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 COINVEST 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. Proceeding No. 24-03232 (MI)

MEMORANDUM OF LAW IN SUPPORT OF THE FORMER D&Os' MOTION TO DISMISS COUNTS I, II, IV, V, VII, VIII, AND XI

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Benoit Gadbois, Nicholas Hewitt, Jeffrey Kist, William Hess, Catherine Landman, Kenneth Wilkes, John Dubel, and Lawrence McRae ("Former D&Os")[1] move to dismiss all counts against them under Rules 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure ("Rules"), made applicable to this adversary proceeding by Federal Rules of Bankruptcy Procedure 7009 and 7012.[2]

PRELIMINARY STATEMENT

Plaintiff Alan D. Halperin, acting solely in his capacity as Litigation Trustee of the Instant Brands Litigation Trust ("Trustee"), brought multiple claims—which, as to four Former D&Os, were not retained (and were released) by the debtors' chapter 11 plan—to recover damages based on the same alleged conduct.[3] The Trustee alleges that undefined or confusingly defined transfers are avoidable as actual or fraudulent transfers, one such transfer constituted an illegal dividend, some defendants breached their fiduciary duties in approving that dividend and an unrelated transaction, and some defendants engaged in "fraudulent inducement/negligent misrepresentation (including aiding and abetting)." These contentions are unsupported by the alleged facts, contradicted by documents integral to the Complaint, and undercut by the governing law.

The Complaint must be dismissed as to the Former D&Os for five reasons. *First*, the Trustee is precluded from bringing claims against Dubel, Gadbois, McRae, and Wilkes because those claims were not retained—and in fact were released—under the debtors' confirmed chapter

[1] The Former D&Os are referred to individually by last name.

[2] As noted throughout this brief, the Former D&Os expressly adopt and incorporate the Background Section and Argument Sections I.A, I.B, II–IV of the motion to dismiss filed by the Cornell Defendants at Adv. D.I. 77–80 ("Cornell Defendants' MTD").

[3] The Former D&Os categorically deny any wrongdoing or liability for the claims in the Complaint. The Complaint's factual allegations are distortions of the events in question, often taken out of context, missing material relevant facts, or presented in a timeless sequence without reference to the true chronology of the facts described.

11 plan ("Plan").[4] The Plan expressly and unambiguously excludes from the retained causes of actions any claims against Dubel, Gadbois, McRae, and Wilkes, each of whom was released under the Plan and Confirmation Order.

Second, the Complaint lacks any details to plausibly allege fraud, dooming the actual fraudulent transfer claims. The Trustee does not identify which debtor(s) made the transfers or whether the Former D&Os were initial or subsequent transferees.

Third, the Complaint fails to establish insolvency, which is fatal to the constructive fraudulent transfer and illegal dividend claims.

Fourth, the Trustee is barred from bringing breach of the duty of care claims against Dubel, Gadbois, Hess, Landman, McRae, and Wilkes because, as former directors, they are exculpated under the relevant Certificates of Incorporation. Moreover, the Former D&Os—both directors and officers—are entitled to the protection of the business judgment rule. Alternatively, the claims are barred by the entire fairness doctrine. In any event, the Complaint is devoid of facts supporting a breach of any fiduciary duty by the Former D&Os.

Finally, the Trustee lacks standing to bring Count XI on behalf of "Assigned Lenders." The Complaint does not identify those lenders, their purported entitlement to relief, or the terms of the assignments. Moreover, the Trustee's allegations concerning "fraudulent inducement/negligent misrepresentation" are conclusory and lack any factual detail about specific statements or omissions, including who made them, when, and to whom. These claims—lumped into Count XI—are not claims of the Estate. Under fundamental principles of fairness, the Former

[4] The Plan is attached to the confirmation order at D.I. 1146 of the bankruptcy case's docket ("Confirmation Order"). "D.I." refers to the bankruptcy case's docket.

D&Os are entitled to know who is suing them, on what grounds, and what is the nature and amount of the supposed damages allegedly caused by them.

BACKGROUND

The Background Section of the Cornell Defendants' MTD is adopted and incorporated. Additional facts relevant to the claims against the Former D&Os are set forth below.

I. The Roles of the Former D&Os.

The Former D&Os are former directors and/or officers of Instant Brands Acquisition Holdings Inc. ("TopCo") and/or former directors of Instant Brands Holdings Inc. ("OpCo") and Instant Brands Acquisition Immediate Holdings Inc. ("Intermediate HoldCo"):

- Dubel and McRae are former independent directors of TopCo and members of the Special Committee of TopCo's board of directors. Compl. ¶¶ 39–40, 149.
- Gadbois and Wilkes are both the former Chief Executive Officer of TopCo and former members of TopCo's board. *Id*. ¶¶ 33, 38.
- Hewitt is the former Chief Financial Officer of TopCo. *Id*. ¶ 34.
- Kist is the former Corporate Controller of TopCo. *Id*. ¶ 35.
- Hess is the former Chief Operating Officer of TopCo and a member of the boards of directors of OpCo and Intermediate HoldCo. *Id*. ¶¶ 36, 231.
- Landman is the former Chief Legal Officer of TopCo and a member of the boards of directors of OpCo and Intermediate HoldCo. *Id*. ¶¶ 37, 231.

The Complaint does not identify when the Former D&Os held these positions, except for noting that Dubel joined TopCo's board on January 10, 2023. *Id*. ¶ 148.

II. Instant Brands' Bankruptcy, Plan, and Confirmation Order.

On June 12, 2023, Instant Brands and certain affiliates ("Debtors") filed a voluntary petition for relief under Chapter 11, Title 11 of the United States Code in this Court. *See In re Instant Brands Acquisition Holdings Inc., et al.*, No. 23-90716 (Bankr. S.D. Tex.). On February 23, 2024, this Court confirmed the Plan. D.I. 1146.

III. The Plan Does Not Retain Claims Against Dubel, Gadbois, McRae, and Wilkes and Releases Them from Liability.

The Debtors filed the original version of the Plan after reaching a "global settlement" with the official committee of unsecured creditors ("Creditors Committee") and an ad hoc group of lenders, pursuant to which certain causes of action were to be assigned to a litigation trust. D.I. 883 (Creditors Committee's statement in support of solicitation motion). The Plan's original version—supported by the Creditors Committee and the lender group—included broad releases in favor of Dubel, Gadbois, McRae, and Wilkes ("Released Former D&Os"). D.I. 845. In the original version, which carried through to the final version, all current and former directors and officers, other than those that are an "Excluded Party," were "Released Parties." *Id.* §§ I.A.197-198. Importantly, in each filed version of the Plan,[5] the Released Former D&Os were expressly carved out of the definition of "Excluded Party": an "Excluded Party" is "any director of Instant Brands Acquisition Holdings Inc., ***except for Kenneth G. Wilkes, Benoit J. Gadbois, Lawrence McRae, and John S. Dubel***." Plan § I.A.89 (emphasis added). To be clear, in connection with the establishment of the litigation trust to pursue claims against a large list of litigation targets (*i.e.*, the "Excluded Parties"), the Debtors, Creditors' Committee, and ad hoc lender group excluded the Released Former D&Os from that list and, instead, gave them releases.

Like most plans that contemplate postconfirmation litigation, the Plan expressly retains the right to pursue certain causes of action, ensuring that the Trustee has standing to pursue them. Unsurprisingly, given the releases, the Plan excludes claims against the Released Former D&Os from the causes of action that were retained and assigned to the Trust. Thus, in the final version, "Litigation Trust Recovery Actions" are limited to certain causes of action "against any Excluded

[5] D.I. 845, 878, 898, and 926-1.

Party." Plan § I.A.147.[6] And the Released Former D&Os are expressly excluded in the Schedule of Retained Causes of Action attached as Exhibit E to the final Plan.

IV. The Trustee Commenced This Adversary Proceeding.

The Trustee brought this adversary proceeding seeking relief related to two transactions: (1) the payment of a dividend in the spring of 2021 ("Special Dividend")[7] and (2) Instant Brands obtaining a $55 million loan from Cornell Capital LLC in January 2023 that was secured by tangible assets that were transferred to two Instant Brands subsidiaries ("UnSub Transaction"). *See* Cornell Defendants' MTD Background §§ B and E. The Trustee asserted the following claims against the Former D&Os:

> **Count I** - actual fraudulent transfer (Special Dividend) against Gadbois, Hess, Hewitt, Landman, and Wilkes
>
> **Count II** - actual fraudulent transfer (Parent Transfer, OpCo Seller Notes Transfer, and Special Dividend) against Gadbois, Hess, Hewitt, Landman, and Wilkes
>
> **Count IV** - constructive fraudulent transfer (Special Dividend) against Hess, Hewitt, and Landman
>
> **Count V** - constructive fraudulent transfer (Parent Transfer, OpCo Seller Notes Transfer, and Special Dividend) against Hess, Hewitt, and Landman
>
> **Count VII** - illegal dividend against Hess and Landman
>
> **Count VIII** - breach of fiduciary duty against all Former D&Os based on the Special Dividend and/or the UnSub Transaction
>
> **Count XI** - "fraudulent inducement/negligent misrepresentation (including aiding and abetting) (Credit Agreement)" against Gadbois, Hewitt, Kist, and Landman

[6] Earlier versions of the Plan included slightly different language but the effect was the same: just as the Released Former D&Os have always been released, claims against them have always been excluded from the retained causes of action that the Trustee could pursue.

[7] "Special Dividend" is capitalized in the Complaint but not defined, despite being the basis of most of the claims against the Former D&Os.

LEGAL STANDARDS

A complaint must be dismissed under Rule 12(b)(6) if it does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility requires the plaintiff to "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[F]acts that are 'merely consistent with' a defendant's liability … stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. The court "will not 'strain to find inferences favorable to the plaintiffs'" or "accept conclusory allegations, unwarranted deductions, or legal conclusions." *Southland Sec. Corp. v. INSpire Ins. Sols. Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (citations omitted).

A plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." Rule 9(b). This requires "specify[ing] the statements contended to be fraudulent, identify[ing] the speaker, stat[ing] when and where the statements were made, and explain[ing] why the statements were fraudulent." *ABC Arbitrage Plaintiffs Grp. v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (quotation marks and citation omitted). "Rule 9(b) requires the who, what, when, where, and how of the alleged fraud to be laid out." *Kreway v. Countrywide Bank, FSB*, 647 F. App'x 437, 437–38 (5th Cir. 2016) (cleaned up). The plaintiff cannot make "collectivized or group allegations" and instead "must delineate which Defendant is responsible for which allegedly fraudulent activity." *Ramirez v. Allstate Vehicle & Prop. Ins. Co.*, 490 F. Supp. 3d 1092, 1116 (S.D. Tex. 2020). Rule 9(b) applies to claims for actual fraudulent transfer and fraudulent

inducement. *Red Rock Sourcing LLC v. JGX LLC*, No. 21 Civ. 1054 (JPC), 2024 WL 1243325, *40 (S.D.N.Y. Mar. 22, 2024) (actual fraudulent conveyance under New York's Debtor & Creditor Law[8]); *Rowe Plastic Surgery of N.J., L.L.C. v. Aetna Life Ins. Co.*, No. 23-8083, 2024 WL 4315128, *4 (2d Cir. Sept. 27, 2024) (fraudulent inducement).

ARGUMENT

I. The Trustee Is Precluded From Bringing Claims Against the Released Former D&Os.

A. The Trustee Lacks Standing.

After confirmation of a chapter 11 plan, a debtor has the authority to pursue claims on behalf of the bankruptcy estate only if they "were properly retained." *Lovett v. Cardinal Health, Inc. (In re Diabetes Am., Inc.)*, 485 B.R. 340, 343 (Bankr. S.D. Tex. 2012). To properly retain a claim, the plan documents must include a "specific and unequivocal" reservation of the cause of action, meaning "the plan must expressly retain the right to pursue such actions." *Adler v. Frost (In re Gulf States Long Term Acute Care of Covington, L.L.C.)*, 614 Fed. App'x 714, 717 (5th Cir. 2015) (quotation marks and citation omitted). "[T]he debtor has no standing to pursue a claim that the estate owned before it was dissolved" if that claim was not properly preserved. *Id*. (quotation marks and citation omitted); *see also 1701 Commerce, LLC v. Richfield Hosp., Inc. (In re 1701 Commerce, LLC)*, Adv. No. 14-04028-DML, 2014 Bankr. LEXIS 5285, *12 (Bankr. N.D. Tex. Oct. 20, 2014) ("In bankruptcy, Code section 1123(b)(3) is a formality that must be observed … A failure to observe the required formalities may cost a plaintiff the standing to sue."). Indeed, courts routinely dismiss for lack of standing claims that were not adequately preserved in plan documents. *See Rossco Holdings, Inc. v. McConnell*, 613 Fed. App'x 302, 308 (5th Cir. 2015);

[8] The actual fraudulent transfer claims (Counts I and II) are under New York's Debtor & Creditor Law. Compl. ¶¶ 170–72, 177, 179.

Wooley v. Haynes & Boone, L.L.P. (In re SI Restructuring Inc.), 714 F.3d 860, 866 (5th Cir. 2013); *Unsecured Claim Pool Sub-Tr. of the Liquidation Tr. of Lilis Energy, Inc. v. Ormand*, No. 4:22-CV-02084, 2023 WL 30006699, *2 (S.D. Tex. April 17, 2023); *Lauter v. Citgo Petroleum Corp.*, No. H-17-2028, 2018 WL 801601, *11–13 (S.D. Tex. Feb. 8, 2018).

The Plan unambiguously[9] excludes claims against the Released Former D&Os from the retained causes of action:

- Plan § XI.I ("Preservation of Causes of Action") retains all "Retained Causes of Action." Confirmation Order ¶ 7 also retains only "Retained Causes of Action."
- "Retained Causes of Action" are "Litigation Trust Recovery Actions and those other Causes of Action listed on the Schedule of Retained Causes of Action." Plan § I.A.207.
- "Litigation Trust Recovery Actions" are limited to Causes of Action related to the Special Dividend and UnSub Transaction "in each case, against any Excluded Party." *Id.* § I.A.147.
- As noted above, the Released Former D&Os are not Excluded Parties. "Excluded Party" includes "any director of Instant Brands Acquisition Holdings Inc., ***except for Kenneth G. Wilkes, Benoit J. Gadbois, Lawrence McRae, and John S. Dubel***." *Id.* § I.A.89 (emphasis added).
- The Schedule of Retained Causes of Action (Plan Ex. E), which includes causes of action to be pursued solely by the Litigation Trust and Trustee, mirrors the definitions of Litigation Trust Recovery Actions and expressly excludes claims against the Released Former D&Os.

[9] When interpreting a chapter 11 plan, courts apply principles of contract interpretation. *See Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. App'x 281, 285 (5th Cir. 2016). The Plan is governed by New York law. *See* Plan § I.D. Under New York law, "when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract[.]" *Howard v. Howard*, 292 A.D.2d 345, 345 (N.Y. App. Div. 2002) (internal citations omitted). "[A] contract may not be found to be ambiguous merely because litigants present alternative interpretations. Rather, ambiguity requires that 'the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'" *In re Trusts Established Under the Pooling & Servicing Agreements*, 375 F. Supp. 3d 441, 447–48 (S.D.N.Y. 2019) (citations omitted).

This language could not be clearer: the Released Former D&Os are (and have always been) expressly carved out of the causes of action retained for the Trustee. Accordingly, the Trustee lacks standing to pursue claims against the Released Former D&Os.

B. All Counts Against the Released Former D&Os Were Released.

The Plan also releases the claims that the Trustee asserts against the Released Former D&Os. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011) (quotation marks and citation omitted). The same contract interpretation principles discussed in n.9 above apply to the construction of releases. *In re Relativity Fashion, LLC*, No. 15-11989 (MEW), 2018 WL 2938516, *5 (Bankr. S.D.N.Y. June 7, 2018) (applying New York law). "[S]ophisticated entities [that] negotiated and executed an extraordinarily broad release with their eyes wide open" are bound by it. *Centro*, 17 N.Y.3d at 278.

Here, the Plan broadly releases "Released Parties." Plan §§ XI.E–F. The definition of "Released Party" includes the Debtors and their "Related Parties." *Id.* § I.A.201. "Related Parties" include an entity's "current and former directors, board observers, managers, [and] officers," among others. *Id.* § I.A.200. This covers each Released Former D&O. While the definition of Released Parties excludes any "Excluded Party," as noted above, the Released Former D&Os are expressly carved out of the definition of Excluded Party. *Id.* § I.A.89. Thus, because the Released Former D&Os are Related Parties of the Debtors and are not Excluded Parties, they are Released Parties who were released from claims held by the Debtors, their estates, and "Releasing Parties." The releases cover "all claims," even fraud:

> ***all*** claims, obligations, debts, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, asserted or unasserted, existing or hereinafter arising, in law, equity, or otherwise, whether for ***tort,***

> ***fraud,*** contract, violations of federal, state, foreign, or other applicable laws, or otherwise, including ***Avoidance Actions*** …

Id. § XI.E (emphasis added).

The Trustee may point to an exception in the release for "any claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct (including actual fraud) or gross negligence." *Id*. But, as explained in Argument § II below and the Cornell Defendants' MTD Argument §§ I.B, II.D, IV.A.2, and IV.B, the Complaint does not plausibly allege actual fraud, willful misconduct, or gross negligence.

II. The Complaint Fails to State a Claim Against Any Former D&O.

A. The Fraudulent Transfer and Illegal Dividend Claims (Counts I, II, IV, V, and VII) Must Be Dismissed.

Counts I, II, IV, V, and VII assert fraudulent transfer and illegal dividend claims. Counts I and II are against Gadbois, Hess, Hewitt, Landman, and Wilkes; Counts IV and V are against Hess, Hewitt, and Landman; and Count VII is against Hess and Landman. Each fails for the reasons in the Cornell Defendants' MTD Argument §§ II and III,[10] which are adopted and incorporated.

In addition, Counts II and V are titled as though they seek recovery of the "Parent Transfer, OpCo Seller Notes Transfer, and Special Dividend." But these counts neither substantively distinguish those transactions nor allege that any Former D&O received a portion of any of those transfers as an initial or subsequent transferee. Counts II and V do not mention any Former D&O, do not explain why those claims have anything to do with any Former D&O, and do not establish a basis for liability against any Former D&O.

[10] The counts addressed in Argument § III of the Cornell Defendants' MTD are not asserted against any Former D&O. Nevertheless, because the legal arguments in Argument § III of the Cornell Defendants' MTD are relevant to the fraudulent transfer claims against Gadbois, Hess, Hewitt, Landman, and Wilkes, those arguments are adopted and incorporated herein.

B. Count VIII Fails to Plausibly Allege a Breach of Fiduciary Duty Claim.

The Trustee contends that the Former D&Os breached their fiduciary duties by approving the Special Dividend and/or the UnSub Transaction.[11] This claim fails for the reasons in the Cornell Defendants' MTD Argument § IV, which is adopted and incorporated. Additional arguments concerning the Former D&Os are below.

1. Dubel, Gadbois, Hess, Landman, McRae, and Wilkes Are Exculpated.

The Trustee's duty of care claim fails because the Certificates of Incorporation for TopCo, Intermediate HoldCo, and OpCo exculpate directors for breaches of fiduciary duty. Under 8 Del. Code Ann. § 102(b)(7), corporations may exculpate directors from monetary liability for breaches of the duty of care, which "is intended to encourage directors to pursue business strategies that may be risky but that hold the potential for value maximization." *In re Trinsum Grp., Inc.*, 466 B.R. 596, 612 (Bankr. S.D.N.Y. 2012). Thus, "the application of an exculpation provision is 'most useful' when, despite a director's good faith efforts to pursue a business strategy, the effort proves unsuccessful financially, resulting in a potentially biased 'hindsight' evaluation of the director's action, improperly influenced by the unsuccessful outcome." *Id*. (citation omitted).

The Certificates of Incorporation state that, "[t]o the fullest extent permitted under the [Delaware General Corporation Law], … no director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty." Cornell Defendants' MTD Ex. C (TopCo Certificate of Incorporation) at Art. VIII, Ex. A (Intermediate HoldCo Certificate of Incorporation)]] at Art. VII, and Ex. B (OpCo Certificate of Incorporation) at Art. VI. Directors can rely on the protections of an exculpation provision in discharging their

[11] The breach of fiduciary duty claim is asserted against Dubel concerning the UnSub Transaction; Kist and Wilkes concerning the Special Dividend; and Gadbois, Hess, Hewitt, Landman, and McRae concerning both. Compl. ¶ 235 n.8.

responsibilities. These provisions may be invoked at the pleadings stage to dismiss breach of fiduciary duty claims against exculpated directors. *See* Cornell Defendants' MTD at Argument § IV.A.1. Therefore, Dubel, Gadbois, McRae, and Wilkes (as former TopCo directors) and Hess and Landman (as former Intermediate HoldCo and OpCo directors) are exculpated for breaches of the duty of care. The Complaint contains no allegations that the exculpation provisions are somehow inapplicable or void. Thus, the duty of care claim must be dismissed as to Dubel, Gadbois, Hess, Landman, McRae, and Wilkes.

2. The Former D&Os Are Entitled to the Protection of the Business Judgment Rule.

Delaware law protects directors and officers by requiring courts to presume that they "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (quotation marks and citation omitted); *see also Gantler v. Stephens*, 965 A.2d 695, 705–06, 708–09 (Del. 2009) (applying business judgment rule to claim for breach of officer's duty of care). The "court will not substitute its judgment for that of the" directors and officers if their decisions can be "attributed to any rational business purpose." *Gantler*, 965 A.2d at 706 (quotation marks and citation omitted). Instead, "the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010). Decisions about whether to enter a particular transaction squarely lie within directors' and officers' business judgment. *See, e.g.*, *In re Orchard Enters., Inc. Stockholder Litig.*, 88 A.3d 1, 34 (Del. Ch. 2014).

"[T]he plaintiff bears the burden of proof in rebutting the presumption of the business judgment rule." *Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, 679 (N.D. Tex. 2011) (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)). Accordingly, while the business

judgment rule is an affirmative defense, to state a facially plausible claim for breach of fiduciary duty, "a plaintiff must plead factual content that allows the court to draw a reasonable inference that in making the challenged decision, the directors or officers breached their duties of loyalty or care." *Kaye*, 453 B.R. at 680; *see also Katchadurian v. NGP Energy Capital Mgmt., LLC (In re Northstar Offshore Grp., LLC)*, 616 B.R. 695, 739 (Bankr. S.D. Tex. 2020) ("To survive a motion to dismiss when the issue [of the business judgment rule] appears within the complaint itself, the plaintiff must plead around the business judgment rule to show it is inapplicable.") (quotation marks and citations omitted); *West v. Avery (In re Noram Resources, Inc.)*, No. 10-03701, 2011 WL 5357895, *10 (Bankr. S.D. Tex. Nov. 7, 2011) (following *Kaye*). If the plaintiff rebuts the presumption of the applicability of the business judgment rule, the defendants must prove "the 'entire fairness' of the transaction." *Cede*, 634 A.2d at 361 (citing *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993)).

Whether to approve the Special Dividend and the UnSub Transaction were decisions squarely within the business judgment of TopCo's, Intermediate HoldCo's, and OpCo's boards. As set forth in the Cornell Defendants' MTD Argument §§ IV.A.2 and IV.B, the Complaint is devoid of plausible factual allegations to state a claim for breach of fiduciary duty. For the same reasons, the Complaint's allegations do not support the inference that the decisions of the Debtors' boards of directors lacked any rational business justification.

Indeed, the Complaint's own allegations and the Cornell Defendants' MTD exhibits plainly establish that rational business reasons justified the Special Dividend and the UnSub Transaction. The Special Dividend resulted from OpCo obtaining a loan to fully repay—including "the principal, accrued and unpaid interest, fees, premium, if any, and other amounts"—a prior loan and certain promissory notes. Cornell Defendants' MTD Ex. M (Credit Agreement) at 66

(definition of "Transactions"). A presentation to prospective lenders disclosed that the 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***." Cornell Defendants' MTD Ex. H (Lender Presentation) at 6 (emphasis added). And the governing credit agreement ("Credit Agreement") states that OpCo would use the loan proceeds for those exact purposes. Cornell Defendants' MTD Ex. M (Credit Agreement) at 1 (first whereas clause). On the "advice of advisors," TopCo's board approved the payment of a $206 million cash dividend, which was $39 million ***less*** than the dividend the Credit Agreement permitted. Cornell Defendants' MTD Ex. M (Credit Agreement) at 63 (definition of "Special Dividend"); Cornell Defendants' MTD Ex. N (April 14, 2021 TopCo Board Resolution) at 1–2.

The UnSub Transaction was borne of Instant Brands' immediate need for a cash infusion. Compl. ¶ 148. "As advised by Cornell Capital's legal counsel," TopCo's "board of directors approved the appointment of John Dubel and Lawrence McRae to a special committee of the board (the 'Special Committee')" to consider the proposed UnSub Transaction. *Id*. ¶¶ 147, 149. The Special Committee appointed Davis Polk & Wardwell LLP ("Davis Polk") and Guggenheim Securities, LLC ("Guggenheim") as advisors and retained Kroll, LLC ("Kroll") to value the assets at issue. Compl. ¶ 149; Cornell Defendants' MTD Ex. P (January 13, 2023 Special Committee Minutes) and Ex. Q (January 14, 2023 Special Committee Minutes). The Special Committee discussed with Davis Polk and Guggenheim "whether the terms proposed by Cornell are at least as favorable to the Company as those expected to be received by a third party" and whether

> (i) any ***transaction with a third-party lender*** would likely contain ***more onerous restrictions*** on the Company than those proposed by Cornell; (ii) a traditional debtor in possession ***(DIP) financing would typically be supported by the entirety of an enterprise's assets*** and those assets would typically be of an operating nature (***as opposed to the discrete non-operating assets*** proposed to support

> Cornell's unrestricted subsidiary loan); (iii) the proposed transaction with Cornell provides ***substantial flexibility*** and can be ***consummated on an extremely tight timeline***; (iv) the ***ABL lenders would likely be more comfortable*** with the transaction involving the sponsor, Cornell, than one where Cornell was not involved; and (v) given the Company's imminent cash needs, ***a transaction with Cornell seemed logical***, given both the favorable terms that Cornell was offering to the Company and the fact that the transaction would allow the Company to negotiate a holistic solution with the lenders in the next phase. …
>
> Guggenheim noted that it was ***an almost certainty that potential third parties would demand a substantially greater return*** on an approximate $50 million investment than Cornell was seeking …

Cornell Defendants' MTD Ex. P (January 13, 2023 Special Committee Minutes) at 2–3 (emphasis added). Based on input from outside advisors and Instant Brands' management, "and in light of the immediate need for liquidity to support the business and maximize value and the favorable terms of the Cornell Financing," the Special Committee approved the UnSub Transaction. Cornell Defendants' MTD Ex. Q (January 14, 2023 Special Committee Minutes) at 3.

These facts establish that the Special Dividend and the UnSub Transaction were "logical approach[es] to advancing the corporation's objectives." *Dollar Thrifty*, 14 A.3d at 598. The Court therefore must presume that the Former D&Os acted in accordance with their fiduciary obligations in approving both. At bottom, the Trustee disagrees with the boards' decisions—despite the boards' reliance on the expertise of outside advisors to address Instant Brands' needs—and seeks the Court's substitution of its own judgment (guided by hindsight). *See* 8 Del. Code Ann. § 141(e) (directors are "fully protected in relying in good faith upon … [advisors'] professional or expert competence"). This is insufficient to rebut the application of the business judgment rule.

Even if the business judgment rule does not apply, the entire fairness doctrine bars Count VIII as set forth in the substance of the Cornell Defendants' arguments about the Special

Dividend and the fairness of the UnSub Transaction. *See* Cornell Defendants' MTD Argument §§ III, IV.A.2, IV.B.2, and IV.B.3, which are adopted and incorporated.

Additionally, the Complaint contains no facts alleging that Hewitt or Kist as officers of TopCo (neither was a director of any Debtor), or any Former D&O in their capacity as an officer, was responsible for approving the Special Dividend or the UnSub Transaction. *McRitchie v. Zuckerberg*, 315 A.3d 518, 533 n.12, 536 (Del. Ch. 2024) ("Delaware corporate law starts from the bedrock principle that '[t]he business and affairs of every corporation … shall be managed by or under the direction of a board of directors,'" which means that "[w]hen the board has made a decision," an officer may be required to comply "with that decision, even if the officer might independently have followed a different course.") (quoting 8 Del. Code Ann. § 141(a)); *Gantler*, 965 A.2d at 705–06, 708–09; Cornell Defendants' MTD Ex. C (TopCo Certificate of Incorporation) at Art. VI(a) ("The business and affairs of [TopCo] shall be managed by or under the direction of the Board."). Indeed, Count XIII does not contain a single allegation explaining how officers had decision-making authority concerning either transaction. This pleading failure is fatal.

C. Count XI Must Be Dismissed.

Count XI purports to assert a claim on behalf of the "Assigned Lenders" for "Fraudulent Inducement/Negligent Misrepresentation (including aiding and abetting) (Credit Agreement)" against Gadbois, Hewitt, Kist, and Landman. Compl. ¶¶ 264–71. As explained in the Cornell Defendants' MTD Argument §§ I.A and I.B—which are adopted and incorporated except as they relate to Count X, which is not asserted against any Former D&O—the Trustee lacks standing to bring claims on behalf of unidentified lenders and fails to allege sufficient facts under Rules 9(b) or 12(b)(6). Painting with a broad brush, the Trustee attempts to bring a third-party claim unrelated to the bankruptcy that would have been asserted by different plaintiffs in different forums had the

Plan not created the option to assign claims to the Litigation Trust. Like with the Cornell Defendants, the Complaint does not identify any specific statement or omission allegedly made by Gadbois, Hewitt, Kist, or Landman to any lender concerning the Credit Agreement. The Complaint also asserts no particularized facts to establish reasonable reliance. Similarly, the negligent misrepresentation claim fails because the Complaint does not allege any privity-like relationship between Gadbois, Hewitt, Kist, or Landman and any Assigned Lender. Because the Trustee does not identify the lenders, describe the conduct at issue, or explain the purported harm, Count XI must be dismissed.

Finally, the Complaint fails to allege that any Assigned Lender did not release Count XI as to Gadbois, a Released Former D&O. The Plan contains broad third-party releases under which the DIP Agents, DIP Secured Parties, Prepetition Agent, Prepetition ABL Agent, Prepetition ABL Lenders, and any other creditor that failed to opt out[12] released the same claims as the Debtors. Plan §§ I.A.202, XI.F. Without pleading facts that the Assigned Lenders are exempt from the release, Count XI is presumed to be released.

CONCLUSION

As set forth above, the Complaint must be dismissed as to the Former D&Os.

[12] 1,399 creditors received solicitation materials, and only 174 elected to opt out of the third-party releases. *See* D.I. 1115, ¶ 12.

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Respectfully submitted,

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