

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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 In re: : Chapter 11
 :
 Medley LLC, : Case No. 21-10526 (KBO)
 :
 Debtor. :
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 MEDLEY LLC LIQUIDATING TRUST, :
 :
 Plaintiff, : Adv. Pro. 23-50121-KBO
 :
 -against- :
 :
 EVERSHEDES SUTHERLAND (US) LLP, :
 :
 Defendant. :
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EVERSHEDES SUTHERLAND (US) LLP’S ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM TO COMPLAINT TO AVOID AND RECOVER TRANSFERS PURSUANT TO 11 U.S.C.§§ 544, 547, 548 AND 550

Defendant, Eversheds Sutherland (US) LLP (“Eversheds”), by and through its counsel, respectfully submits it answers, affirmative defenses and counterclaim to the Plaintiff’s *Complaint To Avoid And Recover Transfers Pursuant To 11 U.S.C.§§ 544, 547, 548 and 550* (the “Complaint”). In support of its answer, affirmative defenses and counterclaim, Eversheds alleges as follows:

NATURE OF THE CASE

1. The allegations of Paragraph 1 purport to state Plaintiff’s intent regarding the adversary proceeding, not factual allegations, and thus no response is required. To the extent a response is required, Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 1 of the Complaint, except denies that avoidable preferential transfers were made by the Debtor to Eversheds and respectfully refers the Court to



the Complaint for the relief the Debtor purports to seek, for the purported full contents thereof and for the causes of action purportedly alleged therein.

2. The allegations of Paragraph 2 purport to state Plaintiff's intent regarding the adversary proceeding, not factual allegations, and thus no response is required. To the extent a response is required, Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 2 of the Complaint, except denies that fraudulent transfers were made by the Debtor to Eversheds and respectfully refers the Court to the Complaint for the relief the Debtor purports to seek, for the purported full contents thereof and for the causes of action purportedly alleged therein.

JURISDICTION AND VENUE

3. The allegations set forth in Paragraph 3 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 3 of the Complaint.

4. The allegations set forth in Paragraph 4 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 4 of the Complaint.

5. The allegations set forth in Paragraph 5 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 5 of the Complaint.

6. The allegations set forth in Paragraph 6 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 6 of the Complaint and respectfully refers the Court

to the Complaint for the relief the Debtor seeks, for the purported contents thereof and for the causes of action purportedly alleged therein.

7. The allegations of Paragraph 7 purport to state Plaintiff's intent regarding the adversary proceeding, not factual allegations, and thus no response is required. Further, pursuant to Fed. R. Bankr. P. 7012(b) and Del. Bankr. L.R. 7012-1, Defendant does not consent to the entry of final orders or judgments by the Court in connection with the Complaint to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

PROCEDURAL BACKGROUND

8. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 8 of the Complaint, except, upon information and belief, admits that on March 7, 2021 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with this Court.

9. Upon information and belief, Eversheds admits the allegations set forth Paragraph 9 of the Complaint and respectfully refers the Court to the Confirmation Order referred to therein for the full contents thereof.

10. The allegations set forth in Paragraph 10 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations in Paragraph 10 of the Complaint and respectfully refers the Court to the Plan Documents referred to therein for the full contents thereof.

11. The allegations set forth in the first sentence of Paragraph 11 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations in the first sentence of Paragraph 11 of the Complaint. Regarding

the remainder of Paragraph 11 of the Complaint, Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations in the Paragraph and respectfully refers the Court to the Plan and the *Notice of Distribution Under Modified Third Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* referred to therein for the full contents thereof.

THE PARTIES

12. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 12 of the Complaint, except, upon information and belief, admits that the Debtor was a direct subsidiary of Medley Management, Inc. (“Medley Management”) and respectfully refers the Court to the Plan referred to therein for the full contents thereof.

13. The allegations set forth in Paragraph 13 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations in Paragraph 13 of the Complaint and respectfully refers the Court to the Confirmation Order and the Litigation Trust Agreement referred to therein for the full contents thereof.

14. Eversheds denies each and every allegation set forth in Paragraph 14 of the Complaint, except admits that at certain times Eversheds was a provider of legal services to the Debtor, Medley Management and/or other subsidiaries of the Debtor and certain of their respective officers and directors and that Eversheds’ has an office located at 999 Peachtree Street, NE, Suite 2300, Atlanta, Georgia 30309.

FACTUAL BACKGROUND

Defendant's Services, Retention and Related Disclosures

15. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 15 of the Complaint, except, upon information and belief, admits that the Securities and Exchange Commission's Division of Enforcement (the "SEC") informed Medley Management that it was conducting an informal inquiry and requested the production and preservation of certain documents and records and thereafter advised Medley Management that a formal order of private investigation had been issued converting the informal inquiry into a formal investigation (the "SEC Investigation"), admits that in connection with this SEC Investigation, Medley Management and the Debtor retained Defendant as counsel, and respectfully refers the Court to the letter, the Plan and the Supplemental Declaration referred to therein for the full contents thereof.

16. Eversheds admits the allegations set forth in Paragraph 16 of the Complaint and respectfully refers the Court to the Retention Application referred to therein for the full contents thereof.

17. The allegations set forth in Paragraph 17 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations in Paragraph 17 of the Complaint, except admits that in support of the Retention Application, the Debtor submitted a declaration of Mark D. Sherrill (the "Original Declaration") but denies Plaintiff's factual description and characterization of the Original Declaration and respectfully refers the Court to the Original Declaration referred to therein for the full contents thereof.

18. Regarding Paragraph 18 of the Complaint, Eversheds admits that approximately three weeks after the Retention Application and the Original Declaration were filed, Eversheds filed the Supplemental Declaration but denies Plaintiff's factual description and characterization of the Supplemental Declaration and respectfully refers the Court to the Supplemental Declaration referred to therein for the full contents thereof.

19. Regarding Paragraph 19 of the Complaint, Eversheds admits that after the Court's order granting the Retention Application was entered, Eversheds filed the Second Supplemental Declaration but denies Plaintiff's factual description and characterization of the Second Supplemental Declaration and respectfully refers the Court to the Second Supplemental Declaration referred to therein for the full contents thereof.

The Trust's Investigation

20. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 20 of the Complaint, except denies the purported conclusions reached by the Trustee.

21. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 21 of the Complaint, except admits that Berkshire was a D&O insurer of fees, costs and expenses incurred in connection with the SEC Investigation, and at the time the Funding Agreement was entered, Eversheds had issued invoices relating to the SEC Investigation in the amount of approximately \$3,482,105.83 for services rendered through October 20, 2020, and respectfully refers the Court to the purported Funding Agreement referred to therein for the full contents thereof.

22. Eversheds denies each and every allegation set forth in Paragraph 22 of the Complaint, except denies knowledge or information sufficient to form a belief as to whether on

January 14, 2021, Berkshire transferred the Advance to Medley Management, but admits that Berkshire made no direct payment to Eversheds on account of pre-petition legal fees and expenses and that, upon information and belief, the Debtor made certain payments to Eversheds between December 10, 2020 and March 2, 2021.

23. The allegations set forth in Paragraph 23 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations in Paragraph 23 of the Complaint, except Eversheds admits that it received payments totaling \$2,015,986.53 between December 10, 2020 and March 2, 2021.

24. Regarding Paragraph 24 of the Complaint, Eversheds admits that on January 23, 2023, Eversheds filed the Third Supplemental Declaration but denies Plaintiff's factual description and characterization of the Third Supplemental Declaration and respectfully refers the Court to the Third Supplemental Declaration referred to therein for the full contents thereof.

Transfers from the Debtor to Defendant During the Preference Period

25. Eversheds denies each and every allegation set forth in Paragraph 25 of the Complaint, particularly concerning any characterization of any "transfer" constituting a "preference," except admits Eversheds received payments totaling \$2,015,986.53 between December 10, 2020 and March 2, 2021 relating to the SEC Investigation.

26. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 26 of the Complaint.

27. Eversheds denies each and every allegation set forth in Paragraph 27 of the Complaint, except admits that it received payments for services relating to the SEC Investigation.

28. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 28 of the Complaint, except upon information and

belief, denies receiving \$2,015,986.53 in transfers of the Debtor's property during the 90-day period prior to the Debtor's bankruptcy.

29. The allegations set forth in Paragraph 29 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds admits that to the extent the Debtor is able to meet its initial burden under 11 U.S.C. § 547, which it cannot, the purported Transfers are subject in whole or part to defenses under 11 U.S.C. § 547(c).

30. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 30 of the Complaint regarding the Plaintiff's diligence. Regarding the remainder of Paragraph 30 of the Complaint, Eversheds denies each and every allegation set forth in Paragraph 30 of the Complaint, except admits that on or about January 13, 2023, the Trust, through counsel, sent Eversheds the purported Demand Letter and that Eversheds filed a Third Supplemental Declaration, and respectfully refers the Court to the purported Demand Letter referred to therein for the full contents thereof.

31. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 31 of the Complaint, except denies that the claims asserted in the Complaint are viable or are presented in good faith.

Transfers from the Debtor to Defendant Prior to the Preference Period

32. Eversheds denies the allegations set forth in Paragraph 32 of the Complaint.

33. Eversheds denies the allegations set forth in Paragraph 33 of the Complaint, except admits that Eversheds received payment of the purported Other Transfers in connection with fees and expenses for services rendered through December 1, 2020 which the Debtor was obligated to pay on account of such antecedent obligations under the terms of the Debtor's applicable limited liability company agreement.

34. Eversheds denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 34 of the Complaint.

Reservation of Rights

35. The allegations of Paragraph 35 purport to state Plaintiff's intent regarding the adversary proceeding, not factual allegations, and thus no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 35 of the Complaint.

CLAIMS FOR RELIEF

COUNT I

(Avoidance of Preference Period Transfers – 11 U.S.C. § 547)

36. Eversheds incorporates its responses to Paragraphs 1 through 36 of the Complaint as if fully set forth herein.

37. Upon information and belief, Eversheds denies each and every allegation set forth in Paragraph 37 of the Complaint, except admits that Eversheds received transfers totaling \$2,015,986.53 between December 10, 2020 and March 2, 2021.

38. Upon information and belief, Eversheds denies each and every allegation set forth in Paragraph 38 of the Complaint, except admits that the referenced Transfers were received directly from an account maintained by the Debtor.

39. Eversheds denies each and every allegation set forth in Paragraph 39 of the Complaint, except admits that it was a creditor of the Debtor at the time of the referenced Transfers.

40. The allegations set forth in Paragraph 40 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 40 of the Complaint.

41. The allegations set forth in Paragraph 41 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 41 of the Complaint.

42. The allegations set forth in Paragraph 42 of the Complaint constitute legal conclusions to which no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 42 of the Complaint, except admits that section 547(f) of the Bankruptcy Code provides for a presumption of insolvency which may be rebutted.

43. Regarding Paragraph 43 of the Complaint, Eversheds admits that it received certain payments from the Debtor during the 90 days predating the Debtor's bankruptcy but denies that each of the Transfers received by Eversheds were of the Debtor's property and denies that the Transfers constituted preferences.

44. Eversheds denies each and every allegation set forth in Paragraph 44 of the Complaint.

45. Eversheds denies each and every allegation set forth in Paragraph 45 of the Complaint.

COUNT II
(Avoidance of Fraudulent Conveyances – 11 U.S.C. § 548(a)(1)(B))

46. Eversheds incorporates its responses to paragraphs 1 through 45 of the Complaint as if fully set forth herein.

47. Eversheds denies each and every allegation set forth in Paragraph 47 of the Complaint.

48. Eversheds denies each and every allegation set forth in Paragraph 48 of the Complaint.

COUNT III

(Avoidance of Fraudulent Transfer Pursuant to State Law – 11 U.S.C. § 544 and Applicable State Law)

49. Eversheds incorporates its responses to paragraphs 1 through 48 of the Complaint as if fully set forth herein.

50. The allegations of Paragraph 50 purport to state Plaintiff's intent regarding the adversary proceeding, not factual allegations, and thus no response is required. To the extent a response is required, Eversheds denies the allegations set forth in Paragraph 50 of the Complaint.

51. Eversheds denies each and every allegation set forth in Paragraph 51 of the Complaint.

52. Eversheds denies each and every allegation set forth in Paragraph 52 of the Complaint.

COUNT IV

(Recovery of Avoided Transfers – 11 U.S.C. § 550)

53. Eversheds incorporates its responses to paragraphs 1 through 52 of the Complaint as if fully set forth herein.

54. Eversheds denies each and every allegation set forth in Paragraph 54 of the Complaint.

55. Eversheds denies each and every allegation set forth in Paragraph 55 of the Complaint.

56. Eversheds denies each and every allegation set forth in Paragraph 56 of the Complaint.

WHEREFORE, Eversheds demands that the Complaint be dismissed, with prejudice, and that Eversheds be awarded all costs of this action, together with all other and further relief which is just and proper under the circumstances. Eversheds further responds that the Debtor is not entitled to any relief.

AFFIRMATIVE DEFENSES AND COUNTERCLAIM

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

The Complaint, in whole or in part, fails to state a claim upon which relief may be granted. Among other things, and upon information and belief, the Debtor fails to allege facts sufficient to establish that each purported Transfer constituted a transfer of an interest of the Debtor in property or a transfer of a non-earmarked third-person's interest in property. Upon information and belief, some or all of the payments made to Eversheds by the Debtor constituted earmarked funds from third parties.

SECOND AFFIRMATIVE DEFENSE
(New Value)

Pursuant to 11 U.S.C. § 547(c)(4), the alleged transfers cannot be avoided because after such transfers Eversheds gave new value to or for the benefit of the Debtor, not secured by an otherwise unavoidable security interest and on account of which new value the Debtor did not make an otherwise unavoidable transfer to or for the benefit of Eversheds.

THIRD AFFIRMATIVE DEFENSE
(Ordinary Course)

Pursuant to 11 U.S.C. § 547(c)(2), the alleged transfers cannot be avoided in whole or part because they constituted payments of debts incurred by the Debtor in the ordinary course of business or financial affairs of the Debtor and Eversheds or was made according to ordinary business terms.

FOURTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

The claims in Counts II, III and IV are barred by the applicable statute of limitations in whole or part.

FIFTH AFFIRMATIVE DEFENSE AND COUNTERCLAIM
(Setoff and Recoupment)

To the extent that any liability is established, any recovery by the Debtor is subject to Eversheds' right of setoff and recoupment relating to its allowed administrative expense claim.

WHEREFORE, Eversheds demands that the Complaint be dismissed, with prejudice, and that Eversheds be awarded costs and attorneys' fees together with all other and further relief which is just and proper under the circumstances.

Dated: June 23, 2023
Wilmington, Delaware

CHIPMAN BROWN CICERO & COLE, LLP

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Counsel for Eversheds Sutherland (US) LLP

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

-----X	:	
In re:	:	Chapter 11
	:	
Medley LLC,	:	Case No. 21-10526 (KBO)
	:	
Debtor.	:	
-----X	:	
MEDLEY LLC LIQUIDATING TRUST,	:	
	:	
Plaintiff,	:	Adv. Pro. 23-50121-KBO
	:	
-against-	:	
	:	
EVERSHEDS SUTHERLAND (US) LLP,	:	
	:	
Defendant.	:	
-----X	:	

CERTIFICATE OF SERVICE

I, William E. Chipman, Jr., hereby certify that, on June 23, 2023, *Eversheds Sutherland (US) LLP’S Answer and Affirmative Defenses and Counterclaim to Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 544, 547, 548 and 550* (the “**Answer/Counterclaim**”) was filed *via* the Court’s CM/ECF electronic filing system (“**CM/ECF**”), which sent notice to all parties receiving notification through CM/ECF.

I further certify that, in addition, on the same day, I caused the Answer/Counterclaim to be served on the parties listed below *via* electronic mail.

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Dated: June 23, 2023
Wilmington, Delaware

CHIPMAN BROWN CICERO & COLE, LLP

/s/ William E. Chipman, Jr.
William E. Chipman, Jr. (No. 3818)