

**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**

Defendant the Get Good Nonexempt Trust (“Get Good” or “Defendant”) in the above-captioned adversary proceeding (the “Adversary Proceeding”) files this *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, for the reasons set forth in the accompanying Brief in



Support, respectfully moves the Court to dismiss as to Get Good, 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 it may be entitled.¹

Respectfully submitted,

HELLER, DRAPER, & HORN, LLC

/s/ Douglas S. Draper

Douglas S. Draper, La. Bar No. 5073

ddraper@hellerdraper.com

Leslie A. Collins, La. Bar No. 14891

lcollins@hellerdraper.com

Greta M. Brouphy, La. Bar No. 26216

gbrouphy@hellerdraper.com

650 Poydras Street, Suite 2500

New Orleans, LA 70130

Telephone: (504) 299-3300

Fax: (504) 299-3399

**COUNSEL FOR THE GET GOOD
NONEXEMPT TRUST**

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.

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 30, 2021.

/s/ Douglas S. Draper

**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

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

TABLE OF CONTENTS

	<i><u>Page</u></i>
I. MOTION TO WITHDRAW REFERENCE.....	4
II. FACTUAL OVERVIEW.....	4
III. THE COMMITTEE’S CLAIMS AND CAUSES OF ACTION.....	6
IV. ARGUMENTS & AUTHORITIES SUPPORTING DISMISSAL.....	6
A. APPLICABLE STANDARD – 12(B)(6) MOTION TO DISMISS	6
B. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR ACTUAL FRAUDULENT TRANSFER AGAINST GET GOOD.ERROR! BOOKMARK NOT DEFINED.	
C. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONSTRUCTIVE FRAUDULENT TRANSFER AGAINST GET GOOD UNDER SECTION 24.005(A)(2)(B)ERROR! BOOKMARK NOT DEFINED.	
D. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONSPIRACY AGAINST GET GOOD.ERROR! BOOKMARK NOT DEFINED.	
V. MOTION FOR MORE DEFINITE STATEMENT	17
VI. CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	6
<i>Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.</i> , No. 3:17-CV-1147-D, 2019 WL 329545 (N.D. Tex. Jan. 25, 2019).....	8, 15, 16
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	6
<i>In re: Brown Med. Ctr., Inc.</i> , 552 B.R. 165 (S.D. Tex. 2016).....	7, 11
<i>ClaimHub, Inc. v. Universal Risk Ins. Servs., Inc.</i> , No. H-10-2841, 2011 WL 13247456 (S.D. Tex. July 25, 2011).....	15
<i>Clapper v. Am. Realty Inv'rs, Inc.</i> , No. 3:14-CV-2970-D, 2018 WL 3868703 (N.D. Tex. Aug. 14, 2018).....	7, 8
<i>In re Cyr</i> , 602 B.R. 315 (Bankr. W.D. Tex. 2019).....	8, 12
<i>Firestone Steel Prod. Co. v. Barajas</i> , 927 S.W.2d 608, 614 (Tex. 1996).....	16
<i>Jones v. Gee</i> , No. CV 18-5977, 2020 WL 564956 (E.D. La. Feb. 5, 2020).....	17
<i>Juhl v. Airington</i> , 936 S.W.2d 640, 644 (Tex. 1996).....	16
<i>Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners)</i> , 498 B.R. 679 (Bankr. N.D. Tex. 2013) (Jernigan, J.).....	7
<i>R2 Invs. LDC v. Phillips</i> , 401 F.3d 638 (5th Cir. 2005).....	7
<i>Royalty Clearinghouse, Ltd. v. CTS Properties, Ltd.</i> , No. 1:16-CV-1342-LY, 2018 WL 5778676 (W.D. Tex. July 31, 2018).....	8
<i>Swierkiewicz v. Sorema N.A.</i> , 534 U.S. 506 (2002).....	17

Statutes

TEX. BUS. & COM. CODE ANN § 24.005(a)(2)(B)9, 14

Other Authorities

Federal Rule of Bankruptcy Procedure 7008(a)7
Federal Rule of Bankruptcy Procedure 7012(b)(6)4
Federal Rule of Civil Procedure Rule 87, 8
Federal Rule of Civil Procedure Rule 9(b)7, 8, 11
Federal Rule of Civil Procedure Rule 12(b)(6).....5, 6, 9, 14
Federal Rule of Civil Procedure Rule 12(e)17

BRIEF IN SUPPORT

Defendant Get Good Nonexempt Trust (“Get Good” or “Defendant”) in the above-captioned adversary proceeding (the “Adversary Proceeding”) files this *Brief in Support of the 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 moves the Court to dismiss as to it, 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 the Motion, Defendant respectfully represents as follows:

I. MOTION TO WITHDRAW REFERENCE

1. Contemporaneously herewith, Defendant has 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. Get Good expressly reserves its right to a jury trial on all causes of action alleged in the Complaint. Defendant also states, under Federal Rule of Bankruptcy Procedure¹ 7012(b), that it does 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 Defendant or Defendant’s consent to the Bankruptcy Court entering final orders or judgments in this Adversary Proceeding.

II. FACTUAL OVERVIEW

4. The Committee’s Complaint asserts that all of the named defendants, with Get Good among them, engaged in purportedly unlawful conduct with respect to a transaction that

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

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 Get Good (Complaint, ¶ 30). According to Plaintiff, the Debtor received a 97.6835% interest in a promissory note held by Get Good (which Plaintiff summarily categorizes as “overvalued”), in exchange for the Debtor’s transfer of three separate assets to Get Good (the “Transferred Assets”), which thereafter were “funneled down” to CLO Holdco, Ltd. (“CLO Holdco”) through a series of transfers allegedly orchestrated and consummated by the actions of all defendants.

5. Not surprisingly, the Committee exhaustingly emphasizes defendant James D. Dondero (“Dondero”) as the principal antagonist in its Complaint, by portraying all defendants as being part of a “Byzantine Empire” and describes the CLO Holdco Transaction as a nefarious and “convoluted” scheme concocted and orchestrated by Dondero, all allegedly with implied complicity from the Defendant and other named defendants. As against Get Good, the Committee asserted claims for actual and constructively fraudulent transfers under the Texas Uniform Fraudulent Transfer Act (“TUFTA”) and a claim for conspiracy with all defendants. Lacking from the Committee’s Complaint, however, are any specifically stated factual assertions that support these claims. As a result, the Committee’s Complaint is devoid of the necessary allegations to support its claims against Get Good, as the alleged transferee of the Transferred Assets.

6. As discussed below, the Committee’s deficient allegations do not meet the standard under Rule 12(b)(6) nor does it satisfy the heightened pleading requirements applicable to its claims sounding in fraud, and should therefore be dismissed. The Committee’s other asserted claim of conspiracy also fails for lacking legal predicate to support that claim, and as such, that claims should also be dismissed against Get Good.

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 Get Good, as purported instrumentalities for Dondero's alleged fraud. The Complaint purports to assert three causes of action against Get Good. Plaintiff asserts: 1) Actual Fraudulent Transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"); 2) Constructive Fraudulent Transfer under TUFTA; and 3) Conspiracy.

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

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 Procedure² 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 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).

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

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

³ Arguably, Federal Rule of Civil Procedure 9(b) applies to Plaintiff’s claims against Get Good based on allegations against Grant Scott, its “Trustee.” 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 Get Good

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 Get Good. 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

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. 2019) (“It is not necessary that all or any one of the badges of fraud be established to support a finding of actual

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 Get Good and eventually to CLO Holdco. The mechanism of that transaction does not support a finding of any badges of fraud under TUFTA’s actual fraudulent transfer statute. For example, Get Good 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 Get Good. For instance, the Committee suggests that because Grant James Scott, III, who the Committee alleges is a close personal friend of Dondero, is the trustee of Get Good, that Get Good has no independence or separation from Dondero’s ultimate control and that Scott simply did what the Debtor requested. Complaint, at ¶ 27. However, Plaintiff fails to plead any facts that actually evidence Dondero’s or Debtor’s control over Scott or Get Good. Instead, Plaintiff asserts only that “[u]pon information and belief Scott . . . routinely approved, without inquiry or requests for additional information, all investments and transfers presented to him by the Debtor.” (Complaint, at ¶ 27). 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

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.

that the Debtor absconded. Plaintiff does not plead that the Debtor removed or concealed assets, but rather that it exchanged assets for a nearly \$24 million note—which is being timely paid. 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. In fact, by the continued payment on the Dugaboy Note (as defined in the Complaint), the Debtor has been and continues to be enriched by the transfer of the Note. 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 would have rendered the Debtor insolvent, or was sufficiently damning to cause the Debtor to arrange 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

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 \$0.00 (Claim # 198).

similar risk factors associated with the transferred Crusader Interests which were, as Plaintiff notes, subject to pending litigation at the time.¹¹

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 the derivative Crusader participation interests valueless (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

¹¹ See Ft. Nt. 10.

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).

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 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

20. 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

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

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 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.

21. 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 Get Good, and any opportunity to amend its pleading is likely futile.

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

22. The Committee’s claim for constructive fraudulent transfer as to Get Good 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 or 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

¹⁴ *Id.*

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.

23. 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

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 Get Good received from the CLO Holdco Transaction. As previously stated, 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 assertions 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.

24. The Committee acknowledges that the Crusader Litigation was pending at the time of the CLO Holdco Transaction. Get Good (and eventually, 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 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 conspiracy against Get Good

25. Civil conspiracy is not an independent cause of action, but rather a derivative claim dependent on an underlying tort.¹⁶ 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.¹⁷

¹⁶ *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).

¹⁷ *ClaimHub, Inc. v. Universal Risk Ins. Servs., Inc.*, No. H-10-2841, 2011 WL 13247456, at *7 (S.D. Tex. July 25, 2011).

26. 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 payment of his financial obligations,” the Plaintiff cannot plausibly maintain its claim of conspiracy.¹⁸

27. Furthermore, conspiracy to commit constructive fraud is a legal and logical impossibility. “Civil conspiracy requires specific intent.”¹⁹ There is no intent requirement for constructive fraud other than an intent to incur debts. However, “merely proving a joint ‘intent to engage in the conduct that resulted in the injury’ is not sufficient to establish a cause of action for civil conspiracy.”²⁰ Rather, conspiracy requires a specific intent to “accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.”²¹ Because constructive fraud under TEX. BUS. & COMM. CODE § 24.005(a)(2)(B) does not include an element for intent to accomplish an unlawful purpose, the Committee’s conspiracy claims cannot go forward for constructive fraud and should be dismissed.

¹⁸ *Basic Capital Mgmt., Inc.*, 2019 WL 329545, at *7.

¹⁹ *Firestone Steel Prod. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996)

²⁰ *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).

²¹ *Id.*

V. MOTION FOR MORE DEFINITE STATEMENT

28. “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.”²² 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.”²³

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

VI. CONCLUSION

WHEREFORE Defendant Get Good Nonexempt Trust respectfully prays that the Court grant the Motion in its entirety, dismiss the Complaint as to Get Good, or in the alternative, require a more definite statement, and grant such other relief, at law or in equity, to which he may be entitled.

Respectfully submitted,

HELLER, DRAPER, & HORN, LLC

/s/ Douglas S. Draper

Douglas S. Draper, La. Bar No. 5073

ddraper@hellerdraper.com

Leslie A. Collins, La. Bar No. 14891

lcollins@hellerdraper.com

Greta M. Brouphy, La. Bar No. 26216

gbrouphy@hellerdraper.com

650 Poydras Street, Suite 2500

New Orleans, LA 70130

Telephone: (504) 299-3300

Fax: (504) 299-3399

²² *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.”).

²³ FED. R. CIV. P. 12(e).

**COUNSEL FOR THE GET GOOD TRUST
NONEXEMPT TRUST**

**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 Defendant Get Good Nonexempt Trust's ("Get Good" or "Defendant") *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 the Get Good Nonexempt Trust.

END OF ORDER

Order Submitted and Prepared By:

HELLER, DRAPER, & HORN, LLC

/s/ Douglas S. Draper

Douglas S. Draper, La. Bar No. 5073

ddraper@hellerdraper.com

Leslie A. Collins, La. Bar No. 14891

lcollins@hellerdraper.com

Greta M. Brouphy, La. Bar No. 26216

gbrouphy@hellerdraper.com

650 Poydras Street, Suite 2500

New Orleans, LA 70130

Telephone: (504) 299-3300

Fax: (504) 299-3399

**COUNSEL FOR THE GET GOOD TRUST
NONEXEMPT TRUST**