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. Proceeding No. 24-03232 **REPLY IN SUPPORT OF MOTION TO TRANSFER**

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PRELIMINARY STATEMENT

The factors under Sections 1404 and 1412 weigh heavily in favor of transfer here. On this motion, it is beyond dispute that:

1. None of the alleged events underlying the Trustee's claims occurred in Texas;
2. None of the witnesses identified by the parties reside in Texas;
3. None of the claims are governed by Texas law, while New York law governs nine;
4. No alleged injury was suffered in Texas, and every party but one (Defendant Wilkes) lives closer to New York than Houston by hundreds of miles; and
5. Over 75 third-party witnesses, including advisors on and participants in the disputed transactions, are based in New York.

As if these stark facts were not enough, the Trustee admits that he brings claims on behalf of the lenders *and* two Debtors that expressly agreed to a New York forum-selection clause in the very Credit Agreement to which each of the Trustee's claims relate. The Fifth Circuit has long held that a party cannot simultaneously rely on a contract to plead claims against a non-signatory while disclaiming that contract's choice of forum. *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 526 (5th Cir. 2000). Under *Grigson*, the Trustee's reliance on the Credit Agreement's terms equitably estops him from avoiding its forum-selection clause.

The Trustee does not come close to overcoming these basic truths. He claims, for example, that this case should be litigated in Texas because this Court presided over the Debtors' bankruptcy. But that runs headlong into long-standing Fifth Circuit precedent confirming that any policy interest in adversary proceedings being litigated alongside bankruptcy cases does not apply where, as here, the Debtors' reorganization concluded *over a year ago*. *In re Instant Brands Acquisition Holdings Inc.*, No. 23-90816, ECF 1146 (Bankr. S.D. Tex. Feb. 23, 2024). The Trustee's core claims, moreover, are premised exclusively on prepetition conduct and rely on the same factual basis as the Trustee's state law claims for relief. The bankruptcy is thus irrelevant to

his claims, with the one exception being certain Defendants' invocation of post-petition releases, which may call for the transferee court to interpret two of this Court's prior orders. Courts do that every day, and that cannot reasonably outweigh the fact that this case has no relationship to Texas.

As another example, the Trustee claims the Credit Agremeent's forum-selection clause does not control here because it contains an exclusion for claims brought by "any Lender" "against the Borrower or any Loan Party or its properties." Opp. 5. However, the Trustee has not brought a claim against the *Borrower* or any *Loan Party*; therefore, that exclusion is irrelevant. The Trustee also concedes that the "first nine causes of action of the Complaint were brought by the Trustee as successor to the Debtors[]," *id.* at 6, and Debtor claims do not qualify for the exclusion. Because this exclusion does not apply to the Trustee's claims, the only permitted jurisdiction for those claims, under the Credit Agreement, is New York. The Trustee also raises a Credit Agreement clause limiting third-party beneficiaries, but the Fifth Circuit has confirmed that where, as here, a party is relying on estoppel principles to enforce a forum-selection clause, there is no need to show "an intention at the contracting stage to create a third-party beneficiary" before the forum-selection clause can be enforced. *In re Lloyd's Reg. N. Am., Inc.*, 780 F.3d 283, 293 (5th Cir. 2015).

At bottom, this is not a close call: these prepetition claims have no relationship to Texas, they have numerous ties to New York, the alleged lenders and Debtors on whose behalf the Trustee is suing expressly agreed to litigate in New York, and every party but one (Defendant Wilkes) is either located in New York or in places hundreds of miles closer to New York than Houston. This case should be transferred to the Southern District of New York.

ARGUMENT

On a motion to transfer an adversary proceeding with core and non-core claims, there are three factors for the Court to consider: (I) would venue have originally been proper in the transferee court; (II) do the private factors favor transfer; and (III) do the public factors favor transfer. *See*

28 U.S.C. §§ 1404(a), 1412.[1] When the venue element is met, and each of the statutory factors either favors the transferee forum or is "neutral," the "district court should grant a motion to transfer." *In re TikTok, Inc.*, 85 F.4th 352, 358 (5th Cir. 2023) (holding that "a district court abuses its discretion by denying transfer when 'not a single relevant factor favors the plaintiff's chosen venue.'"). Here, the only reasonable result here is transfer to the Southern District of New York.

I. Venue Is Proper in the Southern District of New York Under § 1404(a).

The Transfer Motion meets the first element of transfer under 28 U.S.C. § 1404(a) because "the case could have originally been filed in the proposed transferee district." *Borger Props., Inc. v. Auer Corp.*, 2010 WL 3932393, at *3 (Bankr. S.D. Tex. Oct. 4, 2010) (Isgur, J.). The Transfer Motion established that venue is proper in the Southern District of New York, and the Trustee does not dispute this element except as to Defendant Younghoon Park: the Trustee claims that this Court "is the only one" with the "ability to exercise nationwide jurisdiction" over Mr. Park. Opp. 4, 23

The Trustee's argument is contrary to the Bankruptcy Rules. "[N]ationwide jurisdiction," *id.* at 4, is available wherever this case proceeds, because "Bankruptcy Rule 7004(d) applies to *all 'adversary proceedings'* (as defined by the Bankruptcy Rules) *conducted in the bankruptcy courts or in the district courts*," *Diamond Mortg. Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1242 (7th Cir. 1990). Bankruptcy Rule 1001 permits no other conclusion: it states that the Rules, including Rule 7004, apply in "every case and proceeding." Fed. R. Bankr. P. 1001. Therefore, "Bankruptcy Rule 1001 makes the Bankruptcy Rules applicable to cases and proceedings under Title 11, *whether before the district judges or the bankruptcy judges of the district*." Fed. R. Bankr. P. 1001 adv. comm. note (1987) (emphasis added); *see* Fed. R. Bankr. P. 9001 adv. comm. note (1987) (stating that "a case or proceeding may be before a bankruptcy judge or a judge of the district

[1] At least five of the Trustee's claims are non-core claims (Counts VI–XI). *See* Compl. ¶¶ 163–271.

court"). Courts in the Southern District of New York have thus long recognized that "no inquiry into a defendant's 'minimum contacts' with the forum state is needed to exercise jurisdiction pursuant to Bankruptcy Rule 7004; rather, only a federal 'minimum contacts' test is required." *In re Enron Corp.*, 316 B.R. 434, 444 (Bankr. S.D.N.Y. 2004). If, as the Trustee contends, there is personal jurisdiction over Defendant Park in this Court pursuant to the "nationwide jurisdiction" standard in Rule 7004, Opp. 4, then "nationwide jurisdiction," *id*., is also available over Defendant Park in the Southern District of New York. Rule 1404(a)'s first element is therefore satisfied.

II. The Private Interest Factors Favor Transfer Because the Credit Agreement's Forum-Selection Clause Governs the Trustee's Claims and Is Enforceable Here.

The next step in the transfer analysis is assessing the private interest factors. That analysis is straightforward here, because "the presence of a valid forum-selection clause" means that "the plaintiff's choice of forum merits no weight" and the Court "should not consider arguments about the parties' private interests." *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 51 (2013). As the Transfer Motion demonstrated, and as further set out below, the Trustee is bound by the Credit Agreement's New York exclusive forum-selection clause; the Cornell Defendants can enforce that clause; and the clause applies to the Trustee's claims. The Credit Agreement's New York forum-selection clause therefore controls.

A. The Trustee Is Bound by the Forum-Selection Clause and the Exclusion for Suits Against the Borrower or Any Loan Party Is Inapplicable.

1. The Trustee Is Bound as Both the Debtors' and Lenders' Representative.

The Transfer Motion demonstrated that the Trustee is doubly bound by the Credit Agreement's forum-selection clause: he is the Litigation Trustee for the Debtor entities that signed the Credit Agreement (OpCo and Intermediate HoldCo); and he is the alleged assignee of the lenders under the Credit Agreement. Mot. 12. After the motion was filed, this Court confirmed that a bankruptcy "Litigation Trustee" "is bound by" the prepetition forum clauses agreed to by

debtors: "A bankruptcy trustee stands in the shoes of a debtor for purposes of an arbitration clause and is bound by the clause to the same extent as a debtor." *Goldberg v. Foley & Lardner LLP (In re GWG Holdings, Inc.)*, Adv. No. 23-3199, ECF 18, at 1, 7 (Feb. 26, 2025) (hereinafter "*GWG*").

The same reasoning applies to the forum-selection clause here, because it was agreed to by Debtors OpCo and Intermediate HoldCo. While *GWG* concerned an arbitration clause, the Fifth Circuit has refused attempts "to distinguish between arbitration and forum selection/choice-of-law clauses for enforceability purposes," because "in relevant aspects, there is little difference between the two." *Haynsworth v. The Corp.*, 121 F.3d 956, 963 (5th Cir. 1997). Therefore, the Trustee is bound by OpCo and Intermediate HoldCo's promise that any claims they brought "arising out of or relating to" the Credit Agreement would be in New York. Ex. B § 10.14. The Trustee never addresses this point and wrongly asserts that the forum-selection clause applies to him only "as an assignee of certain lenders." Opp. 1. In fact, he "is bound by the" Credit Agreement's forum-selection clause "to the same extent as" Debtors OpCo and Intermediate HoldCo. *GWG* at 7.

2. The Forum-Selection Clause's Exclusion Does Not Apply.

The Trustee attempts to escape the Debtors' and Lenders' agreement to litigate in New York by pointing to a narrow exclusion in the forum-selection clause: "Nothing in this Agreement or in any other Loan Document shall affect any *right that the Administrative Agent or any Lender may otherwise* have to bring any action or proceeding relating to this Agreement or any other Loan Document *against the Borrower or any other Loan Party or its properties* in the courts of any jurisdiction." Ex. B § 10.14(b) (all caps omitted, emphases added); *see* Opp. 1, 5, 7–8. As those terms make clear, the exclusion does not apply to the Trustee's claims.

First, the exclusion only applies to claims brought by "the Administrative Agent or any Lender," *not* claims brought by, or on behalf of, the Debtors signatories. *Id.* As the Trustee concedes, "[t]he first nine causes of action of the Complaint were *brought by the Trustee as*

successor to the Debtors' claims." Opp. 6 (emphasis added). The exclusion therefore does not apply to the "first nine causes of action" in his Complaint by the Trustee's own admission. *Id.*

Second, the exclusion does not apply for the independent reason that *none* of the Trustee's claims are "against Borrower or any other Loan Party or its properties." Ex. B § 10.14(b). The "Borrower" under the Credit Agreement is Debtor OpCo, *id.* at 1, and the "Loan Parties" are "collectively, (i) the Borrower, (ii) Holdings and (iii) each other Guarantor," with "Holdings" referring to Debtor Intermediate HoldCo, and "Guarantor" referring additionally to subsidiaries of that entity, *id.* § 1.1 (definitions of "Loan Parties," "Holdings," "Guarantor," and "Intermediate Parent"); *see id.* at 1. Thus, for the exclusion to apply, the suit must be against OpCo, Intermediate HoldCo, one of their subsidiaries, or their property. Ex. B § 10.14(b).

None of the Trustee's claims meet the "Borrower" or "Loan Party" requirement, because none of the Debtors is a defendant in this proceeding. Because the Trustee cannot meet the plain terms of the exclusion, he makes the contorted argument that "Defendants claim the right to enforce the forum selection clause" "through" the Borrower. Opp. 9. That is baseless: the Transfer Motion does not assert an alter ego theory, nor does it claim to "enforce the rights of the borrower." Opp. 10 (nor could it, because the Trustee represents the Borrower). Instead, the motion provides two independent bases for enforcing the forum-selection clause: the Fifth Circuit's "estoppel" test in *Grigson* and the Fifth Circuit's "closely related" test in *Ney*, neither of which contemplates the Cornell Defendants acting through the Borrower or enforcing its rights. Mot. 13.

Thus, the Trustee cannot rely on the § 10.14(b) exclusion for *any* of his eleven claims. None of the Trustee's cited cases change this fact, as they involved suits brought by, and against, the parties covered by the applicable exclusions. *Crespo v. Smart Health Diagnastics Co.*, 2024 WL 2064071, at *2 (N.D. Ala. May 7, 2024) (exclusion for suits "against Borrower" applied

because suit *was* against the borrower); *Intrepid Invs., LLC v Selling Source, LLC,* 2015 NY Slip Op 31129[U], at *10 (Sup Ct, NY County 2015) (forum-selection clause was non-exclusive and therefore not mandatory); *Garcia v. Top Rank, Inc.*, 2014 WL 12791946, at *6 (C.D. Cal. Sept. 9, 2014) (forum-selection clause was non-exclusive and not limited to specific suits against specific parties); *Mao v. Sanum Invs., Ltd.*, 2014 WL 5292982, at *2 (D. Nev. Oct. 15, 2014) (exclusion applied to "any Designated Action" and was not limited to suits against specific parties).

3. Because the Exclusion Does Not Apply, Neither Does the Venue Waiver.

The Trustee's reliance on the venue waiver clause in § 10.14(c) fails for the same reasons. Section 10.14(c) waives each Credit Agreement party's objection to venue "in any court referred to in paragraph (b) of this Section 10.14," *i.e.*, the forum-selection clause. The forum-selection clause, in turn, refers only to two courts: (1) the state and federal courts of New York, where any claim arising out of relating to the Credit Agreement shall be brought; and (2) the courts of any other jurisdiction, *to the extent the exclusion* applies. Ex. B § 10.14(b). Accordingly, the Trustee's venue waiver argument is premised on the notion that the forum-selection clause's "carveout" applies and he can bring his claims in "any other jurisdiction." Opp. 9. However, as shown above, the exclusion does not apply to the Trustee's claims. Thus, the exclusive forum for the Trustee's claims, and the only forum where venue waiver applies to those claims, is New York.[2]

B. Defendants Can Enforce the Forum-Selection Clause Under *Grigson*, Which Overrides the Credit Agreement's Limit on Third-Party Beneficiaries.

Having shown that the Trustee is subject to the forum-selection clause, the next step is determining whether the Cornell Defendants can enforce that clause. They can. The Transfer

[2] The Trustee repeatedly insists that the "Defendants" are directly bound by the venue waiver clause. *E.g.*, Opp. 3, 9. Leaving aside that false premise, the Trustee's venue waiver argument fails for the above reasons. Likewise, he offers no factual support, nor legal relevance, to his baseless claim that the Defendants are estopped from contesting venue of this proceeding because they "caused and approved" the filing of the bankruptcy in this Court. *Id.* at 3.

Motion demonstrated two separate bases under Fifth Circuit law for enforcing the clause: equitable estoppel and the "closely related" doctrine. Mot. 13. The Trustee only contests one—the closely-related doctrine—but equitable estoppel alone is sufficient to permit enforcement here.

1. Under Fifth Circuit Law, the Trustee's Reliance on the Credit Agreement Empowers the Cornell Defendants to Enforce the Forum-Selection Clause.

The Transfer Motion showed that the Fifth Circuit, for decades, has permitted non-signatory defendants to enforce forum clauses against signatory plaintiffs based on "equitable estoppel." Mot. 13–14 (quoting *Grigson*, 210 F.3d at 526). Equitable estoppel applies when a signatory plaintiff is "relying on the terms of the agreement in asserting their claims" *or* "raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Grigson*, 210 F.3d at 527–29. The Trustee therefore cannot "have it both ways"—relying on the agreement to establish liability while flouting that agreement's forum-selection clause. *Id.* at 528.

Relying on *Grigson*, courts have repeatedly concluded that "under the doctrine of equitable estoppel, Defendants," "even though they are not signatories," "are entitled to enforce the forum selection clause" against signatory plaintiffs. *Vartec Telecom, Inc. v. BCE Inc.*, 2003 WL 22364302, at *3-4 (N.D. Tex. Oct. 9, 2003); s*ee Van Rooyen v. Greystone Home Builders, LLC*, 295 F. Supp. 3d 735, 749–50 (N.D. Tex. 2018); *Wellogix Inc. v. BP Am., Inc.*, 2008 WL 11342260, at *7 (S.D. Tex. Dec. 8, 2008); *Alt. Delivery Sols., Inc. v. R.R. Donnelley & Sons Co.*, 2005 WL 1862631, at *16 (W.D. Tex. July 8, 2005).

The Trustee never addresses *Grigson*, nor does he deny that its equitable estoppel standard is met here. At most, he indirectly argues that *Grigson* has been superseded by *Franlink*: he insists (wrongly) that *Franlink* presents the sole "legal basis to enforce the forum selection clause." Opp. 10, 20 (citing *Franlink Inc. v. BACE Servs., Inc.*, 50 F. 4th 432 (5th Cir. 2022). This argument

fails at every level of analysis. First, the Fifth Circuit has continued to apply *Grigson* and its equitable estoppel test *post-Franlink*. *See Bufkin Enters., L.L.C. v. Indian Harbor Ins. Co.*, 96 F.4th 726, 730 (5th Cir. 2024); *Llagas v. Sealift Holdings, Inc.*, 2023 WL 8613607, at *3 (5th Cir. Dec. 13, 2023) (affirming district court's application of equitable estoppel under *Grigson*). Second, *Franlink*, as a panel decision, could not overturn *Grigson*.

Third, *Franlink* concerned the "closely-related" doctrine, and *Franlink* noted that "equitable estoppel" (as in *Grigson*) is a distinct "other argument[]" for enforcing a forum-selection clause. *Id.* at 442 n.9. The two cases also dealt with polar opposite enforcement scenarios: in *Grigson* a non-signatory sought enforcement against a signatory; while in *Franlink* a *signatory* sought to bind a *non-signatory*. In *Franlink*'s scenario, "[t]he absence of the non-signatory's consent presents a due process problem by forcing a party to litigate in a forum that would otherwise lack personal jurisdiction." 50 F.4th at 441. *Franlink* was therefore careful to "repeat" that the standard it announced was limited to when the "closely related" doctrine could "bind *a non-signatory* to a forum selection clause." *Id.* at 441. The Trustee never acknowledges this distinction; he cites *Franlink*'s "rare circumstances" language four different times, Opp. 2, 14, 15, 19, while omitting the full quote showing that the Fifth Circuit was referring only to enforcement against a non-signatory: "This court has indicated that *non-signatories should only have contractual provisions enforced against them in 'rare circumstances*,'" *Franlink*, 50 F.4th at 442 n.8 (emphasis added). The Trustee therefore cannot use *Franlink* to overwrite the decades of case law in this circuit permitting non-signatories to enforce forum-selection clauses against signatories, including on the equitable estoppel grounds set out in *Grigson*.

Here, both of *Grigson*'s "two scenarios" for equitable estoppel are present. *Bufkin*, 96 F.4th at 730. The Trustee's Complaint shows that he "must rely on the terms of the written

agreement in asserting its claims against the non-signatory defendants." *Id.* Counts X and XI rely on the terms of the Credit Agreement, as they sound in tortious interference with and fraudulent inducement of the Credit Agreement itself. Mot. 16. The fiduciary duty Counts in VIII–IX allege that the Defendants breached their fiduciary duties (or aided in such breach) by causing Instant Brands to breach the Credit Agreement through the UnSub Transaction. Mot. 11. Those same claims accuse the Defendants of causing Instant Brands to incur debt for a dividend—which theory also relies on the Credit Agreement. Compl. ¶¶ 234, 247. The fraudulent transfer claims in Counts I–III all rely on the alleged "massive new debt" under the Credit Agreement to state a claim. *Id.* ¶¶ 160, 169, 178. The Trustee is therefore relying on the Credit Agreement's terms to prove his claims—core and non-core—thereby triggering equitable estoppel under *Grigson*.

Grigson's other scenario is present because the Trustee alleges "substantially interdependent and concerted misconduct by both the nonsignatory" Defendants "and one or more of the signatories," *i.e.*, OpCo, Intermediate HoldCo, and Jefferies. *Bufkin*, 96 F.4th at 730. By alleging that Defendants *caused* OpCo and Intermediate HoldCo to breach the Credit Agreement, Plaintiff is necessarily asserting an interdependent and concerted breach by OpCo and Intermediate HoldCo. Compl. ¶¶ 154, 249-263. Indeed, in *Grigson* the Fifth Circuit applied equitable estoppel *because* the signatory alleged that the non-signatories had tortiously interfered with the contract, as here. 210 F.3d at 530. Count XI also alleges interrelated conduct: fraudulent inducement based on alleged misstatements and omissions by Defendants, Instant Brands, and Jefferies. By alleging that "members of Instant Brands' management" fraudulently induced the lenders through false statements in Instant Brands materials, the Trustee necessarily alleged that Instant Brands itself engaged in fraud, thereby alleging interdependent and concerted conduct by non-signatories and signatories. Compl. ¶¶ 265–267. The Complaint also alleges that fraudulent materials were "put

together" by "Jefferies, Cornell Capital (including Justine Cheng and Rodrigo Bravo), and Instant Brands management"—thereby alleging interrelated conduct with Jefferies, which was also a signatory under the Credit Agreement. *Id.* ¶ 101; *see also id.* ¶ 105, Mot. at 21; Ex. B at 1.

The remaining causes of action are all based on the Special Dividend and the UnSub Transaction, which the Trustee plainly alleges were undertaken by Instant Brands itself, and thus the Trustee is alleging interdependent and concerted conduct by non-signatories and signatories together for these claims as well. Compl. ¶¶ 163–248.

2. Under Fifth Circuit Law, Estoppel Allows Non-Signatories to Enforce Forum Clauses, Even if the Contract Limits Third-Party Beneficiaries.

Because equitable estoppel applies against the Trustee, Fifth Circuit precedent prevents him from relying on the third-party beneficiary clause in the Credit Agreement to bar the Cornell Defendants' enforcement of the forum-selection clause. In *In re Lloyd's Reg. N. Am., Inc.*, the Fifth Circuit rejected an argument that forum-selection clause "estoppel cannot apply because the Classification Contract disclaims liability to, and enforceability by, third parties." 780 F.3d 283, 293 (5th Cir. 2015). "As this court has recognized, third-party beneficiary and direct-benefits estoppel are distinct doctrines. Third-party beneficiary doctrine looks at what the parties intended when they executed the contract, whereas direct-benefits estoppel looks at the actions of the parties after the contract was executed." *Id.* Allowing a third-party beneficiary clause to prevent estoppel "would eliminate this distinction and collapse the doctrines." *Id.*

The same reasoning applies to the Cornell Defendants' equitable estoppel arguments. "Equitable estoppel is a theory by which *nonsignatories* bind signatories to a contract pursuant to the arbitration clause therein contained; therefore, if the court accepts Plaintiff's interpretation of the Agreement's 'no third-party beneficiary' clause, it would vitiate the doctrine of equitable estoppel and the principles of fairness it seeks to protect." *Harries v. Stark*, 2015 WL 4545071

(N.D. Tex. July 28, 2015) (emphasis in original). Because Fifth Circuit law provides that estoppel will override a no third-party beneficiary clause, this Court can enforce the forum-selection clause.

3. In the Alternative, the Cornell Defendants Meet the Closely-Related Test.

As noted above, *Grigson*'s equitable estoppel test establishes the Cornell Defendants' right to enforce the forum-selection clause, and the Trustee makes no serious attempt at rebutting that enforcement right. Instead, the Trustee focuses on denying the Cornell Defendants' rights under a separate Fifth Circuit doctrine, which provides that "a non-signatory to a contract containing a forum selection clause may enforce the forum selection clause against a signatory when the non-signatory is 'closely related' to another signatory." *Ney v. 3i Grp., P.L.C.*, 2023 WL 6121774, at *5 (5th Cir. Sept. 19, 2023). The Trustee's arguments on the "closely-related" doctrine fail too. *Id.* First, as noted above, the Trustee's arguments rely on erroneously applying *Franlink*'s standard for enforcement *against* a non-signatory to the Transfer Motion, which is instead about enforcement *by* non-signatories. *Franlink*'s careful language, which repeatedly limited its holding to enforcement *against* a non-signatory, does not permit the Trustee to conflate those scenarios. Further, contrary to the Trustee's claim that each of the elements present in *Franlink* must be met, the Fifth Circuit cautioned "we do not set out a rigid test." 50 F.4th at 442. In any event, the Cornell Defendants meet each of the non-exclusive factors from *Franlink*.[3] Opp. 14.

Knowledge of the Credit Agreement and its forum-selection clause: the Trustee alleged that "Cornell Capital knew of the Credit Agreement and its terms." Compl. ¶ 260.

Direct benefits: a benefit is direct when it arises from the "contract itself." *Franlink*, 50 F.4th at 442. The Credit Agreement provides for the payment of the "Special Dividend," defined

[3] The Trustee's misreading of *Franlink* also precludes his argument that pre-*Franlink* case law on enforcement by non-signatories was abrogated by *Franlink*.

as "a dividend or other distribution to [Instant Brands] equity holders." Ex. B at 1, 63. The Trustee concedes that Cornell was an equity holder of Instant Brands and received part of the "Special Dividend." Compl. ¶¶ 56, 166. Therefore, Cornell received a direct benefit as defined in *Franlink*.

Common ownership: *Franlink* treated "common ownership" as synonymous with "affiliation," 50 F.4th at 440, and the Trustee alleges that "Cornell Capital received a majority share (64%) of TopCo," the parent company of signatory Intermediate HoldCo, which in turn owned signatory OpCo, Compl. ¶ 56. Therefore, "common ownership" exists, and *Franlink* does not permit the Trustee's attempt to read that phrase as meaning direct ownership.

Finally, the Trustee has failed to show that the Credit Agreement's bar on third-party beneficiaries, Ex. B § 10.06(a), prevents the Cornell Defendants from relying on the "closely related" doctrine. District courts in Texas have split on whether the closely-related doctrine overrides such clauses. *See Quintillion Subsea Operations, LLC v. Maritech Project Servs.*, 2023 WL 139663, at *11–12 (S.D. Tex. Jan. 6, 2023), *report and recommendation adopted*, 2023 WL 379722 (S.D. Tex. Jan. 24, 2023). As noted above, this Court need not resolve that issue because equitable estoppel applies here. To the extent the Court does reach this issue, the only argument consistent with the Fifth Circuit's case law is that the closely-related doctrine controls over third-party beneficiary clauses when necessary to prevent inequity. As the Fifth Circuit warned in *Lloyds*, courts should be wary of collapsing equitable doctrines into the contractual doctrine of "third-party beneficiary" clauses. 780 F.3d at 293. While that holding concerned estoppel, it also applies to situations where a non-signatory is so closely related to a contract that it would be inequitable not to apply the forum-selection clause to it. *See Quintillion*, 2023 WL 139663, at *11–12 (applying closely-related doctrine notwithstanding third-party beneficiary clause). To

hold otherwise would enable signatories to impose inequitable results on a non-signatory, while leaving no recourse to that non-signatory.

C. The Forum-Selection Clause Applies to Each of the Trustee's Claims.

Finally, the forum-selection clause applies here, because the Trustee's claims "aris[e] out of or relat[e] to" the Credit Agreement and the forum-selection clause. Ex. B § 10.14(b). The Cornell Defendants' motion showed that under New York law, the law governing the Credit Agreement, this phrasing is the "broadest and most comprehensive language parties can use when choosing a forum," and that each of the Trustee's claims meets that standard. Mot. 9.

Here again, the Trustee does not, because he cannot, directly dispute the Cornell Defendants' argument. Instead, he incorrectly argues that *federal law* governs the interpretation of the forum-selection clause. That argument is contrary to Fifth Circuit precedent, which provides that even "*in federal question cases*," "we still look to state law" to resolve contract questions. *Fintech Fund, F.L.P. v. Horne*, 836 F. App'x 215, 223 (5th Cir. 2020); *see also Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296, 301 (5th Cir. 2016) ("When the *'interpretation' of a forum-selection clause is at issue* in a diversity case, [], we apply the forum state's choice-of-law rules to determine what substantive law governs."). Thus, the majority view among Texas district courts is that "[f]ederal law governs the enforceability of forum selection clauses in both diversity and federal question cases, *but does not govern interpretation of such clauses*." *Doe v. Facebook, Inc.*, 2023 WL 3483891, at *4 (S.D. Tex. May 16, 2023) (emphasis added); *see, e.g.*, *Van Rooyen*, 295 F. Supp. 3d at 746. While the Trustee cites two cases to the contrary, Opp. 20 n.13, their conclusions have been rejected as inconsistent with Fifth Circuit law. *J.V. & Sons Trucking, Inc. v. Asset Vision Logistics, LLC*, 2020 WL 10458645, at *4 n.6 (N.D. Tex. Dec. 15, 2020).

Therefore, the interpretation of "arising out of or relating to" in the Credit Agreement, Ex. B § 10.14(b), is governed by Texas choice of law rules, and "Texas law gives effect to choice of

law clauses regarding construction of a contract." *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726 (5th Cir. 2003). Applying New York law, as the Credit Agreement dictates, shows that each of the Trustee's claims arise out of or relate to the Credit Agreement. Mot. 9–11. In any event, the Trustee's claims meet the more restrictive test posed by the Trustee. As explained above, the Trustee's claims rely specifically on the terms of the Credit Agreement and relate to alleged breaches and fraudulent inducement of that contract, *see* I.B.1, *supra*; therefore, the forum-selection clause applies to the Trustee's claims under any analysis.

D. <u>The Private Interest Factors, to the Extent They Apply, Favor Transfer</u>.

Because the forum-selection clause is enforceable here, no other private factor analysis is necessary. *See* p.5, *supra*. To the extent any private factors are relevant, they favor transfer.

First, every served Defendant has consented to transfer. The *only* party objecting to transfer, the Trustee, is based in New York City and represented by New York City counsel. He cannot claim any inconvenience from litigating in the Southern District of New York.

Second, the cost of attendance for witnesses, both third-party and first-party, would be substantially less if this case were litigated in New York City rather than Houston. The "convenience of the witnesses is" the "most important factor in transfer analysis." *In re Genentech, Inc.*, 566 F.3d 1338, 1343 (Fed. Cir. 2009). At this early stage, where the identity of "willing" witnesses at trial is yet to be determined, this factor focuses on the location of the parties' "corporate headquarters," "principal place of business," along with their "employees'" and "expected witnesses'" residences. *See SQIP, LLC v. Cambria Co. LLC*, 728 F. Supp 3d 447, 453, 455, 457 (E.D. Tex. Mar. 29, 2024) (finding Minnesota forum "clearly more convenient" where defendant "is headquartered in Minnesota" "with its principal place of business in Minnesota," and "expected witnesses" and "all of [defendant's] employees . . . work in . . . Minnesota"); *Dynamic Ticket Sys. LLC v. Ticketmaster LLC*, 2024 WL 3461926, *4-6 (W.D. Tex. Jan. 9, 2024)

(finding Central District of California "clearly more convenient" where "Defendants share a corporate headquarters and principal place of business located in the Central District of California" and "[m]ost employees who possess relevant knowledge . . . are located in or near" that district).

Here, *none* of the witnesses that the parties have identified reside in Texas; and *none* of the relevant entities identified by the parties, including Debtors OpCo, TopCo, and Intermediate HoldCo, are based in Texas. Compl. ¶ 56; *see* ECF 97, 99, 100 (Defs.' Initial Disclosures); 2d Barillari Decl. (Mar. 14, 2025), Ex. F (Plf.'s Initial Disclosures). Nor is it likely that Texas witnesses will be identified in the future, because *none* of the prepetition events underlying the Trustees' claims occurred in Texas. By contrast, several witnesses identified by the Trustee are based in New York (William Chudd, Joanna Reiss, and Euclid Transactional, LLC). *See* Ex. F at 11; ECF 100 at 7. Across the Initial Disclosures, at least 75 identified witnesses (party and third-party) are subject to compulsory process in New York City *compared to zero in Texas*. *See* ECF 97, 99, 100 (Defs.' Initial Disclosures); 2d Barillari Decl., Ex. H (Plf. Interrogatory Response).

These New York witnesses include alleged advisors on the Special Dividend and UnSub Transaction, representatives of the banks that underwrote and arranged the Credit Agreement, and *lenders that the Trustee claims were defrauded* (but that the Trustee conspicuously omitted from his disclosures). *See* ECF 100 at 8-18; Ex. H at 11. The Trustee cannot seriously object to the relevance of these New York witnesses, when his claims depend on proving that the original lenders were defrauded, *e.g.,* Compl. ¶¶ 264-271, and where he has already told the Court that he plans on deposing "advisors of debtors and Defendants," Joint Discovery Plan, ECF 62 at 7.

In addition, the Fifth Circuit's "100 mile rule favors transfer (with differing degrees) if the transferee venue is a shorter average distance away from witnesses than the transferor venue." *Ice Melon, LLC v. Morgan*, 2020 WL 12863808, at *8 (S.D. Tex. Jan. 14, 2020) (cleaned up) (quoting

In re Volkswagen of Am., Inc., 545 F.3d 304, 317 (5th Cir. 2008)). Litigating in Texas would be profoundly inconvenient under this standard. Per the Initial Disclosures: the Cornell Defendants are located in New York City, Defendant McRae also resides in New York City, and Defendant Dubel resides in New Jersey; all of them would therefore be forced to travel over 1,400 miles to litigate in Houston; Defendants Wang, Qin, and Larocque are located in Ontario which is approximately 335 miles from New York City, but *1,518 miles from Houston*; Defendant Hess resides near Charlotte, North Carolina, which is approximately 536 miles to New York City *but 925 miles from Houston*; Defendants Gadbois, Hewitt, Kist, and Landman live near Chicago, Illinois, which is approximately 713 miles from New York City, but 939 miles from Houston. The only party that lives closer to Houston than New York City is Defendant Wilkes who resides near Nashville, Tennessee, which is approximately 100 miles closer to Houston. By comparison, the other parties would travel *an extra 14,789 miles* to testify in Houston rather than New York City.[4]

Third, regarding access to proof, the Trustee correctly concedes that there is no evidence located in Texas but incorrectly asserts that this means this factor is "neutral." Opp. 28. To the contrary, to the extent there is documentary evidence in this case (*e.g.*, hardcopy documents, handwritten notes, etc.), it will be located in New York (where 75 of the 123 witnesses identified thus far reside) or in states *other than Texas* (where no identified witness resides). This factor thus weighs in favor of transfer and is not merely neutral. *See, e.g.*, *Fin. Cas. & Sur., Inc. v. Zouvelos*, 2012 WL 2886861, at *6 (S.D. Tex. July 13, 2012) ("Most of the relevant documents and physical evidence relating to them are located in New York. This factor supports transfer, even in an age of electronically available documents."); *Children's Health Def. v. WP Co., LLC*, 2023 WL

[4] The Trustee also appears to suggest (Opp. 29) that Younghoon Park might not be subject to personal jurisdiction in New York. That is wrong as discussed above in Part I.

3940446, at *3 (N.D. Tex. May 12, 2023) ("[T]he first private interest factor supports transfer because no evidence is in Texas and the relevant documents are in Defendants' respective headquarters in New York, the District of Columbia, and London.").

Fourth, the "last private interest factor favors transfer when most witnesses are present in the transferee forum and the plaintiff has no presence in" the transferor forum. *Correct Transmission LLC v. ADTRAN, Inc.*, 2021 WL 1967985, at *5 (W.D. Tex. May 17, 2021). Here, "far more witnesses for both parties live in or" can travel "convenient[ly] to New York than to Houston," which makes "trial of the case there easier and less expensive." *Pakage Apparel Inc. v. Tommy John Inc.*, 2024 WL 3905738, at *4 (S.D. Tex. Aug. 22, 2024). This "is especially so where," as here, the plaintiff "has no physical presence or witnesses of its own whatsoever in the SDTX." *Id*. Under these circumstances, "[t]his factor weighs heavily in favor of transfer." *Id.*

The Trustee incorrectly contends that this factor weighs against transfer because (he says) this Court has "familiarity with the issues involved in this adversary" proceeding. Opp. 30. "This case is at an early stage," however, and this Court has not had occasion to consider or adjudicate the merits of the Trustee's claims. *SQIP*, 728 F. Supp. 3d at 456 (granting transfer where "this Court has not gained substantial familiarity with the case"). In addition, the Trustee omits that the Debtors' bankruptcy is relevant here only insofar as some Defendants have invoked certain post-petition releases and that those defenses are a limited component of this action. Those defenses, moreover, would require the transferee court merely to interpret another court's orders, which courts do on a daily basis and therefore does not require this case to be adjudicated here. There is "no reason to conclude" that this Court "is the only court able to interpret" the releases in the DIP Order and the Chapter 11 Plan Confirmation. *See In re Finley, Kumble, Wagner, Heine,*

Underberg, Manley, Myerson & Casey, 149 B.R. 365, 370 (Bankr. S.D.N.Y. 1993) (denying transfer to "home" bankruptcy court). Therefore, all the private factors favor transfer.

III. The Case Must Be Transferred to the Southern District of New York Because the Public Interest Factors Also Favor Transfer.

A. Centralization Cannot Outweigh the Public Interest in Enforcing Forum-Selection Clauses Because Instant Brands' Reorganization Is Complete.

Instant Brands reorganization was confirmed over a year ago; therefore, any public interest in centralizing bankruptcy proceedings is "significantly weakened, if not entirely destroyed" as applied to the Trustee's claims. *Manchester*, 417 B.R. at 387 n.8; *Mirant Corp. v. Southern Co*., 337 B.R. 107, 124 (N.D. Tex. 2006); *see CapRock Milling & Crushing, LLC v. Perdue Agribusiness LLC*, 2024 WL 4582903, at *6 (N.D. Tex. Oct. 25, 2024). While the Transfer Motion explained this point at length, Mot. 22–23, the Trustee ignores it entirely and simply insists, incorrectly, that the "public policy favoring the adjudication of core claims in bankruptcy court" weighs against transfer here. *E.g.*, Opp. 24–25 (insisting falsely that Cornell Defendants' "only argument on this point is that the forum selection clause overcomes this presumption").

The Trustee's argument ignores the posture of this bankruptcy and the prepetition nature of his claims. There is no need for centralization when (a) Instant Brands' reorganization concluded in February 2024 and (b) "in the words of the Fifth Circuit, the underlying nature of the Adversary Proceeding, does not derive exclusively from the provisions of the Bankruptcy Code and is in fact derivative of the prepetition legal rights possessed by the debtor." *Manchester*, 417 B.R. at 386–87 (internal citations omitted). Indeed, at least five out of the Trustee's eleven claims are non-core claims, and the core claims are "premised exclusively on prepetition conduct and rel[y] on the same factual basis as the Trustee's state law claims for relief." *GWG* at 9; *see* Part I.B, *supra*. Under these circumstances, the public interest favors enforcing the forum-selection clause, *see id.*, because when a "forum-selection clause" governs, "'the interest of justice' is served

by holding parties to their bargain" in "all but the most unusual cases," *Atl. Marine Constr. Co.*, 571 U.S. at 66.[5] Thus, the Trustee's centralization argument fails, whether construed as a public factor argument or as a claim that enforcing the forum-selection clause would be unreasonable.

B. The Remaining Public Factors Favor Transfer.

All the other public interest factors under 28 U.S.C. §§ 1404(a), 1412 favor transfer here. *First*, New York has a stronger interest than Texas in adjudicating these claims. To identify which forum has a "local interest," "[w]e look not to the parties' significant connections to each forum but rather the significant connections between a particular venue and the events that gave rise to a suit." *TikTok*, 85 F.4th at 365 (original ellipses omitted). "Accordingly, this factor weighs heavily in favor of transfer when there is no relevant factual connection to the transferor district." *Id.* (original ellipses, brackets, quotations, and citations omitted). The Trustee cannot reasonably contend that Texas citizens have any interest in adjudicating this case: (i) *none* of the events in the Complaint are alleged to have occurred in Texas; (ii) *none* of the witnesses identified in any party's Initial Disclosures reside in Texas; (iii) *none* of the claims are governed by Texas law; and (iv) *no* injury allegedly was suffered in Texas.

New York citizens, by contrast, have a strong interest in adjudicating this case where: (i) the Complaint asserts that nine out of eleven claims are governed by New York law, Mot. 3; (ii) the Cornell Defendants are based in New York, *id.* at 23; (iii) many third-party witnesses reside in New York; (iv) the Trustee himself resides in New York, *id.*; (v) the Credit Agreement at the heart of this case is a New York law agreement, *id.*; and (vi) the assets that the Trustee alleges were

[5] *In re Cole*, 2008 WL 2857118 (Bankr. N.D. Tex. July 21, 2008) is inapposite. There, the main bankruptcy proceeding had not yet concluded, unlike here, where the debtor's reorganization plan has already been confirmed. *See id.* at *4 ("the adversary proceeding should be *tried along with the core bankruptcy case*"). Furthermore, the adversary proceeding in *Cole* was "a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B)(I) & (O)." *Id.* at *1. By contrast, here, five out of eleven of Trustee's claims are non-core. *See* n.1, *supra*.

fraudulently transferred included a Corning, NY manufacturing plant, *id.* (while the Trustee notes that Corning, NY is not in the Southern District of New York, it remains of much greater interest to New York residents than Texas residents). This factor weighs in favor of transfer.[6]

Second, the Trustee's claim that a New York court would not have greater familiarity with the governing law is incredible. Opp. 32. Despite insisting in the Complaint that New York law governs his fraudulent transfer claims, Compl. ¶¶ 163–222, his opposition brief asserts that Illinois or Delaware law apply to those claims, Opp. 32. The Trustee cannot argue New York law governs in the Complaint, and then argue that a different state law governs to try to avoid transfer. *Tianhai Lace USA Inc. v. Forever 21, Inc.*, 2017 WL 4712632, at *2 (S.D.N.Y. Sept. 27, 2017) ("In resolving a motion for transfer, the Court assumes allegations in the Complaint to be true."); *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001) ("A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them."). Moreover, the Trustee's tort claims (Counts X and XI) indisputably are subject to the Credit Agreement's New York choice of law clause, creating a further connection to New York. Ex. B § 10.14(b).[7] Thus, the only claims *not* governed by New York law are the Delaware-law illegal dividend and fiduciary duty claims, *i.e.*, claims that New York courts hear regularly. *See* Cornell Defendants' Motion to Dismiss, ECF 78, at 35 n.14, 43.[8]

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[6] Because Instant Brands' reorganization is complete, and because the Complaint focuses on purely prepetition conduct, the Trustee cannot rely on *In re Genever Holdings LLC* to claim that this proceeding "arise[s] from this Court's bankruptcy plan." Opp. 32. *Genever Holdings* concerned a motion to transfer a lawsuit *in parallel* to active chapter 11 reorganizations and which concerned an inter-creditor dispute that was the "gating issue" common to those reorganizations. 2022 WL 16703185, at *5–6, 8 (S.D.N.Y. Nov. 3, 2022). None of those facts are present here.

[7] Because the Complaint alleges prepetition claims that arise out of prepetition events, the Trustee's speculation that New York courts "would be unfamiliar with" Instant Brands' bankruptcy is irrelevant. Opp. 32.

[8] For these same reasons, there is no basis to the Trustee's unsupported claim that transfer would lead to a conflict of laws. Opp. 33. The Defendants have agreed with the Complaint's invocation of New York law as to all claims except the special dividend and fiduciary duty claims. *See* Mot. 7–8. Both New York and Texas adhere to the internal affairs doctrine; therefore, Delaware law would govern those three claims no matter where this case is adjudicated.

Third, to the extent the Court analyzes court congestion, it favors transfer. The Trustee asserts that the bankruptcy court of the Southern District of New York has experienced a 6.5% uptick in the number of pending cases in 2024, Opp. 30–31, but he omits that the bankruptcy court of the Southern District of Texas had *12,247* cases pending at the end of 2024 (2,449 cases per judge) as compared to only 4,980 cases pending in the bankruptcy court of the Southern District of New York (498 cases per judge).[9] Put differently, there are nearly *five times more cases per judge pending in this Court than in the bankruptcy court of the Southern District of New York*. Likewise, the Trustee omits that the median time from filing to disposition for civil cases in the Southern District of New York is faster (6.6 months) than in the Southern District of Texas (7.5 months),[10] while the seven-month difference in time to trial is negligible, at most. Opp. 30–31.

Fourth, this case does not present any "risk of inconsistent rulings." Opp. 33. The Trustee fails to identify a single dispute before this Court that requires it to interpret a Plan provision that also is at issue in this proceeding. That is because there are none. The Debtors' reorganization concluded over a year ago and all that remains in the bankruptcy are claims objections, none of which concern the releases that may be interpreted in this action. Further, the Trustee claims (at 33) that severance could potentially lead to "inconsistent rulings," but his concern is misplaced. No party is advocating for severance and there is no risk of inconsistent rulings on that basis.

CONCLUSION

The Court should grant the motion and transfer this adversary proceeding.

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[9] *U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending December 31, 2023 and 2024*, U.S. Courts, at 1–2 (Dec. 31, 2024), *available at* https://www.uscourts.gov/sites/default/files/2025-01/bf_f_1231.2024.pdf.

[10] *See U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated and Pending During the 12-Month Periods Ending December 31, 2023 and 2024*, U.S. Courts, at 1–2 (Dec. 31, 2024), *available at* https://www.uscourts.gov/sites/default/files/2025-01/bf_f_1231.2024.pdf

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2025, a true and correct copy of the foregoing was served on the parties via the Court's electronic notification system.

/s/ *John F. Higgins*
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