IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	**Chapter 7**
J & M SALES INC., *et al*.,	**Case No. 18-11801 (JTD)** **(Jointly Administered)**
Debtors.	
GEORGE L. MILLER, in his capacity as Chapter 7 Trustee for the jointly Administered bankruptcy estates of J&M Sales Inc., *et al*.,	**Adv. No. 20-50775**
Plaintiff,	
v.	
MICHAEL FALLAS, Individually and As Trustee of the Michael Fallas Living Trust dated 1/19/05, *et al*.,	
Defendants.	**Re: D.I. Nos. 27, 30, 36, 42, 44, 46, 51, 52, 55, 62, 70, 80 and 106**

OPINION AND ORDER

I. INTRODUCTION

Plaintiff George L. Miller, the Chapter 7 Trustee for the jointly administered bankruptcy estates of the Debtors (the **"Trustee"**), filed this adversary alleging that the Debtors' owners, Michael Fallas ("**Fallas**") and his wife Ilanit Fallas ("**Ms. Fallas**") (collectively the "**Fallases**"), operated and controlled a vast enterprise of entities that functioned as the alter-egos of the Debtors, and used the Debtors to sustain the enterprise and enrich the Fallas family at the Debtors' expense. The Trustee seeks to (a) avoid the Debtors' assumption of nearly $46 million in liabilities resulting from the Debtors' acquisition of Conway Stores, Inc. ("**Conway**") and avoid and recover payments

made by Debtors to Conway's creditors; (b) avoid as fraudulent transfers nearly $67 million in rent payments made by Debtors to special purpose entities owned by the Fallases; (c) avoid other alleged fraudulent transfers made to Fallas, his family, and trusts under their control; and (d) recover damages for alleged breaches of fiduciary duty by the Fallases. In response, the following defendants (collectively, the "**Moving Defendants**") filed thirteen Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "**Motions**"): (i) the Fallases and the Fallas-owned special purpose entities (collectively, the "**Fallas Defendants**") (D.I. Nos. 55 & 56);[1] (ii) Morris Cohen, Abe M. Cohen, Jeffrey Cohen (collectively, the "**Cohens**") (D.I. Nos. 30 & 31); (iii) The Timing Inc. d/b/a La Vie 89 and KC Exclusive Inc. d/b/a Zenana (collectively, "**Timing and KC**") (D.I. Nos. 27 & 28); (iv) Rosenthal & Rosenthal, Inc. ("**Rosenthal**") (D.I. Nos. 36, 37, & 53); (v) the Blue Star Group ("**Blue Star**") (D.I. Nos. 42, 43, & 50); (vi) Consensus Securities LLC and Consensus Advisory Services, LLC (collectively, "**Consensus**") (D.I. Nos. 46 & 47); (vii) Middlegate Factors LLC (D.I. Nos. 44 & 45); (viii) Active USA, Inc. (D.I. 51); (ix) Wicked Fashions, Inc. (D.I. 52); (x) Panties Plus, Inc. (D.I. 62); (xi) Haselson International Trading, Inc. (D.I. 70); (xii) Poetry Corporation (D.I. 80); and (xiii) Jesco Footwear, Inc. (D.I. 106) (Timing and KC through Jesco Footwear are collectively, the "**Conway Creditors and Factor Defendants**").[2] The Motions to Dismiss include several arguments supporting dismissal, some of which apply to all defendants, and others applying only to individual Defendants. Many Defendants also joined arguments made by other Defendant groups. The Trustee submitted an Omnibus Memorandum of Law in Opposition to Moving Defendants' Motions to Dismiss (the "**Opposition**") (D.I. 83) and the Moving Defendants submitted reply briefs in further support of their Motions (D.I. Nos. 97,

[1] Unless otherwise noted, all docket indices correspond to the adversary proceeding.

[2] At certain times in this opinion, the Defendants, other than the Fallas Defendants, will be referred to collectively as the "Non-Fallas Defendants."

92, 90, 91, 85, 99, 96, 93, 95, 98, 94, 106). At my request, additional briefing was submitted on several issues. (D.I. Nos. 114, 115, 117, 119, 132, 133, 144, 174). I have considered all the parties' submissions and, for the reasons set forth below, the Motions are granted in part and denied in part.

II. FACTUAL ALLEGATIONS IN THE COMPLAINT

A. The Debtors' Business and Corporate Structure

Since 1962, the Debtors operated retail stores offering clothing, shoes, toys, household items, and other discount merchandise.[3] The business was started by Fallas's father, Joseph Fallas, and the ownership and control of the company was transferred to Fallas in 2002.[4] Over the years, Debtors expanded their business operations through multiple acquisitions of other retail chains and at the time of the Debtors' bankruptcy filings, they operated a total of 344 stores, under various store names.[5]

Each Debtor was independently owned, directly or indirectly, by the Fallases.[6] Fallas was Chairman of the Board and CEO of National Stores, the largest of the Debtor entities.[7] Fallas was President, Secretary, and CEO of National Stores and J&M Sales and Fallas and Ms. Fallas were the sole directors of those entities.[8] Fallas was the managing member of the Debtor Entities that

[3] Complaint ("Compl.") ¶ 183 [D.I. 1].

[4] Compl. ¶ 183.

[5] Compl. ¶ 184.

[6] Compl. ¶ 187. The Debtors are J & M Sales Inc. ("**J & M Sales**"), National Stores, Inc. ("**National Stores**"), J&M Sales of Texas, LLC ("**J&M Texas**"), FP Stores, Inc. ("**FP Stores**"), Southern Island Stores, LLC ("**Southern Island"**), Southern Island Retail Stores LLC ("**SI Retail**"), Caribbean Island Stores, LLC ("**Caribbean Island**"), Pazzo FNB Corp. ("**Pazzo FNB**"), Fallas Stores Holdings, Inc. ("**Holdings**"), and Pazzo Management LLC ("**Pazzo Management**") (collectively, the "**Debtors**" or the "**Debtor Entities**").

[7] Compl. ¶ 17.

[8] Compl. ¶ 185.

are limited liability companies.[9] "The Debtors had no independent board members or managers[.]"[10]

In addition to the Debtor Entities, the Fallases "controlled, both directly and through family trusts for which they were trustees," a large group of special purpose entities (the "**Fallas SPEs**").[11] These non-debtor SPEs owned the commercial real estate where many of the Debtors' retail stores operated.[12]

The individual Debtors "essentially functioned as a single enterprise[.]"[13] For example, "(i) a cash management system existed between the Debtors that operated retail locations; (ii) intercompany accounts were maintained to account for transactions between the Debtors; (iii) all of the Debtors were identified as borrowers under various secured lending facilities; and (iv) the Debtors cross-guaranteed each other's obligations."[14] "The Debtors did not prepare financial projects on an entity-by-entity basis but rather on a combined basis. Reporting to third parties, including the Debtors' annual audits, was also on a combined basis."[15] Operating costs incurred and paid by one Debtor were allocated to other Debtors.[16]

"Debtors' employees routinely performed services for the benefit of the Fallas SPEs and Fallas personally."[17] High-ranking Debtor personnel, including the Debtors' CFO, Treasurer, and

[9] Compl. ¶ 22.

[10] Compl. ¶ 349.

[11] The Fallas SPEs were either owned and controlled by Fallas alone, the Fallases together, or Fallas and his father, Joseph M. Fallas. Compl. ¶ 191.

[12] Compl. ¶ 190.

[13] Compl. ¶ 186.

[14] Compl. ¶ 186.

[15] Compl. ¶ 259.

[16] Compl. ¶ 259.

[17] Compl. ¶ 208.

CRO worked on the refinancing of the Fallas SPEs or the properties they held, and Debtor employees' regular responsibilities included preparing financials or registration documents for the Fallas SPEs.[18]

B. The Conway Acquisition

In late 2013, the Debtors began to consider acquiring their competitor, Conway, a retail chain that was on the verge of bankruptcy, with the stated intent of expanding their retail footprint into the East Coast and Midwestern states. On October 31, 2013, the Debtors entered into a confidentiality agreement with Conway to receive diligence information with respect to a potential investment and explore potential restructuring alternatives.[19] Fallas wanted to move as quickly as possible on closing a deal with Conway.[20] Sandra Menichelli, the Debtors' Chief Financial Officer, along with Steven Hanan, then Chief Operating Officer of the Debtors, expressed concern about the speed at which Fallas seemed to want to enter into this potential transaction. In email correspondence on December 28, 2013, Hanan wrote –

> I am very concerned with a lot of things about this deal especially past due invoices, once the market hears there has been a sale of the company they will bombard us with calls to get paid, we must come up with a plan, we are in much better position to discuss settlement prior to a purchase of the company.

Menichelli replied:

> I agree. That's why I am asking Michael [Fallas] for all of the info. We don't even know what all the entities are that make up the company [Conway], who owns them, what their liabilities are and how they fit together operationally……..I am nervous about moving too quickly but I am trying to balance that with Michael's desire to move forward as quickly as possible. I don't want them to make their problem our problem.[21]

[18] Compl. ¶ 209.

[19] Compl. ¶ 220.

[20] Compl. ¶ 223.

[21] Compl. ¶ 223.

The debtors did not obtain any valuations, fairness opinions, or third-party due diligence prior to completing the transaction.[22]

Phase I of the Conway transaction commenced on January 22, 2014, when Debtor Pazzo FNB executed a Loan Assignment Agreement with First Niagara Commercial Finance, Inc. ("**FNCF**") and Conway, along with certain of its affiliates, pursuant to which Pazzo FNB purchased for $11.7 million, all of FNCF's right, title and interest in its existing loan to Conway, effectively becoming Conway's lender with a first priority lien on all of Conway's assets.[23] As Pazzo FNB was an entity newly formed for purposes of this transaction and had no capital, Debtor J & M Sales obtained a waiver and consent from its secured lender to loan up to $12 million to Pazzo FNB to fund the purchase price.[24] Debtor J&M Sales wired the purchase price for the loan assignment directly to FNCF.[25] While Pazzo FNB ultimately assigned its rights to the FNCF loan to debtor Southern Island, J&M Sales was never repaid.[26] Following the loan assignment, Pazzo Management took control of Conway's cash management, including deposit control agreements.[27]

In the second part of Phase I of the acquisition, the parties conducted a liquidation of the inventory of Conway's 87 store locations. Conway retained Hilco Merchant Resources and Gordon Brothers Retail Partners LLC (collectively, the "**Agent**") to act as agents for purposes of effectuating the liquidation.[28] When the sales were complete, "the Agent and Conway, through the Debtors, entered into a final account reconciliation, in which the parties agreed to the sharing of

[22] Compl. ¶ 245.

[23] Compl. ¶ 228.

[24] Compl. ¶ 229.

[25] Compl. ¶ 229.

[26] Compl. ¶¶ 229–30.

[27] Compl. ¶ 232.

[28] Compl. ¶ 231.

the liquidation proceeds. The residual cash left in the Conway bank account appears to have been ultimately transferred to Debtors' accounts."[29] The total amount the Debtors' received from the inventory liquidation was $4.7 million.[30] The Debtors then rebranded the former Conway stores to "Fallas" stores and debtor Southern Island was formed to operate these stores and to effectuate Phase II of the Conway Acquisition.[31]

Phase II of the Conway Acquisition consisted of the Debtors' purchase of Conway's assets and the assumption of its liabilities. Pursuant to the Asset Purchase Agreement (the "**Conway APA**"), effective as of May 1, 2014, debtors Southern Island and SI Retail acquired from the Sellers[32] assets consisting of specified leases, membership or stockholder interest in certain entities, specific security deposits, and furniture, fixtures, and equipment located at the specified properties.[33] The consideration paid, approximately $46 million, "consisted of the assumption of Conway's accounts payable, accrued expenses" and the assumption of the FNCF loan, described above.[34] The Debtors' Audited Combined Financial Statements as of January 31, 2015, set forth the following valuations of the consideration received –

[29] Compl. ¶ 232.

[30] Compl. ¶ 233.

[31] Compl. ¶ 234.

[32] The Conway APA defines "Seller" as Conway and several affiliated entities listed in Exhibit A to the Conway APA. Exhibit A lists these affiliates as well as "Morris Cohen, Abe M. Cohen and Jeffrey Cohen with respect to the Assigned Entities" (eleven Conway affiliates listed in Schedule 1 to the APA). "Abe Cohen executed the Conway APA on behalf of the Seller entities and, with respect to the Assigned Entities, Abe Cohen, Morris Cohen, and Jeffrey Cohen also executed the Conway APA in their personal capacity." (Compl. ¶ 238).

[33] Compl. ¶ 235–239.

[34] Compl. ¶ 241.

Cash	$4,733,595
Property and Equipment	$572,349
Deposits	$1,044,123
Intangibles	$22,441,000
Goodwill	$17,175,322
TOTAL	$45,966,389[35]

The Trustee alleges that "the true value Southern Island and SI Retail received in connection with the Conway Acquisition was cash, property, equipment, and deposits totaling only $6,350,067."[36] He further alleges that, in exchange for that amount, Southern Island and SI Retail "assumed liabilities to third-parties which represented a significant portion of Conway's debt, in the amount of $45,966,389" as well as "various store operating leases, including future obligations for rent and other lease obligations such as taxes, common area maintenance charges, and insurance."[37]

C. Debtors Pay Conway Creditors

Before the Conway Acquisition even closed, "the Debtors were inundated with calls from Conway Creditors seeking payment[.]"[38] Some creditors threatened litigation or the filing of an involuntary bankruptcy proceeding if debts were not paid immediately.[39] In the months following the acquisition, Debtors' relationships with its own creditors began to suffer as demands from Conway Creditors overwhelmed them.[40]

[35] Compl. ¶ 241.

[36] Compl. ¶ 242.

[37] Compl. ¶ 242.

[38] Compl. ¶ 245.

[39] Compl. ¶¶ 245, 267.

[40] Compl. ¶¶ 267–70 (describing emails from disgruntled creditors complaining about a lack of communication and payment issues, among other things).

"In connection with the Conway Acquisition, HEP, Conway's financial advisory firm, also acted as the noticing agent for the Debtors, charged with issuing settlement offers to Conway Creditors starting in February 2014, which included seeking discounts and payment plans to resolve the Conway debt which the Debtors would be assuming."[41] "The HEP engagement was very limited in scope, but two years later HEP was still being inundated with calls from Conway Creditors demanding payments.[42]

As of October 1, 2015, "$55,068,947 of Conway Creditor claims had been settled for $33,661,050[.]"[43] As of August 31, 2015, only about half of that had been paid.[44] In early 2016, the Debtors attempted to re-settle a portion of the claims previously settled to reduce them further. While some creditors did agree to a reduction, others made complaints, suggesting that the request to reduce the already settled debt was "unfair and/or criminal."[45] In at least one instance, litigation to enforce a prior settlement agreement was commenced.[46]

D. Debtors' Financial Decline

Not long after the Conway Acquisition, the Debtors' financial condition rapidly deteriorated. Debtors were unprepared for the distribution challenges and additional costs associated with expanding into a new geographic area. The cost to operate Conway's stores was significantly higher than the Debtors' stores in other regions and the Debtors did not have sufficient human capital to handle the changes that came along with the acquisition.[47]

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[41] Compl. ¶ 273.

[42] Compl. ¶ 275.

[43] Compl. ¶ 276.

[44] Compl. ¶ 276.

[45] Compl. ¶ 277.

[46] Compl. ¶ 277.

[47] Compl. ¶ 245.

The Debtor entities that purchased the Conway assets and assumed its liabilities, Southern Island and SI Retail, incurred losses since their inception, beginning in 2015 with losses of $29 million and ending in 2018 with losses of $17.6 million.[48] Year after year Southern Island and SI Retail reported liabilities exceeding the fair market value of their assets, with deficiencies ranging from negative $29 million to negative $102 million.[49]

When viewed on a combined basis, all the Debtors suffered similar declines. Though profitable prior to the Conway Acquisition, the Debtors quickly became unprofitable after that transaction closed, going from net income of $9.5 million and EBITDA of $16.4 million at the end of fiscal year 2014 to net losses of $11 million and EBITDA of $1.6 million in 2015.[50] The losses continued to the Petition Date:

Fiscal Year End	Net Loss	EBITDA
2016	($26.4 million)	($9.8 million)
2017	($44.3 million)	($22.9 million)
2018	($42.9 million)	($10.1 million)[51]

"The Debtors' books and records demonstrate that they were balance sheet insolvent, with insufficient assets to cover their liabilities, for FY 2015 and every year thereafter through the Petition Date."[52] The Trustee alleges that the Debtors' records overstate the fair value of the Conway assets by nearly $40 million and that by "using a fair valuation of the Conway assets, and taking into account the massive liabilities incurred in connection with the Conway Acquisition,

[48] Compl. ¶ 256.

[49] Compl. ¶ 257.

[50] Compl. ¶ 252.

[51] Compl. ¶ 252.

[52] Compl. ¶ 253.

the Debtors were insolvent upon closing on the Conway Acquisition."[53] He also alleges that the Debtors may have had a negative implied equity value of at least $41 million during this time period.[54]

E. Rise in Rents

The Debtors leased their corporate facility and dozens of their store locations from Fallas SPEs.[55] Beginning in 2015, the rent at the stores that were owned by the Fallas SPEs suddenly spiked.[56] While the average rent per store at locations owned by Fallas SPEs was $180,074 in 2014, in 2015 the average was $336,381.[57] By comparison, for properties owned by third parties, the average rent per store went down in 2015, from $284,767 in 2014 to $241,698.[58] "In FY 2015 the average rent per store for Fallas-Owned Properties increased by almost 87% and was 40% higher than the rest of the store portfolio."[59] This trend continued until the Petition Date.[60]

"[T]he Debtors overall rent expenses were substantially higher than those of comparable retail chains, such as Burlington Stores, Inc., Ross Stores, Inc., The TJX Companies, Inc., Dollar General Corporation, Dollar Tree, Inc., and Five Below, Inc."[61] A comparison of net rent expenses of these comparable retail chains to those of the Debtors "reveals that the comparable companies' rent as a percentage of sales averaged 4.6% for historical years (ending November 2018), while

[53] Compl. ¶ 254.

[54] Compl. ¶ 255.

[55] Compl. ¶ 281.

[56] Compl. ¶¶ 285–86.

[57] Compl. ¶ 285.

[58] Compl. ¶ 286.

[59] Compl. ¶ 286.

[60] Compl. ¶ 287.

[61] Compl. ¶ 289.

the Debtors' (for the period ending May 2018) was approximately 12% – two to three-and-a-half times higher than each of the companies used for comparison."[62]

The rent at properties owned by Fallas SPEs was also high in comparison with the rent paid by other tenants in the same buildings. For example, Debtors' Store 102-B paid $9000 a month to lease 4,275 square feet at a property in Huntington Park, California, while Payless Shoes paid only $4000 a month for the same amount of space at the same location.[63] Likewise, Debtors' Store 403 paid $34,116 a month to rent 28,416 square feet, while another tenant of that same building, Need 2 Speed, leased nearly double the square footage (50,400 square feet) for only $25,200.[64]

In at least one instance, the Debtors made rent payments on account of a store that never existed. "Beginning in 2013, the Debtors' rent rolls reported annual rent of $271,800 being paid for 'Store #414'" located in Goodyear, Arizona.[65] When the property was purchased, Fallas had hoped to open a store location on the one available site pad. However, the terms of the lease with the tenant on the other site pad (within the same property) precluded Fallas from opening a competing store on the available lot.[66] Nonetheless, the Debtors began paying rent.[67] The Debtors continued negotiations with Big Lots for some time in an attempt to get the lot restriction removed, but never did open a store at the Goodyear location.[68] In total, the Debtors paid $1,076,838.58 in rent for Store 414 at the Goodyear location, though no store existed there.[69] Despite the lack of an

[62] Compl. ¶ 290.

[63] Compl. ¶ 295.

[64] Compl. ¶ 295.

[65] Compl. ¶ 298.

[66] Compl. ¶ 301.

[67] See Compl. ¶ 302 (describing email from Menichelli directing the rent roll to show rent for both Big Lots and FP Stores, stating "We can just say the truth – that we expect our store to open sometime in Q1 2014.").

[68] Compl. ¶¶ 305–06.

[69] Compl. ¶ 309.

actual store at this location, the Fallas SPE that owned the store reported income on its Profit and Loss Statement "of $162,240.69 for the period August–December 2013 and $351,540 for 2014."[70]

The Trustee alleges that the rents on properties owned by the Fallas SPEs were "artificially inflated to satisfy lenders, with which Fallas had taken out large loans on the properties."[71] "In these instances, Fallas would have the Debtors pay rental rates on Fallas-Owned Properties that were well in excess of market rates . . . to inflate the cash flow stream for the Fallas SPE that owned the property."[72] On December 4, 2013, in an email exchange between the Debtors' CFO, Menichelli, and representatives of RBS Citizens, N.A. regarding the financing of nine store locations, Menichelli responded to the question of why the rents are so high with the following –

> It is the rent on that store that makes it appear unprofitable. Store 101 is in a 10 floor building in downtown LA. About 6 years ago, we took out a loan on the building of about $16 million to finance the conversion of floors 3 through 10 into residential loft apartments. [. . .] The loan was not a construction loan that converted to a perm – it was a permanent loan where the proceeds were used for construction. The lender then needed a cash flow stream to support the debt service. That cash flow came in the form of rent from the store. The rent then increased very significantly to satisfy the lender. It is not the level of rent we would ordinarily pay but it makes sense for Michael in the big pictures. Prior to the loan, the rent on that store was roughly 1/5 of the current rate. If you were to use the old rental rate, the store is quite profitable. Hope that explains it.[73]

Fallas himself thought the rental rates were high in some instances.[74]

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[70] Compl. ¶ 310.

[71] Compl. ¶ 291.

[72] Compl. ¶ 291 (emphasis in original).

[73] Compl. ¶ 293 (alteration in original).

[74] Compl. ¶ 294 (describing email exchange about rent in which Menichelli states "Michael thought the rent seemed high.. . . He wanted to know what the loan amount was on the property, who the lender is, what the monthly payment is, amortization term and interest rate. . . ."); Compl. ¶ 307 (describing an email exchange in which Menichelli was informed by Pena that Fallas wanted to stop paying rent for the Goodyear store since it was not able to open, but Pena thought Michael should be reminded that the leases for both stores were required by the banks. Menichelli replied, "I agree – we can't change the rents without the lender's consent. I'll remind Michael.").

F. Dividends Paid and Security Interests Issued

Also in 2015, in the midst of their financial troubles, Debtors J&M Sales and FP Stores issued more than $7.6 million in dividend payments to Fallas, his wife, and trusts under their control.[75]

On January 31, 2015, the Fallases, in their capacities as directors of J&M Sales and trustees of trusts holding all of the common stock in J&M Sales, executed a "Unanimous Written Consent of the Shareholder and Board of Directors," authorizing "a dividend of $6,474.375 per share… to all shareholders of record as of January 31, 2015, who are the holders of the Company's 40 outstanding shares of one class common stock."[76] "This dividend amounted to $258,975 total, split as follows: (i) $129,487.50 to 'The Michael Fallas Living Trust dated 1/19/05,' which held 20 shares of J&M Sales common stock and of which Fallas was trustee; and (ii) $129,487.50 to 'The Ilanit Fallas Living Trust dated 1/19/05,' which held 20 shares of J&M Sales common stock and of which [Ms. Fallas] was trustee" (collectively, the "**J&M Sales Dividend**").[77]

On that same day, the Fallases executed another Unanimous Written Consent for FP Stores, in their capacity as sole directors and shareholders authorizing a second dividend (the "**FP Stores Dividend**").[78] "This document authorized 'a dividend of $741.9227 per share … to all shareholders of record as of January 31, 2015, who are the holders of the Company's 10,000 outstanding shares of one class common stock.' The dividend amounted to $7,419,227 total, as follows: (i) $3,709,613.50 to 'The Michael Fallas Living Trust dated 1/19/05,' which held 5,000 shares of FP Stores common stock and of which Fallas was trustee; and (ii) $3,709,613.50 to 'The

[75] Compl. ¶ 311.

[76] Compl. ¶ 312.

[77] Compl. ¶ 312.

[78] Compl. ¶ 313.

Ilanit Fallas Living Trust dated 1/19/05,' which held 5,000 shares of FP Stores and of which [Ms. Fallas] was trustee."[79]

Although the Unanimous Written Consents were dated January 15, 2015, approximately $7.4 million of the dividends may have been paid as early as April of 2014, when $4,224,022 was transferred from J&M Sales to Fallas' personal bank account or in June of 2014, when another $2,463,000 was transferred to the same account.[80] Additionally, despite the Unanimous Written Consent authorizing a dividend from Debtor FP Stores, all of the amounts transferred were paid by Debtor J&M Sales.[81]

On June 13, 2017, Debtor Southern Island issued a Promissory Note to Fallas in the amount of $5 million (the "**June 2017 Note**"), which granted Fallas a security interest in substantially all of Southern Island's personal property.[82] On March 13, 2018, Debtors Southern Island, J&M Sales, National Stores, J&M Texas, FP Stores, SI Retail, Caribbean Island, and Pazzo FNB issued another Promissory Note to Fallas, also in the amount of $5 million (the "**March 2018 Note**") and similarly granted Fallas a security interest in substantially all of the personal property of those Debtors.[83] "The June 2017 Note and March 2018 Note were subject to subordination agreements between Fallas and the Debtors' largest secured creditors, Encina Business Credit, LLC and Gordon Brothers Finance Company."[84]

[79] Compl. ¶ 313.

[80] Compl. ¶ 314.

[81] Compl. ¶ 314.

[82] Compl. ¶ 319.

[83] Compl. ¶ 320.

[84] Compl. ¶ 321.

On June 11, 2018, Fallas filed a UCC-1 financing statement (the "**Fallas UCC-1**" or the "**Fallas Lien Transfer**") against the debtors who issued the Notes, listing as collateral all assets of each debtor.[85]

G. Looking Back on the Conway Acquisition

By 2017, when the bankruptcy was looking imminent, the Debtors' management seemed to have already concluded that the Conway Acquisition was a big mistake. On January 16, 2017, in an email from Menichelli to mortgage loan broker Jonathan David Hakakha regarding due diligence for refinancing of Fallas's real estate portfolios, she stated "[Y]ou can assume that this was a highly profitable company until the 2014 acquisition and that there have been substantial losses since."[86]

In August 2018, just before the Debtors' bankruptcy filing, "the Debtors prepared a PowerPoint presentation for a vendor meeting, which contained a slide entitled 'How Did We Get Here?' that set forth a timeline of events that had caused Debtors' operational and financial breakdown – with the first event being: 'National Stores overpays for Conway Stores for ~$70 million including working capital needs, and in order to support the vendor base assumes financial debt and trade debt.'"[87] "The presentation further contains a slide explaining how 'The Top Line Benefit [of the Conway Acquisition] Did Not Outweigh Conway's Costs' (due to, *inter alia*, the burden of 'increased store expenses'), and describes 'significant cash burn after the Conway acquisition' which led to increased bank debt, increased trade debt, and the need for cash injections by Fallas to stay afloat."[88]

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[85] Compl. ¶ 323.

[86] Compl. ¶ 261.

[87] Compl. ¶ 264.

[88] Compl. ¶ 264.

H. Post-Bankruptcy Transactions

On August 16, 2018 (the "**Petition Date**"), the Debtors each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. On October 17, 2018, the Debtors' sale of 85 of their store locations to Pegasus Trucking, LLC ("**Pegasus**"), an entity owned and controlled by Fallas, pursuant to the terms of an Asset Purchase Agreement dated October 4, 2018 (the "**Pegasus APA**") was approved. (Bankr. D.I. 670). The sale closed on October 19, 2018.[89]

"Following the sale to Pegasus and the completion of the Debtors' inventory liquidation sales in December 2018, the Debtors had no ongoing business operations."[90] On January 28, 2019, the Debtors' Chapter 11 cases were converted to cases under Chapter 7 of the Bankruptcy Code, effective as of February 4, 2019 (the "**Conversion Date**"). (Bankr. D.I. 1240). On the Conversion Date, George L. Miller was appointed the Chapter 7 Trustee. (Bankr. D.I. 1262). On July 30, 2020, the Trustee filed this adversary proceeding.

III. JURISDICTION

The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. § 1409(a).

IV. STANDARD OF REVIEW

A Rule 12(b)(6) motion challenges the sufficiency of the factual allegations in the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is

[89] Compl. ¶ 13.

[90] Compl. ¶ 13.

facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The court must draw all reasonable inferences in favor of the plaintiff. *See, e.g., Alpizar-Fallas v. Favero,* 908 F.3d 910, 914 (3d Cir. 2018). On a motion to dismiss, "[t]he defendant bears the burden to show that the plaintiff's claims are not plausible." *In re LSC Wind Down, LLC*, 610 B.R. 779, 783 (Bankr. D. Del. 2020).

In weighing a motion to dismiss, the court should undergo a three-part analysis. "First, the court must take note of the elements needed for a plaintiff to state a claim." *Santiago v. Warminster Twp*., 629 F.3d 121, 130 (3d Cir. 2010) (citing *Iqbal*, 556 U.S. at 675). Second, the court must separate the factual and legal elements of the claim, accepting all of the complaint's well-pled facts as true and disregarding any legal conclusions. *Id.*; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citing *Iqbal*, 556 U.S. at 679). Third, the court must determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *Santiago*, 629 F.3d at 130.

V. DISCUSSION

A. Avoidance and Recovery of Transfers Under DUFTA (Counts I–III)

In Counts I through III of the Complaint, the Trustee asserts claims for avoidance of alleged fraudulent transfers pursuant to both the actual and constructive fraud provisions of Delaware's Uniform Fraudulent Transfer Act ("DUFTA"). 6 Del. C. §§ 1301, *et seq*. Section 1307 allows a creditor to avoid debtor transfers that are fraudulent under §§ 1304 or 1305. The Trustee's power to assert claims under DUFTA derives from Section 544 of the Bankruptcy Code (the "**Code**"), which provides that:

> the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor

> holding an unsecured claim that is allowable under Section 502 of this title or that is not allowable only under Section 502(e) of this title.

11 U.S.C. § 544(b). Section 544 grants the authority to "bring certain claims on behalf of, and for the benefit of, all creditors." *In re Cybergenics Corp.*, 226 F.3d 237, 244 (3d Cir. 2000). It does so by allowing the trustee to "step into the shoes" of the debtors' unsecured creditors in order to realize upon their state law claims. *UMB Bank, N.A. v. Sun Capital Partners (In re LSC Wind Down, LLC)*, 610 B.R. 779, 784 (Bankr. D. Del. 2020).

In Count I of the Complaint the Trustee asserts claims under DUFTA against the Conway Sellers, KeyBank, and the Conway Creditors and Factor Defendants (collectively, the "**Non-Fallas Defendants**") arising out of the Conway Acquisition and payments made to the Conway Creditors and Factor Defendants following that acquisition. Count II asserts DUFTA claims against the Fallases arising out of the J&M Sales Dividend and the FP Stores Dividend. Count III asserts DUFTA claims against the Fallas SPEs arising out of the rent payments made to those SPEs.

While the Complaint does not plead the claims for actual and constructive fraud separately, they must be addressed separately because their requirements are different.

1. **Constructive Fraud**

DUFTA's constructive fraud provisions provide as follows:

Section 1304(a)(2) states:

> **(a)** A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > **(2)** Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> >
> > **a.** Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Section 1305(a) states:

> **(a)** A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

6 Del. C. §§ 1304(a) & 1305(a).

Defendants have raised several bases for dismissal of the claims for constructive fraudulent transfer including statute of limitations, standing, and sufficiency of pleading.

a. <u>Statute of Limitations Defense</u>

The Bankruptcy's Code's "strong-arm provision," Section 544, "confers . . . no greater rights of avoidance than the creditor would have if the creditor were asserting invalidity on its own behalf. Consequently, if the creditor is . . . barred from recovery because of the running of a statute of limitations prior to the commencement of the case, the trustee is likewise . . . barred.'" *UMB Bank, N.A.*, 610 B.R. at 784.

All the Defendants argue that the Trustee is time barred from pursuing the constructive fraud claims in Counts I through III because the applicable statute of limitations has expired. The time limitations for claims asserted under these provisions are contained in Section 1309, which provides that:

> A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:
>
> **(2)** Under § 1304(a)(2) or § 1305(a) of this title, within 4 years after the transfer was made or the obligation was incurred

6 Del. C. § 1309.

The Moving Defendants argue that because the Conway Acquisition and some of the associated transfers took place more than four years before the Complaint was filed, those claims in Count I are barred by Section 1309. The Trustee responds that he has alleged the existence of several predicate creditors with claims that arose within the prescribed time limits, in whose shoes he may stand pursuant to Bankruptcy Code Section 544. Among these predicate creditors are several government entities that the Trustee argues are immune from the time limits imposed by Section 1309 under the doctrine of *nullum tempus*.

As a threshold matter, it is important to observe that Section 1309 as it relates to constructive fraud claims is not a statute of limitations, but rather a statute of repose. Though none of the parties base their arguments on this point, the distinction is a critical one as it effects subject matter jurisdiction.

A motion to dismiss under Rule 12(b)(6) asserting that a claim is time-barred calls into question a court's jurisdiction to hear the matter. While a claim's untimeliness under a statute of limitations is an affirmative defense, the presence of which will not usually justify dismissal on a 12(b)(6) motion, that is not the case where the time limitations are contained in a statute of repose. As the Delaware Supreme Court has explained –

> While the running of a statute of limitations will nullify a party's remedy, the running of a statue of repose will extinguish both the remedy and the right. The statute of limitations, therefore, is a procedural mechanism which may be waived. On the other hand, the statute of repose is a substantive provision which may not be waived because the time limit expressly qualifies the right which the statute creates.. . . Moreover, because the statue of repose is a substantive provision, it relates to the jurisdiction of the court; hence 'any failure to commence the action within the applicable time period extinguishes the right itself and divests the . . . court of any subject matter jurisdiction which it might otherwise have.'

Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413, 421 (Del. 1984) quoting *First Savings & Loan Assoc. v. First Federal Savings & Loan Assoc. of Hawaii,* 547 F. Supp. 988, 995 (D. Haw. 1982).

The difference between a statute of limitations and a statute of repose is the tipping point. A typical statute of limitations is triggered by an injury or the discovery of an injury. *Cheswold Volunteer Fire Co.*, 489 A.2d at 416 ("[A]n ordinary statute of limitations [does] not begin to run until either the date of the injury or its discovery[.]"). A statute of repose, on the other hand, is triggered by an event or transaction, without regard for when an injury occurs, or a claim arises. *Worker's Comp. Fund v. Kent Constr. Corp.*, No. 07A-06-008 FSS, 2008 Del. Super. LEXIS 352, at *9 (Del. Super. Ct. Sep. 19, 2008) ("A statute of repose, however, can begin to run before the cause of action arises because it begins 'irrespective of the date of injury.' In other words, when the cause of action triggers the statute, it is a statute of limitations. When the cause of action is not the trigger, it may be a statute of repose.") (quoting *Cheswold*, 489 A.2d at 420).

Unlike statutes of limitations, which were designed to deter plaintiffs from sitting on their rights, statutes of repose are typically enacted for the purpose of protecting defendants by creating a finite period within which a defendant can be sued for a particular transaction. *Goad v. Celotex*, 831 F.2d 508, 511 (4th Cir. 1987) ("In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago."). For this reason, when the time limit set forth in a statute of repose has passed, the claim ceases to exist entirely.

Here, because Section 1309 is not triggered by the date of the injury or its discovery but is instead triggered by an independent event (the making of a transfer or the incurring of an obligation), it is a statute of repose. The comments by the Commission on Uniform Laws (the

"**Commission**") confirm that this is the case. *See* UNIFORM FRAUDULENT TRANSFER ACT ("**UFTA**"), 7A pt.II U.L.A. 7, §9 cmt. 1. (stating that the purpose of the extinguishment provision "is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. . . ."). [91] The plain language of Section 1309 makes this clear as well with its use of the word "extinguished," which conveys that there is a finite amount of time within which to assert claims. S*ee* Merriam-Webster Dictionary at https://www.merriam-webster.com/dictionary/extinguish, last visited on 8/11/21 (defining "extinguish" as "to bring to an end: make an end of.").

As the Commission goes on to explain, the extinguishment of claims serves an important purpose: *"*Because a voidable transfer or obligation may injure all of a debtor's many creditors, there is need for a uniform and predictable cutoff time." UNIF. FRAUDULENT TRANSFER ACT, 7A pt.II U.L.A. 7, §9 cmt. 1. To effectuate this purpose, tolling principles do not generally apply to statutes of repose like they do to statutes of limitation. The United States Supreme Court in *CTS Corp. v. Waldburger* explained:

> Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to "pursu[e] his rights diligently," and when an "extraordinary circumstance prevents him from bringing a timely action," the restriction imposed by the statute of limitations does not further the statute's purpose. *Lozano*, *supra*, at 10, 134 S. Ct. 1224, 188 L. Ed. 2d 200). But a statute of repose is a judgment that defendants should "be free from liability after the

[91] The prefatory note to this provision uses the term "statute of limitations" rather than statute of repose. This does not alter the conclusion that the provision is indeed a statute of repose. A review of case law reveals that the term "statute of limitations" is frequently used as a matter of course when referring to statutes that set time limitations. *See Nathan v. Whittington*, 408 S.W.3d 870, 873–74 (Tex. 2013) ("We have found that some courts, including the high courts of several states, have referred to this UFTA provision as a "statute of limitations," while others have referred to it as a "statute of repose." *See K-B Bldg. Co. v. Sheesley Constr., Inc*., 2003 PA Super 372, 833 A.2d 1132, 1133 n.1 (Pa. Super. Ct. 2003) (noting that its "review of decisions of other jurisdictions reveals that [the provision] is referred to as both a statute of limitations and a statute of repose"). But in most of the opinions in which the court referred to the provision as a statute of limitations, including all of those of the states' high courts, the courts did not actually consider or address the issue. Instead, they simply referred to the provision as a statute of limitations without actually concluding that it was a statute of limitations as opposed to a statute of repose.") (citing cases).

> legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason." C. J. S. §7, at 24.

CTS Corp. v. Waldburger, 573 U.S. 1, 7 (2014) *superseded by statute on other grounds as noted in In re Dow Corning Corp.*, 778 F.3d 545, 553 n.2 (6th Cir. 2015). *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) ("[A] period of repose [is] inconsistent with tolling"); 4 C. Wright & A. Miller, Federal Practice and Procedure §1056, p. 240 (3d ed. 2002) ("[A] critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling"). Because the constructive fraudulent transfer provisions of DUFTA are subject to a statute of repose, the Court would lack jurisdiction to hear claims against Defendants that arose more than four years before the Petition Date.

Here, the Trustee argues that the doctrine of *nullum tempus* should apply to extend the prescribed time limitations of Section 1309 because some of the Debtors' creditors, in whose shoes he stands, are government entities. Specifically, the Trustee argues that because he alleged that the Debtors have numerous governmental creditors – including, among others, the Ohio Department of Taxation, Pennsylvania Department of Labor and Industry, New Mexico Taxation & Revenue Department, and the Arizona Department of Revenue – which he alleges are, by virtue of the laws in their respective states, exempt from the application of any limitations period for fraudulent transfer claims, that he too gets the benefit of those exemptions. [92]

The doctrine of *quod nullum tempus occurrit regi* – literally translated to "no time runs against the King" – is an ancient doctrine that provides governmental entities with immunity to the defense that claims are time-barred, allowing the government to sue defendants that, in some

[92] The Trustee has only pled the existence of *state* government creditors here. He has not pled the existence of any *federal* government creditors. Accordingly, I have only considered DUFTA's operation against state government creditors and have not considered whether it would operate to bar the claims of the United States.

instances, could not be sued by any private party. While the doctrine most typically applies to the federal government, as the Trustee has correctly pointed out, many states have enacted statutes or have common law rules in place that apply *nullum tempus* to exempt their governmental entities from state statutes of limitations as well.[93] However, such laws also typically provide that *nullum tempus* does not apply where the statute expressly provides that it runs against the government. In Delaware, "[i]t is the generally recognized rule, *unless the statute expressly provides to the contrary*, that statutes of limitations do not apply to a state when suing in its sovereign capacity." *Wilmington v. Dukes*, 157 A.2d 789, 794 (Del. 1960) (emphasis added).

By its own terms, DUFTA makes it clear that the government is not exempt from its time limitations. Section 1301 defines a "creditor" to mean "a person who has a claim" and then defines a "person" to mean "an individual, partnership, corporation, association, organization, *government or governmental subdivision or agency*, statutory trust, business trust, estate, trust or any other legal or commercial entity." 6 Del. C. § 1301 (emphasis added). Because any state government entity asserting a claim here would be doing so as a "creditor," that entity, and consequently the Trustee, would be required to file its claim before the time limitations expire and the claim is extinguished. *See In re CVAH, Inc.*, 570 B.R. 816, 836 (Bankr. D. Idaho 2017) ("While, under § 544(b)(1), a trustee benefits from the rights of creditors, it has also been said that the 'trustee is chained to the rights of creditors.'") quoting *In re Acequia, Inc.*, 34 F.3d 800, 809 (9th Cir. 1994); *see also In re Kaiser,* 525 B.R. 697, 714 (Bankr. N.D. Ill. 2014) (the trustee is "subject to the benefits as well as the burdens" of relying on a particular predicate creditor).

While the Trustee cites to several cases in support of his position, they only confirm the rule that *nullum tempus* does not apply where the statute expressly provides otherwise. *See*

[93] Opposition at 22 (citing cases).

Commw., Dep't of Transp. v. J.W. Bishop & Co., 439 A.2d 101, 101 (Pa. 1981) (reaffirming "the long-standing rule that [statutes of limitations] do not apply to the Commonwealth *unless the statute specifically so provides*"); See *State v. Sullivan*, 527 N.E.2d 798, 801 (Ohio 1988) (a state agency is "exempt from the operation of a generally worded statute of limitations," *unless there is an "express statutory provision to the contrary*."); *State v. Roy*, 68 P.2d 162, 164–65 (N.M. 1937) ("It is generally held that statutes of limitation do not apply to actions in behalf of the State [of New Mexico], *unless it is specifically so provided in the statute….*"); *In re Valdez*, 136 B.R. 874, 876 (Bankr. D.N.M. 1992) ("the sovereign is immune from statutes of limitation *unless a statute 'expressly' or by 'clearest implication' permits the defense to be raised against the state*."); *In re Estate of Deuth*, 992 N.E.2d 180, 182 (Ill. App. Ct. 2013) ("Under the common law [of Illinois], when a governmental unit acts in a public capacity . . . a statute of limitations may not be asserted against the government *unless the statute expressly applies to claims brought by the government*."); *Anne Arundel County v. McCormick*, 594 A.2d 1138, 1141 (Md. Ct. App. 1991) ("The ancient common law maxim of *nullum tempus occurrit regi* has been adopted in [Maryland] and exempts the State and its agencies from the bar of a statute of limitations . . . *which does not expressly bar the State or its agencies*.") (emphasis added to all).

For all of these reasons, I reject the Trustee's argument that his reliance on government entities as predicate creditors provides an exemption to the time limitations contained in Section 1309 and I hold that claims asserted under Sections 1304(a) and 1305(a) of DUFTA (the constructive fraud provisions) that are seeking to recover transfers that occurred more than four years before the petition date (or before August 16, 2014) are dismissed as time-barred. Consequently, the claims for constructive fraud in Count I that occurred outside of the limitations

period are dismissed, as are the claims for constructive fraud set forth in Counts II and III that occurred prior to August 16, 2014.

b. Standing

The Defendants next argue that the constructive fraud claims in Counts I through III must be dismissed for lack of standing. Specifically, the Fallas Defendants, the Cohens, and Timing and KC argue that the Trustee does not have standing to pursue these fraudulent transfer claims because certain of the Debtors – most notably Southern Island and SI Retail, the Debtor entities created to complete the Conway Acquisition – are limited liability companies and the Delaware Limited Liability Company Act (the "**LLC Act**") limits a creditor's ability to assert derivative claims Therefore, the Defendants argue, this count would fail to meet the requirement under § 544(b) that the trustee only pursue a transfer that is "voidable under applicable law."

The LLC Act provides that "[i]n a derivative action, the plaintiff must be a member or an assignee of a limited liability company interest at the time of bringing the action." 6 Del. C. § 18-1002. The Delaware Supreme Court has held that even in a situation where an LLC is insolvent or in the zone of insolvency, a creditor may not bring derivative claims on behalf of an LLC. *CML V, LLC v. Bax*, 28 A.3d 1037, 1044 (Del. 2011). The Delaware Supreme Court stated that "[o]nly LLC members or assignees of LLC interests have derivative standing to sue *on behalf of an LLC* – creditors do not." *Id*. (emphasis added).

Of course, here, the Trustee is suing on behalf of creditors, not the Debtor LLC. Section 541(a)(3) of the Code describes property of the debtor's estate as "any property that the trustee recovers under section… 550 … of this title." Section 550(a) provides "[e]xcept as otherwise provided in this section, to the extent that the transfer is avoided under 544 … of this title, the trustee may recover, *for the benefit of the estate*, the property transferred…." So, while some courts

have described fraudulent transfer claims as derivative in the bankruptcy context,[94] they are derivative of the rights of creditors on whose behalf the claims are being brought – not the rights of the debtor.

Delaware courts have recognized the right of a creditor to bring a direct claim for fraudulent transfer outside the bankruptcy context. *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007) ("While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are offered protection through contractual agreements**,** *fraud and fraudulent conveyance law*, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights.") (emphasis added); *Trenwick Am. Lit. v. Ernst & Young*, 906 A.2d 169, 199 (Del. Ch. 2006) (recognizing that in a fraudulent conveyance suit, creditors would have direct standing to prosecute an action); *Burkhart v. Genworth Fin., Inc.*, 2020 WL 507938 (Del. Ch. 2020) (recognizing that DUFTA protects creditors from fraudulent transfers).

Indeed, Defendants' position, if correct, would lead to absurd results. A Delaware LLC could fraudulently transfer its assets with impunity because the only one who could sue to recover the transfer would be the LLC member involved in the fraudulent transfer. Clearly, that is not the law. For these reasons, I reject the Defendants' arguments that the Trustee does not have standing to pursue the claims in Counts I through III.

c. Sufficiency of Pleading[95]

Defendants next argue that the Trustee has failed to sufficiently plead the elements of a claim for constructive fraudulent transfer. Specifically, the Defendants argue that the Trustee has

[94] *In re AstroPower Liquidating Trust*, 335 B.R. 309, 328 (Bankr. D. Del. 2005); *In re JMO Wind Down, Inc.*, 2018 WL 1792185, *8 (Bankr. D. Del, 2018).

[95] The Fallas Defendants argued in their motion to dismiss that the Trustee's complaint is an impermissible shotgun pleading and therefore subject to dismissal. I find this argument completely without merit. Federal Rules of Civil

failed to properly allege that the allegedly fraudulent transfers were made for a reasonably equivalent value and that the Debtors were insolvent at the time the transfers were made. [96]

i. Reasonably Equivalent Value

Constructive fraudulent transfer requires that the transfer be made "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation." 6 Del. C. § 1304(a)(2). "[A] party receives reasonably equivalent value for what it gives up if it gets 'roughly the value it gave.'" *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3d Cir. 2007). "The Third Circuit utilizes a totality of the circumstances test in determining whether reasonably equivalent value was given, and that factual inquiry is not suitable for determination on a motion to dismiss." *In re Am. Bus. Fin. Servs., Inc.*, 361 B.R. 747, 760 (Bankr. D. Del. 2007). Totality of the circumstances "tak[es] into account the good faith of the parties, the difference between the amount paid and the market value, and whether the transaction was at arms length." *In re Charys Holding Co.,* 443 B.R. 628, 637 (Bankr. D. Del. 2010) (internal quotations omitted). Such determination "typically requires testing through the discovery process." *Id*. at 638.

The Trustee advances three independent counts of constructive fraudulent transfer and I will address them separately as it relates to reasonably equivalent value.

Procedure 8 has "liberal pleading principles." *In re DVI, Inc.*, 326 B.R. 301, 309 (Bankr. D. Del. 2005). It does not require a technical form. Fed. R. Civ. Pro. 8. The Trustee's complaint is carefully organized with corresponding headings to make it easy for parties and the court to know which facts correspond with which claims and give notice to the Defendants. Therefore, this argument is rejected.

[96] The Trustee also alleges the entirety of the Conway Acquisition was not for reasonably equivalent value, however since I have already ruled that the statute of repose bars constructive fraudulent transfer claims in relation to the Conway Acquisition, I will not address it here.

a. Conway Creditor and Factor Defendant Payments

Count I of the Complaint seeks to avoid and recover payments made to the Conway Creditors and Factor Defendants that were made within the 4-year limitations period on the basis that the Debtors did not receive reasonably equivalent value.

To support his argument that the payments were made for less than reasonably equivalent value, the Trustee alleges that "[b]ecause the Conway Acquisition is a fraudulent transfer which the Trustee is entitled to avoid, the Debtors' payment of Conway Creditor liabilities assumed as part of the Conway Acquisition – which were made at a time when the Debtors were insolvent and for which the Debtors received no benefit – are likewise avoidable as fraudulent transfers."[97] The Trustee goes on to argue that "[e]ven if the Court determines that the Conway Acquisition is unavoidable due to the statute of limitations or another reason, the fact remains that the Debtors did not receive reasonably equivalent value in connections with the acquisition or, in turn, for payments on Conway's debts…[T]he more than $13 million in value the Debtors gave to Conway Creditors and Factor Defendants resulted in value to those entities and to Conway (which received the goods and services in questions), but not to the Debtors."[98]

I am not persuaded by this narrative. The Trustee is attempting to paint the picture that because the Conway Acquisition was for less than reasonably equivalent value – a contention I will assume arguendo – each of the assumed liabilities was also for less than reasonably equivalent value. However, without something more from the Trustee, this is an untenable position. For example, the Trustee admitted that when Conway liquidated its inventory in anticipation of the merger the Debtors "agreed to the sharing of the liquidation proceeds."[99] The Debtors received

[97] Compl. ¶ 279.

[98] Pl.'s Supp. Mem. Law Further Opposition Moving Defs.' Mot. Dismiss ("Trustee Supp. Briefing") at 6 [D.I. 114].

[99] Compl. ¶ 232.

$4.7 million from this liquidation,[100] yet the Trustee makes no attempt to explain whether this liquidation itself was for less than reasonably equivalent value or whether the $4.7 million covers any of the product at issue in the fraudulent transfers. Additionally, the Trustee admits that the Debtors received $572,349 in property and equipment and $1,044,123 in deposits from Conway upon closing of the merger.[101] While the Trustee contends this is less than the value of *all* assumed debts, he makes no attempt to compare it to the value of the specific transfers at issue.

In short, even accepting all the Trustee's pleaded facts, the Trustee has entirely failed to allege that the Debtors did not receive reasonably equivalent value for the specific Conway Creditor and Factor Defendant payments at issue.[102]

The Conway Creditor and Factor Defendants' motions to dismiss the constructive fraudulent transfer claims of Count I are granted. The Trustee is granted leave to amend the Complaint to replead this Count solely with regard to transfers after August 14, 2014.

b. Dividend Payments

The Fallas Defendants next argue that Count II of the Complaint, which seeks to avoid and recover dividend payments worth approximately $7.6 million made to the Fallases, also fails to sufficiently allege lack of reasonably equivalent value.[103] I disagree.

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[100] Compl. ¶ 233.

[101] Compl. ¶¶ 241–42.

[102] The Defendants made several arguments opposing the Trustee's claims including that the payments are based on valid antecedent debts, are covered by independent settlement agreements, and are not severable from the original time-barred assumption of the liability. Because I have ruled that the Trustee has failed to identify sufficient facts, I do not find it necessary to address any of these arguments.

[103] It is unclear from the papers exactly when these dividend payments occurred. The Trustee states that "upon information and belief" three dividends were paid prior to July 2014. However, the Fallases appear to concede that the dividends were made in January 2015, when the board of directors approved the dividends. Opening Br. Support Fallas Defs.' Mot. to Dismiss ("Fallas Reply") at 17 [D.I. 56] ("the Trustee has not shown that Debtors J&M Sales and FP Stores were insolvent or rendered insolvent in January 2015 when the J&M Sales Dividends and FP Stores Dividends were made"). This is a crucial difference as the statute of repose discussed above would potentially affect my jurisdiction over these claims. However, since it has not been made clear to me what the actual date of transfer is,

Distributions made on account of equity interests confer no value on the transferor. *In re SemCrude, L.P.*, 2013 WL 2490179, at *5 (Bank. D. Del. 2015) ("The Bankruptcy Code defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor…" Case law teaches that equity distributions on account of partnership interests do not confer "value" upon the transferor").

To support his argument that the Debtors did not receive reasonably equivalent value in exchange for the dividend payments, the Trustee states that "[n]o value was transferred to J&M or FP Stores in exchange for the dividends."[104] The Trustee stresses that "Fallas and [Ms. Fallas] authorized and paid these dividends to themselves when the Debtors were insolvent…[t]he issuance of the J&M Sales Dividend and the FP Stores Dividend further worsened the Debtors' financial condition."

At this stage, the Trustee's factual allegations that the Debtors received no value in exchange for the dividend payments are assumed true and are enough to conclude that the Debtors did not receive reasonably equivalent value for the payment of dividends to the Fallases.

The arguments made to dismiss the constructive fraudulent transfer claims for Count II based on failure to plead lack of reasonably equivalent value are therefore rejected.

c. Rent Payments

The last argument Defendants make with respect to reasonably equivalent value is that Count III of the Complaint, which seeks to avoid and recover rent payments worth approximately $67 million made to the Fallas SPEs, is also not sufficiently pled.[105]

I will not assume a particular date and apply the statute of repose sua sponte. To be clear, whether or not the dividend payments are ultimately subject to the statute of repose, the actual fraudulent transfer claims will remain unaffected.

[104] Compl. ¶ 317.

[105] Certain of these transfers are covered by the statute of repose and thus dismissed on those grounds.

To support his argument that the Debtors did not receive reasonably equivalent value in exchange for the rent payments, the Trustee states that "[t]he Debtors paid inflated, above-market rents on the Fallas-Owned Properties, which were, on average, significantly higher both per square foot and as percentage of sales than rents the Debtors paid on properties which were not owned by or affiliated with Fallas."[106] The allegations include two tables that compare the rent per store of the Fallas-owned properties to the non-Fallas-owned properties.[107] The Trustee provides the following specific examples –

- Store 102-B (Huntington Park, CA), Owned by 6725 Pacific Ventures, LLC: Debtor National Stores paid monthly rent of $9,000 to lease 4,275 square feet ($25.26 annual base rent per square foot). At the same property location, Payless Shoes also leased 4,275 square feet, but for only $4,000 per month ($11.23 annual base rent per square foot). Thus, National Stores paid 125% more than Payless Shoes for the same amount of space at the same location.
- Store 403 (Reno, NV), Owned by 6895 Sierra Center Parkway LLC (assigned to Fallas Borrower IV, LLC in July 2018): Debtor FP Stores paid monthly rent of $34,116 to lease 28,416 square feet ($14.41 annual base rent per square foot). At the same property location, a company called Need 2 Speed leased 50,400 square feet, but only paid monthly rent of $25,200 ($6.00 annual base rent per square foot). Thus, FP Stores paid 140% more per square foot than Need 2 Speed for leased space at the same location.
- Store 289 (San Antonio, TX), Owned by J&M Properties I, LLC (assigned to Fallas Borrower III, LLC in July 2018): Debtor J&M Texas paid monthly rent of $33,333 to lease 30,680 square feet ($13.04 annual base rent per square foot). At the same property location, Texas Western Warehouse leased 28,570 square feet, but only paid monthly rent of $14,285 ($6.00 annual base rent per square foot). Thus, J&M Texas paid 117% more per square foot than Texas Western Warehouse for leased space at the same location.[108]

The Trustee further alleges that "it appears from the Debtors' records that the Debtors would pay additional common area maintenance charges [] and property taxes associated with the

[106] Compl. ¶ 283.

[107] Compl. ¶¶ 285 and 287.

[108] Compl. ¶ 295.

non-leased available space, in order to benefit Fallas and provide "cash flow" to cover Fallas SPE expenses for the non-leased available space."[109]

In addition to the facts about disproportionate rent, the Trustee alleges that "[t]he Debtors also made rent payments on account of at least one store that never existed. Beginning in 2013, the Debtors' rent rolls reported annual rent of $271,800 being paid for "Store #414" … a property owned by a Fallas SPE…However, the Debtors never actually opened or operated a store at this location."[110]

The Fallas Defendants respond that the Trustee is not permitted to avoid the rent payments without avoiding the underlying lease.[111] They reason that "[e]ach rent payment was made consistent with the terms of the respective property's rental agreement. As a result, the Debtors did receive reasonable value for the rent payments."[112] I am not persuaded.

At this stage, the Trustee's factual allegations are assumed true and are enough to support the conclusion that the Debtors did not receive reasonably equivalent value for the payment of rent to the Fallas SPEs.

The arguments made to dismiss the constructive fraudulent transfer claims for Count III on basis of failure to plead lack of reasonably equivalent value are therefore rejected.

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[109] Compl. ¶ 296.

[110] Compl. ¶¶ 297–98.

[111] If the Fallases' vague statement is meant to be a reference to the idea that payments on a valid antecedent debt are presumptively valid, it is misplaced. The presumption is rebuttable by an allegation that the underlying debt is invalid. *In re Aphton Corp.*, 423 B.R. 76, 93 (Bankr. D. Del. 2010). The Trustee has presented copious evidence that the rent imposed by the leases was a direct result of the Fallases' breaches of fiduciary duty and self-dealing and thus not entitled to a presumption.

[112] Fallas Reply at 20.

ii. Insolvency

In addition to arguing that the Trustee has failed to plead lack of reasonably equivalent value, the Fallas Defendants also argue that the claims for constructive fraudulent transfer in Counts II and III should be dismissed because the Trustee has not adequately pled the Debtors' insolvency. Specifically, they argue that the Trustee's allegations that the Conway Acquisition rendered the Debtors insolvent and that the Debtors remained insolvent are insufficient because the Trustee pled insolvency on a combined basis rather than on a debtor-by-debtor basis which, they argue, essentially amounts to an impermissible substantive consolidation of the Debtors.[113]

> Constructive fraudulent transfer requires that the transfer be made while the debtor –
>
> > a. [w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or b. [i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

6 Del. C. § 1304(a)(2). The Defendants assert that because the Trustee has not specifically alleged facts sufficient to show each applicable Debtor was individually insolvent, the Complaint lacks specificity and the fraudulent transfer claims should be dismissed as a matter of law.

The Court in *In re Extended Stay, Inc.* faced a similar question about viewing the insolvency of a debtor on a combined basis at the motion to dismiss stage. The Court ultimately overruled the defendants' argument that the combined pleadings were insufficient to state a claim for fraudulent transfer finding "[t]he Court has determined the Amended Complaint meets the pleading standards under Rule 8 of the Federal Rules of Civil Procedure, and that the Trust has

[113] Substantive consolidation is an equitable bankruptcy rule that "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities." *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005) (internal quotations omitted). Nonconsensual substantive consolidation can be proved by showing that "(i) prepetition [the debtor] disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors." *Id*. at 211.

alleged enough facts to state grounds for aggregating the Debtors' estates under principles of substantive consolidation. The Court finds no merit to the [] Defendants' challenge to the adequacy of the pleadings in support of [fraudulent transfer]." *Extended Stay*, 2020 Bankr. LEXIS 2128, *316 (Bankr. S.D. N.Y. Aug. 8, 2020). The Court reasoned "[i]t is enough for the Court to find that for purposes of the Motions [to Dismiss], the Trust is not barred from invoking substantive consolidation in support of its assertion that it can aggregate the Debtors' estates in establishing its standing to sue. Should it become relevant at a later date, the Court can address the impact of substantive consolidation on the Trust's standing to avoid and recover alleged fraudulent transfers." *Id*. at *166–167.

The Defendants cite *In re DBSI, Inc.*, 447 B.R. 243 (Bankr. D. Del. 2011) for the proposition that, absent actual substantive consolidation, pleading insolvency on an enterprise basis is insufficient. However, *DBSI* is distinguishable. The DBSI court was faced with a situation in which the debtor had already substantively consolidated and the ruling regarding the insolvency analysis[114] found that actual substantive consolidation was sufficient, not that potential substantive consolidation was insufficient.

I agree with the reasoning in *Extended Stay* that at the motion to dismiss stage, if there are facts alleged that would support the conclusion that the estate is not barred from substantively consolidating, then it is permissible to consider the solvency of debtors on a combined basis.

In this case, to support his argument that the Debtors' finances should be considered on a combined basis, the Trustee asserts that "the Debtors' solvency is best viewed on a combined basis

[114] "[B]ecause the relevant DBSI entities have been substantively consolidated, Trustee's allegations of the insolvency of the unified DBSI enterprise is sufficient to meet the insolvency criteria for fraudulent transfer analysis." *Id*. at 248.

because of the manner in which the Debtors intertwined their business."[115] The Trustee specifically alleges that –

- "The Debtors did not prepare financial projections on an entity-by-entity basis but rather on a combined basis."[116]
- "Reporting to third-parties, including the Debtors' annual audits, was also on a combined basis."[117]
- "All of the Debtors were identified as 'borrowers' on their bank credit facilities."[118]
- "[O]perating costs often were incurred and paid by J&M Sales and allocated to the other Debtors…for tax purposes, as the Debtors were pass-through entities, with the income and losses for each Debtor entity ultimately included on Fallas's personal tax returns."[119]

These factual assertions are enough to support the conclusion that, at this stage of the case, the Debtors are not barred from substantively consolidating the estate. Accordingly, I can consider the insolvency of the combined debtors for purposes of determining whether a claim for constructive fraudulent transfer has been sufficiently pled.

The Defendants also argue that the Trustee has failed to plead facts sufficient to show that the Debtors were, in fact, insolvent. I disagree.

"[I]nsolvency is generally a factual determination not appropriate for resolution in a motion to dismiss." *DBSI*, 447 B.R. at 248.

In order to show the insolvency of the combined debtors, the Trustee alleges that "[f]ollowing the Conway Acquisition…the Debtors' EBITDA plummeted – from $16.4 million in FY 2013 to $1.6 million in FY 2014 – and the Debtors never again made a profit on a combined

[115] Compl. ¶ 259.

[116] Compl. ¶ 259.

[117] Compl. ¶ 259.

[118] Compl. ¶ 259.

[119] Compl. ¶ 259.

basis. The assumption of Conway's liabilities caused the Debtors – including but not limited to Southern Island and SI Retail – to become insolvent, as a direct result of and upon closing the Conway Acquisition."[120] Along with this statement the Trustee provided charts detailing the Debtors' combined EBITA from 2012 to 2018,[121] the net losses of Southern Island and SI Retail from 2015 to 2018,[122] and the fair value of Southern Island and SI Retail's assets from 2015 to 2018.[123]

Further, in addition to alleging facts sufficient to show insolvency on a combined basis, the Trustee also specifically addresses the insolvency of Southern Island and SI Retail, the entities formed for the Conway Acquisition. The Trustee alleges that –

- "Southern Island and SI Retail, in particular, incurred losses since their inception."[124]
- "Southern Island and SI Retail reported liabilities exceeding the fair value of their assets for every year since their inception until the Petition Date."[125]
- "Southern Island and SI Retail were insolvent from their inception and never had the ability to pay their obligations as they became due, including but not limited to obligations to Conway Creditors assumed in connection with the Conway Acquisition."[126]

At this stage, the Trustee's factual allegations are assumed true and are enough to conclude that the Debtors were rendered insolvent by – and remained insolvent at all points subsequent to –

[120] Compl. ¶ 251.

[121] Compl. ¶¶ 250 and 252.

[122] Compl. ¶ 256.

[123] Compl. ¶ 257.

[124] Compl. ¶ 256.

[125] Compl. ¶ 257.

[126] Compl. ¶ 258.

the Conway Acquisition. The arguments made to dismiss the constructive fraudulent transfer claims for Counts II and III based on failure to plead insolvency are rejected.[127]

In sum, having now considered all of the arguments for dismissal of the constructive fraud claims in Counts I through III of the Complaint, I hold that (1) claims for transfers made before August 16, 2014 are dismissed as time-barred; (2) claims for transfers against the Conway Creditor and Factor Defendants in Count I are dismissed for failure to state a claim because the Trustee did not adequately allege lack of reasonably equivalent value; and (3) all other arguments for dismissal of the constructive fraudulent transfer claims in Counts I through III are rejected. The Trustee is granted leave to amend the Complaint to replead Count I.

2. Actual Fraud

Defendants next make several arguments for dismissal of the actual fraud claims contained in Counts I through III of the Complaint, including failure to state a claim, and statute of limitations.

a. Count I

In Count I of the Complaint, the Trustee alleges that the Conway Acquisition and subsequent Conway Creditor and Factor Defendant Payments were actually fraudulent such that the Conway Sellers, KeyBank, the Conway Creditors, and the Factor Defendants are liable. The Conway Creditor and Factor Defendants argue that the Trustee failed to adequately plead facts sufficient to show actual intent to hinder, delay, or defraud and, therefore, the actual fraudulent transfer claims must be dismissed.

[127] Because the constructive fraudulent transfer portion of Count I was dismissed based on the Trustee's failure to sufficiently plead lack of the reasonably equivalent value, I did not address the question of the Debtors' alleged insolvency as it would apply to Count I.

Under DUFTA, a transfer may be avoided if it is made "[w]ith actual intent to hinder, delay or defraud any creditor of the debtor." 6 Del. C. § 1304(a)(1). The Third Circuit recognizes "[b]ecause direct evidence of fraudulent intent is often unavailable, courts usually rely on circumstantial evidence to infer fraudulent intent." *In re Fedders N. Am., Inc.*, 405 B.R. 527, 545 (Bankr. D. Del. 2009). *See In re Charys Holding Company, Inc.*, 2010 WL 2774852, *5 (Bankr. D. Del. 2010); *In re Polichuk*, 506 B.R. 405, 417–18 (Bankr. E.D. Pa. 2014).

> Circumstantial evidence, also known as "badges of fraud," include –
>
> (1) the relationship between the debtor and the transferee; (2) consideration for the conveyance; (3) insolvency or indebtedness of the debtors; (4) how much of the debtor's estate was transferred; (5) reservation of benefits, control or dominion by the debtor over the property transferred; and (6) secrecy or concealment of the transaction.[128]

Fedders, 405 B.R. at 545. *See In re OODC, LLC*, 321 B.R. 128, 140 (Bankr. D. Del. 2005). These considerations are not exclusive and "[a] court may, of course, consider factors other than the traditional badges of fraud in an analysis of fraudulent intent." *In re Tribune Co.*, 464 B.R. 126, 162 (Bankr. D. Del. 2011). "The presence or absence of any single badge of fraud is not

[128] 6 Del. C. § 1304(b) identifies 11 factors a court may consider in determining actual intent under § 1304(a)(1) –

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

conclusive." *Fedders*, 405 B.R. at 545. *See In re Hill*, 342 B.R. 183, 198 (Bankr. D. N.J. 2006). One badge "may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud." *Fedders*, 405 B.R. at 545. *See Hill*, 342 B.R. at 198.

Generally, "fraudulent intent is a question of fact that is rarely susceptible to resolution" at the pleading stage. *Polichuk*, 506 B.R. at 418; *In re Adelphia Communications Corp.*, 365 B.R. 24, 35 (Bankr. S.D.N.Y. 2007). However, when there is an absence of facts supporting a finding of actual intent to hinder, delay, or defraud, a court will grant a motion to dismiss actual fraudulent transfer claims. *Fedders*, 405 B.R. at 545 (granting the motion to dismiss when "these facts, and the absence of facts indicating anything other than an arm's length relationship between [transferor and transferee], Plaintiff has failed to plead a claim for an actually fraudulent transfer"); *In re AgFeed USA, LLC*, 546 B.R. 318, 337 (Bankr. D. Del. 2016) ("the complaint does not sufficiently allege facts regarding the circumstances constituting fraud…[the Plaintiff] has failed to state a claim against the Defendant for actual fraud under section 548(a)(1)(A)"); *In re Am. Bus. Fin. Servs., Inc.*, 362 B.R. 135, 146 (Bankr. D. Del. 2007) (concluding that there was an insufficient basis for a claim of actual fraud and granting the motion to dismiss with leave to amend).

I find that the facts alleged here are insufficient to support claims for actual fraudulent transfer as to the Conway Acquisition and the subsequent Conway Creditor and Factor Defendant payments.

Despite the Trustee's allegation that the Conway Acquisition was made with the actual intent to hinder, delay, or defraud creditors no facts have been advanced to support that conclusion. Rather, the Trustee is relying on the theory that "[t]he "natural consequence" of prioritizing a Conway bail out over the interests of the Debtors and their creditors was to hinder, delay, or

defraud those creditors."[129] But even construing the Complaint in a light most favorable to the Trustee, as I must, it can only be read to allege at most two badges of fraud applicable to the Conway Acquisition – (I) inadequate consideration and (II) the insolvency of the debtors.[130]

These two alleged badges of fraud coupled with the Trustee's theory of natural consequences, however, are insufficient to support a claim for actual fraudulent conveyance. Indeed, combined, these allegations merely state the definition of a claim for constructive fraudulent transfer. *See AgFeed*, 546 B.R. at 336 ("A claim of constructive fraud, however, need not allege the common variety of deceit, misrepresentation, or fraud in the inducement…because the transaction is presumptively fraudulent and all that need be alleged is that the conveyance was made without fair consideration while the debtor was functionally insolvent.") (internal quotations omitted). Delaware Bankruptcy Courts have long recognized that there is a distinction between actual and constructive fraudulent transfer claims and the facts needed to support them. *See Id*. at 337 (granting a motion to dismiss actual fraudulent transfer and denying a motion to dismiss constructive fraudulent transfer against the same defendant for the same transaction); *Am. Bus. Fin. Servs.*, 362 B.R. at 146 (same).

The cases relied upon by the Trustee reinforce the conclusion that the facts presented are insufficient to support a claim for actual fraudulent transfer. In cases where the plaintiff presented limited badges of fraud indicating intent, the Court declined to find that actual intent to hinder, delay, or defraud existed. In *Fedders*, the Court determined that insolvency coupled with "the

[129] Opposition at 45–46 citing *In re Syntax-Brillian Corp.*, 2016 WL 1165634, *6 (Bankr. D. Del. 2016); *Tribune*, 464 B.R. at 162.

[130] The Trustee does not use the term "badges of fraud" to describe the factual allegations in the Complaint. It is in his responsive papers that for the first time he refers to the badges of the fraud by this term of art. However, he does allege that the Conway Acquisition and the subsequent payments to the Conway Creditors "did not convey reasonably equivalent value to Southern Island and SI Retail and (ii) rendered the Debtors, particularly Southern Island and SI Retail, insolvent as a result." Compl. ¶ 246

absence of facts indicating anything other than an arm's length relationship between Fedders and the Lenders" was insufficient to survive a motion to dismiss the claims for actual fraudulent transfer. 405 B.R. at 545–46. In *Tribune*, the Court determined that lack of consideration was the only badge shown and "lack of the traditional badges of fraud… make is less likely that a plaintiff has a strong likelihood of avoiding the [] transaction based on intentional fraud claims." 464 B.R. at 163.

In contrast, cases where courts determined there was enough indication of actual intent to survive a motion to dismiss included facts more clearly indicative of fraudulent intent. *See Fedders*, 405 B.R. at 546 (unlike the claims against the Lenders, the claims against Salvatore Giordano Jr., as a potential insider, were not dismissed); *Adelphia*, 365 B.R. at 32, (the transfers at issue were alleged to have been by and for the benefit of former management as an insider); *Charys*, 2010 WL 2774852 at *5 (the Trustee successfully pled that there was an insider relationship and the transfer was concealed); *Hill*, 342 B.R. at 199 (the Court concluded "the Trustee has proven the first, third, fourth, eighth, and tenth badges of fraud"); *OODC*, 321 B.R. at 140 (the Trustee "alleged a close relationship between the Selling Companies and the Debtor" in relation to the transactions the Trustee sought to avoid); *Polichuk*, 506 B.R. at 413 (the court did not grant a motion for summary judgment where there was alleged to exist "a massive scheme to fraudulently transfer [the debtor's] assets to members of his family and entities that they controlled"); *Syntax-Brillian*, 2016 WL 1165634 at *6 (the Debtor and an affiliate were actively engaged in a scheme to conceal massive losses when they incurred the debt at issue the "natural consequence" of such incursion was to delay payment to creditors).

For these reasons, I find that the Trustee has not sufficiently alleged facts to support the conclusion that the Conway Acquisition was *intended* to hinder, delay, or defraud the Debtors'

creditors. The claims for actual fraudulent transfer in Count I with respect to the Conway Acquisition are therefore dismissed.[131]

As to the subsequent payments to the Conway Creditors[132] and Factor Defendants, the Trustee makes the same argument as that above with the addition of one more alleged badge of fraud – that "the Conway Creditor Payments occurred shortly after (and as a direct result of) the substantial debts incurred in the Conway Acquisition."[133] The Trustee makes no attempt to address whether this purported badge of fraud should be considered in connection with each Conway Creditor and Factor Defendant payment even though the payments range from May 2014 to September 2017. Regardless, the inclusion of this one additional badge of fraud, even if proven, does not substantially change the reasoning articulated above. The Trustee has still failed to allege that any *actual intent* to hinder, delay, or defraud underpins these subsequent payments. Rather, he continues to rest on his theory of natural consequences and inferred intent, which I have determined is the functional equivalent of constructive fraud in this case. For this reason, the claims for actual fraudulent transfer based on the subsequent Conway Creditor and Factor Defendant payments are likewise dismissed.

In sum, the motions to dismiss the claims for actual fraud in Count I are granted and the actual fraud claims in Count I are dismissed as to all Non-Fallas Defendants.[134] The Trustee is granted leave to amend the Complaint to replead this Count.

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[131] This includes claims against the Moving Cohen Defendants, who do not make the argument that Count I fails under Rule 8(a) but instead argue that it fails under Rule 9(b) for failure to provide adequate notice as to what transfer they are alleged to be liable for. As I have already ruled that there are insufficient facts to support a finding that the Conway Acquisition was a fraudulent transfer, I do not need to address the sufficiency of the allegations under Rule 9(b).

[132] Though Timing and KC did not make this argument or join the other Conway Creditors' arguments, the analysis is equally applicable to them as a Conway Creditor.

[133] Opposition at 46.

[134] The Fallas Defendants are not charged under this Count and the charges against these Defendants are discussed below.

b. Counts II and III

Counts II and III of the Complaint also assert claims for actual fraudulent transfers. Count II seeks to avoid and recover dividend payments worth approximately $7.6 million that were made to the Fallases in January 2015. Count III seeks to avoid and recover rent payments worth approximately $67 million that were made to the Fallas SPEs beginning in January 2013. The Fallas Defendants argue that both claims should be dismissed in their entirety for failure to state a claim or, at the least, some of the transfers should be dismissed because they are barred by the applicable statute of limitations.

i. Failure to State a Claim

The Fallas Defendants argue that the Trustee failed to adequately plead facts sufficient to support these claims because the badges of fraud relied upon by the Trustee are insufficient to show actual intent to hinder, delay, or defraud. I disagree.

As discussed in more depth immediately above, fraudulent intent for actual fraudulent transfers can be inferred by looking at badges of fraud and is rarely subject to resolution at the motion to dismiss stage. *Polichuk*, 506 B.R. at 418. As discussed above in parts in Parts V.A.1.c.i and V.A.1.c.ii *supra*, the Trustee has successfully pled several badges of fraud present in the transfers to the Fallas Defendants, including lack of reasonably equivalent value and insolvency.[135] Additionally, I find that the Trustee has also successfully pled another one of the badges of fraud – that the transfers were made to and for the benefit of an insider. 6 Del. C. § 1304(b) (one of the badges of fraud that courts will consider is whether "[t]he transfer or obligation was to an

[135] As to the transfers that occurred prior to Conway Acquisition, the Trustee failed to allege any facts that would indicate the Debtors were insolvent. Therefore, I find that the Trustee has not successfully pled this badge of fraud as to those transfers. However, I do not find the lack of insolvency as to those transfers determinative. The Trustee has still presented sufficient evidence to show that the transfers were for less than reasonably equivalent value and made to insiders. The combination of these two badges of fraud is enough to find at this stage that all the transfers alleged were made with the actual intent to hinder, delay, or defraud.

insider."). Transfers to insiders are consistently suspect in Delaware and sufficient to allow a claim to survive a motion to dismiss. *See Fedders*, 405 B.R. at 546; *OODC*, 321 B.R. at 140. An insider includes officers, directors, persons in control of a corporation and their relatives. 6 Del. C. § 1301(7).

The Trustee alleges that the dividend payments at issue were made "to Fallas, his wife, and trusts under their control."[136] The Trustee alleges that the rent payments at issue were made to Fallas SPEs "which were controlled by Fallas and in which Fallas owned either all or the majority ownership interest (with any other ownership interests being owned by members of Fallas's family)."[137] The Fallases and the Fallas SPEs qualify as insiders thus satisfying this badge of fraud.

ii. Statute of Limitations

The Fallas Defendants next argue that the statute of limitations for certain of the transfers at issue in Counts II and III has already expired and thus the claims must be dismissed.

Claims alleging actual fraud under DUFTA are subject to a four-year statute of limitations which states –

> [a] cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought: (1) Under § 1304(a)(1) of this title, within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligations was or could reasonably have been discovered by the claimant.

6 Del. C. § 1309.[138] Expiration of the statute of limitations is an affirmative defense. *Schmidt v. Skolas*, 770 F.3d 241, 251 (3d Cir. 2014) "[W]hile a court may entertain a motion to dismiss on

[136] Compl. ¶ 311.

[137] Compl. ¶ 281.

[138] Unlike subsection (2) of section 1309, discussed above, which applies to DUFTA's constructive fraud provisions and is a statute of repose, subsection (1) of section 1309, which applies to the actual fraud provisions, is a statute of limitations. This is because it contains a provision that links the running of the limitations period to the injury or the discovery of the injury. See *Worker's Comp. Fund v. Kent Constr. Corp.*, 2008 Del. Super. LEXIS 352, at *9 (Super.

statute of limitations grounds [] it may not allocate the burden of invoking the discovery rule in a way that is inconsistent with the rule that a plaintiff is not required to plead, in a complaint, facts sufficient to overcome an affirmative defense. *Id*. (citing *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002)). When "the pleading does not reveal when the limitations period began to run ... the statute of limitations cannot justify Rule 12 dismissal." *Id*. The affirmative defense is successful when the plaintiff "effectively [pleaded himself] out of court by alleging facts that [were] sufficient to establish the defense." *Id*. at 252 (internal quotations omitted).

That is not the case here. Though the Fallas Defendants object that certain of the rent payments are barred by the statute of limitations, that argument is not proper for the motion to dismiss stage in this case. The Trustee has in no way pleaded himself out of court. To the contrary, he presented sufficient facts to allege that the transfers were not reasonably discoverable so that the statute of limitations was tolled and thus did not expire. These include –

- "The Debtors had no independent board members or managers and the Fallases dominated the companies. As privately held companies dominated by the Fallases, the Debtors' minutes, board resolutions and financial records were not available to creditors."[139]
- The Fallases "failed to appoint independent Board members or managers that could have protected the Debtors' interest, investigated the unlawful conduct described herein, and/or enabled the Debtors to assert claims in connection with the Fallases' unlawful behavior."[140]
- "Through his domination of the Debtors' affairs, Fallas fraudulently concealed the wrongdoing alleged herein – including the Fallases' breaches of fiduciary duty in connection with the Conway Acquisition and their authorization and implementation of the self-interested transactions at issue – through and until the Petition Date."[141]

Ct. Sep. 19, 2008) ("An 'ordinary statute of limitations begins with an injury or the discovery date of an injury.' A statute of repose, however, can begin to run before the cause of action arises.")

[139] Compl. ¶¶ 349–50.

[140] Compl. ¶ 352.

[141] Compl. ¶ 353.

- "Prior to the Petition Date, the Fallases themselves were the only individuals in a position or with the information necessary to assert claims on behalf of the insolvent Debtors for the benefit of the Debtors and their creditors."[142]

I find these allegations to be sufficient to satisfy the Trustee's burden of pleading. The argument to dismiss based on the statute of limitations is therefore rejected.

In sum, as to the claims for actual fraud in Counts II and III against the Fallas Defendants, the motions to dismiss are denied.

B. Avoidance of Transfers Pursuant to Section 548 (Count IV)

Having addressed the claims that the Trustee asserts under section 544 of the Code, which allows the Trustee to assert fraudulent transfer claims under applicable state law, I now turn to the claims asserted under section 548, the Bankruptcy Code's fraudulent transfer provision. In Count IV of the Complaint, the Trustee seeks to recover payments made to the Conway Creditors, Factor Defendants and Fallas SPEs pursuant to both the actual and constructive fraud provisions of section 548.

Section 548 is the Bankruptcy Code's equivalent to DUFTA's fraudulent conveyance laws. The only difference is that section 548 is limited to a two-year look back period instead of DUFTA's four-year lookback period. *Crystallex Int'l Corp. v. Petroleos De Venezuela, S.A.*, 879 F.3d 79, 86 (3d Cir. 2018) (comparing 11 U.S.C. § 548 with 6 Del. C. §§ 1302–1306).[143] As discussed above, while I dismissed the Trustee's constructive fraudulent transfer claims against the Fallas Defendants that were more than four years before the petition date, all of the Trustee's constructive fraudulent transfer claims against the Fallas Defendants not affected by the statute of

[142] Compl. ¶ 354.

[143] *See generally In re Syntax-Brillian Corp.*, 573 F. App'x 154, 161 (3d Cir. 2014) (evaluating the Counts simultaneously); *In re BMT-NW Acquisition, LLC*, 582 B.R. 846 (Bankr. D. Del. 2018) (same). Additionally, each of the affected Defendants considered and argued the Counts together.

repose – which is inapplicable to section 548 – survived. Additionally, all of the Trustee's actual fraudulent transfer claims survived. Also as discussed above, I dismissed the Trustee's claims for both constructive and actual fraudulent transfer against the Conway Creditors and Factor Defendants for failure to plead sufficient facts.

Therefore, the Fallas Defendants' motion as to Count IV is denied in its entirety. The Conway Creditor and Factor Defendants' motions as to Count IV are granted. The Trustee is granted leave to amend the Complaint to replead this Count.

C. Unjust Enrichment (Count V)

In Count V of the Complaint, the Trustee asserts claims of unjust enrichment against all the Defendants, stating "each of those transfers conferred a benefit on the Defendant which received it, and such Defendant unjustly retained that benefit at the expense of the Debtors' estates."[144] In support of his unjust enrichment claims, the Trustee primarily relies on the factual allegations that support his fraudulent transfer claims. He argues that the "unjust enrichment claim is based on the Defendants' receipt of benefits (in the form of transfers they received from the Debtors or obligations that the Debtors incurred for their benefit) at the expense of the Debtors and their creditors. The Complaint alleges a lack of justification for these transactions, given the Debtors' financial condition, the circumstances and terms of the transactions, the lack of the value the Debtors received in exchange, and, for those benefiting the Fallas Defendants, the self-interested nature of the transfers."[145]

"Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good

[144] Compl. ¶ 409.

[145] Opposition at 57.

conscience." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) (internal quotations omitted). Unjust enrichment requires a showing of "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *In re FAH Liquidating Corp.*, 572 B.R. 117, 130 (Bankr. D. Del. 2017) (quoting *Nemec*, 991 A.2d at 1130).

All of the Defendants have moved to dismiss the claims contained in Count V. As the analysis is different for the Fallas Defendants and the Non-Fallas Defendants, I will address them separately.

1. Fallas Defendants

The Fallas Defendants object to the unjust enrichment claim on the basis that the factual assertions are the same as those made in support of the fraudulent transfer claims, which they argue should be dismissed. As I have already denied the Fallas Defendants' motions to dismiss the fraudulent transfer claims, this argument is irrelevant.

The Fallas Defendants also argue that the unjust enrichment claim is duplicative of the legal claims asserted and therefore should be dismissed. This argument is without merit. "[A]t the pleading stage it is entirely acceptable to pursue alternative theories." *FAH Liquidating*, 572 B.R. at 131. "[A] claim for unjust enrichment can survive a motion to dismiss where it is plausible that the plaintiff's other claims may fail and leave the plaintiff without a remedy at law." *Id.*

While I have held that most the Trustee's fraudulent transfer claims are sufficiently pled, it remains plausible that these claims could fail at a later stage of the case, leaving the Trustee without a remedy. For that reason, the Fallas Defendants' motion to dismiss Count V is denied.

2. Non-Fallas Defendants

As to the Conway Creditor and Factor Defendants, the Trustee has failed to allege facts to support the merits of his unjust enrichment claim. To support the element "absence of justification," the Trustee merely reiterates that the circumstances evidencing the fraudulent transfer claims also evidence unjust enrichment claims. However, I remain unpersuaded by these factually bare assertions. The Trustee's narrative relies on the lack of justification for the Conway Acquisition, not the lack of justification for the payments to the Conway Creditor and Factor Defendants. The Trustee has failed to present facts that show there is a lack of justification for *those* payments.

As to the Cohens, this claim fails because it is controlled entirely by the written APA. "Unjust enrichment may only be found where there is no written agreement binding the parties." *In re Lexington Healthcare Grp., Inc.*, 339 B.R. 570, 576 (Bankr. D. Del. 2006) (quoting *In re Integrated Health Servs., Inc.*, 303 B.R. 577, 585 (Bankr.D.Del.2003)). While this may be overcome at the pleading stage where the complaint alleges facts suggesting a genuine dispute regarding the existence of a contract, *id*., the Trustee has not alleged such facts here. On the contrary, the Trustee's argument to hold the Cohens liable is that they were defined as "Sellers" under the Conway APA.[146]

Therefore, the Non-Fallas Defendants' motions to dismiss Count V are granted.

D. Avoidance of Transfers Pursuant to Section 547(b) (Count VI)

In Count VI of the Complaint, the Trustee seeks to avoid the Fallas Lien Transfer as preferential pursuant to section 547 of the Code.

11 U.S.C. § 547(b) permits avoidance of –

[146] Compl. ¶ 238; Opposition at 6.

> any transfer of an interest of the debtor in (1) property to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made – (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if – (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). To support his claim for preferential transfer the Trustee alleges that Fallas created a lien by filing a UCC-1 Statement to perfect a security interest on June 11, 2018 which was within 90 days of the Petition Date.[147] The Trustee also alleges that this lien was created "on account of antecedent debt, as it was made on account of the June 2017 Note and the March 2018 Note, and "that it "was made at a time when the Debtors were insolvent."[148] Finally, the Trustee alleges that "[t]he Fallas Lien Transfer was made to or for the benefit of a creditor and enabled that creditor to receive more than he would have received if the Fallas Lien Transfer had not been made."[149]

The Fallas Defendants' only arguments opposing Count VI are that the Complaint is a shotgun pleading and insolvency is pled on an enterprise level. As discussed in Parts V.A.1.c n.96 and V.A.1.c.ii *supra*, respectively, I find those arguments to be without merit.

At this stage, the Trustee's factual allegations are assumed true and are enough to conclude that the lien created by Fallas constitutes a preferential transfer. The motion to dismiss Count VI is denied.

[147] Compl. ¶ 415.

[148] Compl. ¶¶ 414, 416.

[149] Compl. ¶ 417.

E. Breach of Fiduciary Duty (Count VII)

In Count VII of the Complaint, the Trustee asserts claims for breach of the fiduciary duties of care and loyalty against the Fallases. "To establish liability for the breach of a fiduciary duty, a plaintiff must demonstrate that the defendant owed [] a fiduciary duty and that the defendant breached it." *Est. of Eller v. Bartron*, 31 A.3d 895, 897 (Del. 2011). As the Delaware Chancery Court has explained –

> The fiduciary duty of due care requires that directors of a Delaware corporation use that amount of care which ordinarily careful and prudent [persons] would use in similar circumstances, and consider all material information reasonably available in making business decisions, and that deficiencies in the directors' process are actionable only if the directors' actions are grossly negligent…
>
> "[T]he duty of loyalty, in essence, mandates that the best interest of the corporation and its shareholders take[ ] precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally. The classic example that implicates the duty of loyalty is when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all shareholders."

In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 751 (Del. Ch. 2005), aff'd, 906 A.2d 27 (Del. 2006) (internal quotations omitted).

To support his claim for breach of the fiduciary duties the Trustee asserts that Fallas breached his fiduciary duties by –

- "Failing to conduct appropriate due diligence in connection with the Conway Acquisition and/or consciously disregarding information (which Fallas knew or should have known) regarding the harm the Conway Acquisition would cause to the Debtors;"[150]
- "Authorizing the Debtors' entry into the Conway Acquisition including but not limited to the debtors' assumption of nearly $46 million in liabilities;"[151]

[150] Compl. ¶ 425(a).

[151] Compl. ¶ 425(b).

- "Authorizing fraudulent and/or preferential transfers made on behalf of the Debtors as set forth herein, including but not limited to transfers made for Fallas's personal benefit;"[152]
- "Charging and authorizing payment of Fraudulent Rent Payments to Fallas SPEs, which exceeded market value and benefited the Fallases and the Fallas SPEs at the Debtors' expense;"[153]
- "Authorizing the J&M Sales Dividend and FP Stores Dividend, which benefited Fallas, his family, and trusts under their control at the Debtors' expense; and"[154]
- "Using Debtor employees to perform various functions for Fallas-controlled non-Debtor entities and for the Fallases personally."[155]

As to Ms. Fallas, the Trustee alleges that she breached her fiduciary duties by "abdicating and disregarding her fiduciary responsibilities."[156] Ms. Fallas allegedly "took no active or meaningful role in the Debtors' affairs or decision-making, and instead left all such decisions (including but not limited to those regarding disposition and use of the Debtors' assets) to Fallas and simply executed resolutions or other documents from time to time at the behest of Fallas. [Ms. Fallas's] failure to take any active role in connection with the Debtors' affairs or any actions to prevent the harms to the Debtors described herein (many of which involved payments, distributions, and other transactions that benefitted [Ms. Fallas] personally) exhibits an abdication of and gross negligence in connection with her fiduciary duties."[157]

The Trustee further alleges that "[a]t all times relevant hereto, the Fallases engaged in self-dealing, prioritizing their own interests and the interests of non-Debtor Fallas Enterprise entities over the interests of the Debtors."[158]

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[152] Compl. ¶ 425(c).

[153] Compl. ¶ 425(d).

[154] Compl. ¶ 425(e).

[155] Compl. ¶ 425(f).

[156] Compl. ¶ 426.

[157] Compl. ¶ 426.

[158] Compl. ¶ 428.

The Fallases have moved to dismiss the fiduciary duty claims on three grounds. First, they argue that the Trustee improperly assumes that Delaware law applies. Second, they argue that the claim is barred by the business judgment rule. Third, they argue that Trustee has failed to plead sufficient facts to support a finding of breach of fiduciary duty.[159] I will address each argument separately.

1. Governing Law

The Fallases first argue that because "the Debtors are formed under various states' and one territory's laws, Delaware law does not apply to all of the Debtors' affairs" and "[t]he Trustee improperly assumes that Delaware law applies to analyze the Fallases['] alleged improprieties to each Debtor."[160] This vague reference to some other possibly controlling state law is insufficient to allege an actual conflict with Delaware law.[161] Delaware performs a conflict of law analysis only when "the laws actually conflict on a relevant point." *Vichi v. Koninklijke Philips Electronics, N.V.*, 85 A.3d 725, 773 (Del. Ch. 2014) (quoting *Pa. Emp., Benefit Trust Fund v. Zeneca, Inc.*, 710 F.Supp.2d 458, 466 (D. Del. 2010)). If there is no conflict between the states' laws "it is not necessary to perform a choice of law analysis." *CKSJB Holdings LCC v. EPAM Systems, Inc.*, 837 Fed. Appx. 901, 904 (3d Cir. 2020).

Therefore, the Fallases' argument about choice of law is rejected and I will apply Delaware law.

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[159] The Fallases also objected on statute of limitations grounds, however as discussed more in depth in Part V.A.2.b.ii *supra*, dismissal on statute of limitation grounds is an affirmative defense and is not proper in this case.

[160] Fallas Reply at 23.

[161] At no point do the Fallases allege what law besides Delaware would apply, though the Trustee admits that certain Debtors are organized under California, New York, and Puerto Rico law. However, he asserts that those laws "support the same claims that the Trustee brings here." Opposition at 62.

2. Business Judgment Rule

The Fallases next argue that they are entitled to the benefit of the business judgment rule. I disagree. "The application of the business judgment rule is an affirmative defense, the determination of which is not proper at the motion to dismiss stage." *In re The Brown Sch.*, 368 B.R. 394, 401 (Bankr. D. Del. 2007) (citing *In re Tower Air, Inc.*, 416 F.3d 229, 238, 242 (3d Cir. 2005)). As the Fallases themselves acknowledge, the business judgment rule is a presumption that "can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or loyalty or acted in bad faith."[162] That is precisely what the Trustee has alleged here. I therefore reject this argument as well.

3. Merits

The Fallases' final objection is that the Trustee has failed to present facts sufficient to support his claims that the Fallases acted with gross negligence as to the duty of care or in a self-interested manner as to the duty of loyalty.

a. Duty of Care

The duty of care requires Delaware directors to exercise ordinarily careful and prudent behavior and makes grossly negligent behavior actionable. *Walt Disney*, 907 A.2d at 751. Gross negligence has been defined to include "actions which are without the bounds of reason." *Id*. at 750 (internal quotations omitted). "The gross negligence standard, however, is somewhat flexible in that the exact behavior that will constitute gross negligence varies based on the situation, but generally requires directors and officers to fail to inform themselves fully and in a deliberate manner." *In re USA Detergents, Inc.*, 418 B.R. 533, 544 (Bankr. D. Del. 2009) (internal quotations omitted).

[162] Fallas Reply at 25 (quoting *Walt Disney*, 906 A.2d at 52).

The Trustee has alleged that Ms. Fallas took no part in deliberations or considerations and merely approved what she was presented with. This abdication of her fiduciary duties is assumed true and easily satisfies the standard that she "failed to inform [herself] fully and in a deliberate manner."

As the CEO and managing member,[163] Fallas' breaches are more evidenced by the Debtors' actions. As described in depth above, the Trustee has adequately pled that both the rent payments and dividend payments were exchanged for little or no value to the Debtors. The facts alleged are sufficient for me to conclude at this stage that Fallas executed those exchanges in a manner that can reasonably be described as "without the bounds of reason." As to the Conway Acquisition, the Trustee alleged that "Fallas was aware of numerous red flags regarding the ill-advised nature of the Conway Acquisition, but disregarded them and rushed closing on the transaction without obtaining any valuations, fairness opinions, or third-party due diligence and despite concerns raised by other executives of the Debtors."[164] The Trustee alleges the following specific red flags that Fallas ignored –

- "Conway was insolvent and on the brink of filing for bankruptcy;"[165]
- "Conway incurred operating losses in the years preceding the Conway Acquisition, and many of its stores were not profitable;"[166]
- "On January 14, 2014, counsel for certain Conway Creditors had threatened to commence an involuntary bankruptcy proceeding if debts owed to his clients were not resolved immediately;"[167]
- "The Debtors were inundated with calls from Conway Creditors seeking payments even before the Conway Acquisition closed;"[168]

[163] In Part V.G *infra*, the Trustee's argument that the Debtors are an alter-ego of Fallas is addressed and accepted.

[164] Compl. ¶ 245.

[165] Compl. ¶ 245(a).

[166] Compl. ¶ 245(b).

[167] Compl. ¶ 245(c).

[168] Compl. ¶ 245(d).

- "There were distribution challenges and additional cost and efficiency concerns related to expanding into a new geographic footprint on the East Coast, for which the Debtors were unprepared;"[169]
- "Store operating costs, including but not limited to payroll and rental costs, for Conway stores were significantly higher than for the Debtors' stores in other regions; and"[170]
- "Commencing such a large acquisition in a condensed time frame caused significant organizational distraction and disruption, for which the Debtors had insufficient human capital to handle."[171]

The Fallases' argument that the "Conway Acquisition was not an arbitrary leap for Fallas – it was a strategic and informed decision made within the bounds of good faith and ordinary care"[172] is an argument of fact that is inappropriate at the motion to dismiss stage. The Trustee's facts are assumed true and are sufficient to conclude that Fallas either "failed to inform [himself] fully" or "acted without the bounds of reason" in executing the Conway Acquisition.

The Trustee has pled sufficient facts to show that the Fallases breached their duties of care and the motion to dismiss Count VII is denied as to the duty of care.

b. Duty of Loyalty

The duty of loyalty requires that Delaware directors place the best interests of the company over personal interests. *Walt Disney*, 907 A.2d at 751. "The classic example that implicates the duty of loyalty is when a fiduciary either appears on both sides of a transaction or receives a personal benefit not shared by all shareholders." *Id*.

To support his claims that the Fallases acted in their own self-interest, the Trustee has alleged facts that support the conclusion that the Fallases "appear[ed] on both sides" of the rent

[169] Compl. ¶ 245(e); *See* Compl. ¶¶ 223–24.

[170] Compl. ¶245(f).

[171] Compl. ¶245(g); *See* Compl. ¶¶ 223–24.

[172] Fallas Reply at 27.

and dividend transactions. The dividends were approved by the Fallases in their role as the Debtors' directors then received by the Fallases in their personal capacity. The rent payments were approved by Fallas in his capacity as the CEO of National Stores and J&M Sales then received by the Fallas SPEs that were also owned and controlled by Fallas. The Fallases argue that these allegations are an "over-simplified analysis" and fail to support a claim for breach of the duty of loyalty.[173] However, this objection is a factual one that is inappropriate at the motion to dismiss stage. I find that the Trustee has presented sufficient facts to support a claim for breach of the duty of loyalty as to the rent and dividend payments.

However, as to the Conway Acquisition, the Trustee has presented no facts that tend to show the Fallases were self-interested. The Fallases were not on both sides of the Conway Acquisition nor did the Trustee present facts to show that they personally benefited from it. Therefore, the Trustee has failed to meet his burden to show that the Fallases breached the duty of loyalty as it relates to the Conway Acquisition.

The Fallases' motion to dismiss Count VII with respect to the duty of loyalty claim is granted as to the Conway Acquisition and denied in all other respects. The Trustee is granted leave to amend the Complaint to replead this Count.

F. Aiding and Abetting Breach of Fiduciary Duty (Count VIII)

In Count VIII of the Complaint, the Trustee asserts claims of aiding and abetting breach of fiduciary duty against the Fallas SPEs for their participation in the fraudulent rent payments.

Under Delaware law –

> a valid claim for aiding and abetting a breach of fiduciary duty requires: (1) the existence of a fiduciary relationship; (2) proof that the fiduciary breached its duty; (3) proof that a defendant, who is not a fiduciary, knowingly participated in a

[173] Fallas Reply at 28.

> breach; and (4) a showing that damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary.

In re Fedders N. Am., Inc., 405 B.R. 527, 543–44 (Bankr. D. Del. 2009). "A director's knowledge and participation in a breach may be imputed to a non-fiduciary entity for which that director also serves in a fiduciary capacity." *Carr v. New Enter. Assocs., Inc.*, 2018 WL 1472336, at *16 (Del. Ch. Mar. 26, 2018).

As explained above, the Trustee has successfully pled a claim for breach of the fiduciary duty against the Fallases, therefore the first two elements are met. The Trustee sufficiently alleged the fourth element by alleging that the "Debtors have suffered damages, which include but are not limited to the millions of dollars' worth of Fraudulent Rent Payments paid by the Debtors" to the Fallas SPEs.[174] The Trustee also properly alleged the third element by imputing Fallas' knowledge as the primary fiduciary to the Fallas SPEs that he controlled. The Fallas SPEs, through Fallas, knowingly participated in the breach of fiduciary duty by charging and collecting the fraudulent rent payments from the Debtors.[175] Delaware law recognizes that when the "fiduciary and primary wrongdoer" also "controlled [the abetting entity] or occupied a sufficiently high position that his knowledge is imputed to those entities, the knowing participation test is easier to satisfy." *BrandRep, LLC v. Ruskey*, 2019 WL 117768, at *6 (Del. Ch. Jan. 7, 2019) (citing *In re PLX Technology Inc. Stockholders Litigation*, 2018 WL 5018535, at *49 (Del. Ch. Oct. 16, 2018)).

The Fallas Defendants oppose this Count on three grounds – 1) that it is duplicative of Count X for civil conspiracy and should therefore fail; 2) that because the underlying breach of

[174] Compl. ¶ 436.

[175] Compl. ¶ 435.

fiduciary duty claims fail this should too; and 3) that the Trustee has not alleged the required scienter.[176]

The Fallas Defendants' first argument is irrelevant. As explained above, it is appropriate at the pleading stage to plead claims in the alternative. Therefore, even if the claims are interchangeable[177] that would not make them subject to dismissal. The Fallas Defendants' second argument is also irrelevant because, as explained above, the fiduciary duty claims are not dismissed. As to the third argument, that the Trustee has not sufficiently alleged scienter, I am not persuaded. The Trustee has presented extensive facts that suggest that Fallas knew about the breaches – being the breaching party – and that his knowledge would be imputed to the SPEs, which he and Ms. Fallas "controlled, both directly and through family trusts for which they were trustees"[178] such that the SPEs had the required scienter.

The Trustee has pled facts sufficient to support a claim for aiding and abetting breach of fiduciary duty against the Fallas SPEs. Therefore, the motion to dismiss Count VIII is denied.

G. Veil-Piercing (Count IX)

In Count IX of the Complaint, the Trustee asserts claims to pierce the corporate veil between the Fallases, Fallas SPEs, and the Debtors.

"To prevail on an alter-ego claim under Delaware law, a plaintiff must show (1) that the companies 'operated as a single economic entity' and (2) that an 'overall element of injustice or unfairness ... [is] present.'" *In re Moll Indus., Inc.*, 454 B.R. 574, 587 (Bankr. D. Del. 2011)

[176] The Fallas Defendants' third argument is improperly made under civil conspiracy, but I will address it here.

[177] The Fallas Defendants did not adequately argue this. They rely on *Malpied v. Townson* for the proposition that aiding and abetting and civil conspiracy are interchangeable even though *Malpied* clearly states "[a]lthough there is a distinction between civil conspiracy and aiding and abetting, we do not find that distinction meaningful here." 780 A.2d 1075, 1098 n. 82 (Del. 2001).

[178] Compl. ¶ 190.

(quoting *Off. Comm. of Unsecured Creditors v. Highland Capital Management, L.P. (In re Broadstripe, LLC)*, 444 B.R. 51, 101 (Bankr.D.Del.2010)). In deciding the first factor, courts consider –

> (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) the insolvency of the debtor corporation at the time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence of corporate records; and (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.

Id. at 588 (internal quotations omitted). "The second prong of this test does not require allegations of fraud or a sham corporation to pierce the corporate veil." *Id*. at 591. However, the plaintiff "must prove [] reasonable reliance and intent to deceive." *Id*.

The Trustee concluded that "[i]t would be unjust and/or unfair to allow the Fallases and the Fallas SPEs to retain the financial benefits they received through their disregard of corporate separateness."[179] To support his claim for piercing the corporate veil the Trustee alleges the following –

- "Fallas exercised complete dominion and control over the Debtors, Fallas SPEs, and other Fallas-controlled entities, and failed to observe corporate formalities between the various entities."[180]
- The challenged dividends "were all paid by Debtor J&M Sales, even though the subsequent Unanimous Written Consents purportedly authorized $7.4 million in dividends from Debtor FP Stores – providing yet another example of the Fallases' failure to observe corporate boundaries between the Debtor entities."[181]
- "[T]he Debtors' finances and operations were intertwined and they essentially functioned as a single enterprise, including when obtaining credit from third-parties. By way of example: (i) a cash management system existed between the Debtors that operated retail locations; (ii) intercompany accounts were maintained to account for transactions between the Debtors; (iii) all of the Debtors were

[179] Opposition at 83.

[180] Compl. ¶ 205.

[181] Compl. ¶ 315.

identified as borrowers under various secured lending facilities; and (iv) the Debtors cross-guaranteed each other's obligations."[182]

- "The Debtors did not prepare financial projections on an entity-by-entity basis but rather on a combined basis. Reporting to third-parties, including the Debtors' annual audits, was also on a combined basis. All of the Debtors were identified as 'borrowers' on their bank credit facilities. Further, it appears that operating costs often were incurred and paid by J&M Sales and allocated to the other Debtors."[183]
- The Fallases "controlled, both directly and through family trusts for which they were trustees, a large group of entities including but not limited to the Debtors and the Fallas SPEs [] which were co-dependent and used to enrich the Fallases at the expense of the Debtors and their creditors."[184]
- "Fallas charged above-market rental rates for properties owned by the Fallas SPEs."[185]
- "Debtors' employees routinely performed services for the benefit of the Fallas SPEs and Fallas personally. The management, bookkeeping, record retention, billing and invoicing, and payables for the Fallas Enterprise were the responsibility of Debtor employees. Additionally, the mailing address utilized for all the entities within the Fallas Enterprise was…the Debtors' mailing address and corporate headquarters."[186]
- "The Debtors were undercapitalized and insolvent."[187]
- "Fallas's authoritarian management style, coupled with the absence of any independent board members, created a complete lack of oversight which allowed this course of conduct to continue unchecked for years."[188]

The Fallases present three primary arguments against the Trustee's claim for piercing the corporate veil. First, they argue that the Trustee has failed to show that the Debtors were insolvent or undercapitalized. For the reasons explained above, this argument is rejected. Second, they argue that the Trustee failed to sufficiently allege that the Fallases "siphoned funds," "exerted an

[182] Compl. ¶ 186.

[183] Compl. ¶ 259.

[184] Compl. ¶ 188.

[185] Opposition at 83 (citing Compl. ¶¶ 193, 196–99).

[186] Compl. ¶ 208.

[187] Opposition at 83.

[188] Compl. ¶ 206.

authoritarian management style," or engaged in transactions that violated fiduciary duties.[189] As explained in more detail above, the Trustee has presented sufficient facts to show that the Fallases siphoned corporate funds and exerted an authoritarian management style through the payments of rent and dividends.[190] Additionally, as explained above, the Trustee has presented sufficient facts to conclude that the Fallases breached their fiduciary duties.

The Fallases' final argument is that the Trustee failed to present facts sufficient to show that the corporate formalities were not respected. I am not persuaded. The Trustee has presented sufficient facts that are accepted as true to conclude that the Debtors, controlled by the Fallases, failed to maintain corporate formalities.

The Trustee has pled facts sufficient to support a claim to pierce the corporate veil. Therefore, the motion to dismiss Count IX is denied.

H. Civil Conspiracy (Count X)

In Count X of the Complaint, the Trustee asserts claims of civil conspiracy against the Fallases and the Fallas SPEs.

"The elements for civil conspiracy under Delaware law are: (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties." *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *10 (Del. Ch. Aug. 26, 2005).

"T]he hallmark feature of a conspiracy is the confederation among two or more parties to commit an unlawful act. . . ." *Lechliter v. Del. Dep't of Nat. Res.*, 2015 Del. Ch. LEXIS 294, *36–

[189] Fallas Reply at 31–32.

[190] *See* Compl. ¶¶ 292–94 (email exchanges in which Debtors' CFO and real estate accounting manager discussed that the rent to a Fallas owned SPE "is not the level of rent we would ordinarily pay but it makes sense for Michael [Fallas] in the big picture" and that "the rent seemed high. (I told [Fallas] it was because the landlord is a son of a gun.)").

37 (Ch. Nov. 30, 2015). While the Trustee has alleged that the Fallases and the Fallas SPEs engaged in a conspiracy, he also alleged that: (1) Ms. Fallas did whatever Fallas told her to; and (2) Fallas largely controlled the Fallas SPEs himself. Therefore, as it relates to Ms. Fallas, there are no allegations that she knowingly took action to engage in unlawful conduct. "To simply allege that two or more parties have committed the same wrong, without more, is not enough to satisfy this element; at the pleading stage, the Plaintiff must allege that the parties *knowingly* participated in the conspiracy and that there was coordination of action among the parties." *Id*. (emphasis in original). Accordingly, there are insufficient facts from which I can conclude that Ms. Fallas participated in a conspiracy.

As for Fallas and the Fallas SPEs, the Fallas Defendants mistakenly cite the test for aiding and abetting breach of fiduciary duty then proceed to argue that the Trustee has failed to meet the requirements. This argument was already addressed and rejected in relation to aiding and abetting breach of fiduciary duty. It is irrelevant as related to civil conspiracy and is therefore rejected.

The Trustee has pled facts sufficient to support a claim for civil conspiracy against Fallas and the Fallas SPEs. Therefore, the motion to dismiss Count X is granted in relation to Ms. Fallas and denied to all else. The Trustee is granted leave to amend the Complaint to replead this Count.

I. Corporate Waste (Count XI)

In Count XI of the Complaint, the Trustee asserts claims of corporate waste against the Fallases for the payments related to the Conway Acquisition, the rent payments, and the dividends.

"Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *In re The Brown Sch.*, 368 B.R. 394, 408 (Bankr. D. Del. 2007) (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del.2000)). If "there is any substantial consideration received by the

corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude ex post that the transaction was unreasonably risky." *Id*. "In evaluating a waste claim, courts look to the exchange itself. The exchange must be irrational." *Continuing Creditors' Comm. of Star Telecommunications, Inc. v. Edgecomb*, 385 F. Supp. 2d 449, 465 (D. Del. 2004). "[B]efore the Court may find corporate waste, it must determine whether adequate consideration was received and whether good faith existed. Such a factual inquiry is inappropriate at the motion to dismiss stage." *Brown Sch.*, 368 B.R. at 408.

The Fallas Defendants present three arguments to dismiss the claim of corporate waste – 1) the claims are based on fraudulent conduct that should be dismissed; 2) there are insufficient factual allegations that the transfers were an irrational squandering of assets; and 3) this is an equitable claim that is duplicative of a legal claim and should therefore be dismissed.[191]

The Fallas Defendants' first argument has been addressed above and is rejected. The Fallas Defendants' third argument is likewise rejected as it is appropriate at the pleading stage to plead both legal and equitable claims in the alternative. The Fallas Defendants' second argument, regarding the sufficiency of the allegations, goes to the merits of the claims and must be separately addressed as to each allegation of corporate waste.

1. <u>Rent Payments and Dividend Payments</u>

As I explained in more detail in Part V.A.1.c.i.c *supra*, at this stage, the Trustee has sufficiently alleged that the Debtors did not receive reasonably equivalent value for the payment of rent to the Fallas SPEs. The Trustee concludes that "no reasonable person exercising sound

[191] In the responsive briefing, the Fallas Defendants argued that they were entitled to business judgment protection, as I explained in more detail in Part V.E.2 *supra*, the Fallases are not entitled to business judgment protection at this time.

business judgment could believe that purposefully overpaying insiders for monthly rent served a legitimate corporate purpose."[192] I agree. Likewise, as I explained in more detail in Part V.A.1.c.i.b *supra*, at this stage, the Trustee has successfully alleged that the Debtors received no value in exchange for the dividend payments to the Fallases. I conclude that based on these facts the payments "served no rational business purpose and were commercially unreasonable."

The Trustee has pled facts sufficient to support a claim for corporate waste against the Fallas Defendants as it relates to the rent and dividend payments. The motion to dismiss Count XI is denied with respect to the rent payments and the dividends.

2. <u>Conway Acquisition</u>

The Trustee alleges that the Conway Acquisition constitutes corporate waste because it "caused the Debtors[] to assume more than $46 million in liabilities in exchange for a failing business that was worth a mere fraction of that amount and which the Debtors did not have the operational capabilities to sustain or profit from."[193] In support of this claim, the Trustee alleges that "the true value Southern Island and SI Retail received in connection with the Conway Acquisition was cash, property, equipment, and deposits totaling only $6,350,067."[194] The Trustee argues that the transaction did not provide the Debtors with sufficient value and that it "served no rational business purpose and [was] commercially unreasonable."[195]

The Fallases disagree with this assessment of the Conway Acquisition.[196] They argue that the Conway Acquisition was meant to expand the Debtors' geographic footprint and "was entered

[192] Opposition at 73.

[193] Opposition at 73.

[194] Compl. ¶ 242.

[195] Compl. ¶ 445.

[196] The Fallases also argue that there are no allegations that the process was inappropriate. However, as the Fallases themselves point out, the process is irrelevant for a claim of corporate waste, only the resulting exchange is important.

into at arm's length and for fair consideration."[197] The Fallases' argument is essentially a factual challenge of the Trustee's valuation and stated motivation. Such challenges are not appropriately addressed at the motion to dismiss stage when the Trustee's facts are assumed true.

The Trustee has pled facts sufficient to support a claim for corporate waste against the Fallas Defendants as it relates to the Conway Acquisition. Therefore, the motion to dismiss Count XI is denied.

VI. CONCLUSION

For the reasons set forth above, the motions to dismiss are granted as to Counts I; denied as to Counts II, VI, VIII, IX, and XI; and granted in part as to Counts III, IV, V, VII, and X.[198]

The Trustee is granted leave to amend the Complaint to replead Counts I, IV, VII and X.

SO ORDERED.

Dated: August 20, 2021

JOHN T. DORSEY, U.S.B.J.

[197] Fallas Reply 3.

[198] Summary of rulings are provided in App. A attached.

Appendix A

COUNT	CLAIM	NAMED DEFENDANTS	DISPOSITION
Count I	11 U.S.C. §§ 544 & 550 (Conway Acquisition and Payments to Conway Creditors) ***Constructive Fraud***	Conway Sellers, KeyBank Conway Creditors, and Factor Defendants	Motion granted; claim DISMISSED as follows – Claims with respect to transfers that occurred prior to August 16, 2014 are time barred. Constructive Fraud claims with respect to payments to the Conway Creditors and Factor Defendants are dismissed for failure to plead reasonably equivalent value – with leave to amend for transfers within the limitations period.
	11 U.S.C. §§ 544 & 550 (Conway Acquisition and Payments to Conway Creditors) ***Actual Fraud***	Conway Sellers, KeyBank Conway Creditors, and Factor Defendants	Motion granted; claim DISMISSED – with leave to amend.
Count II	11 U.S.C. §§ 544 & 550 (Dividends) ***Constructive Fraud***	Michael Fallas and Ilanit Fallas	Motion denied.
	11 U.S.C. §§ 544 & 550 (Dividends) ***Actual Fraud***	Michael Fallas and Ilanit Fallas	Motion denied.
Count III	11 U.S.C. §§ 544 & 550 (Rent Payments) ***Constructive Fraud***	Fallas SPEs	Motion granted in part, denied in part – Claims with respect to transfers that occurred prior to August 16, 2014 are time barred.
	11 U.S.C. §§ 544 & 550 (Rent Payments) ***Actual Fraud***	Fallas SPEs	Motion denied.

Count IV	11 U.S.C. § 548 & 550 (Payments to Conway Creditors, Factor Defendants, and Fallas SPEs) ***Constructive Fraud***	Conway Creditors, Factor Defendants	Motion granted; Claim DISMISSED – with leave to amend.
		Fallas SPEs	Motion denied.
	11 U.S.C. § 548 & 550 (Payments to Conway Creditors, Factor Defendants, and Fallas SPEs) ***Actual Fraud***	Conway Creditors, Factor Defendants	Motion granted; Claim DISMISSED – with leave to amend.
		Fallas SPEs	Motion denied.
Count V	Unjust Enrichment	Conway Sellers, KeyBank, Conway Creditors, Factor Defendants	Motion granted; Claim DISMISSED.
		Michael Fallas, Ilanit Fallas, and Fallas SPEs	Motion denied.
Count VI	11 U.S.C. § 547 (Fallas Lien Transfer)	Michael Fallas and Ilanit Fallas	Motion denied.
Count VII	Breach of Fiduciary Duty of Care	Michael Fallas and Ilanit Fallas	Motion denied.
	Breach of Fiduciary Duty of Loyalty		Motion granted in part, denied in part – with leave to amend.
Count VIII	Aiding and Abetting Breach of Fiduciary Duty	Fallas SPEs	Motion denied.
Count IX	Veil Piercing	Michael Fallas, Ilanit Fallas, and Fallas SPEs	Motion denied.
Count X	Civil Conspiracy	Michael Fallas, Ilanit Fallas, and Fallas SPEs	Motion granted in part, denied in part. – with leave to amend.
Count XI	Corporate Waste	Michael Fallas and Ilanit Fallas	Motion denied.