Docket #0023 Date Filed: 4/14/2021

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

In re:	§	**Case No. 19-34054-sgj11**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Chapter 11**
	§	
Debtor	§	

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	§	
	§	
Plaintiff,	§	
	§	**Adversary No. 20-03195**
vs.	§	
	§	
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§	
	§	
Defendants.	§	

JURY TRIAL DEMANDED

MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

Defendants CLO Holdco, Ltd. ("CLO Holdco") and Highland Dallas Foundation, Inc. ("Dallas Foundation") (Dallas Foundation, together with CLO Holdco, "Defendants") in the above-captioned adversary proceeding (the "Adversary Proceeding") file this *Motion to Dismiss, or in the alternative, Motion for More Definite Statement* (the "Motion") pursuant to Federal Rule

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of Bankruptcy Procedure 7012(b)(6), and, for the reasons set forth in the accompanying Brief in Support, respectfully move the Court to dismiss as to them, either in whole or in part, the Amended Complaint ("Complaint") (Dkt. No. 6) filed by the Plaintiff Official Committee of Unsecured Creditors ("Plaintiff" or the "Committee") or in the alternative, require a more definite statement, and grant such other relief, at law or in equity, to which they may be entitled.[1]

Respectfully submitted,

KELLY HART PITRE

/s/ Louis M. Phillips
Louis M. Phillips (#10505)
One American Place
301 Main Street, Suite 1600
Baton Rouge, LA 70801-1916
Telephone: (225) 381-9643
Facsimile: (225) 336-9763
Email: louis.phillips@kellyhart.com

Amelia L. Hurt (LA #36817, TX #24092553)
400 Poydras Street, Suite 1812
New Orleans, LA 70130
Telephone: (504) 522-1812
Facsimile: (504) 522-1813
Email: amelia.hurt@kellyhart.com

KELLY HART & HALLMAN

Hugh G. Connor II
State Bar No. 00787272
hugh.connor@kellyhart.com
Michael D. Anderson
State Bar No. 24031699
michael.anderson@kellyhart.com
Katherine T. Hopkins
Texas Bar No. 24070737
katherine.hopkins@kellyhart.com

[1] Nothing herein shall be deemed a waiver of any right to a jury trial by the Defendants or Defendants' consent to the Bankruptcy Court entering final orders or judgments in this Adversary Proceeding.

201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Telecopier: (817) 878-9280

ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this April 14, 2021.

/s/ Louis M. Phillips

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
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In re:	§	**Case No. 19-34054-sgj11**
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HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Chapter 11**
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OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	§	
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	§	**Adversary No. 20-03195**
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CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§	
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JURY TRIAL DEMANDED

BRIEF IN SUPPORT MOTION TO DISMISS, OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

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BRIEF IN SUPPORT

Defendants CLO Holdco, Ltd. ("CLO Holdco") and Highland Dallas Foundation, Inc. ("Dallas Foundation") (Dallas Foundation, together with CLO Holdco, "Defendants") in the above-captioned adversary proceeding (the "Adversary Proceeding") file this *Brief in Support of their Motion to Dismiss, or in the alternative, Motion for More Definite Statement* (the "Motion") pursuant to Federal Rule of Bankruptcy Procedure 7012(b)(6), and respectfully move the Court to dismiss as to them, either in whole or in part, the Amended Complaint ("Complaint") (Dkt. No. 6) filed by the Plaintiff Official Committee of Unsecured Creditors ("Plaintiff" or the "Committee"). In support of their Motion, Defendants respectfully show the Court as follows:

I. MOTION TO WITHDRAW REFERENCE

1. Contemporaneously herewith, Defendants have filed a *Motion to Withdraw the Reference* (the "Motion to Withdraw Reference") requesting that the District Court withdraw the reference as to this Adversary Proceeding from the Bankruptcy Court

2. Defendants expressly reserve their right to a jury trial on the all causes of action alleged in the Complaint. Defendants also state, under Federal Rule of Bankruptcy Procedure[1] 7012(b), that they do not consent to the entry of final orders or judgment by the Bankruptcy Court.

3. Nothing herein shall be deemed a waiver of any right to a jury trial by the Defendants or Defendants' consent to the Bankruptcy Court entering final orders or judgments in this Adversary Proceeding.

[1] The Federal Rules of Bankruptcy Procedure shall be hereafter referred to as the "Bankruptcy Rules" and each a "Bankruptcy Rule."

II. FACTUAL OVERVIEW

4. The Committee's Complaint asserts that all of the named defendants, with CLO Holdco and Dallas Foundation among them, engaged in purportedly unlawful conduct with respect to a transaction that occurred more than four years ago, on or about December 28, 2016 (the "CLO Holdco Transaction"), concerning an alleged "swap" transaction between the Debtor and The Get Good Nonexempt Trust ("Get Good") (Complaint, ¶ 30). According to Plaintiff, the Debtor received a 97.6835% interest in a promissory note held by defendant Get Good (which Plaintiff summarily categorizes as "overvalued"), in exchange for the Debtor's transfer of three separate assets to defendant Get Good (the "Transferred Assets"), which thereafter were "funneled down" to CLO Holdco through a series of transfers allegedly orchestrated and consummated by the actions of other defendants.

5. Indeed, the Committee exhaustingly emphasizes defendant James D. Dondero ("Dondero") as the leading antagonist in its Complaint, by portraying the CLO Holdco Transaction as a nefarious and "convoluted" scheme concocted and orchestrated by Dondero, all allegedly with implied complicity from the Defendants and other named defendants. Lacking from the Committee's Complaint, however, are any factual assertions that support certain claims lodged against CLO Holdco and Dallas Foundation. As a result, the Committee's Complaint is devoid of the necessary allegations to support its claims against CLO Holdco and Dallas Foundation, as alleged subsequent transferees of the Transferred Assets.

6. As discussed below, the Committee's deficient allegations do not meet either the standard under Rule 12(b)(6) or heightened pleading requirements applicable to its claims sounding in fraud, and should therefore be dismissed. The Committee's other asserted claims also fail for independent reasons, on statute of limitations grounds for "money had and received"

and no legal predicate to support its alter-ego and conspiracy claims, such that those claims should also be dismissed against CLO Holdco and Dallas Foundation.

III. THE COMMITTEE'S CLAIMS AND CAUSES OF ACTION

7. The general premise of the Complaint is that the CLO Holdco Transaction was concocted by Dondero to transfer and conceal assets from the Debtor's creditors, using the named defendants, including CLO Holdco and Dallas Foundation, as purported instrumentalities for Dondero's alleged fraud. The Complaint purports to assert five causes of action against CLO Holdco and/or Dallas Foundation, Plaintiff asserts: 1) Actual Fraudulent Transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"); 2) Constructive Fraudulent Transfer under TUFTA; 3) Declaratory Judgment for Alter Ego Liability; 4) Money Had and Received; and 5) Conspiracy.

8. As demonstrated below, the Committee has failed to adequately plead *any* claim warranting liability against CLO Holdco or the Dallas Foundation, and therefore failed to state a claim upon which relief can be granted against CLO Holdco or the Dallas Foundation.

IV. ARGUMENTS & AUTHORITIES SUPPORTING DISMISSAL

A. Applicable Standard – 12(B)(6) Motion to Dismiss

9. To survive a Rule 12(b)(6) motion to dismiss, the Plaintiff's Complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Federal Rule of Civil Procedure[2] 8(a)(2) "requires a showing, rather than a blanket assertion, of entitlement to relief." *Id.* at 556 n.3. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, [the complaint] 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) After all, "where the well-pleaded facts do not permit the court

[2] Federal Rules of Civil Procedure shall be hereafter referred to as the "Rules" and each a "Rule".

to infer more than the mere ***possibility*** of misconduct, the complaint has alleged—but it has not shown—the pleader is entitled to relief." *Id.* at 679 (emphasis added, internal quotations removed).

10. The Supreme Court's interpretation of Rule 8, incorporated here pursuant to Bankruptcy Rule 7008(a), requires pleadings that demonstrate "facially plausible claims," a standard satisfied when "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Courts should not strain to find inferences favorable to the plaintiff or accept "conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (citations omitted).[3]

11. With respect to Plaintiff's First Cause of Action for Actual Fraudulent Transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), several courts within the Fifth Circuit have stated that "where plaintiffs seek to establish the actual intent of the debtor [with respect to a fraudulent transfer], the enhanced pleading requirements of Rule 9(b) should apply."[4] Accordingly, Rule 9(b) imposes a heightened pleading standard for Plaintiff's First Cause of Action for Actual Fraudulent Transfer under TUFTA, and requires that a party state with particularity facts supporting each element of fraud and the particulars of time, place, and contents of the false or fraudulent conduct, as well as the identity of the person(s) acting

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[3] Arguably, Federal Rule of Civil Procedure 9(b) applies to Plaintiff's claims against Grant Scott. *See Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners)*, 498 B.R. 679, 711–12 (Bankr. N.D. Tex. 2013) (Jernigan, J.) (applying Rule 9(b) to fraudulent transfer claims). If that is the case, then Plaintiff's claims clearly fail to adequately allege the required "who, what, when, where and how" regarding his alleged involvement in an alleged breach of fiduciary duty.

[4] *Clapper v. Am. Realty Inv'rs, Inc.*, No. 3:14-CV-2970-D, 2018 WL 3868703, at *8 (N.D. Tex. Aug. 14, 2018) (citing *In re: Brown Med. Ctr., Inc.*, 552 B.R. 165, 168 (S.D. Tex. 2016) (applying Rule 9(b) to fraudulent transfer claim based on actual fraudulent intent) and *E. Poultry Distributors, Inc. v. Yarto Puez*, 2001 WL 34664163, at *2 (N.D. Tex. Dec. 3, 2001) (Lynn, J.) ("If the fraudulent transfer statute Plaintiffs want the Court to apply requires intent to defraud, the enhanced pleading requirements of Rule 9(b) apply; if the statute allows for fraudulent transfer without intent to defraud, however, only the general pleading rules of Rule 8(a) must be satisfied.")).

fraudulently and what each actor thereby obtained—i.e. the "who, what, when, where, and how" of the fraud.[5]

B. Plaintiff has failed to state a claim for actual fraudulent transfer against CLO Holdco

12. Under either Rule 8's general pleading standard or Rule 9(b)'s heightened pleading requirements, the Committee has failed to state a claim for Actual Fraudulent Transfer against CLO Holdco or Dallas Foundation. To establish a claim under TUFTA, a Plaintiff must prove that (1) [it] is a "creditor" with a claim against a "debtor"; (2) the debtor transferred assets after, or a short time before, the plaintiff's claim arose; and (3) the debtor made the transfer with the intent to hinder, delay, or defraud the plaintiff.[6]

13. Where, as here, the Plaintiff seeks to establish the actual fraudulent intent of a Defendant under TUFTA, the Court may consider, among other factors, various statutory "badges of fraud" under Section 24.005.[7] TUFTA's statutory list of "badges of fraud" is neither exhaustive nor exclusive, but at least one or more "badges of fraud" must be sufficiently pled with particularity to support a claim under TUFTA for actual fraudulent intent.[8]

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[5] *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, No. 3:17-CV-1147-D, 2019 WL 329545, at *5 (N.D. Tex. Jan. 25, 2019) (citing *Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005)).

[6] *Clapper v. Am. Realty Inv'rs, Inc.*, No. 3:14-CV-2970-D, 2018 WL 3868703, at *7 (N.D. Tex. Aug. 14, 2018) (citing *Dontos v. Vendomation NZ Ltd.*, 582 Fed. Appx. 338, 344 (5th Cir. 2014)).

[7] TEX. BUS. & COM. CODE ANN. § 24.005 (West). In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether: (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 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.

[8] *Royalty Clearinghouse, Ltd. v. CTS Properties, Ltd.*, No. 1:16-CV-1342-LY, 2018 WL 5778676, at *5 (W.D. Tex. July 31, 2018), report and recommendation adopted, No. 1:16-CV-1342-LY, 2018 WL 5733138 (W.D. Tex. Sept. 19, 2018) ("A single badge of fraud is not enough to find a fraudulent transfer occurred, but a few badges together can support an inference of actual fraudulent transfer."); *In re Cyr*, 602 B.R. 315, 329 (Bankr. W.D. Tex.

14. Despite its conclusory labeling of the CLO Holdco Transaction being "convoluted," the Committee has alleged that the series of transactions constituting the CLO Holdco Transaction moved the Transferred Assets from the Debtor to CLO Holdco. That transaction does not support a finding of any badges of fraud under TUFTA's actual fraudulent transfer statute. For example, CLO Holdco is not an insider of the Debtor and was not an insider in 2016. Moreover, the Complaint does not allege that the Debtor retained possession or control of the Transferred Assets. Plaintiff pleads no facts with particularity to suggest that the Debtor retained control over the Transferred Assets through purported control over CLO Holdco. For instance, as to CLO Holdco, the Committee suggests that because the Dallas Foundation and its general partner Charitable DAF GP, LLC held and/or controlled the equity interest in CLO Holdco, that CLO Holdco has no independence or separation from Dondero's ultimate control. Complaint, at ¶ 21. However, Plaintiff fails to plead any facts that actually evidence Dondero or the Debtor's control over CLO Holdco. Instead, Plaintiff asserts only that "upon information and belief Dondero indirectly controls CLO Holdco," among other entities (Complaint, at ¶ 25). That conclusory statement cannot support a badge of fraud, let alone an actual fraud claim under TUFTA.

15. While the Debtor asserts that the CLO Transaction was concealed, it pleads no specific facts to support that conclusory allegation.[9] Plaintiff does not plead that the CLO Holdco Transaction involved substantially all of the Debtor's assets, and Plaintiff does not plead that the Debtor absconded. Plaintiff does not plead that the Debtor removed or concealed assets,

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2019) ("It is not necessary that all or any one of the badges of fraud be established to support a finding of actual fraudulent intent by the debtor; however, more than one badge of fraud must be shown to establish actual fraudulent intent. Moreover, courts—including this Court—have required the "confluence" of multiple badges of fraud to establish actual fraudulent intent.").

[9] While not before the Court given the strictures of a Rule 12(b)(6) motion, the Plaintiff knows that the CLO Holdco Transaction was expressly identified, disclosed and discussed in the Debtor's audited financial statements for the year 2016.

but rather that it exchanged assets for a nearly $24 million note. Further, Plaintiff fails to plead with any particularity that the Debtor was insolvent at the time of the transfer or was made insolvent as a result of the transfer. Plaintiff's suggestion that litigation filed mere months prior to the CLO Holdco Transaction, and years before the Debtor's bankruptcy, evidenced the Debtor's insolvency at the time of the transfers is purely conclusory.

16. Finally, and importantly, Plaintiff's allegation that the CLO Holdco Transaction was in exchange for less than reasonably equivalent value is patently erroneous and highlights the duplicity of Plaintiff's claims. Plaintiff alleges that the Crusader litigation, and the claims included therein, eventually rendered the Debtor insolvent or were sufficiently damning to cause the Debtor to transfer the Crusader Interests to CLO Holdco. However, this pleading, conclusory as it is, generates the opposite conclusion than alleged by the Plaintiff, - if the Crusader litigation in fact would have rendered the Debtor insolvent, or were sufficiently damning to cause the Debtor to conduct the CLO Holdco Transaction, the conclusion to draw is that the Debtor was pawning off the Crusader interests through the CLO Holdco Transaction, and in fact took in value to jettison problematic interests.[10] While Plaintiff is quick to suggest that the Dugaboy Note was worth considerably less than its face value as a result of certain risk factors (though Plaintiff admits that the Debtor has received millions of dollars in payments under the note), Plaintiff patently ignores similar risk factors associated with the transferred Crusader Interests which were, as Plaintiff notes, subject to pending litigation at the time.[11]

[10] Again not before the Court because of the scope of this Motion, the Committee knows that the Debtor's interests in the Crusader Interests were and are worthless. In fact, the Debtor during the bankruptcy proceedings demanded that CLO Holdco amend its proof of claim to reflect the $0 value of the Crusader Interests transferred to it. CLO Holdco did amend its proof of claim to reflect a claim of $00.00 (Claim # 198).

[11] See Ft. Nt. 10.

17. Even construed liberally with all indulges in Plaintiff's favor, Plaintiff's Complaint alleges, at best, only one badge of fraud: that the Debtor was subject to pending litigation at the time of the CLO Holdco Transaction. The remainder of the Plaintiff's allegations are conclusory and unsupported (and even negated by other facts and by logic), and therefore fall well short of the heightened pleading standard of Rule 9(b). In sum, it is illogical to conclude that the Debtor, after the commencement of litigation that if successful would render valueless the derivative Crusader participation interests (which were interests in the Debtor's interests), transferred out such derivative interests to benefit the transferee. In fact, the opposite conclusion is compelled by logic - the Debtor transferred the derivative interests out and replaced them with a valuable asset (upon which Plaintiff admits to having received payments of multiple millions of dollars).

18. Indeed, district courts in the Fifth Circuit have dismissed claims for actual fraudulent transfer, due to similar pleading deficiencies as those in the Committee's Complaint. In *In re: Brown Medical Center, Inc.*, the district court held that the Plaintiff failed to state with particularity a claim under TUFTA § 24.005(1) for actual fraudulent intent, because the Plaintiff had only alleged that the value of consideration the Debtor received was not reasonably equivalent to the value of the funds transferred and that the Debtor was insolvent or became insolvent shortly after the transfers were made, which pursuant to TUFTA did not support any *actual* fraudulent intent.[12]

19. Similarly, in *In re Cyr*, the district court dismissed claims for both actual and constructive fraudulent transfer due to pleading deficiencies that are present in this case. Similar to the Committee's allegations regarding Dondero's close personal relationship with defendant

[12] *In re: Brown Med. Ctr., Inc.*, 552 B.R. 165, 172 (S.D. Tex. 2016) (claim for actual fraudulent transfer dismissed as to all Defendants).

Grant James Scott III ("Scott"), the *Cyr* Trustee relied on its allegations that there was a family, friendship, or close associate relationship between the parties during a time when the Debtor was contemplating bankruptcy, and the Debtor thereafter conducted transactions to place assets with defendants while retaining possession, benefit, and use of the assets. In dismissing the *Cyr* Trustee's claim for actual fraudulent transfer, the district court disagreed with the Trustee's characterization of its pleadings, and opined that:

> The Trustee does not specify which badge of fraud is manifested by such factual allegations and it is not clear to the Court which badge of fraud these facts are intended to support. At least two badges of fraud deal with the financial condition of the Debtor at the time of the transfer; however, the Court is not convinced that the Trustee has properly plead facts demonstrating either badge of fraud. For example, one badge of fraud involves the financial condition of the party sought to be charged both before and after the transaction in question. The Trustee has not asserted any facts alleging the financial condition of Debtor before each transfer. The Court is not convinced that contemplating bankruptcy and/or filing bankruptcy is sufficient to demonstrate the status of Debtor's financial condition. As acknowledged below, individuals seek protections provided by the Bankruptcy Code for a myriad of reasons, not solely because they are experiencing financial ruin. The second badge of fraud dealing with a debtor's financial condition involves the existence or cumulative effect of the pattern or series of transactions or course of conduct after the onset of financial difficulties. Again, the Court is not convinced that contemplating and/or filing bankruptcy is sufficient to demonstrate that Debtor was experiencing financial difficulties.[13]

Additionally, the district court noted that the *Cyr* Trustee did not allege any facts indicating "that creditors were pursuing claims against Debtor at the time of or after the transfers were made," and as such, "[w]ithout the allegations that such creditors existed, there can[not] be intent to hinder, delay, or defraud present or future creditors."[14] As mentioned, here the allegations in fact compel the opposite conclusion that the Debtor was involved in actual fraud. The Committee alleges that litigation had been commenced, which was in infancy. The CLO Holdco Transaction involved in great part derivative participation interests that would have been (and in

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[13] *In re Cyr*, 602 B.R. 315, 331 (Bankr. W.D. Tex. 2019).

[14] *Id.*

fact were) rendered valueless if the litigation was successful. In fact, then, the Transferred Assets were swapped for an asset with value, that would be unaffected by the litigation just commenced. The reverse of actual fraud upon creditors.

20. In sum, the Complaint does not sufficiently allege the requisite "badges of fraud" demonstrating actual fraudulent intent, or the "who, what, when, where, and how" of any fraud related to or in connection with CLO Holdco, and any opportunity to amend its pleading is likely futile.

C. Plaintiff has failed to state a claim for constructive fraudulent transfer against CLHO Holdco under Section 24.005(A)(2)(B)

21. The Committee's claim for constructive fraudulent transfer as to CLO Holdco is implausible on its face and lacks support for the requisite elements under TEX. BUS. & COMM. CODE § 24.005(a)(2)(B), as to transfers fraudulent as present and future creditors. In order for the Committee to assert its constructive fraudulent transfer claims, it must plead that, "without receiving a reasonably equivalent value in exchange for the transfer of obligation," the Debtor "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." The Committee fails to plead any facts that link the CLO Holdco Transaction and the Debtor's purported belief that it would incur debts that it could not pay as they came due. While the Committee asserts that the Crusader Litigation was pending at the time of the CLO Holdco Transaction, the Committee does not assert that the Debtor believed or should have reasonably believed at the time that it had incurred or would incur debts beyond its ability to repay when due. To the contrary, the Committee's pleadings acknowledge that the Crusader Litigation was contested over a period of years, and that the Debtor successfully operated and paid its debts as they came due until October, 2019 when it filed for bankruptcy relief. Thus, it is implausible for the Committee to support its

constructive fraudulent transfer claim on allegations that at the time of the CLO Holdco Transaction, the Debtor believed or reasonably should have believed it would incur debts it could not pay when due.

22. As to the threshold element of the Debtor receiving less than a reasonably equivalent value in exchange for the Transferred Assets, the Committee has offered no more than unsupported, conclusory allegations that the Dugaboy Note first transferred from Get Good to the Debtor was less than a reasonably equivalent value of the Transferred Assets. Indeed, the Committee robustly argues for a reduction of the value of the Dugaboy Note, which it summarily terms as "overvalued," based on application of a discount rate to calculate the value of the Dugaboy Note (Complaint at ¶¶ 41-42), but makes no attempt whatsoever to suggest any similar analysis of value reduction and/or discounting be performed on the Transferred Assets, on the other side of the purported constructive fraudulent transfer, despite the allegations that litigation had been commenced that if successful, could (and did) render the derivative participation interests valueless.[15]

23. The Committee acknowledges that the Crusader Litigation was pending at the time of the CLO Holdco Transaction. CLO Holdco was assigned participation interests in the Debtor's interests in Crusader funds. The Committee discounts the face value of the Dugaboy Note, but intentionally fails to account for a similar risk-based discount to the interests transferred to CLO Holdco. Again, the Committee's argument belies an obvious reality. Either the Committee: (A) believes the Debtor was certain to lose the Crusader Litigation, which would

[15] As detailed above and in the Debtor's bankruptcy case, the Committee's proposition has already been proven false. The Debtor has received far more from the Dugaboy Note than CLO Holdco received from the CLO Holdco Transaction. As previously stated, CLO Holdco's participation interests in the Debtor's interests in the Crusader Funds were cancelled out and deemed worthless as a result of the Crusader Litigation and settlement in the Debtor's bankruptcy case. While assertion of this outside the four corners of the Complaint is not a consideration of this Motion under Rule 12(b)(6), the acknowledgement of the litigation and the above stated illogic of the Plaintiff's position, is relevant.

likely result in adverse consequences for the Debtor's interests involved in the litigation, thereby devaluing the transferred interest (as in fact occurred); or (B) the Committee believes (looking back with reality defying hindsight) there was a high likelihood that the Debtor would succeed in the Crusader Litigation, which would mean the Debtor would not reasonably believe it incurred or would incur debts that it was incapable of paying when due. Under either scenario, the Committee's claim fails. A litigation discount renders the assets reasonably equivalent in value or, alternatively, the Debtor had no reason to believe it would lose the Crusader Litigation and so the Committee cannot satisfy the second element of its claim.

D. Plaintiff has failed to state a claim for alter ego against CLO Holdco

24. Plaintiff's cause of action for declaratory judgment for Alter Ego Liability against CLO Holdco (Third Cause of Action) does not specify what law Plaintiff claims governs its alter ego claim against CLO Holdco. However, assuming Texas law applies, a claim for alter ego liability is not a standalone cause of action, but instead a means of imposing individual liability where it would not otherwise exist, as a remedy for a viable, underlying cause of action.[16] As pled, Plaintiff's cause of action for declaratory judgment asks solely for the Court's imposition of alter ego liability against CLO Holdco, without description of the underlying viable cause of action supporting such relief. CLO Holdco is already a Defendant in this action and facing direct claims under TUFTA. Thus, Plaintiff's Third Cause of Action is deficiently pled and must be dismissed because it does not assert a separate underlying cause of action through which alter ego liability can be sought as a remedy.

[16] *McLeaish Law Office v. Britton*, No. 05-00-00623-CV, 2001 WL 988048, at *4 (Tex. App.—Dallas Aug. 30, 2001, pet. denied) (citing *Equinox Enters., Inc. v. Assoc. Media Inc.*, 730 S.W.2d 872, 877 (Tex. App.—Dallas 1987, no writ)); *see also In re Moore*, 379 B.R. 284, 285 (Bankr. N.D. Tex. 2007) (analyzing remedy of alter ego liability for causes of action for fraudulent transfer and constructive trust).

25. To the extent any of the Plaintiff's underlying causes of action are viable for consideration as a basis to impose alter ego liability against CLO Holdco, Plaintiff has failed to plead the threshold elements warranting imposition of alter ego liability as a remedy for any of Plaintiff's claims.

26. Under Texas law, a shareholder, owner, or a corporate affiliate "may not be held liable to the corporation or its obligees with respect to ... any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, ... or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory" unless the "obligee demonstrates that the [share]holder, beneficial owner, ... or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, ... or affiliate." Tex. Bus. Orgs. Code Ann. § 21.223. "That is, alter ego or other similar theories may be used to pierce the corporate veil ***only if***: (1) actual fraud is shown and (2) it was perpetrated primarily for the direct personal benefit of the corporation's shareholder, beneficial owner, subscriber, or affiliate."[17]

27. In *Viajes Gerpa, S.A. v. Fazeli*, the Texas appellate court considered the legal sufficiency of the evidence supporting an alter ego theory to pierce the corporate veil and impose personal liability on an individual.[18] Underlying the dispute in *Viajes Gerpa, S.A.* was a 2007 settlement agreement that required The Ticket Company and its president, Seyed Fazeli, to remit payments to the plaintiff and other travel agencies to compensate for a failure to procure tickets

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[17] *See id.; Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 532 (Tex. App. 2016) (emphasis added); *Ocram, Inc. v. Bartosh*, No. 01–11–00793–CV, 2012 WL 4740859, at *3 (Tex. App.–Houston [1st Dist.] Oct. 4, 2012, no pet.) (mem. op.).

[18] *Viajes Gerpa S.A.*, 522 S.W.3d at 533-35.

to the World Cup Soccer tournament.[19] After The Ticket Company failed to make its required payments, the plaintiff sued Fazeli and others alleging that Fazeli was individually liable under Tex. Bus. Orgs. Code Ann. § 21.223 for The Ticket Company's debts created pursuant to the 2007 settlement agreement.[20] The jury returned a verdict for the plaintiff on its alter ego claim. On the defendants' motion, the trial court rendered judgment for Fazeli.[21] The appellate court affirmed, explaining: "[T]o support individual liability under section 21.223, there must be evidence of direct personal benefit to [Fazeli] resulting from fraud in connection to The Ticket Company and the [settlement agreement] with [the plaintiff]...." The appellate court stated that the evidence "reflect[ed] general (mis)handling of corporate accounts, record keeping, and operations," but failed to demonstrate that the fraudulent conduct was related to the 2007 settlement agreement.[22]

28. None of the allegations supporting Plaintiff's Third Cause of Action properly assert the factors warranting alter ego liability as an available remedy to Plaintiff. Plaintiff alleges that CLO Holdco is a "corporate fiction relied upon as a protection from liability for the fraudulent transfers effected by CLO Holdco, by Scott and the Debtor under the direction of Dondero," and that Dondero and/or Scott's control of "a multitude of organizations with overlapping, interrelated interests . . . often place[d] them in a position of potential conflicts of interest." Complaint at ¶¶ 75, 77, 79.

29. These conclusory allegations do not bear on the applicable legal standard that the Committee must show to make a successful alter ego claims. Other than the bald assertion that

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19 *Id*. at 527-28.

20 *Id*. at 529.

21 *Id*. at 530.

22 *Id*. at 535.

CLO Holdco is a corporate fiction used by Dondero and the Debtor, Plaintiff has not otherwise pled any *facts* plausibly giving rise to the inference that CLO Holdco's corporate form was ignored or misused. Similarly, the Plaintiff's conclusory allegations regarding Dondero "sit[ting] on the boards of a multitude of organizations" and "direct[ing[the various entities controlled by Scott [including CLO Holdco] to effectuate the CLO Holdco Transaction" also fall short of plausibly supporting a claim for alter ego against CLO Holdco. [23]

30. While the Committee ignores pleading obligations about corporate formalities, it also ignores corporate realities. CLO Holdco is, in essence, part of a donor advised charitable endowment. CLO Holdco was the *recipient* of donated assets, which it accepted and managed on behalf of its parent donors. CLO Holdco very likely would have *violated* its corporate obligations had it refused the donated assets to which it was transferred through the CLO Holdco Transaction.

E. Plaintiff has failed to state a claim for money had and received against CLO Holdco

31. Plaintiff's Fourth Cause of Action for Money Had and Received, asserted against CLO Holdco, is barred by the statute of limitations of two (2) years. The affirmative defense of statute of limitations can be addressed in a Rule 12(b)(6) motion if the defense is "established by the face of the complaint."[24] Claims for "money had and received" are subject to a two-year statute of limitations and, without any apparent or alleged basis for tolling limitations, may

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[23] *Id.* ("Without additional factual support, such conclusory allegations are insufficient under *Twombly* and *Iqbal*. Because Plaintiffs have not set forth sufficient factual detail to support their alter ego theory, their proposed Amended Complaint would fail to state a claim upon which relief could be granted. Accordingly, granting Plaintiffs leave to amend their Complaint with their proposed Amended Complaint would be futile.") (citing *Med. Supply Chain, Inc. v. Gen. Elec. Co.*, 144 Fed. App'x. 708, 713 (10th Cir. 2005) (affirming ruling that complaint failed to adequately plead alter ego claim because it lacked any "factual allegations to support these conclusory statements.") (citing *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996)) (affirming dismissal of alter ego claim because the pleadings were "devoid of any specific facts or circumstances supporting this assertion").

[24] *Johnson v. Aurora Loan Servs., LLC*, No. CIV.A. H-15-755, 2015 WL 5009228, at *4 (S.D. Tex. Aug. 21, 2015) (citing *Janvey v. Suarez*, 978 F.Supp.2d 685, 702 (N.D.Tex. 2013)).

properly be dismissed where the face of the Complaint alleges a transaction that is beyond the two-year statute of limitations.[25] Plaintiff's Complaint alleges that the CLO Holdco Transaction occurred on or about December 28, 2016, which occurred more than two years prior to October 26, 2019, the commencement of the Debtor's bankruptcy case. As a result, Plaintiff's claim for "money had and received" is barred by limitations.

F. Plaintiff has failed to state a claim for conspiracy against CLO Holdco

32. Civil conspiracy is not an independent cause of action, but rather a derivative claim dependent on an underlying tort.[26] Accordingly, because the Committee's allegations of conspiracy to commit a fraudulent transfer are derivative of its TUFTA claims, its deficient pleading of claims for fraudulent transfer (as discussed above) are necessarily fatal to the claims for conspiracy to commit a fraudulent transfer.[27]

33. The Committee has not alleged that any creditor of the Debtor is more than general creditor as to the Transferred Assets at issue in the CLO Holdco Transaction, and therefore its conspiracy claim fails for this additional reason. A "mere general creditor may take advantage of the Texas fraudulent conveyance statute, but may not recover damages for conspiracy to commit a fraudulent conveyance." Where, as here, because "a mere general creditor without a lien has no interest in the Debtor's property, and hence is not legally injured by any conspiracy with the Debtor to aid him in disposing of his property in order to evade the

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[25] *Id.*

[26] *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, No. 3:17-CV-1147-D, 2019 WL 329545, at *7 (N.D. Tex. Jan. 25, 2019) (granting motion to dismiss fraudulent transfer claim as well as conspiracy claim).

[27] *ClaimHub, Inc. v. Universal Risk Ins. Servs., Inc.*, No. H-10-2841, 2011 WL 13247456, at *7 (S.D. Tex. July 25, 2011).

payment of his financial obligations," the Plaintiff cannot plausibly maintain its claim conspiracy.[28]

V. MOTION FOR MORE DEFINITE STATEMENT

34. "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding."[29] A Rule 12(e) motion requires a court to determine whether the complaint is "so vague or ambiguous that the party cannot reasonably prepare a response."[30]

35. As set forth herein, the Complaint is devoid of many of the necessary elements of the Committee's claims. While Defendants believe that dismissal is the appropriate remedy, in the alternative, Defendants move for a more definite statement under Rule 12(e).

VI. CONCLUSION

WHEREFORE Defendants CLO Holdco, Ltd. and Highland Dallas Foundation, Inc. respectfully pray that the Court grant the Motion in its entirety, dismiss the Complaint as to them, or in the alternative, require a more definite statement, and grant such other relief, at law or in equity, to which they may be entitled.

Respectfully submitted,

KELLY HART PITRE

/s/ Louis M. Phillips
Louis M. Phillips (#10505)
One American Place
301 Main Street, Suite 1600
Baton Rouge, LA 70801-1916
Telephone: (225) 381-9643

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28 *Id.*

29 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *see Jones v. Gee*, No. CV 18-5977, 2020 WL 564956, at *8 (E.D. La. Feb. 5, 2020) ("When evaluating a motion for a more definite statement, courts must look to Federal Rule of Civil Procedure 8 for the minimal pleading requirements when analyzing the complaint.").

30 FED. R. CIV. P. 12(e).

Facsimile: (225) 336-9763
Email: louis.phillips@kellyhart.com

and

Amelia L. Hurt (LA #36817, TX #24092553)
400 Poydras Street, Suite 1812
New Orleans, LA 70130
Telephone: (504) 522-1812
Facsimile: (504) 522-1813
Email: amelia.hurt@kellyhart.com

KELLY HART & HALLMAN

Hugh G. Connor II
State Bar No. 00787272
hugh.connor@kellyhart.com
Michael D. Anderson
State Bar No. 24031699
michael.anderson@kellyhart.com
Katherine T. Hopkins
Texas Bar No. 24070737
katherine.hopkins@kellyhart.com
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Telecopier: (817) 878-9280

ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

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

In re:	§	**Case No. 19-34054-sgj11**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Chapter 11**
	§	
Debtor	§	

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	§	
	§	
Plaintiff,	§	
	§	**Adversary No. 20-03195**
vs.	§	
	§	
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§	
	§	
Defendants.	§	

ORDER GRANTING MOTION TO DISMISS

Having considered Defendants CLO Holdco, Ltd. ("CLO Holdco") and Highland Dallas Foundation, Inc.'s ("Dallas Foundation") (Dallas Foundation, together with CLO Holdco, "Defendants") *Motion to Dismiss, or in the alternative, Motion for More Definite Statement* (the "Motion to Dismiss"), it is hereby **ORDERED** that :

1. The Motion to Dismiss is **GRANTED**.

2. The Causes of Action in the Complaint (Dkt. No. 6) are dismissed, with prejudice, as to CLO Holdco and Dallas Foundation.

END OF ORDER # #

Order Submitted and Prepared By:

KELLY HART PITRE

/s/ Louis M. Phillips
Louis M. Phillips (#10505)
One American Place
301 Main Street, Suite 1600
Baton Rouge, LA 70801-1916
Telephone: (225) 381-9643
Facsimile: (225) 336-9763
Email: louis.phillips@kellyhart.com

and

Amelia L. Hurt (LA #36817, TX #24092553)
400 Poydras Street, Suite 1812
New Orleans, LA 70130
Telephone: (504) 522-1812
Facsimile: (504) 522-1813
Email: amelia.hurt@kellyhart.com

KELLY HART & HALLMAN

Hugh G. Connor II
State Bar No. 00787272
hugh.connor@kellyhart.com
Michael D. Anderson

State Bar No. 24031699
michael.anderson@kellyhart.com
Katherine T. Hopkins
Texas Bar No. 24070737
katherine.hopkins@kellyhart.com
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Telecopier: (817) 878-9280

ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.