Ex. F at 41 (Jan. 2021 Board Presentation), and they say nothing about "significant potential recall and personal injury liabilities," Cplt. ¶ 7. Moreover, federal law mandates that "any accident or investigation report" by the CPSC "shall be made available to the public," 15 U.S.C.A. § 2074(c), and the CPSC's public records show no "investigation into the Instant Pot" as alleged in the Complaint, Cplt. ¶ 78, nor any Instant Pot recall or product safety warning during the 2020-2021 period or thereafter, *see* CPSC, Safer Products, https://www.saferproducts.gov/

(last visited Feb. 12, 2025); CPSC, *Recalls & Product Safety Warnings*, https://www.cpsc.gov/Recalls (last visited Feb. 12, 2025).[12]

3. The Trustee Does Not and Cannot Allege Reasonable Reliance

The Trustee's fraud (and negligent misrepresentation) claims fail for a third reason: he has failed, under Rule 9(b), to allege with particularity facts establishing the Assigned Lenders' reliance. *See e.g.*, *Millsaps v. Cont'l Cas. Co*., 2023 WL 9645471, at *6 (E.D. Tex. Dec. 20, 2023), *report and recommendation adopted*, 2024 WL 1283710 (E.D. Tex. Mar. 26, 2024) ("Rule 9(b)'s particularity requirement applies to allegations of actual reliance"); *see also SRM Glob. Master Fund Ltd. P'ship v. Bear Sterns Cos. LLC (In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.)*, 995 F. Supp. 2d 291, 312 (S.D.N.Y. 2014) ("To plead common law fraud, a plaintiff must allege with particularity that it actually relied upon the supposed misstatements"), *aff'd*, 829 F.3d 173 (2d Cir. 2016).

The Complaint makes no attempt to allege reliance with particularity. Instead, the Trustee pleads reliance *solely* on "information and belief." Cplt. ¶¶ 7, 96, 267. Rule 9(b) forecloses such evasive pleading: it forbids allegations on information and belief except only as to matters that are "peculiarly within the adverse parties' knowledge." *Javino v. Denton*, 2024 WL 4189005, at *15 (E.D.N.Y. Sept. 13, 2024), *appeal filed*, No. 24-2676 (2d Cir. Oct. 7, 2024). That narrow exception does not apply to the element of reliance here because that is within *the lenders'* knowledge—*not Defendants'* knowledge. *See id.*

In addition, the Trustee cannot allege reasonable reliance. "The element of justifiable reliance is lacking where a sophisticated party enters into an arms-length transaction and, with the

[12] This Court may take judicial notice of facts from CPSC's website. *See Guzman v. Polaris Indus., Inc.*, 345 F.R.D. 174, 182 (C.D. Cal. 2023) (taking notice of three public CPSC recall notices).

exercise of ordinary intelligence, could have protected itself through due diligence concerning the transaction." *Rapaport v. Strategic Fin. Sols., LLC*, 140 N.Y.S.3d 508, 509 (App. Div. 2021).

Under these standards, as discussed above in Part I.B.2, the facts that the Trustee claims to have been misrepresented or omitted all were readily available to the Assigned Lenders "through due diligence," *id.*, including:

a. The Restructuring Agreement and related acquisition price reduction, which were disclosed in the 2020 Financial Statements, the Lender Presentation, and the Credit Agreement. *See North Fork Partners Inv. Holdings, LLC v. Bracken*, 2023 WL 3871903, at *9 (S.D.N.Y. June 7, 2023) ("a party cannot claim reliance on a misrepresentation when that party could have discovered the truth with due diligence").

b. Cornell's claims against the sellers, and the related insurance claim, arising out of Instant Brands' 2017-2018 financial statements, which were referred to in the Restructuring Agreement. *See* Part I.B.2.b, above. The sellers could have asked for materials related to that dispute but did not. Instead, the Credit Agreement shows that the borrowers were focused on *the current* financials, rather than the pre-acquisition financials. *See* Credit Agreement §§ 1.01, 4.01(h) (requiring the borrowers to provide only Instant Brands' audited 2020 financials); *see also DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 322 (S.D.N.Y. 2002) (finding no justifiable reliance where plaintiff "could have negotiated for further access or more complete representations, but it either declined, or was unable, to do so"); *HSH Nordbank AG*, 941 N.Y.S.2d at 68.

c. The alleged "reports of Instant Pots" malfunctioning, Cplt. ¶ 7, were (to the extent they existed) publicly accessible by the Lenders under the CPSC statute. *See* Part I.B.2.b, above; *see also 246 Sears Rd. Realty Corp. v. Exxon Mobil Corp.*, 2012 WL 4174862, at *14 (E.D.N.Y. Sept. 18, 2012) ("A plaintiff cannot establish justifiable reliance or a duty to disclose where the information at issue was a matter of public record . . . .").

The Lenders were in possession of these facts and—even if they were not—they undisputedly could have discovered them with due diligence. The fraud claim therefore fails as a matter of law.

4. The Trustee's Negligent Misrepresentation Claim Fails

The Trustee's related negligent representation claim fails for two reasons. *First*, the Trustee fails to allege, as he must, "the existence of a special or privity-like relationship" that is necessary under New York law to support a negligent misrepresentation. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011). *Second*, the negligent misrepresentation claim fails

because it does not satisfy Rule 9(b) for the same reasons the Trustee's fraud claim does not. *See* Part I.B.2-3, above; *see In re Shelton*, 2014 WL 1576864, at * 9¬10 (Bankr. S.D. Tex. Apr. 18, 2014) (Isgur, J.) (negligent misrepresentation claim insufficiently pleaded under Rule 9(b) where the "claims for negligent misrepresentation and fraud are 'factually inseparable'").

C. The Complaint Fails to State a Claim for Tortious Interference (Count X)

A tortious interference claim "requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." *Foster v. Churchill*, 87 N.Y.2d 744, 749–50 (1996). The Trustee's Complaint demonstrates that these elements are not, and cannot be, met.

1. Cornell Is Not a Stranger to the Credit Agreement and Cannot Tortiously Interfere with It

"It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." *Bradbury v. Israel*, 168 N.Y.S.3d 16, 18 (App Div. 2022). A defendant is not a "stranger" to a contract if it "played a role in negotiation of the . . . agreement, and execut[ion of the] same." *Koret, Inc. v. Christian Dior, S.A.*, 554 N.Y.S.2d 867, 869 (App. Div. 1990); *see BSP Agency LLC v. Katzoff (In re KG Winddown, LLC)*, 632 B.R. 448, 492 (Bankr. S.D.N.Y. 2021) (defendant must be "a stranger to the contractual relationship giving rise to and underpinning the contract at issue"). A party also is not a stranger to a contract if it owned and controlled the entity that entered into the contract. *See Bradbury*, 168 N.Y.S.3d at 18 (controlling owner of contracting party was not a stranger to contract); *UBS Secs. LLC v. Highland Cap. Mgmt., L.P.*, 927 N.Y.S.2d 59, 66 (App. Div. 2011) (hedge fund not stranger to contract entered into by its "affiliated funds").

Under these standards, Cornell is not a stranger to the Credit Agreement and therefore cannot be liable for tortiously interfering with it. *First*, the Trustee alleges that Cornell "played a

role in negotiation of the [] agreement, and execut[ion of the] same," *Koret*, 554 N.Y.S.2d at 869, including by "caus[ing] Instant Brands to take on a $450 million term loan," *i.e.*, causing it to enter into the Credit Agreement and being responsible for statements made in marketing the loan, Cplt. ¶ 8. *Second*, Cornell is *named* in the Credit Agreement as the "Sponsor" of Instant Brands (Ex. M § 1.01 (defining "Sponsor"). *Third*, the Trustee alleges that Cornell owned "a majority share (64%)" of Instant Brands and "controlled Instant Brands through its control of Instant Brands' Board of Directors." Cplt. ¶¶ 56, 245.

2. The Trustee Fails to Allege Breach and Causation

"To state a claim for tortious interference with a contract, a plaintiff must allege facts sufficient to show that the contract would not have been breached but for the defendant's conduct." *Plymouth Cap. LLC v. Montage Fin. Grp.*, 219 N.Y.S.3d 372, 375-76 (App. Div. 2024). That means the Trustee must plead facts showing that (i) OpCo breached the Credit Agreement *and* (ii) but for Cornell's alleged interference, OpCo "would have continued" to satisfy its obligations thereunder. *Burrowes v. Combs*, 808 N.Y.S.2d 50, 53 (App Div. 2006). The Trustee does not and cannot do so as to the three breaches he attempts to allege under the Credit Agreement.

Section 7.04 and 7.13. The Trustee alleges that the UnSub Transaction "breached Sections 7.0[4] and 7.1[3] of the Credit Agreement"[13] by "transferring substantially all of the company's assets." Cplt. ¶ 259. These conclusory allegations fail to plead breach, and therefore cannot establish tortious interference.

As the Trustee concedes, section 7.13 of the Credit Agreement permitted OpCo to make certain "Permitted Investments" in its unrestricted subsidiaries. Cplt. ¶ 257. According to the

[13] The Cornell Defendants assume that the Trustee mistakenly cited sections 7.03 and 7.14 of the Credit Agreement and intended to cite sections 7.04 and 7.13.

Trustee, the UnSub transaction constituted a transfer of assets with a "$200 million valuation." *Id.* ¶ 159; *see id.* ¶ 147. But the Trustee fails to explain how that constitutes a breach of the Credit Agreement, which permitted investments of a greater amount than that.

In fact, it does not constitute breach. As the Credit Agreement makes clear, "[f]or purposes of determining compliance with [section 7.13] . . ., an Investment need not be permitted solely by reference to one category of Permitted Investments . . . but may be permitted in part under any *combination* thereof." Ex. M § 7.13. The categories of Permitted Investments, in turn, clearly establish capacity in excess of $200 million by combining fixed-dollar baskets. Specifically:

- Section 7.13(j) permitted "[i]nvestments in Unrestricted Subsidiaries in an aggregate amount at any one time outstanding not to exceed . . . **$40,000,000**";
- Section 7.13(k) permitted "[i]nvestments . . . in an aggregate amount at any one time outstanding not to exceed . . . **$100,000,000**" and
- Section 7.13(k) further provided that "unused amounts available under section 7.06(a)(7) to make Restricted Payments and unused amounts available under clause (ii) of Section 7.15 to make Restricted Debt Payments may in each case be used instead to make additional Investments." Sections 7.06(a)(7) and 7.15(ii), in turn, permitted payments of **$15,000,000** and **$50,000,000**, respectively.

Id. (emphasis added). Aggregating these Permitted Investments' capacity yields a combined total of $205 million—more than the alleged $200 million in assets transferred in the Unsub Transaction. Cplt. ¶¶ 147, 149, 154, 159. The Trustee has not alleged that this investment capacity was unavailable and therefore has not alleged breach.

As for Section 7.04, the Trustee's conclusory allegation that "Instant Brands" breached the Credit Agreement by "transferring substantially all of the company's assets" fails to state a claim. *Id.* ¶ 259. Section 7.04's transfer restrictions are entity-specific. *See, e.g.*, Ex. M § 7.04(a) (limiting transfers by "Borrower," defined in first page as Instant Brands Holdings, Inc.). But the Trustee does not identify *which* entities allegedly transferred *which* assets in the Unsub Transaction. Instead, he uses the term "Instant Brands" to refer to the transferor(s), which is

defined in the Complaint to include *at least 15 different entities*. *See, e.g.,* Cplt. ¶¶ 15 n.1, 255–259. He has thus failed to show that Section 7.04's transfer restrictions even apply much less that they were breached. In addition, the Complaint fails to allege facts showing that the transferred assets were "substantially all" of the assets of any alleged transferor(s). If anything, the allegations suggest the contrary: while the Complaint characterizes the UnSub Assets as "tangible" assets (Cplt. ¶ 147), it elsewhere describes Instant Brands' *intangible* assets as substantial (*see id*. ¶ 83). It is not Defendants' obligation to guess at the Trustee's theory of breach here; he must allege *facts* that establish breach. He has not.

Section 5.15. Section 5.15 of the Credit Agreement is a representation as to the accuracy of "the reports, financial statements, certificates and other written information furnished by or on behalf of any Loan Party to the Administrative Agent or any Lender." Cplt. ¶ 250. This theory fails for lack of causation. The Trustee alleges this provision was breached "at the time that the Prepetition Term Loan was consummated" because *prior to entering into the loan*, "Instant Brands failed to disclose" certain facts. *Id.* ¶¶ 251-52, 254. This claim is thus based on Cornell's and Instant Brands' alleged omission of information *before* the Credit Agreement was effective. The Trustee cannot show, as he must, that but for Cornell, Instant Brands would have "continued" to perform, where he alleges that Instant Brands already had decided to withhold information before the Credit Agreement ever was effective. *Burrowes*, 808 N.Y.S.2d at 53.

3. Cornell Was Entitled to Interfere with Its Subsidiaries' Contracts

Even if the Trustee had alleged that Cornell caused the breach of the Credit Agreement (he has not), the Trustee cannot overcome Cornell's privilege to interfere in its subsidiaries' contracts. "*One who has a financial interest in the business of another possesses a privilege to interfere with the contract* between the other and someone else if his purpose is to protect his own interests and

if he does not employ improper means." *Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 72 Misc. 3d 1218(A), at *11 (N.Y. Sup. Ct. 2021) (emphasis added). The Trustee alleges that (1) Cornell owned the "majority share (64%)" in Instant Brands (Cplt. ¶ 56); and (2) Cornell's alleged interference protected "the financial value" of its "stake[]" in Instant Brands—*i.e.*, the value of Cornell's equity and dividends from Instant Brands—including by providing Instant Brands with financing "to pay suppliers and fulfill obligations to retailers, and . . . pay down the company's asset-based revolver and avoid a default." *Id*. ¶ 148; *Audax*, 72 Misc. 3d 1218(A), at *11. Cornell was permitted to do that, as New York's highest court has explained: "[t]o the extent that respondents acted to preserve the financial health of an ailing [portfolio company], their actions were economically justified." *Foster*, 87 N.Y.2d at 751.

Nor does the Trustee plead around that privilege by "plead[ing] specific facts showing that" Cornell "caused the alleged contractual interference through illegal or fraudulent means or w[as] otherwise motivated by malice toward" the Assigned Lenders. *Audax*, 72 Misc. 3d, 1218(A), at *11. The Trustee does not allege any crime and his fraud allegations fail. *See* Part I.B. Nor does he allege malice. Malice is a "rigorous standard," requiring "an intent to cause harm to the particular plaintiff." *U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, 2019 WL 4744220, at *10 (S.D.N.Y. Aug. 26, 2019). Thus, the Trustee's allegations of "self-dealing" (Cplt. ¶ 93) are insufficient because they do not allege a specific intent to harm the Assigned Lenders. *See Audax*, 72 Misc. 3d 1218(A), at *11 ("bad faith, without more, does not satisfy the malice requirement").

II. The Complaint's Fraudulent Transfer and Illegal Dividend Claims Based on the 2021 Dividend Recap (Counts I-II, IV-V & VII) Must Be Dismissed

The Trustee's fraudulent transfer and illegal dividend claims fail as a matter of law. He (i) fails to identify the transfers he seeks to avoid, (iii) does not allege facts showing insolvency,

and (iii) does not allege how the Assigned Lenders—who expressly approved the dividend—could somehow have been defrauded by it. In fact, the very documents he relies upon show the opposite.

A. The Complaint Fails to Adequately Define the Transfers It Seeks to Avoid

A trustee seeking to avoid a transfer "must plausibly allege which Debtor(s) made each of the [transfers] that [the] Trustee seeks to avoid." *Spradlin v. Wrigley's 7-711, Inc. (In re Licking River Mining, LLC)*, 572 B.R. 830, 836 (Bankr. E.D. Ky. 2017); *see also Beskrone v. OpenGate Cap. Grp., LLC (In re Pennysaver USA Publ'g LLC)*, 602 B.R. 256, 274 (Bankr. D. Del. 2019) ("This Court requires Trustee to identify the particular Debtor making [an avoidable] transfer where there are multiple Debtors involved in the case."). The fraudulent transfer claims here should be dismissed where the Trustee fails to (i) identify the particular Debtors who were the alleged transferors; (ii) define the specific transfers that it purports to challenge, or (iii) make clear whether Defendants are alleged to be the immediate or subsequent transferees of them.

Counts I, II and IV and V, for example, all seek to avoid a so-called "Special Dividend." *See* Cplt. ¶¶ 166-170, 179, 196-198, 208-210. But the Trustee neither defines what the "Special Dividend" is, nor which specific entity allegedly made it. *See id.* ¶ 115. Because the Trustee alleges that "[c]reditors of *Instant Brands* exist who could avoid the Special Dividend" (*see id*. ¶¶ 172, 179, 200 (emphasis added)), one might assume that "Instant Brands" is the alleged transferor. But the Trustee defines "Instant Brands" to include no fewer than fifteen different entities (*id*. ¶ 15 n.1) and the Complaint does not say which is alleged to have made the undefined "Special Dividend." Worse, the Complaint does not state whether Defendants are the "initial or subsequent transferees" of the challenged transfer. *Id*. ¶ 174; *see also id.* ¶¶ 182, 202, 210 (failure to plead whether Defendants are "direct recipients or subsequent transferees"). The Complaint similarly fails as to a so-called "OpCo Seller Notes Transfer" challenged in Counts II and V. The Trustee

does not define that term either, fails to identify the transferor, and fails to identify whether the purported "Seller Note Recipients" are "direct recipients or subsequent transferees" of that transfer. Cplt. ¶¶ 182, 210.

On these allegations, the fraudulent transfer claims should be dismissed. *See, e.g.*, *Moriarty v. Damon (In re PostRock Energy Corp.)*, 2018 WL 4261521, at *6 (Bankr. W.D. Okla. Sept. 6, 2018) (dismissing fraudulent transfer claim where "Complaint does not indicate which of the six PostRock Debtors allegedly made the Transfer to Damon"); *Insys Liquidation Tr. ex rel. Henrich v. Quinn Emanuel Urquhart & Sullivan, LLP (In re Insys Therapeutics, Inc.)*, 2021 WL 5016127, at *4 (Bankr. D. Del. Oct. 28, 2021) (dismissing fraudulent transfer claim where complaint referred "generically" to the "Transferring Debtor" without specifically identifying debtor).

B. The Constructive Fraudulent Transfer Claims (Counts IV-V) Also Fail Because the Complaint Does Not Show that any Transferor Was Insolvent

To plead a constructive fraudulent transfer, the Complaint must allege facts showing, among other things, that the purported debtor-transferor (1) "was insolvent at that time or . . . became insolvent as a result of the transfer," (2) "was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or (3) "intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." N.Y. Debt. & Cred. Law §§ 273(a)(2), 274. The Complaint does not do so. And it cannot do so because the very documents upon which it relies show the opposite.

1. The Complaint Fails to Allege the Insolvency of Any Particular Debtor

To show insolvency, the Trustee must allege facts to "identify which specific transferors were insolvent at the time of the allegedly fraudulent transfers"; group pleading of insolvency is not permitted. *See Infinity Emergency Mgmt. Grp. v. Neighbors Health Sys., Inc. (In re Neighbors*

Legacy Holdings, Inc.), 645 B.R. 864, 895 (Bankr. S.D. Tex. 2022) (Isgur, J.) (dismissing fraudulent transfer claim). The Complaint does not articulate the financial condition of any particular Debtor. Leaving aside the Trustee's conclusory, and therefore irrelevant, allegations of insolvency, the Trustee's allegations are made only as to "Instant Brands" (*see, e.g.*, Cplt. ¶¶ 1, 8, 118, 157, 161, 169, 178, 197), which is an umbrella term the Trustee uses to refer collectively to *fifteen* different Debtors. *Id.* ¶ 15 n.1.

In fact, the only two instances where the Trustee alleges insolvency as to a particular debtor (OpCo) are purely conclusory. *See* Cplt. ¶¶ 93 (alleging that the "Parent Transfer" "rendered OpCo insolvent and over-leveraged"), 206 (alleging, "[a]t the time the Parent Transfer was made, (i) OpCo was insolvent or the Parent Transfer rendered Instant Brands insolvent, (ii) the Parent Transfer left OpCo with unreasonably small capital, or (iii) that the Parent Transfer left OpCo with debts beyond its ability to pay as they matured and became absolute"). By contrast, all factual solvency allegations (such as they are) concern "Instant Brands" as a whole, and therefore constitute impermissible group pleading that is fatal to Counts IV-V. *See Neighbors*, 645 B.R. at 895; *Claybrook v. Pricewaterhousecoopers (In re Am. Remanufacturers, Inc.) U.S. LLC*, 2007 WL 2376723, at *4 (Bankr. D. Del. Aug. 16, 2007) (claim dismissed where trustee did not allege "facts concerning how or why any particular Debtor was either insolvent when the alleged fraudulent transfer was made or rendered insolvent by making the alleged fraudulent transfer").

2. The Complaint Does Not Allege Facts that Would Establish that Instant Brands Was Insolvent at the Time of the Dividend Recap

The Trustee's constructive fraudulent transfer claims also fail for the independent reason that he has failed to allege any of the financial criteria required under New York law: insolvency; unreasonably small assets; or debts beyond the debtor's ability to pay as they became due. N.Y. Debt. & Cred. Law §§ 273(a)(2), 274.

a. The Complaint Does Not Allege Facts Showing that Instant Brands Was Insolvent at the Time of the Dividend Recap

To plead that a company is insolvent, a Complaint must allege that "at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets." N.Y. Debt. & Cred. Law § 271(a); *see Katchadurian v. NGP Energy Cap. Mgmt., LLC (In re Northstar Offshore Grp., LLC)*, 616 B.R. 695, 737 (Bankr. S.D. Tex. 2020) (quoting similar definitions). This element must be alleged not with hindsight, but "with specific reference to the transferor's financial condition *at the time of the transfer*." *Neighbors*, 645 B.R. at 895 (cleaned up; emphasis added).

The Complaint neither alleges the fair value of Instant Brands' assets nor its liabilities at the time of the Dividend Recap. Because these factors determine insolvency, and the Complaint does not even try to compare the two, the Trustee cannot plead constructive fraudulent transfer on the grounds of insolvency. *See Rodriguez v. Cyr (In re Cyr)*, 602 B.R. 315, 332 (Bankr. W.D. Tex. 2019) (dismissing claim where "Trustee presented no allegations regarding the value of . . . debt relative to the value of . . . assets at the time the transfers were made").

The Trustee's failure to plead such facts is not saved by his conclusory allegations of insolvency. Assertions such as the "Special Dividend rendered Instant Brands insolvent" (*e.g.*, Cplt. ¶ 118) are not sufficient. *See, e.g.*, *Neighbors*, 645 B.R. at 895 (dismissing claim where trustee "effectively provides no factual support for its legal conclusion that the Neighbors transferors were insolvent"); *Austin v. Baker & Hostetler, LLP (In re Uplift RX, LLC)*, 2024 WL 5086012, at *9. (Bankr. S.D. Tex. Dec. 11, 2024) (Isgur, J.) (dismissing claim where "Complaint has not alleged any facts demonstrating that Alliance was insolvent at the time of the transfers").

Nor does the Trustee plead any other facts from which insolvency can be inferred. For instance, the Complaint repeatedly alleges that asset values were "overstated" or wrong (*e.g.*, Cplt. ¶¶ 83, 85, 105, 119), but never alleged the purported "correct" values—let alone how the former

compares to the transferor's debts, which is the crux of the solvency inquiry. In contrast, the Trustee *does* purport to value certain Instant Brands assets as of January 2023 (Cplt. ¶¶ 147, 149), but those values are irrelevant to the Dividend Recap, which occurred in April 2021. *See id.* ¶ 8.

Likewise, while the Complaint (¶¶ 69, 71, 74, 77) makes much of Instant Brands' alleged financial decline and missed projections, these allegations are irrelevant to balance-sheet insolvency. A company could miss its projections every year, yet still remain solvent. Or, as one court aptly put it, even "percentage figures of the decrease in revenue and the rise in debt levels do not rule out the possibility that the Debtors may have had a reserve such that they were not insolvent or rendered insolvent." *O'Tool v. Karnani (In re Trinsum Grp., Inc.)*, 460 B.R. 379, 393 (Bankr. S.D.N.Y. 2011).

The holes in the Trustee's allegations are scarcely surprising given that the documents he relies upon show that Instant Brands *was* solvent in April 2021. Take, for example, the Solvency Memo, upon which the Complaint extensively relies. The Trustee asserts that the Memo was flawed because it overstated the value of goodwill and intangible assets by ~$268 million. Cplt. ¶¶ 83, 119. ***Even accepting the Trustee's assertions, however, Instant Brands would still have been solvent.*** The Solvency Memo shows shareholders' equity of ~$310 million immediately following the Dividend Recap—more than enough to absorb even a $268 million overstatement of goodwill and intangible assets. *See* Ex. L (Solvency Memo, at Ex. B). The Trustee has not pleaded, and cannot plead, balance sheet insolvency.

b. The Complaint Fails to Allege, As It Must, that the Assets of the Business Were Unreasonably Small

The Complaint's allegations regarding unreasonably small assets are also deficient. *See* Cplt. ¶¶ 118, 197, 206. To allege a constructive fraudulent transfer claim on that basis, the Trustee must plead that the transferor had an "inability to generate sufficient profits to sustain operations."

Yaquinto v. Thompson Street Cap. Partners (In re Stone Panels, Inc.), 2021 WL 4436166, at *9 (Bankr. N.D. Tex. Sept. 27, 2021) (quoting *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1070 (3d Cir. 1992)). As with insolvency, courts caution "strongly against the use of impermissible hindsight" when assessing whether a debtor's assets were unreasonably small. *Jalbert v. Souza (In re F-Squared Inv. Mgmt., LLC)*, 2019 WL 4261168, at *18 (Bankr. D. Del. Sept. 6, 2019).

The Complaint here "fails to plead unreasonably small capital" because it does not allege, for any Debtor, "facts regarding [the debtor's] overall assets and liabilities," nor does the Complaint allege facts regarding "access to capital, debt to equity ratio or capital cushion.". *See id.* at *17-18. Those failures alone are grounds for dismissal. The Trustee's unreasonably small capital theory also fails because he does not attempt to size the Debtors' capital needs or allege a default on a single debt in the two years after the transaction. Absent these allegations, the Complaint provides no basis from which to infer that any Debtor's capital was unreasonably small. *See Tese-Milner v. Edidin & Assocs. (In re Operations NY LLC)*, 490 B.R. 84, 98 (Bankr. S.D.N.Y. 2013) (trustee failed to plead unreasonably small capital where complaint did not allege that debtor "failed to pay any other debts or that it lacked the capital to do so" nor "facts relating to the Debtor's sales, its ability to generate cash or its ability to pay its debts and sustain itself"); *Burtch v. Opus LLC (In re Opus E. LLC)*, 698 F. App'x 711, 715 (3d Cir. 2017) ("Generally, courts will not find that a company had unreasonably low capital if the company survives for an extended period after the subject transaction." (quotation marks omitted)); *see also Moody v. Sec. Pacific Business Credit*, 971 F.2d 1056, 1074 (3rd Cir.1992) (no unreasonably low capital where creditors paid for twelve months after transaction).

Further, the Complaint, the documents it incorporates, and other judicially noticeable facts show that Instant Brands did, in fact, have adequate capital following the Dividend Recap:

- Instant Brands did not default on its debt until June 1, 2023 (*see* Cplt. ¶ 15)—more than two years after the Dividend Recap.
- The Complaint concedes (¶ 94) that a material portion of the borrowings obtained by Instant Brands in connection with the Dividend Recap was *retained* by Instant Brands. Specifically, $37 million in cash was left with TopCo, *see id.*, and $35 million of cash (totaling approximately $72 million) remained within the Instant Brands organization, as explained in the Confidential Information Memorandum on which the Trustee relies, *see* Ex. I at 23 (Confidential Information Memorandum) (referenced at Cplt. ¶ 101).
- The Company had access to additional financing as of the Dividend Recap, including an "Existing ABL Revolver ($250 million) due 2025" and "sufficient to cover all peak working capital." *See* Ex. H at 7, 36. "ABL" refers to the "asset-based revolver" loan under which Instant Brands was a borrower. Cplt. ¶ 148.

The Trustee thus did not (and cannot) plead unreasonably small capital.

c. The Complaint Does Not Allege Facts That Would Establish That Instant Brands Intended to Incur Debts Beyond Its Ability to Pay

The Trustee also fails to satisfy the last of the three tests for financial distress under New York law—an intent to incur debts beyond the debtor's ability to pay. "The 'ability to pay' test requires proof of the transferor's subjective intent or belief that it will incur debt it cannot pay at maturity." *Geron v. Centr. Park Realty Holding Corp. (In re Nanobeak Biotech Inc.)*, 656 B.R. 350, 365 (Bankr. S.D.N.Y. 2024). Here, the Trustee has not alleged *anything at all* with respect to Instant Brands' intentions or beliefs concerning its ability to pay. *See* Cplt. ¶¶ 197, 206. This glaring omission alone is grounds for dismissal. *See Nanobeak*, 656 B.R. at 365 (dismissing count where "Trustee alleges nothing about the Debtor's intent or belief about its ability to pay debts"); *Operations*, 490 B.R. at 99 (complaint failed to satisfy test where it "does not allege any facts relating to the Debtors' intent to incur debt that it believed it would be unable to pay").

C. The Illegal Dividend Claim (Count VII) Fails for Similar Reasons

Under Delaware law, "to state a cause of action . . . a creditor first must prove that the corporation depleted its surplus in paying the dividend." *Off. Comm. of Unsecured Creditors of Color Tile, Inc. v. Blackstone Fam. Inv. P'ship, L.P. (In re Color Tile, Inc.)*, 2000 WL 152129, at *3 (D. Del. Feb. 9, 2000).[14] The Complaint does not adequately plead that the 2021 Dividend Recap actually depleted Instant Brands' "surplus," which is a defined term of art: "The excess, if any, at any given time, of the net assets of the corporation over the amount so determined to be capital shall be surplus." *See* 8 Del. C. § 154. The Trustee has failed to show that such surplus was depleted for the same reasons that his allegations in support of his constructive fraudulent conveyance claims regarding the 2021 Dividend Recap fail—including the Complaint's failure to identify which entities are being alleged to make which purported illegal dividends, as well as its failure to properly allege the insolvency of any purported transferor. *See* Cplt. ¶¶ 89–107, 223–29; Part II.B, above. Count VII also must be dismissed because the Trustee has failed to plead allegations showing the directors dd not act in "good faith." 8 Del. C. § 172; *see* Part IV.B., below.

D. The Dividend Recap Was Not an Intentional Fraud

The Trustee's claim that the Dividend Recap was an actual fraud on Instant Brands' lenders also fails. Cplt. ¶¶ 163–182. To plead such a claim requires the Trustee to allege with particularity facts showing that the Dividend Recap was made "with actual intent to hinder, delay or defraud any creditor of the debtor." N.Y. Debt. & Cred. Law § 273(b). The problem with the Trustee's

[14] The Complaint incorrectly cites New York law. Delaware law applies because the illegal dividend claim relates to Instant Brands' internal affairs and all of the Instant Brand companies at issue are Delaware corporations. *See West v. Avery (In re Noram Res., Inc.)*, 2011 WL 5357895, at *5-6 (Bankr. S.D. Tex. Nov. 7, 2011) (Isgur, B.J.) ("Both federal and Texas choice-of-law rules state that a corporation's internal affairs should be governed by the law of the state of incorporation."). And the illegal dividend claim would fail under New York law in any event.

fraudulent transfer theory is that the Assigned Lenders—the only creditors whom the Trustee alleges to have been defrauded (Cplt. ¶¶ 169, 178)—*knew from the language of their Credit Agreement that a dividend would be made and that they were funding it*.[15] *See* pp.8, above.

Ignoring the Credit Agreement's plain language expressly providing for the dividend, the Trustee cites purported "badges of fraud," including alleged insolvency, insider status, and management's alleged disregard for "headwinds" to the business. Cplt. ¶¶ 169, 178. But the Trustee "appears to conflate the purported fraudulent transfer and the fraudulent conduct" that undergirds his fraudulent inducement claim. *Uplift RX*, 2024 WL 5086012, at *10. As this Court recently cautioned, "the actual intent to defraud creditors *must refer to the transfer itself*." *Id.* (emphasis added). A transfer disclosed to lenders and that they approved—even if the loan that funded the transfer was secured under allegedly false pretenses—cannot be *a transfer* made to defraud, hinder, or delay those creditors.

"Because they are only evidence of the likelihood of fraud, badges of fraud are not given equal weight; and sometimes the circumstances indicate they should be given no weight at all." *In re Chin*, 492 B.R. 117, 131 (Bankr. E.D.N.Y. 2013). "They must be judged in the context of other evidence and in light of what reasonable implications can be drawn from it in a particular case." *Geron v. Craig (In re Direct Access Partners, LLC)*, 602 B.R. 495, 544 (Bankr. S.D.N.Y. 2019). Here, the indisputable "context" is that the Assigned Lenders were aware that the proceeds of their loan would be used to pay the Special Dividend and consented to it. In that context, none of the Trustee's alleged badges point to actual fraud:

[15] For this reason, among others, the Cornell Defendants reserve the right to assert that the Assigned Lenders ratified the transaction and therefore cannot participate in any potential recoveries on the claims to the extent they survive the pleadings stage. *See Crescent Res. Litig. Tr. v. Duke Energy Corp.*, 500 B.R. 464, 483 (W.D. Tex. 2013).

- Instant Brands' alleged insolvency has been refuted above, and its absence colors the remaining analysis. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 2013 WL 12124306, at *2 (N.D. Tex. Jun. 18, 2013) (explaining how solvency, though not decisive, can "negate[]" other circumstantial evidence of intent).

- The "insider" badge, together with allegations that Instant Brands incurred new debt for no consideration, do not give rise to an inference of fraudulent intent because they are true of *every* dividend recapitalization. *See Direct Access Partners*, 602 B.R. at 545 ("Every dividend is made without consideration for purposes of fraudulent transfer law, but that does not mean that one could or should conclude that every dividend payment is made with fraudulent intent."); *Verizon*, 2013 WL 12124306, at *3 (concluding that "transfer to an insider and transfer shortly before a substantial debt was incurred" were "features of every spinoff transaction that involves debt" and were "insufficient as a matter of law to support a conclusion that the defendants actually intended to hinder, delay, or defraud").

- A disregard for "critical headwinds" to the business, even if true (and it is not), is no evidence of fraud either. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 10 F.4th 147, 162 (2d Cir. 2021) (allegation that independent directors "knew that Tribune was falling far short of projections and thus was unlikely to generate enough cash to service its debt" was insufficient to support an intentional fraudulent transfer claim).[16]

For these reasons, and others discussed above, the claims alleging that the Dividend Recap was a fraudulent transfer or illegal dividend should be dismissed.

III. The Complaint Cannot Show that the UnSub Transaction Was a Fraudulent Transfer—and Claims Arising from the Unwinding of that Transaction Were Released in the DIP Order (Counts III and VI)

The Complaint's fraudulent transfer claims arising out of the UnSub Transaction should also be dismissed. Cplt. ¶¶ 183–194, 211–222.

A. The Trustee Cannot Allege that the UnSub Transaction Was a Transfer for Less than Reasonably Equivalent Value

To state a claim for constructive fraudulent transfer, the Trustee must allege facts showing that the UnSub Transaction was a transfer made "without receiving a reasonably equivalent value

[16] In any event, the Trustee's "headwinds" argument is unambiguously rebutted by the same January 2021 presentation that the Trustee relies upon. Cplt. ¶ 127. For each of the "headwinds," the January 2021 presentation details Instant Brands' "mitigation plans," thus demonstrating that none were being ignored. Ex. F at 29-31 (Jan. 2021 Board Presentation).

in exchange." N.Y. Debt. & Cred. Law § 273(a)(2). In the UnSub Transaction, Instant Brands is alleged to have (i) created new wholly owned subsidiaries, (ii) "transfer[ed] essentially all of its tangible assets" to them, and then (iii) used those assets "as collateral for a $55 million loan from Cornell Capital Partners LP," which loan proceeds were used to provide liquidity to Instant Brands. Cplt. ¶ 147; *see id.* ¶ 56. The claim that this transaction was constructively fraudulent (Count VI) fails out of the gate because the Trustee cannot allege that any transfer comprising the UnSub Transaction was for less than reasonably equivalent value. *See id.* ¶¶ 211–222.

To start, it is black letter law that "a transfer to a solvent, wholly-owned subsidiary does not amount to a fraudulent transfer." *Off. Comm. of Unsecured Creditors of HH Liquidation, LLC v. Comvest Grp. Holdings, LLC (In re HH Liquidation, LLC)*, 590 B.R. 211, 266 (Bankr. D. Del. 2018). "The reasoning behind this rule is sound. It is not fraudulent to allocate property to a solvent, wholly-owned subsidiary because the transferor receives value equal to the transferred asset" in the form of an increase in equity value, *id*., and "the value of the transferred property is ultimately available to satisfy any claims made by [the parent's] creditors," *id*. at 267 (citing *In re First City Bancorporation of Tex., Inc.*, 1995 WL 710912, at *18 n.9 (Bankr. N.D. Tex. May 15, 1995)). The Complaint does not and cannot allege that Instant Brands' newly-formed, unrestricted subsidiaries were insolvent or that they had any creditors other than Cornell. Instant Brands' transfer of assets to its subsidiaries was therefore not a constructively fraudulent transfer.

The obligations and liens that Instant Brands incurred in the UnSub Transaction also were for reasonably equivalent value. *See* Cplt. ¶¶ 14, 147, 157, 160, 184. The Trustee asserts that Instant Brands received "merely a $55 million loan," implying (without quantifying) that it gave up much more than that. *Id.* ¶¶ 160, 187. But any liens and obligations incurred by Instant Brands were by definition equal to—indeed, limited to—the value of the purported loan it obtained. *See*

Peterson v. Colony Am. Fin. Lender LLC, 634 B.R. 1010, 1019 n.3 (Bankr. N.D. Ill. 2021) (stating that "exchange of funds for a lien on a dollar-for-dollar basis is 'value,' and indeed reasonably equivalent value, as a matter of law"); *First Nat'l Bank of Seminole v. Hooper*, 104 S.W.3d 83, 84 (Tex. 2003) ("as a matter of law, the value of the interest in an asset transferred for security is reasonably equivalent to the amount of the debt that it secures"); *Off. Comm. of Unsecured Creditors v. Hancock Park Cap. II, L.P. (In re Fitness Holdings Int'l, Inc.)*, 529 F. App'x 871, 874 (9th Cir. 2013) (affirming dismissal of fraudulent transfer claims that "do[] not allege that the value of the security interest exceeded the value of the loan . . . which is a necessary element of a claim for a constructively fraudulent transfer.").

Finally, the last step in the transaction—the ultimate repayment of the purported UnSub loans in the bankruptcy to release the liens on the assets transferred—was likewise not a fraudulent transfer. The repayment of an antecedent loan is, by definition, for reasonably equivalent value. *See, e.g.*, *Se. Waffles, LLC v. Dep't of Treasury (In re Se. Waffles, LLC)*, 702 F.3d 850, 857 (6th Cir. 2012) ("a dollar-for-dollar reduction in debt constitutes—as a matter of law—reasonably equivalent value for purposes of the fraudulent-transfer statutes"); *Brown v. Douglas (In re Dual D Health Care Operations, Inc.)*, 2021 WL 3083344, at *10 (Bankr. N.D. Tex. July 21, 2021) ("When a debtor makes a payment on antecedent debt and receives a dollar-for-dollar reduction of that debt, the question is easy because the debtor by definition receives reasonably equivalent value." (cleaned up)). And even if it were not, the repayment of the purported $55 million loan in the bankruptcy was provided for in the Court's final DIP Order and all claims relating to that repayment were released. *See* Main Case Dkt. 257, p.28 ¶ 5 ("[T]he payment of the Prepetition Reimbursement Note Obligations is not subject to any challenge, contest, disgorgement, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization,

avoidance, or other claim, cause of action, or other challenge of any nature under the Bankruptcy Code, applicable law, or otherwise.").

Rather than pleading a lack of reasonably equivalent value at any step of the UnSub Transaction, the Complaint instead asserts that it "resulted in the substantial deterioration of the transferred assets" (Cplt. ¶ 185), *i.e.*, that the transferred assets were purportedly worth less after the bankruptcy than on the day they were transferred within Instant Brands to wholly-owned subsidiaries. But this theory fails because whether a transfer is made for reasonably equivalent value "is determined as of the date of transfer." *Jalbert v. Wessel GmbH (In re Louisiana Pellets, Inc.)*, 838 F. App'x 45, 49 (5th Cir. 2020) (quoting *Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638, 644 (5th Cir. 2000)). And "[b]ecause value is determined at the time of transfer, neither subsequent depreciation in nor appreciation in value . . . affects the question whether reasonable equivalent value was given." *Id.* at 50 (cleaned up); *see also In re Hannover Corp.*, 310 F.3d 796, 802 (5th Cir. 2002).

B. The Complaint Alleges No Facts Supporting Its Claim that the UnSub Transaction Was an Actual Fraudulent Transfer

The Trustee's claim that the UnSub Transaction was an actual fraudulent transfer also fails. Cplt. ¶¶ 183–194. As explained above, the Credit Agreement permitted the UnSub Transaction and the Trustee does not allege facts showing otherwise. See Part I.C.2, above. That is the end of the matter. Indeed, as with the "Special Dividend," the Trustee's allegations demonstrate the *lack* of fraud: They show that the UnSub Transaction was a set of transfers for reasonably equivalent value (*see* Part III.A, above) that fulfilled, according to the Complaint, Instant Brands' "need" for $55 million "to pay suppliers," to "fulfill obligations to retailers," and "to pay down the company's asset-based revolver" (Cplt. ¶ 148). The Complaint nevertheless pleads that the transaction was an actual fraud because the liquidity provided was supposedly meant "to delay Instant Brands'

bankruptcy until after the two-year look-back period passed with respect to the Special Dividend." Cplt. ¶ 187. The Complaint fails to allege any facts to substantiate this conclusory assertion.

Rather than point to *anything* suggesting that the UnSub Transaction was made to shield liability for the "Special Dividend," the Complaint again points to Cornell's alleged insider status and a half-hearted recital of additional purported "badges" of fraud. *Id*. But insider status alone is far from sufficient to state a claim for fraud. "While transactions involving insiders are subject to greater scrutiny than those that are arm's length, not every transfer among parents and children can withstand a motion to dismiss without sufficient facts to raise a right to relief above the speculative level." *Agin v. Grasso (In re Luciani)*, 584 B.R. 449, 462 (Bankr. D. Mass. 2018). Since insiders are often a source of financing, more must be pled to state a claim. *See, e.g., Miller v. Black Diamond Cap. Mgmt., L.L.C. (In re Bayou Steel BD Holdings, L.L.C.),* 642 B.R. 371, 397 (Bankr. D. Del. 2022) (dismissing actual fraudulent transfer claim despite presence of "insider" badge because "insiders are likely lender candidates for a distressed entity in need of financing").

Instant Brands' alleged insolvency does nothing to move the needle. If insolvency, together with insider status, were sufficient to state a claim for actual fraud, distressed companies could rarely, if ever, expect to access rescue financing from their sponsors. *See Bayou Steel*, 642 B.R. at 397 ("[P]ermitting a claim to advance that rests on insider status and financial distress alone would discourage rescue financing to the detriment of borrowers with limited options like the Debtors."); *see also Kaye v. Nath Cos*. (*In re Duke & King Acquisition Corp.*), 508 B.R. 107, 140 (Bankr. D. Minn. 2014) (presence of three badges, including transfer to insider and insolvency, "did not ignite in common to the inference" of actual fraud; "it did not even smolder").

The handful of remaining purported badges cited in paragraph 187 of the Complaint are similarly inconsequential, if not unintelligible. Most notably, the Complaint pleads that Cornell

"retained possession or control of the property transferred after the transfer." Cplt. ¶ 187. This fails to support a claim for two reasons. *First*, it mangles the relevant badge of fraud, which looks to whether the *debtor* (not the *transferee*) has retained possession or control of purportedly transferred property. *See, e.g.*, N.Y. Debt. & Cred. Law § 273(b)(2) (phrasing the relevant badge as whether "the debtor retained possession or control of the property transferred after the transfer"). *Second*, Cornell did *not* retain the transferred property; as the Complaint acknowledges, assets were transferred to Instant Brands' wholly owned subsidiaries—*not* to Cornell. Cplt. ¶¶ 14, 56, 147. No inference of fraud can be drawn from these allegations and Count III should be dismissed.

C. The Court-Approved Unwinding of the UnSub Transaction Vitiates Any Claim to Recovery under Section 550

Even had the Trustee stated a claim for avoidance of the UnSub Transaction, the repayment and unwinding of the UnSub Loan in the bankruptcy vitiates any claim to recovery from Defendants under section 550 of the Code. The Complaint shows that none of the UnSub Assets were conveyed to Cornell, which instead only obtained a lien which has long since been dissolved. *See* Cplt. ¶¶ 147, 160. There is nothing else that can possibly be "owed" by Cornell. Nor can the funds repaid to Cornell be clawed back, since any such claims were released by the Final DIP Order. *See* Part III.A., above (quoting the release).

The Bankruptcy Code distinguishes between avoidance—governed (as relevant here) by sections 544 and 548—and recovery—governed by section 550. While transfers and obligations are both subject to avoidance, only transfers are subject to recovery. *See* 11 U.S.C. § 550(a) ("to the extent that a transfer is avoided under section 544 [or] 548 . . . the trustee may recover for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property"); *see also, e.g.*, *In re Asia Glob. Crossing, Ltd.*, 333 B.R. 199, 202 (Bankr. S.D.N.Y. 2005)

(contrasting transfers and obligations, noting that if the trustee "avoids an obligation, the obligation is rendered unenforceable, there is nothing to return and § 550 affords no remedy").

In the case of the UnSub Transaction, there are no transfers left to recover from any relevant transferee. The liens and claims granted to Cornell in the transaction were *obligations*, not transfers of property. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 2012 WL 3100778, at *4-6, 9 (N.D. Tex. July 31, 2012) (concluding that since liens and claims "were obligations incurred, and not transfers of property, the plaintiff cannot recover money damages from the defendants under Section 550"). Thus, even if the already-released liens were still *avoidable* under section 544 (a nonsensical proposition in and of itself), they are not subject to any *recovery* under section 550. The transfer of funds to Cornell in satisfaction of its claim, even if theoretically *avoidable*, is likewise not *recoverable*, since any claims for recovery were released by section 5 of the Final DIP Order. *See* Part III.A, above (quoting the release).

IV. The Trustee's Fiduciary Duty Claims Fail

The Trustee asserts that the directors and officers of TopCo, Intermediate HoldCo, and OpCo breached their duties of care and loyalty under New York law. Cplt. ¶ 238. These claims must be dismissed because no such duties apply. As noted earlier, TopCo, Intermediate HoldCo, and OpCo are Delaware corporations and the internal affairs doctrine thus mandates that Delaware, not New York, law governs their directors' and officers' duties. See n.15, above. But even if the Trustee had asserted breaches of Delaware law, those claims would still fail for the below reasons.

A. The Trustee Cannot State a Duty of Care Claim

1. The Trustee's Director Duty of Care Claims Are Barred by the Certificates of Incorporation for TopCo, Intermediate HoldCo, and OpCo

Delaware permits corporations to adopt certificates of incorporation "exculpating its directors from monetary liability for a breach of duty of care by the corporation or its

shareholders." *Burtch v. Huston (In re USDigital, Inc.)*, 443 B.R. 22, 43 (Bankr. D. Del. 2011); *see* 8 Del. C. § 102(b)(7) (stating that the "certificate of incorporation may also contain" a "provision eliminating or limiting the personal liability of a director or officer"). TopCo, Intermediate HoldCo, and OpCo have each adopted exculpation clauses, providing, "To the fullest extent permitted under the DGCL, as amended from time to time, no director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director." Ex. B (OpCo Cert. of Incorporation, Art. VI); Ex. A (Intermediate HoldCo Cert. of Incorporation, Art. VII) (same); Ex. C (TopCo 3d Am. & Restated Cert. of Incorporation, Art. VIII) (same).

These certificates can be invoked at the pleading stage to dismiss "claims alleging a breach of the duty of care." *USDigital*, 443 B.R. at 43. For example, in *Superior Offshore Int'l, Inc. v. Schaefer*, the court "dismissed Plaintiff's 'duty of care' claim based on the exculpatory provision in Superior's Certificate of Incorporation." 2012 WL 1551703, at *1 (S.D. Tex. Apr. 30, 2012); *see Reed v. Linehan (In re Soporex, Inc.)*, 463 B.R. 344, 413 n.41 (Bankr. N.D. Tex. 2011) (concluding that exculpation clause in debtor's "certificate of incorporation," "may be considered by the Court" on a motion to dismiss). The Second Circuit has likewise held "that the exculpatory clause in [Debtor's] Certificate of Incorporation precludes the Trustee from bringing any due care claims seeking monetary awards against the directors, whether brought on behalf of the creditors or [Debtor] itself." *Pereira v. Farace*, 413 F.3d 330, 342 (2d Cir. 2005). Because the Debtors here have adopted certificates eliminating director liability "to the fullest extent permitted by" Delaware law, the "director defendants are exculpated from breaches of duty of care." *Leap Tide Cap. Mgmt., LLC v. Rafield (In re Diadexus, Inc.)*, 2019 WL 3412928, at *5 (N.D. Cal. July 29,

2019) (cleaned up); *see Pereira*, 413 F.3d at 342 (exculpation provisions "preclude[] creditor claims predicated on mismanagement—*i.e.*, duty of care violations").

2. The Trustee Has Failed to Plead Facts Showing Gross Negligence

The Trustee's duty of care claims fail for the independent reason that he has not alleged facts showing gross negligence. In Delaware, "duty of care violations are actionable only if the directors acted with gross negligence." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 192 (Del. Ch. 2005). The Trustee asserts in conclusory fashion that the "Director and Officer Defendants acted with gross negligence," Cplt. ¶ 234, but as this Court has explained in "the context of a motion to dismiss," "gross negligence 'requires the articulation of facts that suggest a *wide* disparity between the process the directors used and a process which would have been rational.'" *Northstar*, 616 B.R. at 741 (Isgur, J.) (italics in original, cleaned up). Here, the Trustee has failed to "allege any specific facts to support an inference that the [] Directors' decision-making process was grossly negligent or uninformed" as to either the Special Dividend or the UnSub Transaction. *Id.* at 742.

a. The Trustee's Special Dividend Allegations Fail to State a Breach

As to the Special Dividend, the Trustee alleges four theories of gross negligence, none of which state a claim. Cplt. ¶ 234(a)-(d). The Trustee's first two theories simply repackage the Trustee's deficient fraudulent transfer and illegal dividend claims, alleging that the directors and officers approved the Special Dividend while knowing that "Instant Brands was insolvent" or would be rendered insolvent. *Id.* ¶ 234(a)-(b). Because the Trustee has failed to plead any insolvency, the Trustee cannot rely on those deficient allegations to plead breach of fiduciary duty.

The Trustee next claims that Defendants breached their fiduciary duty by proceeding with the Special Dividend "based on a facially—and what they knew to be—critically flawed solvency

analysis." *Id.* ¶ 234(c). This theory fails, because, as explained above, even accepting the Trustee's allegations of substantive flaws in the solvency analysis as true, correcting those flaws pursuant to the Trustee's allegations still results in Instant Brands being solvent under both the balance sheet test and the cash-flow test. *See* Part II.B, above.

The Trustee has also failed to plead any facts showing that Defendants "knew" the solvency memo was faulty. *See* Cplt. ¶¶ 118–134. He asserts that the memo was an obvious farce because it was written "***after*** the board unanimously approved the Dividend" in the "March Resolution" on March 18, 2021, thus making the dividend "a fait accompli." *Id.* ¶¶ 109-110, 116 (emphasis in original). That allegation finds no support in the March Resolution he cites, which shows that the Board did not approve *any* dividend amount in March, let alone the alleged $345 million dividend. *See* Ex. J at 2 (March 21 Board Resolution). Rather, the March Resolution approved pursuing a dividend while leaving the amount and timing for further deliberation, *id.*, and then, in April, the Board determined to approve the Dividend *after* obtaining the solvency memo, *see* Ex. L (Solvency Memo); Ex. N (April Board Resolutions). That is not gross negligence.[17]

Finally, the Trustee alleges that "[a]ccumulating debt for the sole purpose of issuing a dividend" breached the Directors' and Officers' fiduciary duties. Cplt. ¶ 234(d). But this claim is contradicted by the Trustee's allegation that the loan proceeds were used for multiple purposes, including, to "pay off OpCo's existing debt," and "to pay off the Seller Notes which were issued by TopCo to the Instant Brands Sellers as consideration for the 2019 acquisition." *Id.* ¶¶ 93-94.

[17] Nor can the Trustee claim that any Defendants breached their duty of care by relying on an internally-developed solvency analysis. *See* Cplt. ¶ 9. Courts have rejected the "proposition that failing to obtain an outside solvency analysis constitutes a breach of the duty of care." *Off. Comm. of Unsecured Creditors v. Sabine Oil & Gas Corp. (In re Sabine Oil & Gas Corp.)*, 562 B.R. 211, 231 (S.D.N.Y. 2016). In any event, the Credit Agreement shows that the Dividend Recap was reviewed by two independent ratings agencies. Ex. M § 6.17.

And absent insolvency, "there is no basis to fault" directors and officers for taking actions that benefit their company's sole owners, even if those actions render the company "less valuable as an entity." *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 201 (Del. Ch. 2006).

b. The Trustee's UnSub Allegations Fail to State a Breach.

The Trustee likewise offers no allegations substantiating that a fiduciary acted with gross negligence in the UnSub Transaction. Instead, the Complaint shows that the UnSub Transaction was undertaken with due deliberation by independent directors. By alleging (1) that the UnSub Transaction addressed Instant Brands' immediate "need" to "to pay" creditors and suppliers and to "fulfill obligations" to retailers (Cplt. ¶ 148); and (2) the TopCo Board formed "a special committee" to determine whether to approve the UnSub Transaction (*id.* ¶ 149), the Complaint establishes "evidence of sound corporate governance," *In re Rouse Props., Inc.*, 2018 WL 1226015, at *19 (Del. Ch. Mar. 9, 2018). The Trustee's three attacks on this process fail.

First, he asserts that the UnSub Transaction provided "no or meaningless consideration," to Instant Brands (Cplt. ¶ 234(h)), but this claim cannot survive the Trustee's allegations that the UnSub Transaction provided Instant Brands the $55 million that management had concluded was necessary "to manage working capital and debt service" (*id.* ¶¶ 145, 160).

Second, the Trustee cannot claim that the UnSub Transaction rendered Instant Brands insolvent (Cplt. ¶ 234(a) because his allegations are that the UnSub Transaction was balance sheet neutral: Instant Brands obtained a purported $55 million loan to cover $55 million in existing obligations (*id.* ¶¶ 145, 160). His solvency argument thus boils down to the notion that Instant Brands' directors and officers "should have filed for bankruptcy rather than enter into the [UnSub] Transactions" and that they breached their duty of care by "delaying the unavoidable bankruptcy," but "Delaware law does not support such claims." *Off. Comm. of Unsecured Creditors v. Nat'l*

Amusements Inc. (In re Midway Games Inc.), 428 B.R. 303, 315-16 (Bankr. D. Del. 2010). Delaware empowers fiduciaries "in taking steps to continue the firm's operations," and because the Trustee has not shown that those steps were grossly negligent, his duty of care claim fails. *Id.*

Finally, the Complaint forecloses the Trustee's assertions that the "UnSub Transaction disposed of effectively all of Instant Brands Holdings, Inc.'s remaining assets" and decreased the UnSub Assets' "value by removing, liquidating and/or mismanaging the UnSub Assets and related assets and personal property." Cplt. ¶¶ 234(f)-(g). The UnSub Transaction did not dispose of or change the control of any assets: it simply transferred title within Instant Brands to wholly owned subsidiaries; therefore, Instant Brands retained 100% ownership and control. *See* Part III.A, above.

Nor does the Trustee allege any coherent theory for how internally transferring title to the UnSub Assets decreased their "value." Cplt. ¶ 234 (g). Instead, he merely compares a "*draft* valuation report," of the UnSub Assets (*id*. ¶ 149 (emphasis added))—which the Special Committee concluded was "potentially overstated and would ultimately be lower," Ex. Qat 2—with a valuation that was performed after the bankruptcy (Cplt. ¶ 159), and speculates that the delta between them must be from the UnSub Transaction. This conclusory speculation fails as a matter of law because, "the Trustee's allegations are focused on the outcome of the directors' decisions, rather than on the process of the directors' decisions." *Northstar*, 616 B.R. at 742.

B. The Trustee's Duty of Loyalty Claim Fails

1. The Duty of Loyalty Claim Is Based on Inadequate Group Pleading.

A "plaintiff may not rely on group pleading to assert a breach of fiduciary duty claim." *Steinberg v. Sherman*, 2008 WL 2155726, at *5 (S.D.N.Y. May 8, 2008). The Trustee, however, lumps the "Directors and Officers" into an undifferentiated group, claiming that "[t]he Director and Officer Defendants each stood to personally benefit from the Special Dividend separate and apart from the benefit received by other shareholders, and none were disinterested in the

Prepetition Term Loan, the Special Dividend, or the UnSub Transaction." Cplt. ¶¶ 231, 235. This conclusory group pleading cannot state a claim. *Steinberg*, 2008 WL 2155726, at *5.

2. Instant Brands' Sole Shareholders Approved the Special Dividend.

The duty of loyalty claim based on the Special Dividend also fails for the independent reason that Instant Brands' sole shareholders, according to the Trustee, authorized it. The Trustee alleges that the Special Dividend occurred pursuant to the Restructuring Agreement—which all Instant Brands' owners agreed to—and the Special Dividend benefited those owners. *See* Cplt. ¶¶ 56 ("Cornell Capital received a majority share (64%) of TopCo and the Instant Brands Sellers *received the remaining* minority share." (emphasis added)), 64 ("Cornell Capital, the Instant Brands Sellers, and Instant Brands signed a restructuring agreement on February 7, 2020), 169 ("Cornell Capital's earmark of the Special Dividend in the Restructuring Agreement . . ."). Those allegations preclude any duty of loyalty claim as a matter of law. "[A] subsidiary board is permitted to act to benefit its parent, not simply the subsidiary itself, for the obvious reason that wholly-owned subsidiaries are formed by parents to benefit the parents." *Trenwick Am. Litig. Tr.*, 906 A.2d at 202. Because Instant Brands was not insolvent as of the Special Dividend, its directors and officers acted properly by taking "action in aid of its parent[s'] business strategy." *Id.* at 201.

3. The Complaint Fails to Allege that the UnSub Transaction Was Unfair.

The Trustee's duty of loyalty claim regarding the UnSub Transaction also fails. *See* Cplt. ¶ 231. "Transactions between a controlling shareholder and the company are not *per se* invalid under Delaware law." *Monroe Cnty. Emps'. Retire. Sys. v. Carlson*, 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010). "[E]ven in a self-interested transaction," a "plaintiff must allege some facts that tend to show that the transaction was not fair." *In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.*, 318 A.3d 306, 310, 321 (Del. Ch. 2024) (dismissing complaint, "pleading

requirements exist even where entire fairness applies"), *aff'd*, 2024 WL 5114140 (Del. Dec. 16, 2024). Thus, "a plaintiff must do more than allege that a transaction is a self-interested one in order to state a claim. He or she must as well allege some facts which if true would render the transaction unfair." *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *6 (Del. Ch. Apr. 21, 1995).

Therefore, even assuming Delaware's strictest standard—the entire fairness test—applies to the Unsub Transaction, "to state a claim, a complaint must allege facts from which the Court can infer that both the process leading up to and price of the challenged transaction conceivably were unfair." *Honma v. Schacknies*, 2024 WL 3027293, at *4 (Del. Ch. June 17, 2024), *exceptions denied*, 2024 WL 5126806 (Del. Ch. Dec. 16, 2024). If a complaint shows that the process followed was fair, then the burden shifts to the plaintiff to show that the price was actually (not just conceivably) unfair. *In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 462 (Del. 2024).

a. The UnSub Transaction Resulted from a Fair Process

The decision-making process will be deemed fair if it was delegated to "an independent committee of directors." *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 762 (Del. 2018). The Complaint alleges just that: the TopCo board delegated authority to review, negotiate, accept, or reject the UnSub Transaction to an independent committee of Dubel and McRae. *See* Cplt. ¶ 149.

The Trustee does not plead *a single* fact to show that either director had a conflict of interest. The Trustee's sole attack on the Special Committee's independence is his incorrect assertion that the TopCo Board resolution creating the Special Committee empowered it only to "authorize," not reject, the transaction. Cplt. ¶¶ 149, 151. In fact, that resolution empowered the committee not merely to approve the UnSub Transaction but also to "reject a Potential Transaction or, if applicable, to negotiate terms, structure and conditions of a Potential Transaction," and to retain advisors to assist in that process. Ex. O at 1-2 (Jan. 12, 2023 Resolution). The decision-

making process resulting in the UnSub Transaction was therefore fair and it is thus the Trustee's "burden" to allege "that the transaction was not entirely fair." *In re Match Grp.*, 315 A.3d at 462.

b. The UnSub Transaction Was Conducted at a Fair Price.

The "fair price" prong of the entire fairness test examines the "economic and financial considerations of the transaction." *Honma*, 2024 WL 3027293, at *4 (cleaned up). The UnSub Transaction has three such aspects: (1) Cornell provided $55 million in financing to Instant Brands; (2) Instant Brands moved certain tangible assets into wholly owned subsidiaries of Instant Brands; and (3) Cornell received a lien on those assets to secure the purported $55 million loan. Cplt. ¶¶ 147, 160. Each of these aspects, as alleged in the Complaint, was fair.

First, receiving $55 million and promising to pay $55 million at a later date, under any analysis, is a "fair price." *Honma*, 2024 WL 3027293, at *4. In fact, the Trustee does not allege that any aspect of this alleged dollar-for-dollar $55 million loan was unfair. *Second,* Instant Brands' internal transfer of assets to wholly owned unrestricted subsidiaries was fair. Cplt. ¶¶ 56, 147, 184. As explained above, Part III.A, a transfer to a solvent, wholly-owned subsidiary is, as a matter of law, for equivalent value. Further, the Credit Agreement expressly permitted the transfer. *See* Part I.C.2, above. *Third*, the $55 million lien was fair because it corresponded to, and was limited to, the new financing that Cornell provided, dollar-for-dollar. *See* Part III.A, above. Additionally, because the Trustee concedes that the subsidiaries were "unrestricted," Cplt. ¶ 14, the Credit Agreement expressly permitted the lien. Credit Agm't § 6.11.

The Trustee thus fails to allege this transaction was "priced unfairly." *Monroe Cnty. Emps.' Retire. Sys.*, 2010 WL 2376890, at *2. He has "simply alleged that the transaction was a self-dealing one and, in conclusionary fashion, that it was ill-informed, coercive, grossly unfair, etc. This is insufficient to state a claim." *Solomon*, 1995 WL 250374, at *6.

c. The Trustee Fails to State a Claim Based on Delayed Bankruptcy

The Trustee also incorrectly claims the Defendants breached their fiduciary duties because the UnSub Transaction forestalled bankruptcy. Cplt. ¶¶ 147, 234(h). His theory is that the assets collateralizing the purported $55 million loan would purportedly have been worth more to creditors if Defendants had put Instant Brands into bankruptcy immediately rather than avoiding it for six months after the Unsub Transaction. Cplt. ¶¶ 146, 157-160. That is merely a deepening insolvency claim dressed up as a breach of fiduciary duty claim and it fails under Delaware law.

Fiduciaries "do not have a duty to shut down the insolvent firm and marshal its assets for distribution to creditors." *Quadrant Structured Prods. Co. v. Vertin*, 115 A.3d 535, 546–47 (Del. Ch. 2015). They "cannot be held liable for continuing to operate an insolvent entity in the good faith belief that they may achieve profitability, even if their decisions ultimately lead to greater losses for creditors." *Id.* Delaware law rejects such "deepening insolvency" claims even if framed "by some other name," *i.e.*, breach of fiduciary duty. *Midway Games*, 428 B.R. at 315-16.

The Trustee attempts to avoid these precedents by claiming that Defendants undertook the UnSub Transaction in bad faith, motivated to delay bankruptcy past Section 548's two-year lookback period. Cplt. ¶ 14. This allegation cannot be credited. *First*, it is hopelessly conclusory. The Trustee possesses Instant Brands' documents and yet fails to cite a single one supporting this misguided theory. Instead, he simply repeats the same conclusory assertions, Cplt. ¶¶ 14, 147, 159, 187; but conclusory allegations cannot be credited even when pleading interested-party transactions. *Solomon*, 1995 WL 250374, at *6.

Second, the Trustee's theory reduces to the absurd premise that Cornell poured $55 million into a company it knew would require restructuring to avoid exposure under federal avoidance law, only to leave itself exposed to substantially similar state avoidance laws with longer lookback

periods. *See, e.g.*, NY-UVTA § 278(a) (four-year period); *see also* 11 U.S.C. § 544. That is nonsensical, and such speculative allegations cannot be credited, even at the pleading stage.

V. The Trustee's Aiding and Abetting Breach of Fiduciary Duty Claims Fail

The Trustee has failed to plead aiding and abetting breach of fiduciary duty, which requires "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) knowing participation in that breach by the non-fiduciary." *Uplift RX*, 2024 WL 5086012, at *8-9.

First, the Trustee fails to identify an actionable breach. *See* Part IV, *above*.

Second, the Trustee contends that Cornell "participated" in breaches through three purported theories of "control" over the Directors and Officers, but the Complaint precludes each theory. Cplt. ¶¶ 245–246. (1) The Trustee claims that Cornell employed, and thus controlled, each of the directors and officers, *id.*, but he alleges that during both the Special Dividend and the UnSub Transaction, Cornell employed *only three* of Instant Brands' *nine* directors, and the Trustee does not allege that Cornell employed *any* of Instant Brands' officers, *id.* ¶¶ 109, 235 n.8, 246(a)-(c). (2) The Trustee wrongly asserts that Cornell could remove, and thus controlled, each of Instant Brands' directors. Cplt. ¶ 245. But that is not accurate: pursuant to the Restructuring Agreement, Cornell could appoint a majority of the Board but could not unilaterally remove the minority directors or the independent directors. Ex. D at 141-142 (Restructuring Agreement). (3) The Trustee alleges that Cornell offered "financial incentives" to, and thus controlled, Instant Brands' officers and directors. Cplt. ¶ 245. These allegations are conclusory and cannot be credited—the Trustee does not identify what Cornell purportedly offered, to whom it made such offers, and whether such offers even had any relationship to these transactions.

CONCLUSION

For the reasons set forth above, the Cornell Defendants ask that this Court dismiss Plaintiff's Complaint.

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Respectfully submitted,

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