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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	Chapter 11
HARVEST SHERWOOD FOOD DISTRIBUTORS, INC., *et al.*,	Case No. 25-80109 (SGJ)
Debtors.	(Jointly Administered)
HARVEST SHERWOOD FOOD DISTRIBUTORS, INC.,	Adv. Pro. No. 25-08002 (SJG)
Plaintiff,	
v.	
SPROUTS FARMERS MARKET, INC., SFM, LLC D/B/A SPROUTS FARMERS MARKET, AND JOHN DOE DEFENDANTS 1-200,	
Defendants.	

SPROUTS' BRIEF IN SUPPORT OF ITS MOTION FOR: (I) SUMMARY JUDGMENT DISMISSING ALL OF PLAINTIFF'S CLAIMS; AND (II) PARTIAL SUMMARY JUDGMENT ON SPROUTS' COUNTERCLAIMS

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I. INTRODUCTION AND PRELIMINARY STATEMENT

"***Nothing like the smell of napalm first thing in the morning to go with the morning Joe…***"[1] This was Ankura's response to an update from Harvest's Chief Financial Officer, Scott Fournier, sent on *August 3, 2024* regarding Harvest's deteriorating financial condition and inability to pay its food suppliers, including Sprouts' Vendors. Ankura then asked, "Do you think we can hold the line with the suppliers (no additional credit holds, demands for early pay; etc.)?" Fournier replied: "Highly unlikely - we need the product and *they [the vendors] can press the hold button at will* or even worse - reach out to Sprouts/Marcs/ACME and we'd be hit hard. ***Also, our Sprouts vendors are out of terms by 3.5MM and if they caught wind of that, we'd have some major 'splainin' to do Lucy!***" Ex.21, Apx.253-53 (emph. added).[2]

Fournier wrote these words 6 months before the company's collapse—acknowledging that Harvest was millions of dollars behind on payments to suppliers that Sprouts hand-picked and directed to ship Sprouts' orders through Harvest—and if Sprouts ever found out, the deception would be exposed. This email was sent just 6 weeks after Harvest (including Fourier and CEO Karl Berger) had reassured Sprouts multiple times that it was current in paying Sprouts' vendors and would stay current – a discussion that was necessitated in June 2024 after Sprouts discovered that two of its key vendors had placed shipping holds on Sprouts' orders based on Harvest's non-payment, thereby jeopardizing its fresh poultry deliveries to all of Sprouts' Eastern U.S. stores.

Sprouts entrusted Harvest for over 20 years with a key function: work with Sprouts as its nationwide distribution partner, deliver goods required by Sprouts from Sprouts' specific, attribute driven vendors, and pay Sprouts' vendors. Harvest accepted that responsibility—and Sprouts' money—but did not perform. As internal emails obtained in discovery show, Harvest was experiencing a massive cash flow deficit in the *summer/fall of 2024* and could not pay vendors

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[1] The quote "Nothing like the smell of napalm in the morning" is from the movie *Apocalypse Now*, a Vietnam War era film directed by Francis Ford Coppola about the moral and psychological collapse of human beings when placed in the chaos of war. The statement is made by Robert Duvall after an area of the Vietnamese jungle has been strafed with napalm and is on fire.

[2] Citations to the *Appendix To Sprouts' Brief In Support of Motion For Summary Judgment* filed contemporaneously herewith are provided as "Apx.___" to refer to the page number.

timely, even though: (i) Sprouts was timely paying Harvest every week, and (ii) Sprouts' vendors' cost of goods was a direct "pass through" to Sprouts, meaning Harvest always received enough money from Sprouts to cover the cost of the underlying goods (and also received a "cost plus" distribution fee). As more and more Vendors put Harvest on shipping holds, Harvest concealed this from Sprouts knowing Sprouts' entire supply chain and ability to keep its shelves stocked was in jeopardy. By the time the truth emerged, Harvest had failed to pay $60 million owed to Sprouts' vendors, triggering shipment stoppages, supply chain disruption, and reputational harm to Sprouts. As recognized by its CFO in the very email quoted above, Harvest knew such damage would be inflicted on Sprouts, but concealed it nonetheless.

In an incredible attempt at revisionist history, Harvest filed its bankruptcy case under the pretense that *Sprouts* somehow caused Harvest's downfall. But the record is undisputed. Harvest's internal communications, financial statements, and the testimony of its executives and key employees confirm that Harvest misled Sprouts for nearly 9 months about its inability to pay vendors all while continuing to place orders on behalf of Sprouts, yet knowing it likely could not perform (or could be cut-off by Sprouts' vendors at any moment). No reasonable factfinder could conclude otherwise. Sprouts is entitled to summary judgment because the undisputed evidence establishes, as a matter of law, that: (i) Harvest breached its express agreements with Sprouts – namely, to timely pay Sprouts' Vendors; (ii) made material misrepresentations/omissions which Sprouts relied to its detriment, and (iii) caused Sprouts to incur significant damages based on Sprouts' payments to its vendors to ensure they would continue shipping Sprouts' products.

Even worse, when Harvest's deceit finally became clear on or around February 5-7, 2025, Sprouts noticed Harvest of its breach and began exercising it remedies. Harvest – having already begun its wind-down process and being controlled by its Lenders' advisors – then established a plan to hold Sprouts' products (ordered weeks prior and already "landed" in Harvest's warehouses) hostage knowing Sprouts had no ability to obtain replacement products. On February 11, 2025, Harvest extorted Sprouts into a bad-faith "modification" to pay Harvest to get these same goods, while refusing to pay Sprouts' vendors, knowing that Sprouts would have to pay them as well. In

the face of this tremendous economic and temporal burden, Sprouts objectively had no reasonable alternative but to yield to Harvest's ransom demands to prevent irreparable harm to its supply chain and its overall business. Such "agreement" was clearly procured in bad faith and under duress caused by Harvest's long-standing and concealed breach of its agreements with Sprouts.

II. STATEMENT OF FACTS

Sprouts' Business Model and Sourcing of Its Products/Vendors

The parties had a long-standing relationship whereby Harvest acted as Sprouts' sole, nationwide meat and seafood distributor for over 20 years (the "Distribution Agreement"). Ex.75, Young Tr. 19:2-20:1, Apx.778-79;[3] Ex.76, Mirza Tr. 41:16-41:22, Apx.823; Ex.77, Fournier Tr. 59:5-62:2, Apx.829-32. During this period, Sprouts relied on Harvest to deliver all of Sprouts' required meat and seafood for all of its stores, including all new stores that were opened each year as Sprouts grew to 450 stores nationally. Ex.85, Hurley Dec. ¶¶3-7, Apx.1218. Sprouts' business model and product offerings rely on creating a unique shopping experience distinct from traditional conventional grocers. Ex.85, Hurley Dec. ¶8, Apx.1218-19; Ex.88, Ackerman Dec. ¶3, Apx.1242; Ex.78, Farmer Tr.,[4] 38:13-40:17, 47:11-47:22, Apx.914-16, 923. For example, Sprouts does not carry products such as Coca-Cola, Pepsi, Frito Lay, Nabisco, Kraft, Campbells Soup or other well-known national brands, and instead, offers more niche brands to its customers. Ex.85, Hurley Dec. ¶8, Apx.1218-19; Ex.88, Ackerman Dec. ¶3, Apx.1242. Similarly, Sprouts' meat and seafood department aims to distinguish itself from its conventional grocery store competitors by focusing on natural, organic, grass-fed, No Antibiotics Ever (NAE), and other specific attribute-driven meat and seafood products, does not carry big-box brands like Oscar Mayer or Johnsonville. Ex.87, Swinton Dec. ¶3, Apx.1235; Ex.85, Hurley Dec. ¶9, Apx.1219; Ex.88, Ackerman Dec. ¶4, Apx.1242; Ex.78, Farmer Tr., 38:13-40:17, Apx.914-16; Ex.75, Young Tr., 43:21-45:7, Apx.785-

[3] Brad Young worked at Harvest for over 20 years and was the national category manager for deli, bakery, and processed goods. Mr. Young also held roles as poultry and pork procurement in the So-Cal region. From 2016 – 2025 Mr. Young worked exclusively on the Sprouts account for Harvest. Ex.75, Young Tr., 14:2 – 16:1, Apx.775-76.

[4] Spencer Farmer worked for Harvest since 2013 and served as the National Account Manager for Harvest's Sprouts' business, working exclusively with Sprouts from 2017 – 2025. Ex.78, Farmer Tr., 14:13 – 16:12, Apx.911-913. A "cheat sheet" showing the key officers and employees for Harvest and Sprouts is attached hereto as **Schedule 1**.

87.

Sprouts' meat/seafood department is majority "private label," meaning the products are branded using Sprouts' trademarks. Ex.85, Hurley Dec. ¶10, Apx.1219; Ex.88, Ackerman Dec. ¶5, Apx.1242. To obtain private label products, Sprouts negotiates with specific food vendors who can raise and/or process the specific meat/seafood products Sprouts requires and desires to sell in its stores. Sprouts negotiates directly with such vendors to enter into private label agreements and further negotiates the cost of such goods ("COGS") directly with such vendors. Ex.85, Hurley Dec. ¶11, Apx.1219. These agreements are very specific and include the specifications of the products required, "code date" (i.e., expiration date) requirements, and products to be made exclusively for Sprouts. Ex.85, Hurley Dec. ¶12, Apx.1219; Ex.88, Ackerman Dec. ¶7, Apx.1242-43. Generally, these private label agreements contain the same substantive terms, but differ as to the products, quantities, etc. *See* Ex.2, AZ Gems Agmt, Apx.41-57, Ex.3, Europena Ingredients Agmt, Apx.58-74; Ex.4, Randall Foods Agmt, Apx.75-187. Sprouts directly negotiates these agreements and Harvest is not a party to them. *Id.*; Ex.88, Ackerman Dec. ¶6, Apx.1242. Sprouts also negotiated and sourced private label products from Vendors with whom it has done business with for over a decade where it does not have a formal private label agreement. These Vendors include Pitman Farms, Perdue Farms, National Beef, and Southwind Foods. Ex.85, Hurley Dec. ¶13, Apx.1219; Ex.88, Ackerman Dec. ¶8, Apx.1243; Ex.78, Farmer Tr., 154:5-154:12, Apx.963.

Sprouts also does substantial business with Tyson Foods for its rotisserie chicken program with Tyson supplying specific attribute whole chicken for Sprouts pursuant to an agreement entered into in 2022 for the supply of over *26 million tons* of chickens per year. Sprouts continues to operate with Tyson Foods under the substantive terms of this agreement, but with modified pricing Ex.5, Tyson Agmt, Apx.188-198; Ex.88, Ackerman Dec. ¶10, Apx.1243; Ex.85, Hurley Dec. ¶14, Apx.1219. Sprouts also has incentive/volume agreements with certain vendors whereby Sprouts accrues credits and/or rebates based on the amount of products Sprouts purchases from such vendors. Ex.6, Perdue Farms Agmt, Apx.199-204; Ex.7, National Beef Agmts, Apx.205-211; Ex.88, Ackerman Dec. ¶11, Apx.1244; Ex.85, Hurley Dec. ¶15, Apx.1219. Sprouts also has

numerous smaller to medium sized vendors that it sources products from and negotiates prices (COGS) directly with these vendors as well. Ex.85, Hurley Dec. ¶16, Apx.1219-20; Ex.88, Ackerman Dec. ¶12, Apx.1244; Ex.87, Swinton Dec. ¶14, Apx.1237. In total, during 2024 and early 2025, Sprouts sourced products from 65 or more suppliers ("Vendors") for its meat and seafood department. Ex.85, Hurley Dec. ¶17, Apx.1220.

Currently and in 2024/early 2025, approximately 75% of Sprouts meat/seafood products and revenue consists of perishable/fresh product offerings (e.g., thighs, breasts, ground turkey, and ground beef). Ex.88, Ackerman Dec. ¶14, Apx.1245; Ex.85, Hurley Dec. ¶18, Apx.1220. The vast majority of these fresh products were "private labeled" Sprouts products. *Id*. These perishable/fresh product offerings are the main driver of Sprouts' meat/seafood department and generate the most sales. *Id*. Sprouts also sells private label frozen and processed goods. Ex.88, Ackerman Dec. ¶15, Apx.1245; Ex.85, Hurley Dec. ¶19, Apx.1220. In total, approximately, 70-75% of the products offered by Sprouts were (and still are) private label goods. *Id*.

In general, Sprouts evaluates its Vendors to confirm the products they are producing actually contain the attributes Sprouts requires. Ex.85, Hurley Dec. ¶22, Apx.1220; Ex.88, Ackerman Dec. ¶16, Apx.1245; Ex.87, Swinton Dec. ¶15, Apx.1237. This vetting process includes: (i) touring the Vendors' facilities/farms, (ii) engaging in tastings known as "cuttings," (iii) negotiating the COGS, quantities, and number of stores in which to carry the product directly with the Vendor, and (iv) negotiating and executing a private label agreement (if applicable). *Id*. Sourcing just a single vendor involves the foregoing steps and typically takes multiple months. *Id*. Even for larger Vendors such as Tyson Foods or JBS (who Harvest may have purchased products from for other customers), Sprouts determined the specific products (with specific attributes) to purchase from these Vendors (or their subsidiaries) and engaged in the same vetting process, price negotiation, and private label agreements (if applicable). Ex.85, Hurley Dec. ¶24, Apx.1221; Ex.88, Ackerman Dec. ¶18, Apx.1245-46; Ex.87, Swinton Dec. ¶17, Apx.1237. The Tyson Agreement for whole chickens referenced above is a good example of this type of direct negotiation. *Id.*

Harvest's Role As Sprouts Logistics/Distribution Partner With Harvest Operating On a "Cost Plus" Basis

After conducting the foregoing vetting process and confirming that it wishes to carry a particular product, Sprouts then introduced Harvest as Sprouts' distributor and asked the Vendor to ship the goods to Sprouts via Harvest. Ex.85, Hurley Dec. ¶23, Apx.1221; Ex.88, Ackerman Dec. ¶17, Apx.1245; Ex.87, Swinton Dec. ¶16, Apx.1237. For each Vendor, Sprouts informed them that Sprouts will pay for their products through Harvest—i.e., Sprouts will pay Harvest and Harvest will pay the Vendors. *Id*. (Sprouts' Decs). Sprouts is the party that determines which Vendors they will purchase product from, the price of such product, and when to order the product. Ex.85, Hurley Dec. ¶25, Apx.1221; Ex.88, Ackerman Dec. ¶19, Apx.1246 ; Ex.87, Swinton Dec. ¶19, Apx.1238; Ex.78, Farmer Tr., 44:20-46:4, Apx.920-22. Harvest did not play any role in making those determinations other than collaborating with Sprouts to ensure its shelves remained fully stocked . *Id.*

A typical example of Sprouts direct negotiation with vendors is Concord Premium Meats ("Concord"). In early 2023, Sprouts identified Concord as a vendor to sell marinated chicken products to Sprouts. Sprouts conducted its standard vetting/negotiation processes and, after approving the product and negotiating the pricing, introduced Concord to Harvest in February 2024. In the introduction email, Sprouts identified the product, the negotiated COGS, the anticipated launch date (on 4.22.2024—i.e., two months out), and that Concord's products would be carried in all Sprouts' stores. Sprouts then asked that Concord ship the products through Harvest as its distribution partner. Ex.88, Ackerman Dec. ¶21, Apx.1246; Ex.8, 2.14.2024 Email from Sprouts to Harvest, Apx.212-13. The Concord handoff is a typical example and Harvest was not involved in any of the processes/vetting leading up to such handoff. Ex.78, Farmer Tr., 73:11-75:12, Apx.927-29; Harvest understood and agreed that Sprouts was the party that held the relationship with Sprouts' Vendors – i.e., that Sprouts "owned" these relationships. Ex.78, Farmer Tr., 40:18-41:20, 77:24-78:3, Apx.916-17, 932-32; Ex.75, Young Tr., 46:13-47:20, Apx.788-89.

Sprouts and Harvest operated on a pure "cost plus" basis whereby Sprouts negotiated the COGS with Sprouts' food suppliers/vendors (the "Vendors"). Ex.85, Hurley Dec. ¶26, Apx.1221;

Ex.78, Farmer Tr., 47:23-48:23, 87:9-89:20, Apx.923-24, 936-38. Sprouts then communicated that COGS to Harvest and the COGS would be passed through by Harvest on a dollar-for-dollar basis to Sprouts, with Harvest charging a fixed distribution fee on top of the COGS. *Id.; see also* Ex.77, Fournier Tr., 58:9-58:24, Apx.828; Ex.79, Berger Tr., 66:3-67:9, Apx.1008-09. During 2024, the amount Harvest charged for its distribution fee was $0.13 per pound for shipments of 20 pounds or more and $3.00 per case for shipments under 20 pounds. Ex.85, Hurley Dec. ¶27, Apx.1221; Ex.78, Farmer Tr., 45:6-46:25, Apx.921-22. Harvest's former CEO, Karl Berger, estimated that Harvest's gross profit margin was approximately 4-5% on goods shipped to Sprouts. Ex.79, Berger Tr., 67:1-67:9, Apx.1009; *see also* Ex.77, Fournier Tr., 78:5-78:16, 79:13-80:12, Apx.838-40.

The primary purpose of Sprouts' relationship with Harvest was for the logistics/transporting of the products from the Vendors selected/approved by Sprouts at the COGS negotiated between Sprouts and the Vendors, the majority of which were Sprouts' private label goods with Sprouts' trademarks. Ex.87, Swinton Dec. ¶21, Apx.1238; Ex.85, Hurley Dec. ¶28, Apx.1221. Sprouts identified the Vendors to order from and the product/quantities; Sprouts did not ask Harvest to source goods/products from the general marketplace and Sprouts did not accept products from non-Sprouts' Vendors. *Id*. As Farmer testified:

> Q. And in your view, who -- who owns this relationship for the product and the product selection for Sprouts between -- with Concord?
>
> THE WITNESS:· Sprouts would own that.
>
> Q. Okay. And -- and on this type of a handoff, would you view Harvest to be essentially a middleman just serving in the role as a distributor?
>
> THE WITNESS:· **I would label, yeah, facilitator**

Ex.78, Farmer Tr., 77:24-78:10, Apx.931-32, *see also id.*, 83:5-85:7, Apx.933-35.

It is undisputed that Sprouts did not issue purchase orders to Harvest for the goods that Sprouts needed from Sprouts' Vendors to meet Sprouts' needs. Ex.9, Harvest's Supplemental Responses to RFAs at Responses Nos. 1 and 2, Apx.218-19. Rather, Sprouts relied on Harvest to obtain all of Sprouts' required meat and seafood products from Sprouts' Vendors at the negotiated COGS set by Sprouts and its Vendors. Ex.85, Hurley Dec. ¶¶29, 31, Apx.1222; Ex.88, Ackerman

Dec. ¶23, Apx.1246-47; Ex.77, Fournier Tr., 66:9-70:2, Apx.836-37. This was done on a collaborative weekly forecast basis where goods were ordered from Sprouts' Vendors on a two-to-three week "lead" times and based on the quantities and specifications that had been set between Sprouts and its Vendors. *Id*. Effectively, Harvest acted as Sprouts' agent and/or transportation middleman in procuring all goods required by Sprouts from Sprouts' Vendors to meet Sprouts' needs. *Id*. An example of the standing order forecasts used collaboratively by Sprouts and Harvest is attached to the Apx. as Exhibit 10 (Apx.223); Ex.88, Ackerman Dec. ¶23, Apx.1246-47. The parties' course of performance established a weekly forecasting cadence with rolling orders to Sprouts' Vendors, which Harvest would receive and then deliver in separate lots to Sprouts' stores, typically three times per week. The deliveries were evidenced by invoices issued from Harvest to Sprouts. Ex.85, Hurley Dec. ¶30, Apx.1222; Ex.88, Ackerman Dec. ¶24, Apx.1247.

Sprouts used Harvest exclusively as its distribution/transport partner for the products delivered by Harvest. Ex.85, Hurley Dec. ¶31, Apx.1222. Sprouts and Harvest were on 14-day payment terms meaning Sprouts owed Harvest for deliveries 14 days after they were delivered to its various stores. Ex.85, Hurley Dec. ¶32, Apx.1222. Harvest, in turn was permitted to negotiate whatever terms it could obtain from the various vendors, with many of them having terms beyond 14 days and up to 28 days or more. Ex.75, Young Tr., 253:1-254:14, Apx.819-820. Harvest's payment obligations to the Vendors were not triggered until the Vendors' goods were delivered to Harvest's distribution centers ("DCs") – i.e., "landed." Ex.75, Young Tr., 253:1-254:14, Apx.819-820; Ex.80, Owenby Tr., 178:6-179:5, Apx.1110-11.[5]

Harvest Knew Failure To Timely Pay Vendors Threatened Its Ability to Procure and Deliver Products to Sprouts and Thus Sprouts' Entire Business

The meat and seafood section of a grocery store is a key driver of customer foot-traffic and profits. Ex.85, Hurley Dec. ¶20, Apx.1220. Shoppers who buy meat and seafood also typically buy other products at a store, including sides such as potatoes, rice, vegetables, buns or other breads,

[5] Doug Owenby worked for Harves as its VP of Procurement and further acted as a liaison on key customer relationships like Sprouts to ensure no disruption of product flow and/or to get payments to Vendors. Ex.80, Owenby Tr., 18:6 – 19:17, 27:25 – 28:23, Apx.1061-64.

condiments such as ketchup, mustard, or mayonnaise, and other goods. Ex.85, Hurley Dec. ¶21, Apx.1220. If a store does not have meat and seafood, many shoppers would simply walk out and take their business somewhere else that has the products they need. *Id*.

In fact, Harvest prided itself on the delivery of "fresh" – i.e., non-frozen/non-processed products – to distinguish its distribution services:

> *Fresh offerings* were a key point of difference for Harvest Sherwood's customer base *as compared to big-box chains* and e-commerce, and Harvest Sherwood's supplier base provided for a wide breadth of store perimeter meat, seafood, deli, dairy, and bakery products. The perimeter of a store is more profitable when compared to center aisles for retailers, and typically houses perishable products like meat, seafood, dairy, deli, and bakery items. ***Perishable perimeter products account for approximate 25%–30% of retailer gross margins***, as compared to the approximately 20%–25% of retailer gross margins derived from center aisle product offerings. ***Protein is a primary driver of end consumer spending and earns high margins for retailers***, with the average purchase size including a protein often being twice as much as a purchase without protein. Shoppers dedicate a greater share of time in grocery stores at ***the fresh product offerings*** housed around the perimeter of the store, ***which is the primary driver of store visits for over 65% of consumers***.
>
> Harvest Sherwood distributed a wide breadth of store perimeter meat, seafood, deli, dairy, and bakery products ***that were key drivers for retail success***.

Ex.1, Kaup First Day Dec. ¶¶18-19, Apx.9-10 (emphasis added). Berger testified that he believed Kaup's statements *understated* the gross margins for which the meat/seafood department accounted for. Ex.79, Berger Tr., 81:9-82:22, Apx.1010-11.

Because Sprouts sourced and selected its Vendors and was reliant on those specific attribute-driven meat and seafood items for its customers (including its private label goods), Harvest knew it was imperative to pay the Vendors to ensure the continued flow of products to Sprouts. Ex.78, Farmer Tr., 40:18-44:4, Apx.916-20; Ex.82, Farmer II Tr. 383:24-385:12, Apx.1161-63; Ex.75, Young Tr., 42:17-22, Apx.784. Indeed, it is a basic fact of distribution that in order to obtain goods from the vendors, a distributor must pay for those goods. Ex.78, Farmer Tr., 91:5-92:18, Apx.939-40; Ex.81, Kaup Tr., 125:25-128:5, Apx.1132-35; Ex.79, Berger Tr., 50:3-51:8, Apx.1006-07; Ex.75, Young Tr., 28:20-29:6, Apx.780-81; Ex.80, Owenby Tr., 46:13-46:22, Apx.1065; Ex.88, Ackerman Dec. ¶29, Apx.1247. Harvest's agreement with Sprouts also implicitly and expressly meant that when Harvest agreed to place orders on behalf of Sprouts with

Sprouts' Vendors, Harvest was agreeing to obtain and ship those goods timely to Sprouts stores. Ex.77, Fournier Tr., 68:22-69:7, Apx.835-36; Ex.81, Kaup Tr., 194:10-194:20, Apx.1136; Ex.79, Berger Tr., 41:1-46:24, Apx.996-1002.

It is further undisputed that if a vendor is not paid for its goods, it can put a credit hold—a.k.a. shipping hold—on orders previously placed and not ship such orders to the customer/distributor (and refuse to accept further orders).[6] Even an outstanding balance as low as $19,000 has caused a vendor to stop shipping. Ex.80, Owenby Tr., 106:21-108:11, Apx.1092-94; Ex.19, Email string dated 7.22.2024, Apx.248, (stating, "We need them [Harvest] to ACH payment for their May invoices totaling $19,008.00 to process further orders" and internal Harvest response, "Can you help us here on getting Pacific Seafood covered on a payment ***so we can ship this next order please and have product flowing for Sprouts?***") (emphasis added)). The parties' course of dealing demonstrates that Harvest paid Sprouts' Vendors in a timely manner for nearly 20 years, and at least from 2017 through 2023.[7]

For Sprouts to receive products, typically a two week "lead time" order process was maintained. Ex.78, Farmer Tr., 165:22-166:6, (most lead times are 2 weeks), Apx.968-69; Ex.75, Young Tr., 69:13-69:25, 73:1-75:2, Apx.790, 793-95; Ex.80, Owenby Tr., 224:5-224:22, Apx.1120; Ex.81, Kaup Tr., 201:10-201:15, Apx.1137. This meant that if Harvest placed Sprouts' orders on February 1, 2025 for Sprouts' products, such goods would not be expected to be delivered to Harvest's DCs until approximately two weeks later, i.e., February 12 to 14. From there, Harvest would store the fresh (i.e., perishable) products for one to two days and then transport the products to Sprouts' stores. Ex.81, Kaup Tr., 80:2-80:15, Apx.1131; Ex.75, Young Tr., 69:12-70:20, Apx.790-91; Ex.80, Owenby Tr., 179:6-184:18, Apx.111-16. Frozen or processed inventory might be held in Harvest's DCs for one to two weeks. *Id*. The fresh/perishable

[6] *See* Ex.79, Berger Tr., 47:18-49:13, Apx.1003-05; Ex.77, Fournier Tr., 165:9-165:19, Apx.868; Ex.75, Young Tr., 33:18-34:20, Apx.782-83; Ex.80, Owenby Tr., 61:20-62:6, 76:3-77:10, Apx.1066-67, 1071-72; Ex.81, Kaup Tr., 253:21-254:20, Apx.1143-44.

[7] *See* Ex.78, Farmer Tr., 118:2-119:16, 194:23-195:7, Apx.953-54, 975-76; Ex.82, Farmer II Tr., 383:9-383:22, Apx.1161-63; Ex.87, Swinton Dec. ¶23, Apx.1239; Ex.80, Owenby Tr., 103:5-105:5, Apx.1089-91.

products typically only have a 10-day shelf life from the date they leave the Vendors' processing plants. Ex.78, Farmer Tr., 49:12-50:20, Apx.925-26; Ex.75, Young Tr., 72:8-75:7, Apx.792-95; Ex.85, Hurley Dec. ¶35, Apx.1223. The agreement between Sprouts and Harvest required Harvest to deliver such fresh products to Sprouts stores with at least five days remaining before the expiration i.e., "code dates" for the products. Ex.85, Hurley Dec. ¶35, Apx.1223; Ex.78, Farmer Tr., 49:24-50:23, Apx. 925-26; Ex.75, Young Tr., 72:8-75:7, Apx.792-95.

The Contract Terms Between Sprouts and Harvest Required Timely Payment of Sprouts' Vendors

The Distribution Agreement included the following material terms:

A) Harvest would provide distribution services to Sprouts on the "cost-plus" basis described above with Sprouts negotiating COGS directly with the Vendors.

B) Sprouts directed Harvest which Vendors to order from, which products to order (including quantities), and which stores to ship such products to.

C) Harvest agreed to procure and ship those products to Sprouts stores in a timely manner, including by within specified advance periods prior to expiration dates.

D) Harvest agreed to pay Sprouts' Vendors and keep them "current" – i.e., at terms – in order to avoid Vendors refusing to ship goods ordered by Sprouts.

Ex.85, Hurley Dec. ¶33, Apx.1222; Ex.88, Ackerman Dec. ¶27, Apx.1247. The parties also had a pattern and practice of providing offsets and credits for any damaged or non-conforming goods, including "short coded" goods. For deliveries that did not conform, Sprouts received a credit/offset against its next lump sum payment due to Harvest. Ex.85, Hurley Dec. ¶35, Apx.1223; Ex.88, Ackerman Dec. ¶28, Apx.1247.

In addition to being a basic fact/term of any distribution agreement that the distributor must pay Vendors to maintain a flow of products, Sprouts expressly required its Vendors be paid current and at terms, and this commitment was reiterated multiple times throughout the parties' relationship as acknowledged and agreed to by Harvest. Ex.87, Swinton Dec. ¶25, Apx.1239; Ex.88, Ackerman Dec. ¶¶34-43, Apx.1248-49.[8] For example, in approximately December 2022/January 2023, Sprouts was notified by one of its significant fresh poultry vendors, Perdue

[8] This timely Vendor payment term was critical to Sprouts because Harvest's role was predominantly that of a provider of logistics support services to Sprouts, sourcing products from vendors *that Sprouts selected, vetted, and approved.*

Farms, that Perdue was not being paid timely by Harvest and Sprouts' orders were threatened to be put on shipping hold. Ex.87, Swinton Dec. ¶26, Apx.1239. Harvest also received a temporary credit downgrade from SEAFAX at this time. Ex.87, Swinton Dec. ¶26, Apx.1239. Swinton, Sprouts' then head of its meat/seafood department, immediately reached out to Harvest's CEO, Karl Berger. Berger assured Swinton that this was a one-time issue resulting from a banking change from PNC Bank to J.P. Morgan that interrupted Harvest's normal payment processing. Ex.87, Swinton Dec. ¶27, Apx.1239. Berger admitted the company had taken a loss at one of its distribution centers in the prior year that led to the banking change, but did not suggest there were any fundamental financial issues with Harvest's business. *Id.* To the contrary, Berger represented the Seafax credit downgrade would be removed in the near future. *Id.*

Berger also reaffirmed Harvest's obligation to timely pay Sprouts' Vendors and assured Swinton that all such vendors would be caught up and brought current once the banking switch-over was fully in place and payment processes were back to normal. *Id.* at ¶29, Apx.1240. Swinton followed up directly with several vendors at this time to investigate whether this issue was systemic or a "one-off" situation. *Id.* The Seafax credit downgrade also was removed as Berger had stated. Based on Swinton's investigation and Berger's explanations, Swinton was satisfied that the issue was temporary and had been resolved. *Id.* For the remainder of 2023, Sprouts was not notified by any vendors of any shipping holds *Id.*

In June of 2024, two vendors (Perdue Farms and Plainville Farms) again alerted Sprouts that their shipments had been placed on hold due to non-payment by Harvest. Ex.88, Ackerman Dec. ¶31, Apx.1248; Ex.11, 6.10.2024 Email String (email 6.9.2024 from C. Ackerman within string), Apx.230. Ackerman investigated the Perdue and Plainville issues and stated to Harvest the nonpayment of Sprouts' vendors was "not acceptable and puts our business at risk." *Id.* (Ex.11, Apx.230). Multiple emails and Teams/phone calls took place between Sprouts and four Harvest employees/officers involved in these discussions: Berger (CEO), Fournier (CFO), Farmer (National Account Manager for Sprouts), and Owenby (VP of Procurement). Ex.88, Ackerman Dec. ¶32, Apx.1248. During these calls, Ackerman demanded that Harvest investigate and confirm

that all Sprouts' Vendors were both being paid current and would be paid current on a go forward basis. Ex.88, Ackerman Dec. ¶33, Apx.1248.

Fournier and Berger confirmed that they understood their agreement with Sprouts required them to pay Sprouts' Vendors current/at terms to avoid any risk of shipping holds. Ex.88, Ackerman Dec. ¶34, Apx.1248. Fournier and Berger further confirmed that Harvest was timely paying Sprouts' Vendors, blaiming the payment issues to Perdue on the fact that a payment clerk was on vacation and her backup did not know how to process certain invoices received from Perdue. Ex.88, Ackerman Dec. ¶35, Apx.1248. Indeed, Fournier emailed:

> I instructed our Treasury team to go back and reconcile why the payment was much smaller than expected - we either paid more on the catchup from the previous week's split payment error or we were behind in our invoice processing. *Unfortunately, upon reconciliation, we identified that we had an AP Associate on PTO and our backup was unable to resolve PO Variances and Process Invoices timely(for the Sherwood legal company); resulting in delayed invoice entry*. Our AP Manager, who is responsible for this, has been coached on the matter.

Ex.12, Fournier email dated 6.10.2024 (emph. added), Apx.232-34. Fournier further made express written representations that Perdue would be kept current:

> **What are we doing or have done**: … *We will make the payments agreed upon [to Perdue] without deviation*. We will continue to pay on Friday for everything due through the following Sunday – *which is what we have been doing for the last 18 months*. All in written format so there is no ambiguity in what was agreed upon."

Id. (emph. added). In addition, on June 12, 2024, Doug Owenby followed up with Ackerman and confirmed that Plainville had been caught up and would remain current going forward, writing:

> Our AP team has processed the invoices for Plainville and issued a check. I have had conversations with Plainville and we will begin getting weekly statements … [which] will enhance the consistency on this account. ***Plainville and Harvest Sherwood are good and will remain good as we move into the future***.

Ex.13, Email dated 6.12.2024, Apx.235; *see also* Ex.80, Owenby Tr., 77:20-80:2, Apx.1072-75.

Ackerman further demanded calls with Harvest that Harvest investigate all suppliers to confirm there were no issues and bring any issues with late payments to her attention immediately with a plan as to how they would be resolved. Ex.88, Ackerman Dec. ¶36, Apx.1248-49. Fournier and Berger promised to conduct such an investigation and report back if there were any issues, and that "no news was good news". Ex.88, Ackerman Dec. ¶37, Apx.1249. Ackerman recapped these

agreements in her follow up emails to Harvest, writing:

> Below are the agreed upon follow ups with by when's in priority order:
>
> - H/S to Sprouts - All brands under the Perdue umbrella made current to agreed upon terms and confirmation the future hold is released by end of day today …
>
> - **My TOP priority today is to ensure resolution and get confirmation from both parties that everything is current, there is agreed upon process to ensure this does not happen again and the futureorder hold is removed**.
>
> **…**
>
> - ALL - Overtime, restore confidence that all payments to and from Harvest / Sherwood are current and kept "at terms"

Ex.14, Email string dated 6.11.2024, Apx.238; Ex.88, Ackerman Dec. ¶38, Apx.1249. Similarly, on June 13, 2024, Ackerman wrote to Berger, Fournier, Farmer and Owenby:

> My request at this time:
>
> ...
>
> 2. Complete a deep dive of ALL supplier partners ***to ensure they are "at terms" per your agreement with them***
>
> 3. ***Notify me of any and all partners who may not be current*** and what actions you are taking and by when to ensure they are current and in good standing
>
> In return, I will reach out to Scott if I hear from any partners regarding payment opportunities so you can investigate. Again, I appreciate your prompt attention and due diligence to restore confidence *that all partners are getting and receiving payments as expected*.

Ex.71, email from Ackerman within string sent 6.13.2024, Apx.583; Ex.88, Ackerman Dec. ¶38, Apx.1249. In testimony, neither Berger nor Fournier had any specific recollection of what was stated in the June 2024 calls surrounding the Perdue/Plainville shipping holds.[9] However, both Farmer and Owenby confirmed the conversations occurred and that Harvest's agreement to pay Sprouts' Vendors current were confirmed on those calls.[10]

[9] Ex.79, Berger Tr., 84:22-85:6, 88:16-89:5, 94:8-98:7, 103:25-105:24, Apx.1012-15, 1017-21, 1022-24; Ex.77, Fournier Tr., 96:13-98:1, 102:7-103:14, 108:7-110:5, Apx.841-48.

[10] Ex.78, Farmer Tr., 104:6-106:16, 107:12-109:1, 110:11-111:5, 114:16-115:13, 117:19-118:7), Apx.941-948, 950-53; Ex.80, Owenby Tr., 73:13 – 76:22, 79:11 – 80:13, 84:7 - 86:25, Apx.1068-71, 1074-75, 1079-81.

Harvest Commences Its Efforts To Conceal From Sprouts That It Was Not Timely Paying Sprouts Vendors and Sprouts Vendors Were Threatening (or Implementing) Shipping Holds

In reality, as of June 2024, Harvest was already experiencing financial distress and retained Ankura Consulting Group ("Ankura") and Sidley & Austin to provide restructuring related services. Ex.1, Kaup First Day Dec. ¶38, Apx.17. Harvest clearly understood that it was required to pay *all* Sprouts' Vendors timely based on the representations it made to Sprouts as on June 13, 2024, as Fournier wrote to his accounts payable team to figure out a way to pay Sprouts' Vendors current so Harvest "can say ***'yes, we have paid all Sprouts invoices at terms'".*** Ex.15, Teams Chat Messages dated 6.13.2024, Apx.241; Ex.80, Owenby Tr., 90:3-91:22, Apx.1084-85. In fact, contrary to the representations made to Sprouts, Harvest was already materially behind in paying Sprouts' Vendors but concealed this fact from Sprouts. For example, on June 17, 2024, a Sprouts' Vendor, Swaggerty Sausage, emailed Harvest about a significantly past due balance and stated, "[t]hese balances need to be paid in full immediately to avoid stop shipments." Ex.16, Email string dated 6.17.2024, Apx.242. Young forwarded the message internally writing, "As mentioned before, this vendor is very vocal ***and will alert Sprouts to this issue if we don't respond swiftly***." *Id*. (emphasis added). Farmer then further responded, "Doug [Owenby], this would be a good one to keep on our radar with last weeks meetings" referring to the representations made to Akerman and Carlson the prior week. *Id.*; *see also* Ex.78, Farmer Tr., 117:19-120:19, Apx.952-55; Ex.80, Owenby Tr., 84:7-88:2, Apx.1079-83. No one on this email – Young, Fournier, Berger, Farmer, or Owenby – alerted Sprouts to this issue or the fact that Harvest was not paying Sprouts' Vendors at terms in late June 2024 or even as of August 2024. Ex.88, Ackerman Dec. ¶40, Apx.1249; Ex.80, Owenby Tr., 80:14-83:3, 134:21-135:9, Apx.1075-78, 1103-04; Ex.78, Farmer Tr., 110:11-112:24, Apx.947-49; Ex.77, Fournier Tr., 112:24-113:17, 131:22-133:10, 134:14-135:11, 168:13-170:13, Apx.849-50, 860-61, 863-64, 869-871; Ex.79, Berger Tr., 88:16-90:6, 114:12-115:12, 145:5-146:8, 148:10-149:13, 204:1-204:6, Apx.1014-16, 1025-30, 1035.[11]

[11] Berger testified Farmer likely would have been the Harvest employee to notify Sprouts that Harvest was behind paying Sprouts' Vendors. Ex.79, Berger Tr., 89:15-90:6, Apx.1015-16. However, Farmer testified that he did not notify Sprouts of the credit holds and issues with suppliers until at least late January 2025 via the list sent to Ackerman

Similarly, on June 22, 2024, Fournier followed up with his accounts payable team, writing:

> Everyone - where are we at with identifying all Sprouts PO's and vendors ***to ensure that we are paying within agreeable terms***. This must be a priority for Monday. … We need the process established by early next week and we will need to prioritize Sprouts suppliers/PO's going forward … Before I tell Crystal [Ackerman] we can provide, I need to see where we are at currently and what it may tell ….This is the same request ***that was discussed with Sprouts after the Perdue issue*** - … So we need to understand what is our current position with Sprouts suppliers(PO's) ***and plan to keep them to terms which will not cause the suppliers to call Sprouts and complain***.

Ex.17, Teams Chat dated 6.22.2024 (emphasis added), Apx.244-45; Ex.77, Fournier Tr., 114:4-119:10, Apx.851-56; Ex.80, Owenby Tr., 84:7-88:2, Apx.1079-83. That same day, Fournier and Berger exchanged emails with the Harvest's Board Chairman, Sanjay Morey, explaining the Sprouts situation and describing how Harvest could conceal its financial distress from Sprouts by prioritizing Sprouts' Vendors over other vendors:

> [W]e are considering paying PO's for Sprouts related loads before PO's from non-Sprouts PO's from the same vendor - *this way* ***we can say*** *we have paid all "Sprouts Loads", albeit we would still be behind with that same vendor on non-Sprouts PO's - high risk* but may buy us a few weeks of time.
>
> Given our current liquidity position and lack of performance and Detroit/Atl/Other DC drags, *it is becoming increasingly difficult to satisfy suppliers …*
>
> Sprouts is a MATERIAL concern. I have the short-term fix for the next 2-3 weeks, but availability will soon prevent us from furthering this without: relief from banks, just dropping below [bank financial FCCR covenant], cash infusion.

Ex.72, email string dated 6.22.2024 (emphasis added), Apx.589-90; Ex.77, Fournier Tr., 119:17-122:9, Apx.856-59. Morey, having not been on the Perdue/Plainville calls, suggested that Berger reach out to Sprouts to discuss the matter, to which Fournier replied, "Not sure what story Karl would share with Sprouts without alarming them further ***and one that could contradict our recent communications***. I do not want them to ask for a full Financial Review of HS ... nothing good would come of that in my opinion." *Id*. (emphasis added), Apx.590.

On June 25, 2024, Harvest's AP department circulated a report showing Sprouts' Vendors had an aggregate overdue balance of $12.8 million. Ex.18, email dated 6.25.2024 with Excel

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and Hurley. Ex.78 (Farmer Tr., 146:6-147:13), Apx.961-62. In reality, that list was emailed on February 4, 2025. Ex.50, Apx.455.

Attachment, Apx.246-246. This information was not disclosed to Sprouts. Ex.88, Ackerman Dec. ¶¶40-41, Apx.1249; Ex.80, Owenby Tr., 100:25-105:5, Apx.1086-91. In fact, Farmer, Owenby, and Brad Young all confirmed that prior to February 2025, they **never** informed Sprouts of any past due amounts owed to Sprouts' Vendors or of shipping holds that Sprouts' Vendors had placed on Harvest, as they simply hoped to solve the matter internally before Sprouts learned of the situation directly from the Vendor(s). Ex.75, Young Tr., 112:6-113:3, 154:3-155:8, 193:21-198:16, Apx.800-03, 810-15; Ex.78, Farmer Tr., 198:6-200:7, 203:11-19, 213:5-24, 282:16-282:19, Apx.977-79, 982, 988, 992; Ex.80, Owenby Tr., 157:1-159:2, Apx.1107-09. Berger testified that he never shared with Sprouts that Harvest was out of terms with Sprouts' Vendors. Ex.79, Berger Tr., 211:5-214:17, Apx.1040-43. Harvest continued to fail to timely pay Sprouts Vendors throughout the summer of 2024 and was placed on a shipment hold by Sprouts' Vendor Pacific Seafood, with Harvest again scrambling to solve before Sprouts would find out. Ex.19, email string dated 7.22.2024, Apx.248-50.

On July 25, 2024, Harvest was falling even further behind paying Vendors, with Catherine Lecesse (in Harvest's A/P department) emailing Fournier: "We continue to play the whack-a-mole game with the priority vendors and the threats of holds or payment term changes. A shown in the Daily Availability Trend sheet shared by Cody and you, ***the A/P balance being carried has increased 46%*** since the beginning of July." Ex.20, email string ending July 30, 2024, Apx.251; Owenby Tr., 111:13-115:4, Apx.1095-99. Lecesse then recommended a communication strategy to stall Vendors demanding payment. *Id*. Internal emails in August 2024 demonstrate Harvest understood its contractual obligation to pay Sprouts' Vendors at terms even though Harvest was over $50 million past due to its Vendors. In response to Ankura's question, "Do you think we can hold the line with the suppliers (no additional credit holds, demands for early pay; etc.)?", Fournier responded, "Highly unlikely - we need the product and they [Vendors] can press the hold button at will or even worse - reach out to Sprouts/Marcs/ACME and we'd be hit hard. ***Also, our Sprouts vendors are out of terms by 3.5MM and if they caught wind of that, we'd have some major 'splainin' to do Lucy!***" Ex.21, email string dated 8.3.2024 (emphasis added), Apx.253; Ex.77,

Fournier Tr., 153:10-155:3, Apx.865; Ex.80, Owenby Tr., 129:20-131:9, 155:21-158:22, Apx.1100-02, 1105-08. As of August 17, 2024, Harvest fell even further behind on paying Sprouts' Vendors, with the past due balance increasing to over $7.5 million. Ex.22, email dated 8.17.2025 with Excel attachment, Apx.257-59; Ex.77, Fournier Tr., 168:8-169:15, Apx.869-70; Ex.79, Berger Tr., 145:5-146:8, Apx.1027-28; Ex.80, Owenby Tr., 290:21-292:3, Apx.1124-26. Berger and Fournier then discussed prioritizing the Sprouts' Vendors most likely to alert Sprouts to past due amounts over less vocal Sprouts Vendors, writing: "Doug and Spencer are pretty much doing that already. We have a good line of sight ***on who goes directly to Sprouts decision makers as well—so they are getting attention and paid but stretched for the most part***." Ex.23, email 8.18.2024 (emphasis added), Apx.260; Ex.79, Berger Tr., 152:2-153:23, Apx.1031-32.

On August 28, 2024, Harvest made a presentation to its Lenders to request additional liquidity or relief from various financial covenants. In its presentation deck, Harvest communicated the following:

- It was projecting a $25 million liquidity shortfall in October, 2024
- Key Vendor AP was "~$22mm past due *beyond normalized amounts*"[12]
- A forecast prepared by Harvest keeping Key Vendor AP at $22mm past due "is not feasible given the amount of vendor pressure Harvest is experiencing."
- Total AP was stretched beyond normalized levels by ~$30mm, an amount "management believes … is unsustainable and risks harming the business through near-term inventory disruption."

Ex.24, 8.28.2024 Lender Update, Apx.261-280; *see also* Ex.83, Scriven Tr., 113:3-122:21, Apx.1166-75; Ex.77, Fournier Tr., 177:16-187:20, Apx.872-82. Harvest's Lenders were not receptive to Harvest's request for additional liquidity. Ex.25, 8.30.2024 email re: Follow-up to bank meeting, Apx.281-82; Ex.77, Fournier Tr., 188:18-189-14, Apx.883-84; Ex.83, Scriven Tr., 124:8-128:10, Apx.1176-80. As of October 8, 2024, Sprouts' Vendors were continuing to place or

[12] Andrew Scriven of Ankura, who was made the Chief Transformation Officer of Harvest for its sale process, testified that "beyond normal" meant more than seven days past due. In other words, Harvest could generally get away with being slightly out of terms with many vendors so long as it was less than seven days, but the $22mm figure referenced in the lender presentation deck as an additional amount ***greater than*** seven days past due. Ex.83, Scriven Tr., 172:6-178:12; 223:7-225:4, Apx.1189-95, 1200-02.

threaten shipping holds, and Harvest was on hold with over 20 vendors. Ex.91, email string dated 10.9.2024, Apx.1272-73; Ex.77, Fournier Tr., 200:16-203:8, Apx.885-88; Ex.78, Farmer Tr., 200:24-203:19, Apx.979-82; Ex.75, Young Tr., 193:21-197:9, Apx.810-14.

Harvest's Loan Amendment

On October 10, 2024, Harvest entered into a loan amendment with its lenders that: (i) waived Harvest's breach or anticipated breach of certain financial covenants, (ii) imposed significant financial targets and reporting, (iii) required certain sale "milestones" be achieved (including signed LOIs from buyers (acceptable to the Lenders) by January 10, 2025, (iv) provided a temporary increase in a "SOFA" borrowing availability, which stepped down by December 2024 and was eliminated in February 2025, and (v) imposed formal cash dominion with borrowing base advances back to Harvest subject to formula availability. Ex.73, 10.10.2024 Loan Amendment, Apx.591-770. Berger testified that this loan amendment was insufficient to solve Harvest's liquidity problem, but "was better than nothing." Ex.79, Berger Tr., 173:7-174:9, Apx.1033-34. Scriven testified that the amendment actually created *less liquidity* for Harvest that what had existed under the loan facility pre-amendment. Ex.83, Scriven Tr., 162:9-166:10, Apx.1183-87.

Fournier clearly understood that the amendment and stepping down of the SOFA availability would create even bigger liquidity issues in December 2024 and January 2025, as he wrote to Scriven on October 25, 2024 (i.e., two-weeks after the amendment was executed):

> Andrew - as we have previously discussed, Karl and I are growing increasingly concerned with a number of key suppliers in our transaction perimeter (AB Foods, *Nat'l, various Sprouts,* etc...). Now that we have 1O1's with very good probabilities of a positive outcome. I have 3 requests:
>
> 1. Request the additional $10MM of funding we previously requested to ensure that we are in better position with **Natl Beef [a Sprouts Vendor],** AB Foods and various others
>
> **2. We need to address the ratcheting down of the SOFA. This will not work and will create future liquidity problems.**

Ex.26, email string dated 10.25-10.29.2024 (emph. added), Apx.284; Ex.77, Fournier Tr., 214:25-219:4, Apx.889-94; Ex.83, Scriven Tr., 161:14-162:22, Apx.1182-83. Fournier further responded acknowledging the obligation to pay Sprouts' Vendors current (and the non-disclosure to Sprouts

that they were not current) and noting the ratcheting down of the SOFA availability in January would "cripple" Harvest. Ex.26, Email within string dated 10.28.2024, Apx.284; Ex.77, Fournier Tr., 222:3-224:16, Apx.895-97; Ex.83, Scriven Tr. 161:18-167:4, Apx.1182-88. Again, Harvest did not disclose its financial distress to Sprouts or otherwise convey that it was not timely paying Vendors or believed that its distribution services would be compromised in January 2025. Ex.88, Ackerman Dec. ¶45, Apx.1250; Ex.85, Hurley Dec. ¶39, Apx.1223-24.

Sprouts Advises Harvest of its Plan to Transition to Self-Distribution Over A Multi-Year Period

On December 3, 2024, Sprouts held an executive level meeting at Sprouts' headquarters in Phoenix, Arizona and informed Harvest that it had developed a plan to move to self-distribution over a multi-year time frame, asking Harvest to act as its distribution partner to "bridge" it to self-distribution. Ex.85, Hurley Dec. ¶¶37-38, Apx.1223. Berger orally committed that it would continue to distribute for Sprouts during the transition period acknowledging that Sprouts and Harvest had been great partners over the years. Ex.79, Berger Tr., 205:2-206:5, Apx.1036-37; Ex.85, Hurley Dec. ¶¶39-40, Apx.1223-24; Ex.84, Konat Tr., 65:3-68:19, Apx.1212-1215. The parties agreed to negotiate a tentative transition timeline and memorialize that in a Memorandum of Understanding (the "MOU"). Ex.85, Hurley Dec. ¶41, Apx.1224; Ex.27, MOU, Apx.287-90. The MOU contained a binding provision requiring the parties to negotiate a definitive transition agreement in good faith within 45 days –i.e., by no later than February 9, 2025. *See* Ex.27, MOU at § 3, Apx.287. During the MOU negotiation, Harvest confirmed that paying Sprouts' Vendors at terms was not a new term, but rather a "continuing practice". Ex.28, email string 12.23.2024 (stating, "Hi all – can we add 'HS will *continue to* pay for Sprouts goods within the reasonable terms of the vendor community' for clarity that ***this is a continuation of current practice***" with Harvest's response, "Yes, that is fine."), Apx.291-92; Ex.79, Berger Tr., 209:18-214:20, Apx.1038-43, Ex. 86, Mirza Dec. ¶5, Apx.1232. Berger—copied on these emails—again did not disclose that Harvest was already not currently paying Sprouts' Vendors per agreed upon terms. *Id*. During this time frame, Sprouts also agreed to increase the "cost plus" distribution fee it was

paying to Harvest by approximately 8% from $0.13 per pound to $0.15 per pound (and $3.00 per case < 20lbs to $3.25 per case) to go effective in January 2025. Ex.85, Hurley Dec. ¶42, Apx.1224.

Harvest Continues to Deteriorate Unbeknownst to Sprouts

Fournier's predictions about the company's liquidity shortfalls and inability to pay vendors in December 2024/January 2025 were coming to fruition. For example, in its December 13, 2024 PowerPoint update to its Lenders, Harvest, disclosed, that it was more than $15 million past due to "key vendors" and $25 million for all Vendors, again beyond "normal" (greater than seven days past due). This included at least $4 million past due to Sprouts' Vendors.[13]

Sprouts' Vendors continued to issue shipping holds to Harvest, which Harvest hurriedly tried to resolve or blame on other issues. Ex.32, email string dated 12.20.2024 (Bilinski Hold with B. Young noting Sprouts is running promotion for this product), Apx.313. On January 2, 2025, Jaindl Farms, another Sprouts' Vendor, notified Sprouts of a $95,000 past due balance. Ex.88, Ackerman Dec. ¶44, Apx.1249-50. Fournier suggested the Jaindl issue was due to "possibly a gap in holiday mail or on the suppliers end with the check not being deposited." Ex.33, email string dated 1.2.2025, Apx.316-17. Fournier chose not to inform Sprouts of Harvest's significant liquidity issues because it would be bad for Harvest's sale effort:

> Q. Okay. Why didn't you mention in this e-mail response to Crystal that Harvest was significantly behind payment on Sprouts' vendors and was stretching them?
>
> A: Why didn't I? ***We were navigating a sale process at this point, and, again, as always, we were trying not to disrupt any of the process as we were going through this***.
>
> …
>
> Q. You did not want Sprouts to know that you were stretch paying vendors at this time.· Right?
>
> A. We -- ***we did not want to alarm our supply community of any challenges with liquidity***.[14]

[13] *See* Ex.29, 12.13.2024 Lender Update PPT Deck, Apx.300; Ex.77, Fournier Tr. 233:3-236:8, Apx.898-901; Ex.83, Scriven Tr., 172:6-178:15, 191:10-194:21, Apx.1189-99; *see also* Ex.31, email string dated 12.20.2024, Apx.312; Ex.77, Fournier Tr., 240:12-241:25, Apx.902-03.

[14] Fournier subsequently attempted to minimize his detrimental answer by claiming Sprouts' business was not important to the sale problem because Sprouts was moving to self-distribution. However, as noted herein, such move would not be complete for several years and Harvest stood to earn significant revenue from Sprouts during the transition period. This was clearly recognized by the last buyer standing, the Warren Group, whose LOI submitted on

Ex.77, Fournier Tr., 243:20-245:7 (emph. added), Apx.904-06; *see also* Ex.34, email from D. Owenby dated 1.7.2025, Apx.319-20. Harvest's inability to pay Sprouts' Vendors continued through January 2025, as just days later, Fournier and Harvest's treasury team were sending internal emails about Harvest's dire cash situation and inability to pay Vendors. Ex.35, email string dated 1.8.2025 (re Concord notice, "We are about to place orders for an [promotional] AD with Sprouts and they just confirmed these need to be paid before they will ship."), Apx.324-25; Ex.36, email string dated 1.11.2025 re growing number of holds, Apx.330. On January 10, 2025, Harvest reported to its Lenders that its "status quo forecast projects that past due AP will increase from ~$54mm today to ~$80mm by the end of March, a level that is not sustainable." Ex.37 (1.10.2025 Lender Update), Apx.333, 336. Harvest was also forecasting that, even if it could reduce inventory positions in January and February to "preserve liquidity," the past due AP would be *$60 million* as of the week ending January 25, 2025 coupled with an $18 million liquidity shortall. *Id*., Apx. 334. On January 13, 2025, Harvest's Lenders noticed an event of default under the credit facility. Ex.38, Harvest's Supp. Responses to Interrogs, Resp. Nos. 11, 14 and 15, Apx.350-54.

Harvest's game of "whack-a-mole" continued with Harvest having to pick and choose which Vendors it could pay (or partially pay) on any given day. Ex.41, email 1.14.2025 re not paying Hormels to allow payment to MaryAnn's, Apx.364-65; Ex.83, Scriven Tr., 152:5-152:18, Apx.1181; Ex.80, Owenby Tr., 204:18-206:24, Apx.1117-19; Ex.39, email dated 1.13.2025 with proposed partial payments to key vendors, Apx.356-59. Meanwhile, from January 10-14, 2025, Harvest and Sprouts were collaborating on a "positive message" joint communication to be sent to Sprouts' Vendors to notify them of Sprouts' shift to self-distribution over an extended period of time, which Farmer approved. Ex.88, Ackerman Dec. ¶46, Apx.1250, Ex.40, email string ending 1.14.2025 re draft email to Vendors, Apx.360-63, Ex.78, Farmer Tr., 132:6-134:11, Apx.956-58; Ex.79, Berger Tr., 262:19-264:17, Apx.1044-46. During this time, Sprouts was continuing its normal ordering/forecasting process with Harvest that, with the lead-time process discussed herein,

January 24, 2025 for $125 million *required* that the Sprouts transition business be part of the assets it was acquiring. Ex.43, (Warren Group LOI at §3(a) and §3(c)), Apx.395-96.

would be fulfilled the upcoming weeks. Ex.88, Ackerman Dec. ¶48, Apx.1250-51. On January 17, 2025, Harvest provided a further update to its lenders noting its situation had worsened materially in just one week. Ex.42, Lender Update dated 1.17.2025, Apx.368-72; Ex.83, Scriven Tr., 240:15-242:13, Apx.1203-05.

On January 24, 2025, Berger sent an internal email discussing Harvest's dire situation and predicting that a domino effect of Vendor holds was about to begin that would cripple the company and be irreversible. Ex.92, January 24, 2025 email, Apx.1274-75. Harvest's lenders were the only realistic option to provide additional liquidity to Harvest and they had not given any indication that they would provide any additional liquidity. Ex.83, Scriven Tr., 244:1-247:14, Apx.1206-09. On this same day – January 24, 2025 – Sprouts timely paid its ordinary course payment of over $17.4 million to Harvest in compliance with its 14-day payment terms. Ex.89, Lenderman Dec. ¶5-6, Apx.1257-28. Sprouts continued to rely on Harvest in late January/early February 2025 for its successive, rolling orders of products in the ordinary course of business, with Sprouts/Harvest collaborating on orders the week of January 27-31, 2025 (anticipated to be received by Harvest Feb 7-13 and then shipped to Sprouts the week of February 16) and February 3-7, 2025 (anticipated to be received by Harvest February 14-20, 2025 and then shipped to Sprouts the week of February 23). Ex.88, Ackerman Dec. ¶48, Apx.1250-51; Ex.85, Hurley Dec. ¶45, Apx.1224-25. Yet, text messages between Berger and Farmer show significant concern regarding the non-payment to Sprouts' Vendors and Harvest's ability to adequately fill Sprouts' orders. On January 24, 2025 Farmer texted "… we are in a very bad place on cheese for Sprouts" and on January 30, 2025 "… no cheese is shipping this week. Figure we ***are pretty close to needing sprouts (sic) to tell the vendor community to keep shipping on a guarantee.***" Ex.44, text message screenshots (emph. added), Apx.405, 411*;* Ex.78, Farmer Tr., 163:1-163:16, 165:2-168:2, Apx.967-71.

On January 28, 2025, Derek Mirza, Sprouts in-house counsel, emailed the draft definitive transition agreement contemplated under the MOU to Gorman for review and comment. Ex.86, Mirza Dec. ¶6, Apx.1232. At this time, Sprouts learned that Harvest's received a credit downgrade and Hurley contacted Berger asking for a call to discuss the matter. Ex.89, Lenderman Dec. ¶7,

Apx.1258; Ex.85, Hurley Dec. ¶46, Apx.1225. On January 31, 2025 Berger gave Hurley numerous assurances of Harvest's continued ability to perform for Sprouts, saying nothing about the numerous Vendor holds then pending or threatened, and stated he would follow up February 3rd. Ex.85, Hurley Dec. ¶¶47-49, Apx.1225; Ex.45, Hurley recap email 2.1.2025, Apx.414-16. In reality, from January 28, 2025-February 4, 2025, numerous Sprouts' Vendors placed shipping holds on products previously ordered from Sprouts and stopped accepting new purchase orders from Harvest based on Harvest's failure to pay for product previously shipped.[15] This meant none of Sprouts' orders placed weeks earlier from these Vendors would be shipping. *Id*. The shipping holds included Pitman Farms – who supplies Sprouts with all of its private label poultry products in the Western U.S. (approximately 266 stores) and demanded *a $6 million* payment to continue shipping Sprouts' products, notifying Sprouts of this fact that same day. Ex.48, email string dated 2.4.2025, Apx.438; Ex.88, Ackerman Dec. ¶49, Apx.1251; Ex.85, Hurley Dec. ¶50, Apx.1225-26. Joe Hurley had continued to send text messages to Karl Berger asking from updates on February 4th, but Berger stopped responding until Hurley forwarded Pitman's stop notice. Ex.49, texts between Hurley/Berger, Apx.449-52; Ex.85, Hurley Dec. ¶¶51-52, Apx.1226.

At this point, Sprouts had never failed to timely pay Harvest under its 14-day terms agreement and was set to pay Harvest approximately $15 million on February 7, 2025, which would have covered invoices from Harvest from 1/18/25-1/24/2025. Ex.85, Hurley Dec. ¶53-55, Apx.1226; Ex.89, Lenderman Dec. ¶5, Apx.1257-58.

Harvest Finally Comes Clean – Sort of

On February 4, 2025, Harvest finally notified Sprouts of numerous holds placed by Vendors and sent a list of Sprouts' Vendors on "credit/shipping hold" (or near hold). Ex.50, 2.4.2025 email from S. Farmer to C. Ackerman, Apx.454-55. Harvest specifically requested Sprouts contact these Vendors to get them to "continue shipping" while Harvest finalized unspecified financial solutions to solve its liquidity issues, writing:

[15] *See* Ex.47, emails to Harvest from various Vendors, Apx.422-437; Ex.78, Farmer Tr., 144:10-145:19, Apx.959-60; Ex.79, Berger Tr., 276:2-277:21, Apx.1047-48; Ex.80, Owenby Tr., 225:5-227:4, Apx.1121-1123.

> ***The request is to have Sprouts contact these suppliers to ultimately ask them to continue shipping POs at this time*** *while we finalize the financial solutions discussed on the call.* ***The most important being the Pitman group***. Karl and Team will be reaching out Thursday/Friday with the update to that solution.

Id.; *see also* Ex.88, Ackerman Dec. ¶50-51, Apx.1251-52. The Vendors identified by Harvest to Sprouts were Pitman, Applegate, Aquastar, Bilinski's, Concord Meats, Europena, Highliner Seafood, Iowa Premium Port, Marativa, Next Phase (Cheese Vendor), Orca Bay, Pacific Seafood, Brakebush, Force of Nature, Jones Dairy, Mary Ann's, Philly Seafood, Premier Packing (Alaskan Salmon), Slade Gorton, Southwind, and Wellshire (Land o'Frost). *Id*. On February 6, 2025, National Beef, who supplies all of Sprouts' private label beef in the Eastern U.S. (other than grass fed) also placed a shipping hold on Sprouts orders. Ex.44, text message Farmer to Berger, Apx. 407; Ex.78, Farmer Tr., 171:1-173:24, Apx.972-74. Sprouts began immediately contacting these Vendors and learned that some Vendors had millions of dollars in outstanding balances owed from Harvest. Ex.88, Ackerman Dec. ¶52, Apx.1252.

On February 5, 2025, Hurley sent Berger four text messages requesting Berger call him to discuss the urgent situation regarding the Vendors' shipping holds, getting no response (nor any follow up regarding alleged "financial solutions" referenced in the February 4 email). Ex.85, Hurley Dec. ¶52, Apx.1226; Ex.49, Hurley/Berger text msgs, Apx.452-53. Therefore, on February 5, 2025, Sprouts took action. First, Sprouts notified Harvest of its breaches and began exercising its remedies to pay Sprouts' Vendors directly while *still paying Harvest* its distribution fee. Ex.52, email string dated February 5-7, 2025, Apx.474-476; Ex.85, Hurley Dec. ¶56-57, Apx.1226-27. Second, Sprouts immediately contacted the Vendors on hold and provided assurances that they would be paid, urging them to continue shipping into Harvest's DCs, to protect Sprouts' supply chain. Ex.88, Ackerman Dec. ¶52, Apx.1252; Ex.51, emails sent by C. Ackerman on February 5-6, 2025 to Vendors, Apx.456-473; Ex.78, Farmer Tr., 171:1-173:24, Apx.972-74. This was necessary to "keep the trucks rolling," and based on Sprouts' assurances many Vendors continued to ship goods to Harvest's DCs.[16] As of February 6, 2025, however, Berger testified that Harvest

[16] Based on Sprouts' assurances provided, several Vendors continued to ship Sprouts' goods into Harvest's DCs and Sprouts was still advising its Vendors to continue shipping to Harvest in the normal course at that time. Ex.88,

was being controlled by the bank's financial advisors and Berger had been sidelined. Ex.79, Berger Tr., 16:2-16:23, 18:2-18:24, 307:20-308:3, Apx.995-96, 1055-56. Harvest then disputed Sprouts' exercise of its remedy in an email sent by Berger to Hurley, which Berger conceded he did not draft but was told to send. Ex.79, Berger Tr., 306:8-309:10, Apx.1054-56.

Certain Vendors were willing to work with Sprouts to receive payment over time while continuing shipping and Sprouts was working to collect information to allow Sprouts to pay them directly, such as W9s and wire/ACH information, but others (e.g., Pitman) required immediate payment. Ex.88, Ackerman Dec. ¶55, Apx.1253; Ex.89, Lenderman Dec. ¶9, Apx.1258. On February 7, 2025, Sprouts also wired $1,233,832 to Harvest for its estimated distribution fee. Ex.89, Lenderman Dec. ¶10, Apx.1259.

Harvest's Commences Wind-Down and Concocts A Plan To Extort Sprouts

On February 7, 2025, Harvest retained Hilco to commence the liquidation and wind-down of the company. Ex.81, Kaup Tr., 28:10-29:10, Apx.1129-30. Harvest's decision makers going forward were Hilco and Ankura. Ex.79, Berger Tr., 16:2-16:23, 18:2-18:24, 296:7-298:5, Apx. Apx.995-96, 1049-51. Harvest's lenders, acting through their advisor, the Huron Group, were also directing Harvest on its business operations and were not happy with Sprouts' exercise of its remedies. On February 8, 2025, Huron directed Harvest that it should stop shipping to Sprouts and that Sprouts did not have the right to exercise its remedies. Ex.55 (email from L.Macero from Huron dated 2.8.2025), Apx.495. Hilco—whose compensation was directly tied to collection of A/R—also recommended all shipments to Sprouts cease immediately. Ex.56, email from J.Stone dated February 8, 2025, Apx.499; Ex.54, Hilco Retention Agmt, §4(D), Apx.488.

On the afternoon of February 10, 2025, Harvest stopped all shipments to Sprouts stores. In doing so, Harvest essentially held hostage products Sprouts had ordered at least two weeks prior, most of which, Harvest had had been received into Harvest's DCs but had not yet been paid for.

(Ackerman Dec. ¶54), Apx.1252-53; Ex. 51; *see also* Ex.53, Pitman, Europena, Perdue examples re continued shipping, Apx.477-83. Harvest's inbound shipping records show significant goods were shipped into Harvest's DC's following Sprouts assurances. Ex.90, Bierman Dec. ¶10, Apx.1264-65.

Ex.85, Hurley Dec. ¶58, Apx.1227; Ex.75, Young Tr., 85:21-88:11, Apx.796-799. Approximately 75% of these goods were private label Sprouts-branded products that could not be sold to other retailers. Ex.57, (email dated 2.10.2025), Apx.502; Ex.81, Kaup Tr., 260:3-265:12, 281:10–22, 284:2-13, Apx.1145-50, 1157, 1158. In total, Harvest had approximately $25 million of Sprouts' goods on hand. *Id*. The vast majority of the private label goods were also highly perishable fresh products (poultry, beef, pork) which was de-valuing by the day. *Id*. Sprouts had no ability to procure replacement product from other Vendors/distributors on a nationwide scale or any material scale for that matter. Ex.88, Ackerman Dec. ¶56, Apx.1253; Ex.85, Hurley Dec. ¶59, Apx.1227; Ex.78, Farmer Tr., 206:25-210:20, Apx.983-87 ("Q. For the $25 million in product that was in Harvest warehouses as of February 11th, do you have any estimate as to how difficult it would have been for Sprouts to try to replace that from a different distributor? Like by February 12th? A. Impossible. Is that what you mean by how difficult? Q. Sure. I mean, could it have been done? A. No."); Ex.75, Young Tr., 176:6-178:5, Apx.806-08, *see also id*. 167:25 – 168:18, Apx.804-05 ("Q. How long do you think it would take Sprouts, based on your experience in the industry, to locate a replacement vendor to produce all the same tray-pack items that Pitman was producing for Sprouts? … A. I'll scale that just under normal situation. I'd say expedited, to – let's use Pitman as an example, I guess, because that's what we're referencing here -- expedited, ***you could maybe be ready in ten weeks***.") (emph. added).

While the fresh/perishable products were de-valuing to Harvest by the day (and generally could not be liquidated), Eric Kaup – then a Hilco consultant and now Harvest's CRO – admitted that he knew the goods were becoming *more* valuable to Sprouts by the day given the pressure Sprouts was facing to have meat on its shelves:

> Q. Okay. And, again, because of the perishability of the product, with each day that passes, the product becomes closer to its expiration date, right? … And, therefore, less valuable with each passing day, right?
>
> A. Less valuable to Harvest, yeah.
>
> Q. Well, the private -- the private label, as you already mentioned, had very little value to Harvest unless Sprouts was the buyer, right?

> A. Right. I guess I was saying that it has --the inventory dropped -- ***became less valuable to ·Harvest with each day, probably became a little more dear, maybe more valuable, to Sprouts, because Sprouts was running out of inventory***.

Ex.81, Kaup Tr., 265:13 - 266:19, Apx.1150-51. On February 10, 2025, Kaup wrote an internal email with his recommendation to force Sprouts to accelerate its payment terms owed to Harvest from 14 days to 6 days and go to a "cash on delivery" terms for the products Harvest was withholding. Ex.58, email from Kaup dated 2.10.2025, Apx.513. Kaup also suggested a bifurcation payment structure going forward – i.e., nearly the same structure that Sprouts had just attempted to implement. Ex.59, Email titled "draft Sprouts Proposal" 2.10.2025, Apx.516. Kaup admitted he had no idea if the Vendors would continue to ship under this structure without having their prior outstanding balances satisfied, as he never spoken to any Vendors. Ex.81, Kaup Tr., 234:5-236:8, 237:22-238:11, Apx.1138-42.

On the morning of February 11, 2025, Scriven and Kaup scheduled a Teams call with Sprouts' executive team and demanded: (i) Sprouts agree to new payment terms which would be outlined in an emails following the call, and (ii) if Sprouts wanted deliveries to re-start on February 11, 2025, Harvest needed to know by 1pm EST – otherwise, Harvest would not be able to ship that day and Harvest would begin liquidating the inventory on hand to third parties. Ex.85, Hurley Dec. ¶60-61, Apx.1227; Ex.81, Kaup Tr., 271:15-272:9, 276:9-277:4, Apx.1152-55. Harvest did not disclose that it knew it could not sell Sprouts' goods to third parties. Ex.85, Hurley Dec. ¶61, Apx.1227. Harvest also disclosed for the first time it was in default with its lenders and provided no assurances that Sprouts' Vendors would be paid with any money received from Sprouts under this proposed modified agreement. Ex.85, Hurley Dec. ¶62, Apx.1227. At this time, Harvest did not provide Sprouts with a list of the products remaining in its DCs, the expiration dates of such products, or the amount outstanding to Sprouts' Vendors. Ex.85, Hurley Dec. ¶63, Apx.1227-28; Ex.81, Kaup Tr., 276:9-278:7, Apx.1154-56. Following the Teams call, Harvest then sent Sprouts its payment terms/demand. Ex.60, email dated 2.11.2025, Apx.517-20.

Sprouts had no other options at this point and thus accepted the terms under duress as of 10:42 a.m. MST (17:42 UTC), stating, "under the circumstances, Sprouts does not have a choice

but to agree given it needs to put meat on its shelves or its business could be irreparably harmed" (the "2.11 Duress Agreement"). Ex. 60, (email from B. Lombardi dated Feb 11, 2025), Apx.517; Ex.85, Hurley Dec. ¶64, Apx.1228. Sprouts also requested that Harvest provide it with SKU level detail of the products in the DCs with expiration dates. *Id*. Despite Sprouts' ostensible acceptance of the 2.11 Duress Agreement, Harvest informed Sprouts later on February 11th that it would not be able to make shipments to Sprouts on February 11th, and instead they would resume on February 12th. Ex.85, Hurley Dec. ¶64, Apx.1228; Ex.61, email dated February 11, 2025 to N. Konat, Apx. 523. Moreover, after the 2.11 Duress Agreement was agreed to, Harvest sent the SKU detail of the products and outstanding Vendor AP ledger but omitted the requested "code" dates for the products. The Vendor AP was also incomplete and understated, showing only ~$36 million owing. Ex.85, Hurley Dec. ¶65, Apx.1228; Ex.62, email dated 2.12.2025 at 12:17 am UTC attaching Excel document with partial information, Apx.530-31, 538; Ex.77, Fournier Tr., 54:5-55:8, Apx.826-27.

Under the terms of the 2.11 Duress Agreement, Harvest accelerated Sprouts' 14-day payment terms and required Sprouts to pay Harvest a total of $55,000,000 for product ***already delivered*** to Sprouts (and for which most Vendors had not been paid by Harvest), plus additional amounts estimated at $2,500,000 per day, for ***future*** shipments delivered by Harvest to Sprouts after February 11, 2025. Ex.60, 2.11 Duress Agreement, Apx.519-20. Between February 12 and February 14, Sprouts paid Harvest a total of $37,500,000 under to the 2.11 Duress Agreement. Ex.85, Hurley Dec. ¶67, Apx.1228-29. But Harvest shipped goods to Sprouts stores during this period that did not conform to historical shipping practices. For example, rather than receiving products every other day at its stores, fresh proteins were shipped daily to the stores and in a hurried fashion because they were about to expire. Ex.85, Hurley Dec. ¶67-68, Apx.1228-29; Ex.78, Farmer Tr., 214:16-216:7, Apx.989-91; Ex.75, Young Tr., 201:7-24, 208:19-209:6, Apx.816-18.

Simultaneously, Sprouts was working to identify and retain a new distributor and agreed to terms with United Natural Foods, Inc. ("UNFI") on February 17, 2025. On February 19, 2025 UNFI began making limited deliveries of goods from Sprouts Vendors to Sprouts' stores, although Sprouts still did not have all of its Vendors onboarded and ready to ship. Ex.85, Hurley Dec. ¶70,

Apx.1229. Sprouts was also contacting all of its Vendors by phone/Teams and informing them of the situation and requesting that they onboard with UNFI in an expedited fashion. Ex.88, Ackerman Dec. ¶¶61-63, Apx.1254. Certain Vendors continued to demand immediate payment from Sprouts, such as Perdue Farms, writing to Sprouts on Feb. 12, 2025:

> Again, please understand that we need ***payment in full*** and a path to seeing Perdue made whole financially of the debt owed currently from Sherwood/Harvest, prior to shipping any new product.

Ex.63, Perdue's February 12, 2025 email, Apx.539; Ex.88, Ackerman Dec. ¶58, Apx.1253. Perdue refused to onboard with UNFI until it was paid by Sprouts. Ex.88, Ackerman Dec. ¶59, Apx.1253. Perdue's internal emails recognize that it had complete leverage on Sprouts, as Perdue wrote on February 10, "Direction internally, is we can do set-up [with UNFI] ***but we will not ship as long as we are owed money***. I would think Sprouts will work to rectify pretty quickly ***if they want product on shelf***." Ex.64 (Perdue internal email 2.10.2024), Apx.542. Accordingly, Sprouts wired Perdue $5,167,510.71 on February 12, 2025. Ex.89, Lenderman Dec. ¶11, Apx.1259; Ex.85, Hurley Dec. ¶69, Apx.1229. From February 7, 2025-Feb 14, 2025, Sprouts paid $13.5 million to Vendors demanding immediate payment (versus those willing to rely on Sprouts' assurances of future payment. Ex.89, Lenderman Dec. ¶¶12-13, Apx.1259; Ex.88, Ackerman Dec. ¶60, Apx.1253-54.

Onboarding a Vendor to a new distributor is typically a multi-week process. Given the urgency of the situation and Sprouts need to have these Vendors onboarded immediately, Sprouts provided payment assurances to its Vendors to cause them to not just onboard with UNFI, but to do so in an expedited fashion. Ex.89, Lenderman Dec. ¶¶14-15, Apx.1259-60; Ex.88, Ackerman Dec. ¶61-63, Apx.1254; Ex.85, Hurley Dec. ¶71, Apx.1229; Ex.65, email dated 2.13.2025 from C. Ackerman, Apx.546-47 (stating "If you have past due receivable balances, please know that Sprouts is committed to working together in good faith to address your concerns.").[17] Even then, Vendor pressure on Sprouts continued to mount. For example, Sprouts had already made a good faith partial

[17] UNFI also charged Sprouts an $800,000 onboarding fee due to the expedited nature of the transition and UNFI having to deploy a team of employees to allow the transition to happen in the matter of weeks rather than what would have typically taken months. Sprouts paid UNFI on March 7, 2025. Ex. 67, (Invoice $800,000), Apx.555; Ex. 68, Sprouts' Bank Record showing $800k payment, Apx.556-57; Ex.85, Hurley Dec. ¶75, Apx.1230; Ex.89, Lenderman Dec. ¶17, Apx.1260.

payment to its largest seafood Vendor, Southwind Foods (aka Great American Foods), in the amount of $1,403,368.88 on February 11, 2025, yet, on February 19, 2025, Southwind sent an email to Sprouts threatening to withhold further shipments. Ex.66 (email dated February 19, 2025), Apx.549; Ex.88, Ackerman Dec. ¶64, Apx.1254-55; Ex.89, Lenderman Dec. ¶16, Apx.1260.

From February 19, 2025 through April 2025, Sprouts was still not receiving the same level of shipments/products (i.e., fill rates) from UNFI that it had historically received from Harvest due to difficulties in transitioning over 60 Vendors to a new distributor on an expedited time frame. Ex.88, Ackerman Dec. ¶¶65-66, Apx.1255; Ex.85, Hurley Dec. ¶¶72, 74, Apx.1229. In March/April, after Vendors were onboarded with UNFI, Sprouts verified balances and discussed with Vendors whether they would continue to ship to Sprouts uninterrupted if their balances were not satisfied. Sprouts paid the Vendors who threatened to stop shipments. In total, Sprouts paid $59,957,279.77 to Vendors for Harvest balances from 2/7/2025 forward. Ex.89, Lenderman Dec. ¶18, Apx.1260-61; Ex.69, Sprouts payment summary to all Vendors, Apx.558. Sprouts requested from each Vendor supporting invoices and ledgers to confirm the amounts the Vendors were requiring Sprouts pay were actually for Sprouts goods shipped. Sprouts reviewed those invoices/ledgers and confirmed the accuracy of them before remitting payment. Ex.89, Lenderman Dec. ¶19-20, Apx.1260-61; Ex.77, Fournier Tr., 54:5-55:8, Apx.826-27; Ex.90, Bierman Dec. ¶11, Apx.1265. In addition, in discovery Harvest produced its Vendor AP ledgers reflecting Harvest owed Sprouts Vendors $59,272,189 as of April 21, 2025 for goods shipped to Sprouts. Ex.90, Bierman Dec. ¶11, Apx.1265. The vast majority of the invoices shown on Harvest's books match what Sprouts paid to its Vendors. Ex.89, Lenderman Dec. ¶21, Apx.1261; Ex.90, Bierman Dec. ¶11, Apx.1265. Sprouts implemented an offset/recoupment of the amounts paid to Vendors against Sprouts' balance owed to Harvest's balance on Sprouts' books contemporaneously with its payments to Vendors. Ex.89, Lenderman Dec. ¶22-23, Apx.1260.[18]

[18] In addition, Harvest's books show that Harvest did not pay for essentially all of Sprouts' goods landed in Harvest's DCs on or after January 17, 2025. This is based on the fact that: (i) Harvest input Vendors' invoices for the day the goods landed in their DCs, and (ii) Harvest's books show those invoices were not paid. Ex.90, Bierman Dec. ¶12, Apx.1265. From and including January 17, 2025 going forward, Harvest received at least $40,341,286 in goods from Sprouts' Vendors for which it did not pay the Vendors. Ex.90, Bierman Dec. ¶13, Apx.1265-66 and *Exhibit A* thereto.

III. LEGAL STANDARD

A motion for summary judgment shall be granted if the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a)). The burden falls upon the movant to show that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). However, "[i]f the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case; rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case." *Highland Crusader Offshore Partners, L.P. v. Lifecare Holdings, Inc.*, No. 3:08-CV-0102-B, 2009 WL 1065212, at *4 (N.D. Tex. Apr. 21, 2009) (citing *Latimer*, 919 F.2d at 303). Once the movant has satisfied its burden, "the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

Ultimately, there can be no genuine dispute as to a material fact when a party fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322-23. Summary judgment "is appropriate in *any* case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." *Little*, 37 F.3d at 1075 (emphasis in original). "If the nonmoving party fails to meet its burden, the motion for summary judgment must be granted." *Id.*

IV. APPLICABLE SUBSTANTIVE LAW

The RESTATEMENT (SECOND) CONFLICT OF LAWS' "most significant relationship test" requires the application of Arizona law.[19] Sprouts is headquartered in Arizona and has significant operations in Arizona, including its own distribution center and 48 stores. The parties' relationship

[19] *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 145 (Torts - General), 148 (Torts – Fraud and Misrepresentation), 188 (Contracts - Law Governing in Absence of Effective Choice by the Parties), & 201 (Misrepresentation, Duress, Undue Influence and Mistake); *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, 675 F.3d 530 (5th Cir. 2012).

commenced with an agreement between Sprouts and Harvest Meat Co. ("HMC"), which was headquartered in California until it ceased operations. HMC serviced Sprouts through a distribution center located in Arizona. While HMC merged with Sherwood Food Distributors, LLC ("SFD") in 2018, HMC and SFD remained as independent operating subsidiaries with HMC maintaining its headquarters in California and its CEO (Berger) and other executives located there. HMC was the entity that primarily serviced Sprouts', with SFD servicing a smaller number of Sprouts stores in the Eastern United States. The MOU specifically calls for Arizona law to be applied. And, the Debtors argued in opposition to Sprouts' venue challenge that the really didn't have central operations but operated throughout the country using 17 DCs—therefore, it had "principal assets" in multiple states, including Texas, which generated less than 10% of the Debtors' revenue. Harvest's specific representations in 2023 and 2024 regarding paying Sprouts' Vendors current were made to Sprouts employees located in Arizona. In short, using the "most significant relationship test", Arizona law applies.

V. ARGUMENT

A. Sprouts Is Entitled to Summary Judgment On Its Breach of Contract Claim And Harvest's Breach of Contract Claim Must Be Dismissed

In an action based upon breach of contract, the moving party has the burden of proving (i) the existence of a contract, (ii) the breach of the contract, and (iii) the resulting damages with reasonable certainty. *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170 (App. 2004). The Court here is "to ascertain and give effect to the intention of the parties at the time the contract was made[.]" *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1139 (Ariz. 1993) (en banc). Further, "the Court must consider any relevant extrinsic evidence and, if 'the contract language is reasonably susceptible to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties.'" *AGA S'holders, LLC v. CSK Auto, Inc.*, 589 F. Supp. 2d 1175, 1181 (D.Ariz. 2008) (quoting *Taylor*, 854 P.2d at 1140. Indeed, such evidence of the parties' intent includes, among other things, "negotiation, prior understandings, and subsequent

conduct" in connection with the contracts at issue. *Taylor,* 854 P.2d at 1139.[20]

1. The Parties' Had a Global, Long-Standing Distribution Agreement Whereby Harvest Agreed To Provide Sprouts With All of its Required Meat and Seafood Products.

The record establishes the parties had a long-standing Distribution Agreement whereby Harvest acted as Sprouts' sole, nationwide meat and seafood distributor for over 20 years. While the parties never memorialized their contractual relationship in a single, all-encompassing writing, the parties' course of performance shows the Distribution Agreement consisted of the following material terms: (i) Sprouts collaborated with Harvest whereby Harvest would place successive, recurring orders for all of Sprouts' meat and seafood products utilizing a long-standing forecasting process; (ii) Sprouts directed Harvest which Vendors to order from, which products to order (including quantities), the COGS, and which stores to ship such products to; (iii) Harvest agreed to obtain and ship those products to Sprouts stores in a timely manner, (iv) Sprouts agreed to pay Harvest on 14-day terms following Harvest's delivery of the products to Sprouts' stores, and (v) Harvest agreed to pay Sprouts' Vendors and keep them "current" – i.e., at terms – to ensure Vendors shipped Sprouts' orders. The quantities requested by Sprouts varied weekly but consisted of all amounts necessary to keep Sprouts' stores fully stocked, and Harvest endeavored to fill 100% of the amounts requested.[21]

Here, it is undisputed that over the course of the approximately 20-year commercial relationship (and certainly the last 8 years, confirmed by Farmer, Harvest's national account manager for the Sprouts relationship), the parties established practices for placing and filling orders for fresh meats and seafood, repeated weekly due to the perishable nature of such inventory. It is undisputed that Sprouts did not issue purchase orders to Harvest. Rather, Harvest, which had

[20] Furthermore, contracts "are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated they have become an element of the meaning of the words used." Comment, UCC § 2–220.

[21] Even if the U.C.C. applies, this relationship effectively constituted a long-term requirements contract between the parties under the U.C.C. *See* A.R.S. § 47-2306(A). Moreover, where a seller delivers in intervals as needed to satisfy its requirements, "the . . . contract is an installment contract and therefore subject to U.C.C. § 2-612." 4 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-306.27 (3d ed.); *Kirkwood Agri-Trade v. Frosty Land Foods Int'l, Inc.*, 650 F.2d 602 (5th Cir. 1981) (recognizing that output contract also qualified as installment contract); A.R.S. § 47-2612(1).

unfettered access to Sprout's inventory system, would collaborate with Sprouts to identify the quantities of each product Sprouts needed at each of Sprouts' approximately 450 stores. Sprouts personnel reviewed Harvest's recommendations, adjusted the quantities and finalized the amounts to be procured and delivered. This was done on an approximately 2-week lead time from the estimated date Sprouts would need the products, which the Vendors then shipped to Harvest. Harvest received, sorted, and then delivered the fresh goods to Sprouts' stores three times a week (M/W/F for certain stores, T/Th/Sat for the others).[22] Sprouts paid Harvest weekly in a lump sum payment for deliveries made two weeks prior. It is undisputed that as of January 31, 2025, Sprouts was current on its payment obligations owing to Harvest.

Moreover, this extremely close relationship made Sprouts highly dependent upon Harvest's ability to fulfill all of Sprouts' inventory needs for meat and seafood products at its stores on a rolling, go-forward basis. This relationship only worked so long as Harvest could fulfill Sprouts' meat and seafood requirements from Sprouts' Vendors—i.e., the specific vendors Sprouts vetted and approved to ship through Harvest.

2. The Primary Purpose of the Distribution Agreement Was Logistics and Transport; Therefore, the U.C.C. Should Not Govern

Where a contract involves both services and goods, courts determine whether the predominate aspect and purpose of the contract is the sale of goods or the provision of services. *See Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (considering whether transaction was within U.C.C. Art. 2 and holding that "[t]he test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved or is a transaction of sale, with labor incidentally involved"). As explained by a leading treatise, the role of the court is to divine the "essence" of a mixed or hybrid contract:

In applying the "predominant factor" test to determine whether the essence of the

[22] The parties established a somewhat different process for order and deliveries for frozen and processed foods, which generally have a longer shelf-life. Sprouts' individual stores would notify Harvest to replenish low stores' stock. Harvest would track the amounts shipped to Sprouts' stores and backfill stock from Sprouts' vendors to ensure that Harvest was keeping approximately 2 weeks of inventory on hand. This process would then repeat week over week.

> contract is primarily a sale of goods or the provision of services, it must be determined whether the thrust or purpose of the contract is the rendition of service with goods incidentally involved, or is a transaction of sale with labor incidentally involved.

2 ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-105.84 (3d ed.). Arizona courts use the same approach in deciding whether the U.C.C. applies to contracts involving both the sale of goods and services. *Double AA Builders, Ltd. V. Grand State Constr. L.L.C.*, 114 P.3d 835, 841-42 (Ariz. App. 2005) (describing the test as requiring it to "determine whether the predominant aspect and purpose of the contract is the sale of goods or the providing of services.") (collecting cases). For example, in *SiteLock LLC v. GoDaddy.com LLC,* 562 F. Supp. 3d 283 (D. Ariz. 2022), a federal district court applying Arizona law concluded that a contract denominated as a "reseller agreement" was a contract for the provision of services even though it involved a transfer of one party's intellectual property. *Id.* at 299-301. The court reasoned that because the license of software was "tangential to and in service of the predominant purpose of the contract" to provide marketing related services, the U.C.C. did not apply. *Id.* at 300.

Application of the predominant purpose test here produces the same outcome as in *SiteLock* The predominant purpose of the Distribution Agreement entailed Harvest obtaining and delivering products identified, sourced, vetted, and price negotiated directly between Sprouts and its Vendors. It is undisputed that Harvest had no role in the selection, sourcing, negotiation of price, establishment of product specifications/attributes, or otherwise. Rather, Sprouts identified its needs and the Vendors who could fulfill them, and Harvest worked with Sprouts to obtain those goods and deliver them to Sprouts.

Critically, Harvest charged a mere "cost-plus" mark up for this distribution service with the COGS being a direct pass-through to Sprouts (again, because Sprouts had negotiated the COGS directly). Harvest bore no risk with respect to the COGS charged by Sprouts' Vendors given Sprouts paid those exact amounts to Harvest to forward to the Vendors or otherwise immediately reimburse Harvest to the extent Harvest had already paid them. Per Fournier's and Berger's testimony, the only portion of Sprouts' payments available to pay for Harvest's business operations was the "cost-plus" distribution fee. *See* Ex.77, Fournier Tr., 78:5-78:16, 79:13-80:12, Apx.838-

40; Ex.79, Berger Tr., 320:6-12, Apx.1058 ("Q. What were the funds that Sprouts paid pursuant to Harvest's invoices generally used for by Harvest? A. ***Paying a vendor***. Q. Anything else? A. We would -- to pay the vendor and our operating -- OpEx, basically, to run the business.")(emph. added). Indeed, the vast majority of the products obtained and delivered to Sprouts were Sprouts' private label products that could not be sold to any other party and were produced based on trademark license agreements entered into between Sprouts and its Vendors. Essentially, Harvest was delivering Sprouts the very products that Sprouts had already ensured the Vendors would produce for Sprouts (and distinguished from other conventional grocers' products) – i.e., Harvest was primarily providing a service.[23] It is indicative that Sprouts continues to procure those same products today from the same Vendors, but through a different transportation partner – UNFI – who provides the same predominate logistics/transportation service Harvest provided.

Accordingly, Art. 2 of the U.C.C. should not apply in this case. Regardless, as set forth below, whether applying common-law principles or the U.C.C. remedies, Sprouts is entitled to summary judgment on its claims and defenses.

3. Harvest's Materially Breached The Distribution Agreement By Failing To Pay Sprouts' Vendors and Concealing Such Breaches; Harvest's Material Breaches Excused Sprouts' Continued Performance

Harvest materially breached the Distribution Agreement by failing to timely pay (or pay at all) Sprouts' Vendors. This was an express agreement and basic/fundamental term of the Distribution Agreement. Harvest's breach caused Sprouts' Vendors to: (i) refuse to ship products ordered by Sprouts/Harvest weeks earlier, and (ii) stop accepting new orders for products needed approximately 2 weeks later. By early February 2025, the frequency and magnitude of Harvest's repeated failures to pay Sprouts' Vendors had "substantially impair[ed] the value of the whole contract" thereby creating "a breach of the whole" even if the U.C.C. applies. A.R.S. § 47-2612(3).

[23] Sprouts did not simply tell Harvest, "go find us 10,000 tons of organic chickens from anyone", with Harvest doing so at whatever price Harvest could obtain and then reselling to Sprouts at a mark-up. Rather, Sprouts directed Harvest to obtain products only from Sprouts' Vendors at pre-negotiated prices, and only those specific attribute (mostly private label) products Sprouts had already identified and negotiated for directly with the Vendors. While Sprouts some cases find distribution agreements that fall within the scope of U.C.C. Art. 2, none of those agreements have the features present in this case with Sprouts holding all of the relationships with the Vendors and Harvest simply charging a pass-through COGS plus delivery fee.

Sencon Sys., Inc. v. W.R. Bonsal Co., No. 85 C 8250, 1986 WL 10989, *2 (N.D. Ill. Sept. 29, 1986) ("A contract is not severable if the parties assented to all the promises as a single whole and if striking any promise or set of promises would destroy the basis of the bargain").

Harvest's breach and inability to perform the Distribution Agreement was certainly cemented no later than February 4, 2025 when Farmer (copying CEO Berger) emailed Sprouts with the list of Vendors on hold/near hold and asked Sprouts to contact them to get them to continue to ship. On February 5, 2025, Hurley emailed Berger, to notify Harvest that Sprouts would be withholding payment on account of Harvest's breaches. Harvest's breaches (*i.e.*, its failure to pay the Vendors for goods ordered on Sprouts' behalf) created an immediate need for Sprouts to take action to protect itself against the irreparable harm and foreseeable consequences of Harvest's failure to pay the Vendors. Sprouts did so by providing those Vendors with Sprouts' assurances that they would be paid and eventually paying all such Vendors in full for the cost of the inventory that Harvest had ordered for Sprouts without remitting payment to the Vendors.

To the extent the U.C.C. applies, Harvest also materially breached the implied warranty that the goods resold to Sprouts would be free of any encumbrances or adverse claims. U.C.C. § 2-312(1)(b) provides: "[T]here is in a contract for sale a warranty by the seller that . . . the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge." A.R.S. § 47-2312(1)(b). Here, every time Harvest failed to pay a Vendor for products that it then resold to Sprouts, Harvest subjected Sprouts to adverse claims and encumbrances of the unpaid Vendors. For example, under A.R.S. § 47-2702.B the Vendors likely had rights to reclaim such goods from Harvest and Sprouts (once the Vendor and/or Harvest) made Sprouts aware of Harvest's non-payment). *See* 4A ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-702.84 (3d ed.) ("When the transferee of the buyer, who is subject to reclamation, is not a good faith purchaser for value, the transferee holds the goods subject to the seller's right of reclamation, assuming that the seller is able to identify the goods."); *Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*, 387 S.W.2d 17 (Ky. 1965) ("Our conclusion to the effect that the rights of the Indiana sellers survived the resale of the cars and

attached to the proceeds is based on equitable principles."). Of course, Sprouts subsequently satisfied the claims of the Vendors that Harvest left unpaid for goods it purchased on Sprouts' behalf. Accordingly, common law, equity, and U.C.C. principles require that Sprouts be able to recover from Harvest for such losses.

Under both common law and the U.C.C., Sprouts was permitted to (and did) notify Harvest of its intention on February 5th (and again on February 7th) to "deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." A.R.S. § 47-2717; *Palmco Corp. v. American Airlines,* 983 F.2d 681, 684-85 (5th Cir. 1993); *see also* discussion below in § A.4 (damages/mitigation) and § A.5 re recoupment/offset. Moreover, it was clearly foreseeable that if Harvest did not pay Sprouts' Vendors, such Vendors could refuse to ship orders previously placed and demand payment from Sprouts directly to release such orders and/or continue shipping. *See, e.g.*, Ex.21 (Fournier writing, "we [Harvest] need the product and *they [the vendors] can press the hold button at will"*). Apx.253. These are classic expectancy and/or consequential damages.

In sum, the record establishes beyond any material dispute that Sprouts and Harvest were parties to a global, long-term agreement that Harvest – not Sprouts –materially breached through its repeated failure to pay Sprouts' Vendors and wrongfully concealed that information from Sprouts. Harvest's breaches go the very heart and purpose of that contract and prevented Harvest from being able to perform. Accordingly, Sprouts is entitled to summary judgment on its breach of contract claim and Harvest's breach of contract claim—to the extent premised upon Sprouts' purported nonpayment on February 7, 2025 for goods it ordered from Harvest.

4. Harvest's Breaches of the Distribution Agreement Caused Sprouts Damages of at Least $59 million

Regardless of whether U.C.C. Article 2 applies, Sprouts is entitled to recover from Harvest for its reasonable costs incurred in its attempts to avoid or mitigate its losses caused by Harvest's breaches and misconduct. A non-breaching party is entitled to expectancy damages – i.e., the aggrieved party may be put in as good a position as if the other party had fully performed. *See*

Ramsey v. Ariz. Registrar of Contractors, 384 P.3d 316, 321 (Ariz. App. 2016) (citing Restat. (2nd) of Contracts § 347 cmt. a); A.R.S. § 47-1305. "When one party's breach of contract places the other in a situation that makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages." *Desert Mt. Props. Ltd. P'ship v. Liberty Mut. Fire Ins.*, 236 P.3d 421, 436 (Ariz. App. 2010) (citations omitted). The expenses are recoverable only if they are a foreseeable result of the breach. *Id*. Moreover, "[t]he party injured by a breach of contract has a duty to take reasonable steps to avoid the consequences of known injuries." *N. Ariz. Gas Serv. v. Petrolane Transport*, 702 P.2d 696, 706 (Ariz. App. 1984); *Fid. & Dep. Co. of Md. v. Bondwriter Sw., Inc.*, 263 P.3d 633, 641-42 (Ariz. App. 2011) (following RESTATEMENT (SECOND) OF CONTRACTS § 350(1) that "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation" in non-U.C.C. Article 2 case).[24] Whether Sprouts "has acted reasonably under the circumstances is not to be measured by *ex post facto* wisdom." *N. Ariz. Gas Serv.*, 702 P.2d at 708; *Fulton v. Woodford*, 498 P.2d 564, 569 (Ariz. 1972) (When non-breaching party "exercised the amount of care required . . . he was not bound at his peril to know the best thing to do.")

Harvest's contractual breaches of the Distribution Agreement go to the fundamental aspects of the agreement – Harvest was obligated to obtain and deliver Sprouts' required meat and seafood for all Sprouts' stores from Sprouts' Vendors on a recurring basis with deliveries staggered multiple times per weeks. Harvest failed (i.e., breached) in this regard because Harvest did not pay Sprouts' Vendors which Harvest concealed from Sprouts. Harvest then acted in bad faith once Sprouts learned of Harvest's breaches and started exercising its valid remedies (while *still* paying Harvest its "cost plus" fee). Sprouts incurred damages including: (a) the costs to avoid or mitigate its losses by having to pay Vendors directly; and (b) Sprouts' direct liability to Vendors that had

[24] Conversely, Harvest, as "[t]he party in breach", "has the burden of showing that mitigation was reasonably possible but was not reasonably attempted." *N. Ariz. Gas Serv.*, 702 P.2d at 706.

contractual or other grounds to require Sprouts to pay them when Harvest failed to do so.[25]

Here, Sprouts made such direct Vendor payments as part of Sprouts' reasonable efforts to avoid greater losses resulting from Harvest's failure to pay the Vendors and because Sprouts was contractually obligated to make the Vendors whole if Harvest failed to pay them.[26] Moreover, as every witness has testified to, it was foreseeable that if Harvest did not pay Sprouts' Vendors, Sprouts would be required to pay them to obtain the previously ordered goods and ensure future shipments. Ex.75, Young Tr., 182:2-25, 33:11-34:11, Apx.809, 782-83; Ex.78, Farmer Tr., 154:5-157:5, Apx.963-66; Ex.77, Fournier Tr., 283:17-284:14, Apx.907-08; Ex.79, Berger Tr., 50:10-51:8, 298:10-19, 303:25-304:7, Apx.1006-07, 1051, 1052-53. Harvest even sent emails to certain Vendors directing them to Sprouts for payment. Ex.70, 2.6.2025 email re C-Port, Apx.559; Ex.70, 2.7.2025 email to NextPhase, Apx.567-68; Ex.70, 2.10.2025 email to Brakebush, Apx.575. As discussed herein, measured solely by the reasonable payments that Sprouts made to Vendors as a proximate result of Harvest's breaches of the parties' Distribution Agreement, Sprouts' damages exceed $59 million.

The reasonableness of Sprouts' decision to pay the Vendors cannot reasonably be disputed. Between November 2024 and February 2025, at least 25 of Sprouts' Vendors, including several of Sprouts' largest vendors, issued hold notices to Harvest because of Harvest's chronic failure to pay the Vendors for Sprouts' products.[27] In addition to its contractual obligations to Vendors, Sprouts committed to Vendors (at the *express* request of Harvest) that it would backstop Harvest's payment obligations so long as they continued shipping and not disrupt the flow of products to Sprouts. Without this decisive action by Sprouts, Sprouts would have faced dire consequences. Indeed, most of the inventory that Sprouts obtained from its Vendors via Harvest consisted of fresh

[25] Sprouts also suffered lost profits resulting from Sprouts' inability to maintain sufficient stock on hand due to Harvest's breaches but is not seeking these damages on summary judgment. Sprouts reserves its rights in full to recover these and other additional categories of damages at trial.

[26] At minimum, even in the instances where Sprouts did not have written, express contractual obligations (such as under the private label agreements), Sprouts' Vendors had claims for breach of oral agreements, promissory estoppel, and/or as third party/intended beneficiaries.

[27] Sprouts, of course, did not learn about the vast majority of these hold notices issued to Harvest until well after the fact – primarily on February 4, 2025.

meats and seafood with an extremely short shelf-life of less. Sprouts' business model was and is highly dependent upon its ability to source its meat and seafood products from Sprouts' pre-vetted preferred suppliers to ensure that they meet its standards for natural, organic, and other required attributes and which Sprouts' customers regularly purchase and are familiar with. Sprouts had no ability to obtain these products from alternate sources, something even Harvest's key representatives recognize would have been "impossible".[28] Sprouts' only realistic option was to do exactly what it did: tell its Vendors that Sprouts would backstop Harvest's payment obligations and then make good on those commitments by paying the Vendors directly.

Had Sprouts not acted proactively to ensure that its Vendors continued shipping (whether via Harvest or another distributor) the consequences to Sprouts' retail operations would have been disastrous. Harvest was Sprouts' sole distributor for its fresh, frozen, and processed meat and seafood products across Sprouts approximately 450 stores, including all of its private label goods. Sprouts stores were running out of (or had run out of) stock on hand and in many instances had promotions running to the public for specific items. The fresh, private label products are the highest volume, margin, and drivers of customer foot-traffic and "basket-size", as touted by Harvest in Kaup's first day declaration. If customers arrived at Sprouts' stores only to find that Sprouts had no meat/seafood products available (with this occurring for multiple consecutive weeks), many would leave, likely never to return. Beyond even the near-term lost sales, the long-term damage to Sprouts' reputation and customer goodwill would be irreparable and incalculable.

Applicable law – whether the U.C.C. or otherwise – indisputably supports Sprouts' right to recover the expenses it has incurred through its efforts to mitigate by making direct Vendor payments. Under U.C.C. § 2-715, as adopted in Arizona, a non-breaching party in Sprouts' position is entitled to recover both, *inter alia,* (a) "[i]ncidental damages resulting from the seller's breach include[ing] ... any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other

[28] Indeed, Harvest made it virtually impossible for Sprouts to even consider attempting to mitigate by other means by concealing its non-payment of the Vendors and financial distress from Sprouts for months.

breach" *and* "[c]onsequential damages resulting from the seller's breach include[ing] . . . [a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise". *See* A.R.S. § 47-2715(A) & (B)(1). The same result follows under applicable non-U.C.C. law. *See Fid. & Dep. Co. of Md.*, 263 P.3d at 642 (following RESTATEMENT (SECOND) OF CONTRACTS § 350(2) for proposition that "the injured party is not precluded from recovery to the 'extent that he has made reasonable but unsuccessful efforts to avoid loss'").[29] That same court affirmed the finding that a non-breaching issuer of performance bonds acted reasonably to mitigate its risks and costly litigation by honoring the beneficiary's claim under the bond, and rebuffing the contractor's *post hac* attempt to dispute whether the beneficiary had a valid claim. *Id.*

Sprouts made payments of more than $59 million to Vendors to satisfy liabilities resulting from Harvest's failure to pay the vendors for goods ordered and received on Sprouts' behalf. The need for Sprouts to make these Vendor payments is directly attributable to Harvest's material breach of its obligation under the Distribution Agreement and was foreseeable. Sprouts, as the non-breaching party here, is entitled to recover from Harvest for these Vendor payments.

5. Sprouts Was Entitled to Withhold Payment from Harvest as a Proper Exercise of Its Recoupment/ Offset Rights, Thereby Extinguishing Any Corresponding Claims.

Prior to the Petition Date, Sprouts properly withheld payment from Harvest and exercised its rights of recoupments and setoff respecting Harvest's breach of the Distribution Agreement (collectively, the "Sprouts Offsets"). Whether considered under Arizona law, U.C.C. Article 2, or the Bankruptcy Code, the Sprouts Offsets are proper and eliminate any liability that Sprouts would otherwise have to Harvest arising under or in connection with the Distribution Agreement.

(a) The Sprouts Offsets Are Proper Recoupments under the Bankruptcy Code and Arizona Common Law

"Recoupment allows a defendant to reduce the amount of a plaintiff's claim by asserting a

[29] *See also* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. c. ("Incidental losses include costs incurred in a reasonable effort, whether successful or not, to avoid loss . . ."); 11 CORBIN ON CONTRACTS § 57.16 ("[S]pecial losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages.").

claim against the plaintiff which arose out of the same transaction to arrive at a just and proper liability on the plaintiff's claim." *In re Holford*, 896 F.2d 176, 178 (5th Cir. 1990) (internal quotations omitted). Recoupment is proper when the obligations offset "arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of the transaction without also meeting its obligations." *Herod v. Southwest Gas Corp.*, 193 F.3d 371, 374-75 (5th Cir. 1999); *Morris v. Achen Constr. Co.*, 747 P.2d 1206, (Ariz. App. 1986) ("[R]ecoupment is a reduction by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction."), *rev'd in part on other grounds*, 747 P.2d 1211 (1987). "Given the equitable nature of the [recoupment] doctrine, courts have refrained from precisely defining the same-transaction standard, focusing instead on the facts and the equities of each case." *Kosadnar v. Metropolitan Life Ins. Co. (In re Kosadnar)*, 157 F.3d 1011, 1015 (5th Cir. 1998) (quoting *United States v. Dewey Freight Sys. Inc.*, 31 F.3d 620, 623 (8th Cir. 1994)). Indeed, the Fifth Circuit has endorsed construing the term "transaction" broadly, when necessary to do substantial justice. *Kadonsky v. United States*, 216 F.3d 499, 507 (5th Cir. 2000); *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1402 (9th Cir. 1996) (indicating the term "transaction" should be given a "flexible" and "liberal" construction with applying recoupment).[30] This is entirely consistent with the view under Arizona law that recoupment "goes to the very existence and foundation of [a] plaintiff's claim." *Aetna Fin. Co. v. Pasquali*, 626 P.2d 1103, 1105 (Ariz. App. 1981) (citing *Pa. R. Co. v. Miller*, 124 F.2d 160 (5th Cir. 1941))

The record leaves no doubt that the Sprouts Offsets are proper recoupments. Sprouts paid over $59 million to its Vendors for amounts Harvest failed to pay. Harvest seeks approximately $41 million from Sprouts.[31] In short, simple math establishes the Sprouts Offsets arising from its

[30] To be clear, the availability of recoupment is not dependent upon "any express contractual right to withhold payments". *Holford*, 896 F.2d at 178 (citing *In re B & L Oil Co.*, 782 F.2d 155, 159 (10th Cir.1986)). Equitable recoupment remains available even though the debtor's liability for the damages is disputed, and the amount thereof remains to be liquidated. *Holford*, 896 F.2d at 178 ("We also reject the district court's holding that the uncertainty of the fraud damages owed bars recoupment.").

[31] Of this $59 million, Harvest's books confirm that it owed Sprouts Vendors at least $40,062,013 simply for Sprouts' products received by Harvest on January 17, 2025 or thereafter. When Sprouts sought assurances on February 5 – 7, 2025 that Harvest would pay the Vendors for these goods shipped to Sprouts on or after January 17th if Sprouts made its ordinary course payments due on February 7th (and thereafter), Harvest refused to provide such assurances, thereby

Vendor payments eliminate any liability Sprouts could conceivably have to Harvest.

(b) The Sprouts Offsets Also Are Proper Setoffs under the Bankruptcy Code and Applicable Arizona Law

"A set off or counterclaim is a demand which the defendant has against the plaintiff arising out of a transaction extrinsic to the plaintiff's cause of action." *Achen Constr.*, 747 P.2d at 1209. Per Arizona law, "setoffs generally include all mutual debts and liabilities." *Nogales Serv. Ctr. v. Atlantic Richfield Co.*, 582 P.2d 642, 644 (Ariz. App. 1978). Except in certain circumstance not applicable here, a claim may be setoff even if it is contingent or unliquidated. *See Newbery Corp.*, 95 F.3d at 1398 & n.9 (applying Arizona law).

The Sprouts Offsets also are proper setoffs under Bankruptcy Code § 553 to the extent applicable. *See Braniff Airways v. Exxon Co.*, 814 F.2d 1030, 1035 (5th Cir. 1987) (requiring that the debt and claim both arise prior to the commencement of the bankruptcy case and that they be mutual obligations). Here, it is undisputed that the debts and claims at issue here arose prior to the Petition Date. The mutuality of the obligations between Harvest and Sprouts is similarly not in dispute, with both parties maintaining that the other is liable for such obligations. Once again, the record demonstrates conclusively that the Sprouts Offsets are proper.

(c) To the Extent Governed by U.C.C. Article 2, the Sprouts Offsets Are Likewise Proper

Even if Arizona's U.C.C. Article 2 governs, the result is no different. A buyer of goods has an express remedy "on notifying the seller of his intention to do so" to "deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." A.R.S. § 47-2717. This remedy is available when "the breach involved" is "of the same contract under which the price in question is claimed to have been earned." *Id.* cmt. 1.

Sprouts plainly qualifies for this U.C.C. remedial provision. The Distribution Agreement is the governing contract which required successive weekly orders and continuous, staggered deliveries for all meat/seafood products Sprouts required from Sprouts' Vendors. It is undisputed

repudiating its contractual obligations and entitling Sprouts to withhold payment from Harvest on these invoices and pay Vendors directly.

that Sprouts did not issue purchase orders to Harvest. The entire $59 million paid to Sprouts' Vendors could therefore properly be withheld from payment to Harvest. Moreover, at least $40,062,013 concern the very products that Sprouts had ordered and/or received after January 17, 2025 but had not yet paid Harvest for (and for which the first payment was due February 7, 2025).

It is further undisputed that Sprouts provided Harvest with notice no later than February 5, 2025, that Sprouts was withholding further payments to Harvest (to pay Vendors directly) while still paying Harvest its "cost plus" distribution fee because of Harvest's breach/repudiation of the Distribution Agreement—i.e., failing to pay Sprouts' Vendors. Ex.52, 2.5 – 2.7.2025 emails from Hurley to Berger, Apx.474-76. Sprouts therefore satisfied A.R.S. §§ 47-2609 and 47-2610. *See also Palmco Corp. v. American Airlines*, 983 F.2d 681, 684-85 (5th Cir. 1993).

B. <u>All of Harvest's Claims Fail Because Harvest Has No Damages</u>

Even if Sprouts could be held liable for any of Harvest's claims asserted in the Complaint (and it cannot), Harvest's claim fails for lack of damages. *See Graham v. Asbury*, 540 P.2d 656, 657 (1975) (plaintiff's burden to prove "resulting damages" for a contract breach claim); *Fleming v. Fripps Mohave Land, LLC*, 2023 Ariz. App. Unpub. LEXIS 920 *11 (Ariz. App. Nov. 2, 2023) ("[D]amages are a required element of a fraud claim."); *Aaron v. Fromkin*, 196 Ariz. 224 (App. 2000) (explaining that a claim for common-law fraud requires "the existence of damages"); *Jenkins v. Chase Home Mortg. Corp. (In re Maple Mortg.)*, 81 F.3d 592, 595 (5th Cir. 1996) (holding that where transfer "did not diminish [debtor's] estate" it "was not avoidable as either a preferential or fraudulent transfer"); *In re 1701 Commerce, LLC*, 511 B.R. 812, 840 (Bankr. N.D. Tex. 2014) ("A creditor's concern after a transfer of secured assets is whether the estate was diminished."); *Satamian v. Great Divide Ins. Co.*, 545 P.3d 918, 926 (Ariz. 2024) (promissory estoppel claim requires proof promise "actually reli[ed] to his detriment"); *see also* FN 40, *infra*, discussing *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir.1981).

Here, Harvest's only complaint is that Sprouts directly paid the Vendors to satisfy debts Harvest had failed to pay for products ordered on Sprouts' behalf. Harvest further complains that

this denied Harvest the opportunity to use Sprouts' funds to "fulfill payments to Harvest's lenders" (Compl. ¶27). However, a party's expectation damages are measured by its anticipated receipts and losses caused by the breach ***less any cost or other loss he has avoided by not having to perform***. *See, e.g.,* RESTAT (2D) OF CONTRACTS, § 347 (emph. added); *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843 (2d Cir. 1987) (In calculating lost profits, the court stated: "[I]n arriving at a determination of damages for a defendant's wrongful conduct, if any benefit or opportunity for benefit appears to have accrued to the plaintiff because of the breach, a balance must be struck between benefit and loss, ***and the defendant is only chargeable with the net loss***."); J*ohn A. Cookson Co. v. N.H. Ball Bearings*, 147 N.H. 352 (N.H. 2001) (holding, damages should be reduced by expenses saved due to the breach, such as costs avoided by not having to perform: "The goal of damages in actions for breach of contract is to put the non-breaching party in the same position it would have been in if the contract had been fully performed. If a defendant's breach of contract saves expense to the plaintiff, the plaintiff's total damages will be reduced by the amount of money saved."); *Hees v. Burke Constr.*, Inc., 290 Conn. 1 (Conn. 2009) ("The concept of actual loss **accounts for the possibility that the breach itself may result in a saving of some cost that the injured party would have incurred if he had had to perform**. In such circumstances, the amount of the cost saved will be credited in favor of the wrongdoer, that is, subtracted from the loss caused by the breach in calculating the injured party's damages."); *In Truitt v. Evangel Temple, Inc.*, 486 A.2d 1169 (D.C. 1984) (applying the Restatement and affirming trial court ruling that rent received by landlord from a substitute tenant exceeded the amount of rent required from defaulting lessee under the original lease, with the result that landlord suffered no damage and was not entitled to recovery against original defaulting tenant who had abandoned premises).

This case is no different. If Harvest is claiming damages, those damages must be reduced by the costs it likewise saved based on Sprouts' actions – i.e., a dollar-for-dollar reduction of Harvest's liabilities owed to those same Vendors. Indeed, Harvest received the benefit of its bargain under the Distribution Agreement with Sprouts. Every dollar that Sprouts paid to the Vendors satisfied a corresponding liability that Harvest had to such Vendors for goods it purchased

on Sprouts' behalf. Accordingly, Sprouts' direct payment of the Vendors left Harvest in no worse position because such payments reduced Harvest's overall indebtedness.

C. Sprouts Is Entitled to Summary Judgment Dismissing Harvest's Claim for Breach of the 2.11 Duress Agreement (Compl. Count IV)

Harvest claims Sprouts breached the 2.11 Duress Agreement alleging Sprouts was required to pay an additional $41.8 million *beyond the $37.5 million* indisputably paid by Sprouts between February 12-14, 2025. This claim likewise fails for a host of reasons, including: (1) the emails exchanged by the parties were insufficient to create an independent, new agreement as or to amend the existing Distribution Agreement; (2) Harvest's bad faith and use of economic duress against Sprouts after Harvest had already breached the Distribution Agreement rendered the 2.11 Duress Agreement invalid and unenforceable; and (3) regardless, Harvest has no actual damages attributable to Sprouts' alleged breach of the February 11 Agreement.

1. The Parties' February 11 Emails Did Not Create an Independent New Agreement or a Valid Amendment to the Distribution Agreement

Under Arizona law, the parties' February 11 emails did not form a new agreement substituting their pre-existing Distribution Agreement because they did not act "with the intent to extinguish the obligation of the old contract ...." *Yeazell v. Copins,* 402 P.2d 541, 546 (Ariz. 1965) (internal citations omitted); *see also K-Line Builders, Inc. v. First Fed. Dav. & Loan Ass'n,* 677 P. 2d 1317 (Ariz. App. 1983) (stating that a "substituted contract discharges the original duty and breach of the substituted contract by the obligor does not give the obligee the right to enforce the original duty") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 279(2)). As a leading treatise explains, establishing a substituted contract (what Harvest alleges here) is distinct from a mere modification of an existing contract:

> A mere modification of an agreement is distinguishable from a substituted contract by partial discharge. The first involves a change in prospective rights or obligations without extinguishing or discharging a contractual relationship. This distinction becomes relevant in the context of goods because a modification of a contract for the sale of goods does not require consideration but a substituted contract does. A rescission also requires consideration. The existence and the validity of a new contract of substitution must be established in the same manner as any other contract—by establishing mutual assent and consideration, absent a statute abrogating the need for consideration.

13 CORBIN ON CONTRACTS § 71.1[1] (2025).

First, the undisputed facts show Harvest and Sprouts did not intend for the February 11 emails to establish a separate, new contract that would the Distribution Agreement. While Harvest belatedly alleges that an entirely *new* agreement was formed on February 11, 2025, Harvest elsewhere admits it explicitly *disclaimed* any intent to discharge the parties' existing duties/rights under the Distribution Agreement.[32] Sprouts also denies that the February 11 emails resulted in any enforceable new agreement that waived or released any rights, claims, obligations, or defenses under the Distribution Agreement, and the February 11 emails do not contain any release of claims by Sprouts (or even suggest claims are being released).[33] Moreover, Harvest's Complaint reflects its understanding that Sprouts' obligations and liabilities under the Distribution Agreement had *not* been discharged by the 2.11 Duress Agreement, given that Harvest asserts a claim against Sprouts for Sprouts' alleged breach of what it asserts were "pre-existing agreements through which Sprouts agreed to order and Harvest agreed to procure and deliver goods to Sprouts' stores." [Compl., ¶¶73-76]. In short, the record reflects that Harvest and Sprouts, by their February 11 emails, did not intend to waive or release their claims, defenses, or obligations under the pre-existing Distribution Agreement.

Second, no valid, enforceable agreement could have arisen from the February 11 emails because consideration from Harvest was lacking. "A substituted contract is not effective unless it is supported by consideration or some substitute for consideration." *K-Line Builders,* 677 P.2d at 1321. "A promise lacks consideration if the promisee is under a pre-existing duty to counter-perform." *Leone v. Precision Plumb. And Heat. of S. Ariz., Inc.*, 591 P.2d 1002, 1003 (Ariz. App. 1979); *Travelers Ins. Co. v. Breese,* 675 P.2d 1327, 1330 (Ariz. App. 1983) (same). *See also* Restatement (Second) Of Contracts § 73 ("Performance of a legal duty owed to a promisor which

[32] *See* Compl., ¶30) (stating Harvest "'reserve[d] all its rights with respect to amounts owed by Sprouts' in the wake of Sprouts' bifurcating payments."); *see also* Harvest PJOP Op. Br., ¶26 n.3.

[33] *See, e.g.*, Ans/CC, ¶43 ("Sprouts further alleges that even if any such 'agreement' was reached, Sprouts has damages from Harvest's prior breach and ongoing breach which Sprouts did not waive or release and which Sprouts is entitled to recoup or offset to reduce (or eliminate) any amounts purportedly owed to Harvest.").

is neither doubtful nor the subject of honest dispute is not consideration . . . .").

As discussed, Harvest had a pre-existing duty under the Distribution Agreement to deliver the goods already received in its distribution facilities to Sprouts' stores (and ordered by Sprouts weeks earlier). Harvest did not offer Sprouts anything new; to the contrary, Harvest simply refused to perform its pre-existing duty and demand accelerated payments from Sprouts while confirming its ongoing breach. Moreover, the fact that, after Harvest's breach, Sprouts began paying the Vendors directly (while still paying Harvest its "cost plus" distribution fee) did not excuse Harvest from performing its existing duty to deliver the goods to Sprouts. Sprouts was entitled to make direct payments to the Vendors (and arguably required to do so) in order to mitigate its losses arising from the Vendors decisions to withhold further deliveries to Harvest based on Harvest's failure to pay them. *See* A.R.S. § 47-2715(b) (implying the need for a buyer to mitigate to recover consequential damages). Indeed, because of the short shelf-life of most of the meat and seafood products that Sprouts obtained through Harvest, had Sprouts not acted so quickly and decisively its stores would be without essential, high-value inventory, resulting in far greater operational losses to Sprouts' retail grocery business. Sprouts incurred expectancy damages and/or mitigation expenses to ensure that the Vendors continued filling orders for its stores, meaning Sprouts was entitled to recover those amounts from Harvest.[34] And, Sprouts is permitted to recover those mitigation related damages (and other damages) by means of withholding the corresponding portion of the purchase price otherwise due to Harvest. *See* A.R.S. § 47-2717 ("The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.").

Accordingly, the February 11 emails did not produce a valid and enforceable separate

[34] "Either as a claim or a counterclaim against the seller, the buyer may seek indemnity for all expenses reasonably incurred in the mitigation of damages." 4A Part II, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-715:190 (3d ed.). *See also, e.g., Robbins v. Farmers Union Grain Term. Ass'n*, 552 F.2d 788, 797 (8th Cir. 1977) (buyer was entitled to recover cost of specialty feed buyer administered to cattle to increase their weight in furtherance of mitigating losses incurred when purchased cattle were sickly); *Reynolds Metals Co. v. Lmpert*, 316 F.2d 272, 275 (9th Cir. 1963) ("[I]t is well established that the injured party may recover reasonable expenses incurred in attempting to mitigate the damages resulting from a wrongful act."); *Delano Growers' Co-op. Winery v. Supreme Wine Co., Inc.*, 473 N.E.2d 1066, 1074 & n.5 (Mass. 1985) ("[I]ncidental and consequential damages were proper because these costs assessed as damages were incurred in an attempt to mitigate the loss.")

agreement and Harvest's rights and obligations are limited to those contained in the existing Distribution Agreement.

2. Harvest's Wrongful Exploitation of Sprouts' Economic Vulnerability Makes the 2.11 Duress Agreement Invalid and Unenforceable

Even under the U.C.C., any purported modifications to the Distribution Agreement must comply with A.R.S. § 47-2209[35] and other applicable provisions, including A.R.S. §§ 47-1201(20) and 47-1304.[36] These provisions impose a duty of "good faith" applicable to any purported modification of the Distribution Agreement. Official Cmt. 2 to U.C.C. § 2-209 explains further:

> [M]odifications made [under U.C.C. § 2-209] must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith. The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.

U.C.C. § 2-209, cmt. 2.

Arizona law also recognizes economic duress as a defense to the enforceability of the 2.11 Duress Agreement.[37] In Arizona, duress is defined as:

> a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising his free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

Inter-Tel, Inc. v. Bank of Am., 985 P.2d 596, 602 (Ariz. App. 1999). Further, duress occurs "when

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[35] A.R.S. § 47-2209 addresses modification, recission and waiver in contracts for the sale of goods.

[36] A.R.S. §§ 47-1201(20) and 47-1304 are Arizona's versions of U.C.C. §§ 1-201(20) and 1-304. Section 47-1201(20) defines "good faith" as "honesty in fact in the conduct or transaction concerned." Section 47-1304 provides: "Every contract or duty within this title imposes an obligation of good faith in its performance and enforcement."

[37] To be clear, while the factual underpinnings are similar, Harvest's exploitation of Sprouts' economic duress is an independent basis for invalidating the 2.11 Duress Agreement. *See* 2A, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-209:68 (3d ed.) ("When duress is present it is not necessary to place the decision of avoiding the modification on the ground of lack of good faith.").

the wrongful act of one party is the very thing that created the other party's financial difficulty." *Id.* (citing *Frank Culver Elec., Inc. v. Jorgenson*, 664 P.2d 226, 228 (Ariz. App. 1983));[38] *see also Palmco Corp. v. American Airlines*, 983 F.2d 681 (5th Cir. 1993).

The *Palmco* case is highly instructive and should be followed. In *Palmco,* American Airlines ("AA") contracted with Palmco to supply AA with flatware for its airplanes. Palmco was perpetually late in its deliveries and/or missed deliveries. Palmco then refused to deliver the remaining flatware orders unless AA agreed to a 25% price increase. AA determined it could not quickly obtain its needed quantities from other suppliers and agreed. Three months later, AA notified Palmco that it was setting off its damages for Palmco's late and nondeliveries against its outstanding account balance. In response, Palmco refused to deliver AA's remaining orders—30,000 dozen knives. Palmco then sued AA for its failure to pay for the flatware AA had received, as well as the 30,000 dozen knives Palmco did not deliver. On appeal, the Fifth Circuit ruled in favor of AA holding/affirming: (i) the 25% price increase was procured under duress, (ii) AA had valid offset rights under U.C.C. 2-717, and (iii) Palmco breached by failing to deliver the 30,000 dozen knives. The Fifth Circuit flatly rejected Palmco's argument that it was not required to ship in light of AA's notice stating that it was going to offset its damages for late and nondeliveries against future invoices and further awarded AA damages for the 25% price increase that it had to pay to Palmco under duress.

Whether applying the U.C.C.'s lack of "good faith" framework or the economic duress standard, Harvest's wrongful acts in holding Sprouts' products hostage render the 2.11 Duress Agreement invalid and unenforceable whether characterized as a modification or new agreement. In June 2024, Harvest affirmed and reiterated its agreement to pay Sprouts' Vendors according to their required terms and agreed to alert Sprouts of any Vendors that were out-of-terms and

[38] The *Inter-Tel* case is instructive and cites approvingly to several cases determining conduct analogous to Harvest's behavior involved actionable duress, including *Int'l Underwater Contractors, Inc. v. New England Tel. and Telegraph Co.*, 393 N.E.2d 968 (Mass. App. Ct. 1979), *In re Air West Securities Litigation*, 436 F. Supp. 1281 (N.D. Cal. 1977) ("[a] claim of coercion is established by a showing that the defendant put plaintiff in a position of financial weakness and then exploited the plaintiff's position by attempting to force plaintiff to relinquish his legal rights."), and *Litten v. Jonathan Logan, Inc.*, 220 Pa. Super. 274, 286 A.2d 913 (Pa. 1971).

how/when they would be caught up. Harvest then confirmed internally that as of late June 2025 it was past due on Sprouts' Vendors by more than $12 million, but did not disclose this to Sprouts. Instead, Harvest went about actively concealing its breaches while acknowledging internally that such Vendors could "press the hold button on a moment's notice". Harvest continued in its out-of-terms status and blamed any instance that Sprouts learned about on process errors, holiday mail, or employees being on vacation. Harvest did not tell Sprouts the truth because it "did not want to disrupt its sale process," as admitted by Fournier in his deposition.

By early January 2025, Harvest was falling further behind and sending dire messages to its Lenders that it would be going further in arrears which was "not sustainable". On January 13, 2025, Harvest's lenders called an Event of Default, meaning they did not have to advance any funds to Harvest. Harvest had limited daily cash to pay Vendors and was circulating internal spreadsheets showing which Vendors on hold/near hold would be partially paid, if at all. Meanwhile, during January 2025 Harvest was continuing to place Sprouts requirements orders for all of its stores—all while knowing it could not pay Sprouts' Vendors. As the proverbial dominos (predicted by Berger on January 24, 2025) began to fall and the Vendors imposed shipping/credit holds, Harvest still failed to inform Sprouts immediately.[39] Instead, Berger continued to mislead Sprouts through a phone call to Hurley on January 31, 2025, even telling Hurley that Harvest's ability to transition Sprouts over a multi-year period was not an issue and the definitive transition agreement would be executed the following week. Berger further minimized the recent SEAFAX credit downgrade and conveyed he had a solution and would report back the following week. But there was no solution. Meanwhile, Sprouts continued with its normal ordering process the following week of February 3rd under the assumption Harvest could still execute on such orders.

Harvest finally informed Sprouts on February 4th of the shipping holds and ***asked Sprouts***

[39] Bilinski's Sausage and Highliner Foods issued hold notices to Harvest on January 17, 2025, although it appears Harvest was able to get additional shipments due to a partial payment being made (before such Vendors issued renewed holds on January 31st). As set forth herein, NextPhase, Sprout's largest cheese supplier, did not ship Sprouts' cheese orders the week of January 27, 2025. Concord Premium and Pacific Seafood imposed a shipping holds on January 28th. Europena Ingredients imposed a hold on January 30th. Applegate imposed a shipping hold on January 31st. Berger did not inform Sprouts of any of these holds during his call with Hurley on January 31, 2025.

to contact the Vendors to get them to continue to ship to Harvest again claiming a financial solution was forthcoming. Sprouts *did* contact the Vendors, provided assurances, and asked them to continue shipping into Harvest's DCs. Harvest then commenced its liquidation on February 7th (again, without disclosure to Sprouts) while Sprouts' Vendors shipped fresh products into Harvest's DC's based on Sprouts' assurances. Harvest's bank advisors then took over and leveraged the very inventory that Vendors had shipped in while it was deceiving Sprouts (including over $5 million of inventory from the same Vendors Sprouts gave assurances to on February 4-6), refusing to ship to Sprouts on February 10-11 (and forward) unless Sprouts agreed to the 2.11 Duress Agreement. Harvest knew it had leverage given the perishable nature of the products and the fact that Sprouts did not have any other way to obtain replacement goods given the 2-week lead time to order and obtain goods.[40] As Harvest's CRO admitted, "with each day, [the fresh inventory] probably became a little more dear, maybe more valuable, to Sprouts, because Sprouts was running out of inventory." Sprouts had not choice but to accede to the terms or go without meat/seafood for an unknown period of time. Like *Palmco*, this quite obviously constitutes duress.

Moreover, there was no valid meeting of the minds for a "new" agreement. Sprouts was given mere hours to agree to Harvest's extortion terms, with Harvest threatening to liquidate the inventory to third parties. When it was forced to agree, Sprouts did not even know what inventory Harvest had, let alone the extent of Harvest's non-payment to Vendors, or the expiration dates of the products. Sprouts specifically requested this information, but did not receive it until ***after*** the 2.11. Duress Agreement, and Sprouts never received the expiration dates it requested. Harvest had also promised that it would resume deliveries on February 11th if Sprouts capitulated to its terms, but after the "agreement" was reached, Harvest informed Sprouts that trucks would not restart deliveries until February 12th. When the deliveries did finally start, fill rates suffered, products

[40] Indeed, the very products sitting in Harvest's distribution centers as of February 11th had been ordered weeks earlier by Sprouts, on 14-day payment terms (starting from the date are delivered to Sprouts' stores). Based on historical practices, those products were likely ordered the week of January 27th. As Fournier and Kaup acknowledged, the products were highly perishable and Harvest had already caused 2 days of halted shipments. Without an uninterrupted flow of new fresh meat/seafood every 2 days as per the parties' ordinary course practice, Sprouts faced the prospect of lost sales and irreparably damaged consumer goodwill.

were "short-coded" (i.e., not received at least 5 days before their expiration dates), and the regular "every-other-day" delivery schedule was modified to three successive days because the product was about to expire. Harvest quickly ran out of the fresh products that is the main driver of Sprouts' grocery stores and then could only ship its frozen/processed goods, which were actually more than what Sprouts needed for that particular week.

Harvest's actions went far beyond mere aggressive negotiations and instead establish that Harvest created a situation where Sprouts had no choice but to accede to Harvest's extortionary demands to avoid irreparable harm to Sprouts' business. Harvest had maneuvered Sprouts into a position in which it had no choice but to accede to Harvest's demands that Sprouts effectively pay twice for the same goods. Indeed, the very email from Sprouts to Andrew Scriven of Ankura that Harvest relies in arguing a valid agreement was reached states, "Under the circumstances, Sprouts **does not have a choice but to agree given it needs to put meat on its shelves or its business could be irreparably harmed**." Harvest's actions further imperiled Sprouts' entire supply chain and, because Harvest could not pay these Vendors (and was apparently already shutting down), Sprouts was required to pay them their outstanding balances to keep shipments flowing on a go-forward basis. Sourcing an entirely new set of Vendors was not remotely possible. This is precisely the type of bad faith and economic distress that *Inter-Tel, Palmco* and the U.C.C. recognize as providing a complete defense to an adverse contractual modification. Harvest's claim for breach of the 2.11 Duress Agreement fails.

Finally, despite this coerced "agreement", Sprouts *still paid Harvest $37.5 million* from February 12 – 14, but only received approximately $22 million worth of products. The only party that received a "windfall" based on 2.11 Duress Agreement *was Harvest* – not Sprouts – with Harvest receiving approximately $15.5 million extra for the goods shipped. Sprouts then had to make direct payments to the Vendors to cure Harvest's failure to pay them and to cause them to continue shipping to Sprouts through Sprouts' new distributor, UNFI. Sprouts' payments not only directly benefited Harvest by satisfying Harvest's debts owed to the Vendors but also served to mitigate Sprouts' damages.

D. Sprouts Is Entitled to Summary Judgment Dismissing Harvest's Constructive Fraudulent Transfer Claims (Harvest Compl. Count II)

As discussed in Section A.5 above, the Sprouts Offsets – totaling over $59 million – are proper setoffs and recoupments allowing Sprouts to withhold payment to Harvest and extinguish any corresponding claims that Harvest may have against Sprouts. Nonetheless, Harvest seeks to avoid constructive fraudulent transfers from it to Sprouts under Bankruptcy Code §§ 544. According to Harvest, the transfers to be avoided are the goods that it transferred to Harvest. This cause fails in its entirety.

1. The Completed Sprouts Offsets Are Not Transfers Avoidable under 11 U.S.C. §§ 544 or 548

The Sprouts Offsets are not "transfers" as defined in 11 U.S.C. § 101(54) and, thus, Harvest's avoidance claims under §§ 544 and 548 fail as a matter of law.[41] *See* 11 U.S.C. §§ 544(b) (stating "the trustee may avoid any ***transfer*** of an interest of the debtor in property . . .") or 548(a)(1) ("The trustee may avoid any transfer ... of an interest of the debtor in property ..."). "The Bankruptcy Code specifically excludes setoff from the definition of 'transfer.'" *Pereira v. Summit Bank,* 2001 WL 563730, *11 (S.D.N.Y. May 23, 2001). "Congress excluded setoffs from the definition of 'transfer' in Bankruptcy Reform Act of 1978. The House bill's defined 'transfer' to include a setoff, but that reference to setoff was deleted by the Senate. The effect is that a 'setoff is not subject to being set aside as a preferential transfer; but will be subject to special rules.'" *Carlisle Tire & Wheel Co.,* 2008 WL 821521, *3 (quoting 124 Cong. Rec. H11090 (daily ed. Sept. 28, 1978; S17407 (daily ed. Oct. 6, 1978)).

Irrespective of whether the Sprouts Offsets are technically "transfers", the Sprouts Offsets are not subject to avoidance by Harvest. "[B]oth recoupment and setoff can be invoked to defeat … fraudulent transfer ... claims." *Ries v. Ardinger (In re Adkins Supply, Inc.),* 556 B.R. 285, 287 (Bankr. N.D. Tex. 2016). *See also* 5 COLLIER ON BANKRUPTCY ¶553.09 (16th ed. 2205) ("In

[41] Section 553 is the only provision of the Code providing for avoidance of a setoff completed prior to the Petition Date. Harvest has not sought relief under section 553 because it cannot plead a valid claim under section 553.

general, a prepetition setoff is not avoidable as a preference under section 547, or as a fraudulent transfer under section 548 or 544."). Bankruptcy Code §§ 544(b), 547(b), and 548(a) only apply "upon a determination that no right of setoff exists in bankruptcy." *Pereira*, 2001 WL 563730, *11 (citing *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 557 (2d Cir. 1976)). Similarly, a completed recoupment is not subject to avoidance, including under §§ 544(b), 547(b), or 548(a).[42]

As discussed in Section A.5 above, Sprouts properly invoked and exercised its offset rights against any amounts that Harvest seeks to recover from Sprouts for the alleged nonpayment of goods. In contrast, Harvest's defective fraudulent transfer claim seeks to completely negate the parties' contractual obligations and Harvest's prepetition, prior material breach of its obligations. Harvest ignores both its own breaches and that Sprouts exercised its legal and equitable remedies based on such breach, including *fully completing* its setoff/recoupment prepetition.

2. Harvest Cannot Establish that Reasonably Equivalent Value for the Alleged Transfers Was Lacking.

It is undisputed that Sprouts paid more than $59.9 million to Vendors that Harvest failed to pay for products ordered and received by Harvest on Sprouts' behalf. As a result of Harvest's failure to pay Sprouts' Vendors, Sprouts made direct commitments to its Vendors to pay the amounts owed by Harvest to both backstop Harvest's payment obligations and ensure the ongoing shipment of goods to Sprouts (through Harvest or a replacement distributor). There is simply no material dispute that Sprouts' payments to these Vendors satisfied the claims such Vendors had against Harvest, thereby benefitting Harvest by reducing indebtedness Harvest owed to the Vendors on a dollar-for-dollar basis.

Indeed, the vast majority of Sprouts' Vendors have not filed proofs of claim in Harvest's

[42] *See, e.g., In re U.S. Abatement Corp.*, 79 F.3d 393, 398 n.13 (5th Cir. 1996) ("[T]he doctrine of recoupment provides an exception to standard rules governing that priority scheme."); *In re B & L Oil Co.*, 782 F.2d 155, 157 (10th Cir. 1986) ("Recoupment or setoff sometimes allows particular creditors preference over others.") (citing *Lee v. Schweiker*, 739 F.2d 870, 875 (3d Cir. 1984)); *Mercy Hosp. of Watertown v. New York State Dep't of Soc. Servs.*, 171 B.R. 490, 495 n.4 (N.D.N.Y. 1994) ("[A]a party exercising the right of recoupment is not subject to the automatic stay provisions or the prohibitions against preferences or fraudulent transfers under §§ 362(a)(7), 547, 548 and 549 of the Code."); *In re Visiting Nurse Ass'n of Tampa Bay, Inc.*, 121 B.R. 114, 121 n.4 (Bankr. M.D. Fla. 1990) (stating that "Recoupment is a well recognized defense to" claims of preference and fraudulent transfer); *Fiero Prod., Inc. v. Conoco, Inc.*, 102 B.R. 581, 586 (Bankr. W.D. Tex. 1989) ("[R]ecoupment . . . is an exception to the rule that no creditor of a bankrupt shall receive preferential treatment.")

bankruptcy case. *See generally*, Claims Register. For example, Sprouts paid Pitman nearly $12 million after Pitman ceased shipments on February 4, 2025. Pitman has not filed a proof of claim in this matter and further has confirmed under oath it is not doing so based on Sprouts' payments satisfying any claim it may have otherwise had against Harvest. Ex.93 (Pitman Decl.), Apx.1277-86. The same is true for multiple other Vendors that did not file proofs of claim. Exs.94-97 (Declarations of Sprouts' Vendors Brakebush, Cuisine Solutions, Echo Falls, Papa Cantella), App. 1287-1318. Similarly, multiple creditors who filed proofs of claim have amended them to specifically exclude the amounts paid by Sprouts (or never included them in the first place). *See* Claims Register Amended Claims #10776 & #10777 (amending claims #10711 and #10712) (Tyson); Withdrawn Claim at Dkt. 576 (Tyson); Claims Register Withdrawn Claims #10506 and #10509 (Southwind Foods, also at Dkt. 574 and Dkt. 575); Claim Register Withdrawn Claim #10043 (National Beef, also at Dkt. 468); Claims Register Amended Claims #10775 and #10774 (amending claims #333 and #337) (Swaggerty's Sausage); Claims Register #10591, #10601, #10608 (Premium Iowa Pork claims do not include Sprouts' amounts), and JBS.[43] Perdue Farms also indisputably required Sprouts to pay the Harvest balance before shipping any of the products Sprouts had previously ordered through Harvest or otherwise. Ex.63, Perdue Email Demand, App.539. Sprouts' payments to the foregoing creditors alone constitutes Sprouts satisfaction of at least $35 million of Harvest debts that are not being asserted against the estate.[44]

(a) Sprouts' Backstop Commitments and Payments to the Vendors that Harvest Failed to Pay Are "Value" by Any Measure

As used in section 548, "value" means "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor". 11 U.S.C. § 548(d)(2)(A). "Courts generally construe the

[43] Harvest has opportunistically not objected to any proofs of claims filed by Sprouts Vendors' or otherwise moved to amend Harvest's schedules to reduce Vendors' claims by the payments made by Sprouts.

[44] To be clear, Sprouts has presented uncontroverted evidence that every payment it made to Vendors satisfied Harvest's balance, which has been confirm by comparing Harvest's books against the invoices Sprouts paid. Ex.90, Bierman Dec. ¶11, Apx.1265; Ex.89, Lenderman Dec., ¶¶18-23, Apx.1260-61. Harvest has no evidence to the contrary. The vast majority of Sprouts' Vendors have not filed proofs of claim in Harvest's bankruptcy cases, and the few who did provided goods to Harvest for other customers.

term 'value' broadly for purposes of the Bankruptcy Code.*" Templeton v. O'Cheskey (In re Am. Hous. Found.),* 785 F.3d 143, 163 (5th Cir. 2015).[45]

The Fifth Circuit's seminal opinion *Butler Aviation Int'l v. Whyte (In re Fairchild Aircraft Corp.),* 6 F.3d 1119 (5th Cir. 2003), illustrates why Sprouts' direct Vendor payments and backstopping of Harvest's liabilities give rise to certain and quantifiable value under § 548(d)(2)(A). In *Fairchild,* the Fifth Circuit affirmed lower court rulings rejecting attempts by a debtor corporation (Fairchild), a manufacturer and seller of commercial aircraft, to avoid and recover payments it had made to a vendor (Butler) that supplied airline fuel the debtor's financially troubled customers (Air Kentucky) for Fairchild's aircraft after Air Kentucky's fuel vendors had refused to provide any further fuel to it on credit. *Id.* at 1122-23. Fairchild sought to prop up the financial viability of Air Kentucky long enough for it to be acquired by another airline (Reed), which Fairchild hoped would continue to be a customer for Fairchild. *Id.* at 1123-24. Despite Fairchild's expenditures, the acquisition of Air Kentucky was never consummated, and it ceased operations. *Id.* Thereafter, Fairchild succumbed to its own financial problems, sought bankruptcy protection, and sued Air Kentucky to avoid and recover the fuel payments. *Id.* Fairchild's litigation agent argued, "the only value that can be considered is property actually received" by the debtor and since the effort to preserve Air Kentucky ultimately failed, the arrangement conferred no value, let alone reasonably equivalent value, on Fairchild. *Id.* at 1126-27.

The Fifth Circuit rejected this artificially narrow "realized property" approach to determining reasonably equivalent value. *Id.* at 1126-27. The *Fairchild* plaintiff's argument meant "anyone who provides, deals with, or invests in an entity in financial straits would be doing so at his or her peril under § 548; which means, of course, that few would be likely to do so." *Id.* The Court wrote: "[T]he recognized test is whether the investment conferred an economic benefit on the debtor; which benefit is appropriately valued as of the time the investment was made." *Id.* at

[45] *See also, e.g., In re Fruehauf Trailer Corp.,* 444 F.3d 203, 212 (3d Cir. 2006) ("We have interpreted 'value' to include any benefit, … whether direct or indirect.... [T]he mere opportunity to receive an economic benefit in the future constitutes 'value' under the Bankruptcy Code.") (internal citation, quotation marks, and brackets omitted)). "[W]ith only limited exceptions, any kind of enforceable executory promise is value for purposes of section 548." 5 COLLIER ON BANKRUPTCY ¶548.03[5] (16th ed. 2205) (internal quotes and ellipsis omitted).

1127 (citing *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir.1981)).[46] The Court cautioned, "we cannot use hindsight to recalibrate the risk–or the potential reward–of Fairchild's investment." *Id.* at 1126. The panel had little difficulty in concluding that such "indirect financial effects" provided reasonably equivalent value. *Id.*at 1127. The record established that rewards to the debtor of keeping its customer marketable, a result highly desirable to the debtor at the time, were high. *Id.* at 1126. This was more than enough, as "the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value." *Id.* at 1125-26. This indirect value rule is well-established in this Circuit and elsewhere.[47]

Here, Sprouts made payments directly to the Vendors for goods ordered and received by Harvest on Sprouts' behalf (and ultimately received by Sprouts). Sprouts also backstopped Harvest's liability to such Vendors to ensure ongoing shipments. Harvest's position is even more radical than the plaintiff's position in *Fairchild.* This Court need not extend the concept of "value" as far as the *Fairchild* court did to conclude reasonably equivalent value was provided. As to

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[46] The *Rubin* opinion is widely recognized as one of the leading decisions recognizing that indirect benefits to a debtor constitute "value" that can defeat a fraudulent transfer claim. As aptly explained by the Second Circuit:

> If the consideration given to the third person has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person ***otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved*** … provided, of course, that the value of the benefit received by the debtor approximates the value of the property or obligation he has given up … In each of these situations, ***the net effect of the transaction on the debtor's estate is demonstrably insignificant, for he has received, albeit indirectly, either an asset or the discharge of a debt worth approximately as much as the property he has given up or the obligation he has incurred***.

Rubin, 661 F.2d at 991-92 (internal citations and parentheticals omitted; emphasis added).

[47] *See, e.g., Halperin v. Wills (In re Senior Care Ctrs., LLC)*, 2023 Bankr. LEXIS 2653, *94 & 107-08 (Bankr. N.D. Tex. Oct. 29, 2023) (Jernigan, J.) (discussing and applying the "well-settled 'indirect benefit rule'" and later chastising the trustee-plaintiff for "ignore[ing] the indirect benefit rule, articulated in established Circuit-level precedent, that makes the nature of the advance from the original borrower to the debtor, in a three-party transaction ..., irrelevant ..."), *adopted*, 2024 U.S. Dist. LEXIS 143613 (N.D. Tex., Aug. 13, 2024); *Yaquinto v. CBS Radio, Inc. (In re Texas E&P Operating, Inc.)*, 2022 Bankr. LEXIS 1932, *48 (Bankr. N.D. Tex., July 13, 2022) (Jernigan, J.) ("[T]he Fifth Circuit has recognized, in analyzing Section 548, that indirect benefits . . . conferred from transfers at issue can be recognized to serve as 'value' to debtor" such that "the benefit of an obligation paid for by a debtor need not confer a direct benefit on the debtor."); *Osherow v. Nelson Hensley & Consol. Fund Mgmt. (In re Pace)*, 456 B.R. 253, 271 (Bankr. W.D. Tex. 2011) ("[R]easonably equivalent value may be found in transfers involving third parties if the debtor received some indirect benefit from the transfer.")(citing *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 666 (S.D. Tex. 2007)); *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 646–48 (3d Cir. 1991) (finding reasonably equivalent value for a debtor corporation's guarantee of an affiliate's debt when the loan strengthened the corporate group as a whole, so that the guarantor corporation would benefit from "synergy" within the corporate group); *Harman v. First Am. Bank (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 485 (4th Cir. 1992) ("[R]easonably equivalent value can come from one other than the recipient of the payments, a rule which has become known as the indirect benefit rule."); *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir. 1981) ("[A]lthough transfers solely for the benefit of third parties do not furnish fair consideration . . . , the transaction's benefit to the debtor need not be direct; it may come indirectly through benefit to a third person.") (internal quotes omitted).

Sprouts' payments, even under the *Fairchild* plaintiff's "realized property" model, Sprouts is entitled to dollar-for-dollar "value" credit for its payments to Vendors because Sprouts' payments satisfied Harvest's corresponding debts to such Vendors *and* Sprouts paid Harvest its distribution service fee. *See* 11 U.S.C. § 548(d)(2)(A) ("'Value' means … satisfaction ... of a present or antecedent debt of the debtor ...."). Harvest actually realized the value of these Vendor payments because its indebtedness to such Vendors was satisfied by a corresponding amount. Similarly, as to Sprouts' commitments to backstop of Harvest's Vendor obligations, Sprouts provided direct value to Harvest in the form of "security" for its debts owed to the Vendors. *See Id.* ("'Value' means ... securing ... of a present or antecedent debt of the debtor ....").

Even if viewed as a form of "indirect value" to Harvest, Sprouts' backstop commitments and payments to the Vendors fit squarely within the *Fairchild* Courts' concept of "indirect value" constituting reasonably equivalent value. Had Sprouts not provided those assurances of payment to the Vendors, it is likely Harvest would not have been unable to continue functioning as a going concern. The record leaves no doubt that Harvest was only able to continue filling Sprouts' orders through the Vendors from February 4, 2025 forward because Sprouts provided vendors assurances they would be paid by Sprouts if they continued to ship goods for Sprouts orders. As discussed herein, this actually enhanced Harvest's inventory position as of February 11, 2025, which Harvest then used *against* Sprouts to extort new payment terms and block Sprouts' exercise of its remedies. Harvest unquestionably benefited from Sprouts' payments and actions.

(b) Sprouts Provided Harvest with Value at Least Reasonably Equivalent to the Alleged Transfers.

Although Harvest may have preferred to use Sprouts' funds to "fulfill payments to Harvest's lenders" (Compl. ¶27) instead of paying its Vendors, its preferences do not change the fact that: (i) Harvest had contractual obligations to pay Vendors for products it ordered and received as Sprouts' distributor; and (ii) Sprouts satisfied those same obligations. As discussed above, Sprouts made payments totaling more than $59.9 million to Vendors to satisfy Harvest's unpaid debts for products it ordered on Sprouts' behalf as Sprouts' distribution partner. Sprouts'

payments directly benefitted Harvest by satisfying Harvest's liabilities owed to Vendors arising out of the very same transactions for which Harvest now seeks a double-recovery from Sprouts.

Sprouts' payments to Vendors left Harvest and its creditors overall no worse off from a balance sheet and/or "net effect" basis. *See Rubin, supra*, 661 F.2d at 991-92 (if the "net effect of the transaction on the debtor's estate is demonstrably insignificant, for he has received, albeit indirectly, ***either an asset or the discharge of a debt worth approximately as much as the property he has given up or the obligation he has incurred***", then there is no fraudulent transfer). Sprouts is entitled to a dollar-for-dollar credit on account of the payments it made to Vendors in the fraudulent transfer context. While Harvest may dislike that Sprouts' payments to Vendors precluded Harvest from redirecting the funds to its lenders (leaving Vendors unpaid), such fact has no bearing here: Harvest asserts no *preference* claims in this Adversary.

E. Sprouts Is Entitled to Summary Judgment Dismissing Harvest's Quasi-Contractual Claims (Harvest Compl. Counts V, VII)

Harvest's Count V asserting "promissory estoppel" and Count VII asserting "unjust enrichment" must be dismissed. First, neither promissory estoppel nor unjust enrichment is available when a valid contract is present. *See, e.g., Brooks v. Valley Nat'l Bank*, 548 P.2d 1166, 1171 (Ariz. 1976) ([W]here there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application."); *Tenney v. Cox Communs.*, 2009 Ariz. App. Unpub. LEXIS 1142, *7 (Ariz. App. March 27, 2009) ("The remedy of promissory estoppel is only available in the absence of a contractual remedy."). The existence of a contractual relationship necessarily means that the party has access to a remedy at law. Here, while the parties disagree over *which* contract governs the subject matter of their disputes, neither party alleges that no valid agreement existed between them.

Second, Harvest's unjust enrichment claim likewise fails because multiple requirements for unjust enrichment are missing here.[48] Critically, Sprouts was not enriched because Sprouts

[48] "To recover on a claim for unjust enrichment, a claimant must show '(1) an enrichment, (2) an impoverishment, (3) a connection between the two, (4) the absence of justification for the enrichment and impoverishment and (5) the absence of any remedy at law.'" *Loiselle v. Cosas Mgmt. Group, LLC*, 228 P.3d 943, 946 (Ariz. App. 2010) (quoting *Mousa v. Saba*, 218 P.3d 1038, 1045 (App. 2009)).

(rather than Harvest) paid the Vendors for the goods at issue, paying *more* than the amounts Sprouts would have paid to Harvest as the middleman. Harvest also was not impoverished because (i) Harvest never paid the Vendors for the goods and Sprouts' payments extinguished Harvest's liabilities to those Vendors, (ii) the highly perishable/private label nature the products meant that the goods had no independent value to Harvest, and (iii) Sprouts paid $37.5 million for only ~$22 million of goods shipped after February 11th. Finally, Sprouts was justified in not providing Harvest with additional compensation because: (a) Sprouts had legal and equitable rights to withhold payment arising from Harvest's breach/failure to pay the Vendors, and (b) Harvest was guilty of unclean hands, precluding its reliance on this equitable remedy.

Third, Harvest's promissory estoppel claim fails without proof of a promise upon which "the promisee actually relies ***to his detriment***." *Satamian v. Great Divide Ins. Co.*, 545 P.3d 918, 926 (Ariz. 2024) (emphasis added). Harvest experienced no detriment from purportedly "relying" on the 2.11. Duress Agreement. Harvest was already obligated to ship the goods in its DCs to Sprouts and Harvest received *more* money than the value of those goods (even to Sprouts). Sprouts also eventually paid all of the Vendors directly, satisfing any corresponding debts Harvest had relating to those goods. And, again, the goods at issue had no independent value to Harvest, either because they were highly perishable and would have expired had they not been delivered to Sprouts or because Harvest had no ability to resell them elsewhere. To the extent that Harvest complains that it never received additional payments from Sprouts contemplated by the 2.11 Duress Agreement, the invalidity of that purported agreement stemming from Harvest's bad faith and use of economic duress means that Harvest had no entitlement to those payments and is merely complaining of its inability through illicit tactics to leverage a windfall from Sprouts.

VI. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Sprouts respectfully requests that Summary Judgment be awarded as requested in its Motion filed herewith.

Dated: December 15, 2025

Respectfully submitted,

DORSEY & WHITNEY LLP

/s/ Isaac M. Gabriel

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 15, 2025, a true and correct copy of the foregoing was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas on those parties registered to receive electronic notices for this adversary proceeding.

/s/ *Isaac M. Gabriel*
Isaac M. Gabriel

SCHEDULE 1

(Key Officers/Employees Cheat Sheat)

Karl Berger	Harvest CEO
Scott Fournier	Harvest CFO
Spencer Farmer	Harvest National Account Manager (Sprouts Account)
Brad Young	Harvest – National Category Manager (Sprouts Account)
Doug Owenby	Harvest VP of Procurement
Andrew Scriven	Ankura – Chief Transformation Officer retained by Harvest
Eric Kaup	Hilco – Chief Restructuring Officer retained by Harvest
Catherine Lecesse	Harvest Treasury/AP Dept
Maddisen Gorman	Harvest In-House Counsel
Nick Konat	Sprouts President/COO
Joe Hurley	Sprouts – Head of Supply Chain
Crystal Ackerman	Sprouts – Head of Meat Department
Stan Swinton	Sprouts – Former Head of Meat Department
Jason Lenderman	Sprouts – VP of Finance
Derek Mirza	Sprouts In-House Counsel
Brandon Lombardi	Sprouts Chief Legal Officer
Keith Bierman	MCA Financial – Sprouts' Retained Expert