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**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. §



**DEFENDANT JAMES D. DONDERO'S
MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR MORE
DEFINITE STATEMENT, AND BRIEF IN SUPPORT**

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Defendant James D. Dondero (“Dondero”) files this Motion to Dismiss, or in the Alternative, Motion for More Definite Statement, and Brief in Support (the “Motion”) pursuant to Rule 12(b)(6) and Rule 12(e) of the Federal Rules of Civil Procedure (the “Rules”), as incorporated into this adversary proceeding pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and respectfully moves the Court to dismiss, either in whole or in part, the Amended Adversary Complaint (“Complaint”) [Adv. Dkt. 6] filed by the Official Committee of Unsecured Creditors (“Plaintiff” or the “Committee”). In the alternative, Defendant requests that the Court require a more definite statement of the causes of action contained in the Complaint pursuant to Rule 12(e). In support of the Motion, Defendant respectfully shows the Court as follows:

I. RULE 7012(B) STATEMENT

1. Dondero expressly reserves his right to a jury trial on the all causes of action alleged in the Complaint. Pursuant to Bankruptcy Rule 7012, Dondero does not consent to the Bankruptcy Court entering final orders or final judgments in this proceeding.

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

II. FACTUAL OVERVIEW

3. The Committee’s Complaint asserts that all of the named Defendants engaged in purportedly unlawful conduct with respect to a transaction that occurred more than four years ago (three years before the Debtor filed bankruptcy), 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 without support 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” (through a series of transfers allegedly orchestrated by the actions of the other defendants) to CLO Holdco, Ltd. (“CLO Holdco”).

4. Indeed, the Committee exhaustingly emphasizes 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 named Defendants. Despite this emphasis, there is a dearth of detailed factual allegations supporting its claims against Dondero. As a result, the Committee’s Complaint is devoid of the necessary allegations to support its claims against Dondero and should be dismissed.

5. As discussed below, the Committee’s deficient allegations do not meet either of the standard or heightened pleading requirements applicable to its claims sounding in fraud, and should therefore be dismissed. Other of the Committee’s asserted claims fail for independent reasons. The Committee has also failed to sufficiently plead its alter-ego and conspiracy claims against Dondero, such that those claims should also be dismissed.

III. THE COMMITTEE'S CLAIMS AND CAUSES OF ACTION

6. 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 Scott, as purported instrumentalities for Dondero’s alleged fraud. The Complaint asserts five Causes of Actions against various named Defendants; as to Dondero, 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; and 4) Conspiracy.

7. As demonstrated below, the Committee has failed to adequately plead *any* claim warranting liability against Dondero, and therefore failed to state a claim upon which relief can be granted against Dondero. Alternatively, the Committee should be required to provide a more definite statement regarding its claims against Dondero.

IV. ARGUMENTS & AUTHORITIES SUPPORTING DISMISSAL

A. APPLICABLE STANDARD – 12(B)(6) MOTION TO DISMISS

8. 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 Procedure¹ 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.'" *Id.* at 557. After all, "where the well-pleaded facts do not permit the court to infer more than the mere *possibility* of misconduct, the complaint has alleged—but it has not shown—the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added, internal quotations removed).

9. 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

¹ Federal Rules of Civil Procedure shall be hereafter referred to as the “Rules” and each a “Rule”.

deductions, or legal conclusions.” *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (citations omitted).²

10. With respect to Plaintiff’s First Cause of Action for Actual Fraudulent Transfer under the 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.”³ 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 fraudulently and what each actor thereby obtained—i.e. the “who, what, when, where, and how” of the fraud.⁴

B. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR ACTUAL FRAUDULENT TRANSFER AGAINST DONDERO.

11. 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 Dondero. To establish a claim under TUFTA, 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

² Arguably, Federal Rule of Civil Procedure 9(b) applies to Plaintiff’s claims. 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.”

³ *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.”)).

⁴ *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)).

plaintiff's claim arose; and (3) the debtor made the transfer with the intent to hinder, delay, or defraud the plaintiff.⁵

12. 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 24.005.⁶ 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.⁷

13. 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 actually fraudulent transfer statute and the Plaintiff has failed to adequately plead a plausible claim for relief under TUFTA against CLO Holdco. The deficiencies of the Committee’s fraudulent transfer claims

⁵ *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)).

⁶ 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.

⁷ *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. 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.”).

against CLO Holdco are addressed in more detail in its own motion to dismiss,⁸ but include, by way of example, the lack of specific, well-pleaded factual allegations that the Debtor retained the Transferred Assets, that the CLO Holdco Transaction was concealed, that the Debtor was insolvent, and that the transaction was not for reasonably equivalent value.⁹

14. Regardless of whether the Committee has stated a plausible actual fraudulent transfer claim against CLO Holdco as the alleged transferee under the CLO Holdco Transaction, the Complaint fails to state such a claim against Dondero individually. Accordingly, Count 1 of the Complaint should be dismissed as to Dondero.

15. Under TUFTA section 24.009(b), a judgment on a fraudulent transfer cause of action may only be rendered against the: first transferee, the person for whose benefit the transfer was made, or any subsequent transferee other than a good faith transferee who takes for value or from any subsequent transferee. Tex. Bus. & Com. Code § 24.009(b).

16. Additionally, the Committee's claim for actual fraudulent transfer against Dondero rest upon the same deficient allegations made by the Committee against CLO Holdco, which fail for the same reasons and on the additional basis that the allegations against Dondero, individually, are even further removed from plausibility.

17. The Committee makes much ado through purely conclusory statements about the relationship between Dondero and Scott as being one of long-time close friends and former college roommates that inexplicably have no separation or independence from one another. In his various roles, including as director of CLO Holdco, Scott is alleged to have not "independently assess[ed]

⁸ Dondero hereby incorporates by reference the arguments and authorities advanced in the *Motion to Dismiss, or in the Alternative, Motion for More Definite Statement* [Adv. Dkt. 23] and the *Brief in Support of Motion to Dismiss, or in the Alternative, Motion for More Definite Statement* [Adv. Dkt. 23-1] filed by Defendants CLO Holdco, Ltd. and Highland Dallas Foundation, Inc.

⁹ *See id.*

the investments and transfers ‘recommended’ by Debtor personnel” and instead “routinely approved, without inquiry or requests for additional information, all investments and transfers presented to him by the Debtor.” Complaint, at ¶ 27. Even assuming these allegations as being true, the Committee fails to link these assertions to any of the required “badges of fraud” necessary to form a basis supporting Dondero’s or Scott’s actual fraudulent intent with respect to the CLO Holdco Transaction. Other than Scott potentially being an “insider,” the Committee fails to make any non-conclusory allegations that Dondero’s or Scott’s conduct is relevant to the Debtor’s purported concealment of the CLO Holdco Transaction, or to its alleged retention of control of the Transferred Assets after the CLO Holdco Transaction occurred. Accordingly, the Complaint fails to establish facts supporting any actual fraudulent intent as to Dondero, individually.

18. Most importantly, there is no legal basis for any individual liability to attach on the claims asserted against Dondero under TUFTA based on the facts alleged by the Committee. Under Texas law applying TUFTA’s provisions, no individual liability can attach unless the defendant is a transferor or transferee in the purported fraudulent transfer,¹⁰ or there are other allegations that the alleged fraudulent transfer provided a benefit or interest in the assets to the defendant.¹¹ In other words, absent allegations that Dondero was a direct or indirect recipient or beneficiary of the Transferred Assets, Texas law does not permit claims based on derivative liability for fraudulent transfers.¹²

¹⁰ *In re Silver State Holdings, Assignee-7901 Boulevard 26 LLC*, No. 19-41579-MXM, 2020 WL 7414434, at *31 (Bankr. N.D. Tex. Dec. 17, 2020) (analyzing TUFTA and its precursor statute, and disallowing recovery “from a party who was not a direct or indirect recipient of a fraudulent transfer.”).

¹¹ *Ron v. Ron*, No. 20-40248, 2020 WL 6494223, at *2 (5th Cir. Nov. 4, 2020) (citing *Mack v. Newton*, 737 F.2d 1343 (5th Cir. 1984) (“The magistrate judge held that her claim failed because Stein did not benefit from or receive a property interest in the alleged fraudulent transfer of community property. We agree with this reasoning.”)).

¹² *In re Silver State Holdings*, 2020 WL 7414434, at *32 (Bankr. N.D. Tex. Dec. 17, 2020) (citing *Mack v. Newton*, 737 F.2d 1343, 1361 (5th Cir. 1984)) (making distinction as to “if the transferee directed the property to be turned over to his creditor, he [the subsequent-transferee creditor] would be as much liable as though he received it himself.”).

19. The Complaint lacks any such allegations against Dondero. As addressed above, Dondero neither received any of the purportedly fraudulent transfer, nor any other benefit associated with the transfers. The Committee has wholly failed to plead any such facts. Rather, the Committee pleads only “upon information and belief” that Dondero received a “tax benefit” resulting from the transfers, and the Complaint contains no specific, well-pleaded allegations as to what benefit Dondero purportedly received or how the transfers provided this benefit. Moreover, even if Dondero did receive a tangential “tax benefit,” such allegation is insufficient to demonstrate that Dondero received the benefit of the transfers themselves as required to state a claim under TUFTA. The Plaintiff’s actual fraudulent transfer claim against Dondero must therefore be dismissed.

20. Finally, 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. *See Katchadurian v. NGP Energy Capital Mgmt., LLC (In re Northstar Offshore Grp., LLC)*, 616 B.R. 695, 717 (Bankr. S.D. Tex. 2020) (“a court should not give legal conclusions couched as factual allegations any weight.”).

21. 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 still in its infancy 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.

22. In sum, Plaintiff's 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 the CLO Holdco Transaction. As to Dondero individually, the Complaint lacks any specific factual allegations of Dondero's involvement in the transaction. Moreover, Dondero was not a transferor, transferee, or person whose benefit the transfer was made under the CLO Holdco Transaction. For these reasons, the actual fraudulent transfer claim against Dondero cannot be maintained. Accordingly, this cause of action should be dismissed and any opportunity to amend its pleading is likely futile.

C. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONSTRUCTIVE FRAUDULENT TRANSFER AGAINST DONDERO.

23. The Committee's claim for constructive fraudulent transfer as to Dondero similarly cannot be maintained on its face and lacks support for the requisite elements under Tex. Bus. & Com. Code Section 24.005(a)(2)(B).

24. The Committee has no legal basis pursuant to which Dondero can be liable to the Committee under a theory of constructive fraud because he was not a transferor or transferee under any of the alleged transfers. Again, as a threshold issue for any alleged transferee in a purported chain of transfers, the Complaint must demonstrate how the alleged fraudulent transfers directly or indirectly benefitted each of the named Defendants, such that each would qualify as a transferee under TUFTA.¹³ As addressed above, Dondero neither received any of the purportedly fraudulent transfer, nor any other benefit associated with the transfers. Again, the Committee has certainly not pled any such facts. The Committee pleads only "upon information and belief" that Dondero

¹³ *In re Northstar Offshore Grp., LLC*, 616 B.R. 695, 729 (Bankr. S.D. Tex. 2020) (arguing in motion to dismiss that "Plaintiff must allege facts explaining how or why that purchase was made for Movants' benefit. Plaintiff wholly fails to do so" and "at most, [the Trustee] implies that [the NGP Directors] 'benefitted' from money paid to an investment belonging to entities in which [the NGP Directors] held unspecified 'financial interests.'").

received a “tax benefit” resulting from the transfers, the Complaint is devoid of any specific, well-pleaded allegations as to what benefit Dondero purportedly received or how the transfers provided this benefit. Moreover, even if there was an alleged tax benefit, such allegations alone are insufficient to demonstrate that Dondero received the benefit of the transfers themselves under TUFTA. Accordingly, the constructive fraudulent transfer claim against Dondero should be dismissed.

D. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR ALTER EGO AGAINST DONDERO.

25. The Plaintiff’s alter ego claim against Dondero and CLO Holdco, DAF Holdco, and the DAF is completely devoid of the necessary specific factual allegations that properly state a plausible alter ego claim under Rule 8 and Rule 9(b). Accordingly, this claim should be dismissed.

26. Plaintiff’s cause of action for declaratory judgment for Alter Ego Liability against Dondero (Third Cause of Action) does not specify what law Plaintiff claims governs its alter ego claim against Dondero. 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.¹⁴ As pled, Plaintiff’s cause of action for declaratory judgment asks solely for the Court’s imposition of alter ego liability against Dondero, without description of the underlying viable cause of action supporting such relief. Dondero is already a named as a purported defendant in this action and facing direct claims under TUFTA. Thus, Plaintiff’s Third Cause of Action is deficiently pled and must be dismissed

¹⁴ *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).

because it does not properly plead a separate underlying cause of action through which alter ego liability can be sought as a remedy.

27. 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 Dondero, Plaintiff has failed to plead the threshold elements warranting imposition of alter ego liability as a remedy for any of Plaintiff's claims.

28. 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."¹⁵

29. 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.¹⁶ 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

¹⁵ 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.).

¹⁶ *Viajes Gerpa S.A.*, 522 S.W.3d at 533-35.

payments to the plaintiff and other travel agencies to compensate for a failure to procure tickets to the World Cup Soccer tournament.¹⁷ 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.¹⁸ The jury returned a verdict for the plaintiff on its alter ego claim. On the defendants’ motion, the trial court rendered judgment for Fazeli.¹⁹ 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.²⁰

30. None of the allegations supporting Plaintiff’s Third Cause of Action properly include 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.

31. These conclusory allegations do not bear on the applicable legal standard that the Committee must show to make a successful alter ego claim. Other than the bald assertion that CLO Holdco is a corporate fiction used by Dondero and the Debtor, Plaintiff has not otherwise

¹⁷ *Id.* at 527-28.

¹⁸ *Id.* at 529.

¹⁹ *Id.* at 530.

²⁰ *Id.* at 535.

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, Dondero, and the other named entities.²¹

32. Moreover, the Debtor has failed to plead any facts—much less specific, non-conclusory factual allegations—regarding the specific interest, ownership, and control interest that Dondero purportedly maintained related to each of DAF Holdco, the DAF, and CLO Holdco sufficient to support an alter ego theory.

33. Instead, the Complaint contains purely conclusory allegations and legal conclusions that Dondero directly or indirectly controls CLO Holdco, DAF Holdco, and the DAF. *See* Complaint, ¶ 25 (“upon information and belief, Dondero indirectly controls CLO Holdco, DAF Holdco, and the DAF.”). These bare, conclusory allegations are insufficient to support a claim for alter ego. *See Med. Supply Chain, Inc. v. GE*, 144 F. App’x 708, 713 (10th Cir. 2005) (“The bald allegations in the complaint that GE alone controlled GHX are nothing more than conclusory allegations”); *Galvan v. Caviness Packing Co., Inc.*, 546 F. Supp. 2d 371, 379 (N.D. Tex. 2008) (holding that because there was no evidence of the level of entanglement between the individuals and the corporation, no evidence of financial information, and no evidence that individuals used the corporation for personal purposes, the alter ego doctrine did not apply).

²¹*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”).

34. The Plaintiff's Complaint fails to include in any other specific, well-pleaded allegations sufficient to support its alter ego claim as pleaded in compliance with Rule 8 and Rule 9(b). For these reasons, Plaintiff's alter ego claim against Dondero, CLO Holdco, DAF Holdco, and the DAF should be dismissed.

E. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONSPIRACY AGAINST DONDERO.

35. Civil conspiracy is not an independent cause of action, but rather a derivative claim dependent on an underlying tort.²² Accordingly, because the Committee's allegations of conspiracy to commit a fraudulent transfer are derivative of its TUFTA claims (claims in which Dondero is already named as a defendant), its deficient pleading of claims for fraudulent transfer (as discussed above) are necessarily fatal to the claims for conspiracy to commit a fraudulent transfer.²³

36. As discussed above, there is no legal basis for secondary or derivative liability against Dondero as a non-transferee and non-beneficiary of the Transferred Assets.²⁴ Additionally, 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

²² *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).

²³ *ClaimHub, Inc. v. Universal Risk Ins. Servs., Inc.*, No. H-10-2841, 2011 WL 13247456, at *7 (S.D. Tex. July 25, 2011).

²⁴ *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-CV-4641-N, 2014 WL 12572881, at *10 (N.D. Tex. Dec. 17, 2014) (citing *FDIC v. White*, 1998 WL 120298, at *2 (N.D. Tex. 1998) (holding TUFTA "do[es] not create personal liability on the part of a co-conspirator for fraudulent conveyances to an extent or in an amount beyond property which a co-conspirator actually receives or in which he acquires an interest")); *see also Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 386–87 (Tex. App. – Houston [1st Dist.] 2012, pet. denied) (recognizing a claim for conspiracy to commit fraudulent transfer, but acknowledging Mack as restricting the claim to defendants who were parties to the transfer)).

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 payment of his financial obligations,” the Plaintiff cannot plausibly maintain its claim conspiracy.²⁵

V. MOTION FOR MORE DEFINITE STATEMENT

37. “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.”²⁶ 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.”²⁷

38. As set forth herein, the Complaint is devoid of many of the necessary elements of the Committee’s claims. While Dondero believes that dismissal is the appropriate remedy, in the alternative, Dondero moves for a more definite statement under Rule 12(e).

VI. PRAYER

39. Dondero respectfully prays that the Court grant this Motion in its entirety, dismiss the Complaint as to him, or, in the alternative, require a more definite statement, and grant such other relief, at law or in equity, to which Dondero may be entitled.

²⁵ *Id.*

²⁶ *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.”).

²⁷ Fed. R. Civ. P. 12(e).

Dated: April 14, 2021

Respectfully submitted,

/s/ Bryan C. Assink
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**ATTORNEYS FOR DEFENDANT JAMES
DONDERO**

CERTIFICATE OF SERVICE

This is to certify that on April 14, 2021, a true and correct copy of the foregoing document was served by the Court's CM/ECF system on all counsel of record in this proceeding.

/s/ Bryan C. Assink
Bryan C. Assink

**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 JAMES DONDERO’S MOTION TO DISMISS

Having considered the *Motion to Dismiss, or in the alternative, Motion for More Definite Statement and Brief in Support* (the “Motion to Dismiss”), filed by Defendant James D. Dondero (“Dondero”), it is hereby **ORDERED** that:

1. The Motion to Dismiss is **GRANTED**.
2. The Causes of Action in the Complaint (Adv. Dkt. 6) are dismissed, with prejudice, as to Dondero.

END OF ORDER

Respectfully submitted by:

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