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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID M. KLAUDER, IN HIS CAPACITY AS THE CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF RAYTRANS HOLDINGS, INC., Cross-Plaintiff Below/ Appellant,	)	
and	)	No. 133, 2016
SPRING REAL ESTATE, LLC d/b/a SPRING CAPITAL GROUP, Plaintiff Below/Appellant,	)	On Appeal From the Court of Chancery of the State of Delaware, C.A. No. 7994-VCN
v.	)	
ECHO/RT HOLDINGS, LLC and ECHO GLOBAL LOGISTICS, INC., Defendants and Cross-Defendants Below/ Appellees.	)	

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

REPLY ARGUMENT

I. The Echo Parties' Arguments Depend on the Mischaracterizations of Facts and Allegations that are Set Forth in their Brief

This is an appeal from (1) the Chancery Court's dismissal of the Trustee's Cross-claims, in the 2016 Opinion, through the granting of the Echo parties' Rule 12(b)(6) motion to dismiss; and (2) the Chancery Court's dismissal of Spring Capital's amended complaint on the ground that, by the time it was issued, the decision was void as a matter of law, due to the effect of the automatic stay of 11 U.S.C. §362(a).[1] For purposes of the motion to dismiss, the Chancery Court was required to accept as valid all properly pleaded allegations.[2] The premature and pre-discovery dismissal of the Trustee's Cross-claims entailed leaps of judgment that were not proper for a dismissal at the pleading stage.

To shore up the dismissal, the Echo parties have, in Appellees' Answering Brief (the "Echo Brief"), made a series of untrue and unsupported assertions of what is contained in the Cross-claims, the 2016 Opinion, and the record on appeal. For its review of this case on appeal, this Court needs to be alerted to them.

A. The Role of Echo under the APA. The Echo parties seek to isolate Echo with respect to the sale of the RayTrans business, describing it "solely as a

[1] The substance of the Chancery Court's 2013 Opinion has not been directly challenged in this appeal because the 2013 Opinion is void as a matter of law, and Spring Capital may not pursue a fraudulent transfer action as a creditor of RayTrans Holdings while the Trustee is pursuing the same claims on behalf of all the debtor's creditors, including Spring Capital.

[2] Capitalized terms defined in the Opening Brief mean the same here unless otherwise stated.

guarantor of payments." Echo Brief at 2.[3] But Echo's connection to the transaction was not just as some unrelated guarantor. They do not acknowledge that Echo R/T is wholly-owned by Echo. *See* Echo Brief at 9. They do not acknowledge that Echo's press release immediately following the closing stated: "effective immediately, Raytrans Distribution Services will begin doing business as Echo Global Logistics, Inc." [A181], or that in Echo's public filings with the S.E.C., Echo described *itself* as the acquirer of RayTrans. *See* A1063 (defining "Company"); A1067 ("the Company acquired RayTrans").[4]

Nor is it true, as the Echo parties assert, that Echo's guarantee in the APA was solely of "the payment obligation of Echo R/T." Echo Brief at 10. In fact, Echo's guaranty was expressly "a guarantee of payment and performance and not of collection only." A783 (emphasis added). Echo's commitment was obviously critical, because Echo was a substantial company that was about to become publicly-owned, while Echo R/T was just a newly-created limited liability company – essentially a shell into which the RayTrans assets would be transferred.

B. The Role of RayTrans Holdings under the APA. The Echo parties also mischaracterize the role of RayTrans Holdings. RayTrans Holdings was not *just* a signatory "as the sole shareholder of RayTrans." Echo Brief at 2. It was a

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[3] Appellants referred to RayTrans Distribution Services, Inc. as "RT Distribution" in the Opening Brief. But since the Echo parties call it "RayTrans," Appellants will do the same here.

[4] Both the Opening Brief and the Echo Brief note that the Court may take judicial notice of matters not subject to reasonable dispute. The Echo Brief does not repudiate its S.E.C. filings.

participant, with rights, obligations and representations throughout the APA [A142-A176]. It was responsible, along with RayTrans, in the event of non-performance of any of the accounts receivable transferred in the sale. A776.[5]

C. The Timing of RayTrans's Dissolution. It is a troublesome fact for the Echo parties that RayTrans was left to dissolve so soon after a transaction that appeared to allow it to receive, over the ensuing three years, double what was paid out at closing. They try to stretch the timeframe, asserting that "[a]lmost one year after the closing of the APA, James Ray allowed RayTrans to dissolve under Illinois law." Echo Brief at 9.

In fact, James Ray *allowed* the dissolution to go forward much earlier. *See* Opening Brief at 10, 18. The Illinois statute provides a notice period that runs a minimum of 120 days before an administrative dissolution of a company can be put into effect. 805 ILCS § 5/12.40. Therefore, it could not have been more than about seven months after closing that James Ray would have received an official notice, requiring some action to keep RayTrans from being dissolved. RayTrans had no ongoing business, but performance under the APA was just under way. Yet the date its dissolution went into effect, May 14, 2010 [*see* Opening Brief at 10 n.11], preceded the end of even the first one-year earn-out period.

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[5] The Echo parties also say James A. Ray was a signatory just "as the sole stockholder of Holdings" [Echo Brief at 2, 10]; but that was not so either. He was individually held to a set of representations and warranties [A142-A156]; the transaction required that he enter a "consulting agreement" with the Purchaser [A141]; and he could enforce Echo's guaranty [A783].

D. The Earn-Out Provisions of the APA. The Echo parties mischaracterize the APA's earn-out provisions. They assert that it is "undisputed" that the $6,500,000 of the purchase price not paid at closing was to be paid "if the purchased accounts" achieved certain revenue milestones. Echo Brief at 10, *citing* A741. Far from undisputed, that statement is not true. The APA provisions on payment of the earn-out portion of the purchase price were not set with regard to a set of purchased *accounts*; they were set with regard to the purchased RayTrans *Business*. The APA uses the term "Business," in reference to the overall business purchased from RayTrans, repeatedly, in the sections pertaining to the earn-out portion of the purchase price, including §1.6(a) [A741], §1.6(b) [A742], §1.7(a), in the definition of "EBITDA" [A745], and §1.7(g) [A748].

E. The Facts and Allegations Concerning the Post-Closing Earnings Performance of the RayTrans Business. Preliminarily, it should be noted that the Echo Brief frequently refers to RayTrans Holdings interchangeably with the Trustee. *See, e.g.*, Echo Brief at 4, ¶1 (arguing that "Holdings' assertion … was correctly rejected by the trial court"; and *id.* at 4, ¶2 (arguing that "Holdings failed to plead ….", in reference to the Cross-claims).

With that in mind, the Echo parties are not truthful when they assert that "the parties to the APA, … [including] Holdings itself, have conceded, by virtue of the fact that Echo is listed as a creditor on Holdings' schedules in the amount of

$950,000, that RayTrans failed to achieve the minimum EBITDA results under the APA over the three year period following the closing." Echo Brief at 11 (citing A389).[6] The Trustee has made no such concession, express or implied.

First, there is of course no allegation in the Cross-claims conceding that the EBITDA levels reached in the three years following the closing were insufficient to warrant payment of more of the purchase price. *See* A654-A667.

Second, the $950,000 unsecured claim scheduled for Echo (*not* Echo R/T) – cited by the Echo parties – is contained in the RayTrans Holdings bankruptcy Schedules, prepared and signed by the self-interested James A. Ray, and filed along with the Chapter 7 bankruptcy petition. *See* A393. In Chapter 7 cases, although a trustee is automatically appointed, it is the debtor that is responsible for filing the schedules of claims. See Fed. R.Bankr. P. 1007(b), 1009(a). A Chapter 7 trustee is not bound blindly to the schedules filed by a chapter 7 debtor; if there are assets to be distributed to creditors, a trustee should examine and investigate the claims scheduled by the debtor or filed by creditors, and object to any that are improper. *See* 11 U.S.C. § 704(a)(5); Fed. R. Bankr. P. 3007.[7] Here, the claim schedules are subject to the Trustee's review, once assets are recovered into the estate. A scheduled claim for Echo cannot be viewed as a settled matter or a

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[6] Without any support in the Cross-claims or otherwise in the record, the Echo parties assert that the basis for Holdings' pre-petition payment of $50,000 to Echo was the same as the basis for the scheduled claim of $950,000. Echo Brief at 11, n.2.

[7] The Schedules also did not mention RayTrans or the APA. A381-A384.

"concession" by the Trustee.

Third, James A. Ray's description of the Echo claim he scheduled [A389] neither states nor implies that the RayTrans business failed to achieve the EBITDA levels set forth in the APA in the three years following closing. The claim is simply described as: "Refund of purchase price of business assets." The APA is not mentioned. Even if one *assumes* that the Echo claim that James A. Ray scheduled was supported by fact and based on the APA, that assumption does not lead to *any* conclusion about the earnings of the Business, post-closing. The claim could as well have been based on issues with the over $4 million in trade accounts receivable that were transferred to the Purchaser. *See* A788. Section 9.3 of the APA enabled the Purchaser to tender back to the Seller and Holdings those transferred accounts receivable that could not be collected within 180 days, and be reimbursed at full face value for them. A776. The non-performance of some of the transferred accounts receivable would imply nothing about the three-year level of EBITDA of the ongoing RayTrans business.

Fourth, even if the claim scheduled by James A. Ray for Echo were based on a clause in the APA that could support a refund based on post-closing earnings, the Echo parties inaccurately describe that clause. Contrary to their assertion, there is *no* provision in the APA requiring a cash refund to Echo "if the EBITDA numbers are not achieved over the three year period." Echo Brief at 11, *citing* A745-748.

Cf. A769 (potential refund to Echo R/T based on first-year results only).

Finally, the Echo parties are silent about the description of *Echo's* acquisition of RayTrans, as set forth in its Form 10-K for the year ending 12-31-2010, filed with the S.E.C. on March 11, 2011. *See* A1017; A1067-1070. The Form 10-K states that the "amounts of revenue and net income of [RayTrans] included in the Company's consolidated income statement from the acquisition date to the twelve months ended December 31, 2009 was $14,400,066." A1070. That suggests the minimum earnings level *was* topped in the first year.

In sum, the Echo parties' assertions that the earnings "benchmarks were not met" [Echo Brief at 28] and that the scheduling of a claim for Echo is "tantamount to an admission that RayTrans is owed no additional sums of money under the APA" [Echo Brief at 11] are baseless and untrue.[8]

F. Powersource's Claim, as a Creditor of RayTrans and RayTrans Holdings, and the Chancery Court's Ruling With Respect Thereto. The Echo parties mischaracterize the timing of the *claim* of creditor Powersource against RayTrans and RayTrans Holdings, within the meaning of the term "claim" in the UFTA.[9] They do so by focusing on the *judgment* it obtained in 2011, and

[8] As noted in the Opening Brief, the Trustee filed an amended complaint against the Echo parties in Bankruptcy Court, in Adv.Pro.No. 15-50273-CSS on May 2, 2016. It includes *inter alia*, a claim for an accounting, because the Echo parties failed to honor their obligation to provide regular financial reports of the business's performance over the three year earn-out period.

[9] Under the UFTA, "claim" is defined as: "a right to payment, whether or not the right is

subsequent garnishment proceedings, rather than upon the *claim* itself. *See* Echo Brief at 12. As alleged in the Cross-claims (¶¶ 22, 24 and 25), Powersource's claim against RayTrans and RayTrans Holding arose *prior to* the June 2, 2009 transaction: while its lawsuit was pending, the assets of Raytrans Trucking and Unitrans were transferred to RayTrans, and then to the Echo parties. A659.

The Echo parties also state that, in the 2016 Opinion: "The Court of Chancery correctly determined that the Powersource lawsuit and subsequent judgment has no bearing on the [Trustee's] fraudulent transfer claims." Echo Brief at 13. Nowhere in the 2016 Opinion can such a determination be located.

G. The Allegations Concerning the Insolvency of RayTrans following the APA Transaction. Notwithstanding the very limited set of financial records furnished by James A. Ray on behalf of RayTrans Holdings to the Trustee, the Cross-claims do allege the dire and direct financial impact of the transaction, in ¶ 27 together with ¶¶ 29-30, 36-37, 40, 43-44, 49-50, 53. *See* A659-A666.[10] These averments more than adequately allege insolvency within its meaning in the UFTA, for pleading purposes. *See* 6 Del. C. §1302; 740 ILCS §160/3. The Cross-

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reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 6 Del. C. §1301(3); 740 ILCS §160/2(c).

Furthermore, under the UFTA, it is not necessary that the creditor claims existed at the time of the transfer; fraudulent transfer actions can be brought by or on behalf of future creditors. 6 Del. C. §1304; 740 ILCS §160/5.

[10] Para. 27 alleges in part that, "as a result of the asset transfer to Purchaser, ... Raytrans Distribution dissolved; Holdings and James A. Ray filed for chapter 7 liquidation bankruptcy; ... [and] Holdings [was left] unable to fulfill its obligations to the Raytrans ... creditors." A659.

claims (at ¶¶40 and 53) allege that the assets were transferred for less than reasonably equivalent value, leaving debts to creditors in excess of $3.1 million.

This does *not* mean that the total of the RayTrans and RayTrans Holdings debts at the time was $3.1 million, such that the $6 million in cash received at closing was freely available, and could simply have been applied to those creditors, as the Echo parties argue. Echo Brief at 27, n.8, 30-31, & 33. To the contrary, there were lenders to be paid off from the proceeds of the APA transaction. One of the requirements for closing in the APA was "a pay-off letter from each lender of the Company with respect to any Indebtedness," certifying that the lenders would be paid off and fully satisfied through the transaction. A750.

II. The Echo Parties' Responses to the Appellants' Arguments on the Trustee's Standing are Without Merit

A. The Opening Brief's Arguments on Standing Are Properly Presented

The Echo parties' contention that Appellants have "abandoned" their *prior* argument for standing [Echo Brief at 125] is meritless. Appellants have consistently asserted that the Trustee's standing arises from RayTrans Holdings being the 100% stockholder of RayTrans, combined with the dissolution of RayTrans, the effects of which made RayTrans Holdings (and its Trustee) the real party in interest.[11] That position stands. Indeed, the Trustee's standing here should be fairly obvious – what the Echo parties are really challenging is not standing but the merits of the Trustee's claim.

Appellants' argument in section I of the Opening Brief was *not* waived in the Chancery Court. *See* Echo Brief at 14. The Echo parties acknowledge that the issue was at a minimum raised at oral argument. *Id.* at 15. Under Supreme Court Rule 8, the requirement is that the "question" needs to have been "fairly presented"

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[11] The arguments presented in the Trustee's brief pertaining to standing were not limited to the text at A865-A866, referenced by the Echo parties. The Trustee maintained that the Trustee, through the powers set forth in the Bankruptcy Code, has exclusive standing, on behalf of all creditors of Raytrans Holdings, to assert the fraudulent conveyance claims. A852; A859-A862. The Trustee emphasized that the Trustee's posture (on behalf of RayTrans Holdings) stemmed from the dissolution of RayTrans promptly after the closing of the APA, while $6,500,000 of the stated expected consideration remained unpaid. A857, A859.

The Cross-claims also clearly assert that "Holdings is a creditor" of RayTrans. A660. This was amplified in the Trustee's brief in Chancery Court, where it was noted that Raytrans Trucking and Unitrans each owed RayTrans Holdings over $1 million; and since the assets of both those entities were transferred to RayTrans, the debt obligation would have transferred as well. *See* A854-A855. In this respect, the Trustee has standing as a direct creditor – a fact the Chancery Court disregarded.

to the trial court, except that "when the interests of justice so require," the Court may consider "any question not so presented." Del. Supr. Ct. R. 8. There is no requirement that all the sources of law supporting a party's position that are presented to the Supreme Court need also have presented below. In this case, while new sources of law are cited in the Opening Brief, the point was made below. Presenting an issue during oral argument has been deemed adequate for purposes of Rule 8, by this Court. *North River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 383 (Del. 2014), *as revised* (Nov. 10, 2014). The Court has also found it adequate when an issue was "implicitly raised below." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002).

If the Court views the matter otherwise, it should consider Appellants' arguments in the interests of justice. The instant appeal is distinguishable from the unpublished, two-paragraph disposition cited by the Echo parties, in *Roofers, Inc. v. Delaware Department of Labor*, 2014 WL 7010733 (Del. Nov. 24, 2014). There, this Court's abbreviated ruling emphasized that the appeal involved "an extremely unusual request for attorneys' fees," after the parties had resolved their substantive dispute, by a litigant "who should have anticipated a sovereign immunity defense." *Id.* at *1. Here, the question on appeal is not a tangential matter like the attorneys' fees issue in *Roofers*. Rather, it concerns the central and significant matter of the ability of a bankruptcy trustee to pursue fraudulent

transfer actions for the benefit of the estate's creditors, a situation that arises routinely. The issue is also outcome-determinative, as this is an appeal from the dismissal of a complaint at the pleading stage. *Cf. Sandt v. Delaware Solid Waste Auth.*, 640 A.2d 1030, 1034 (Del. 1994) (interests of justice required the Court to address the issue where it was "outcome-determinative and may have significant implications for future cases"); *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 679 (Del. 2013) (same).

B. The Echo Parties' Argument that a Corporate Successor by Dissolution Cannot Pursue Fraudulent Transfer Claims Is Meritless

To begin with, the Echo parties disregard the standing that is derived from RayTrans Holdings *itself* being a creditor of RayTrans. *See* p. 10, n.11, *supra.*

The Echo parties challenge the standing based on RayTrans Holding having succeeded to the assets of the dissolved RayTrans, arguing that, since the assets that devolved to RayTrans Holding did not include what had been conveyed to Echo R/T, no action can be brought. Echo Brief at 17. In essence, the Echo parties' argument is that a corporate parent that succeeds to a subsidiary's assets through dissolution must lack standing to pursue any fraudulent transfer action of its dissolved subsidiary, because (a) the contract rights, causes of action and *choses* in action that pass to the successor don't count, and (b) unless the successor *itself* actually effected the transfer of assets, it is out of luck. *See* Echo Brief at 16-19. They point to some of language in the Seventh Circuit *Matos* case, cited by in the

Opening Brief, but *Matos* does not support their position, and the Echo parties cite no case law of their own to support it.[12]

Their view was rejected by a Florida bankruptcy court in a 2009 opinion applying Texas law. *In re Seminole Walls & Ceilings Corp.*, 2009 WL 3010590 (Bankr. M.D. Fla. Aug. 27, 2009), *op. amended on reconsid.*, 2010 WL 148239 (Bankr. M.D. Fla. Jan. 7, 2010). There, the defendants had cited court decisions holding that a debtor's ownership of stock in a corporation does not mean that the corporation's assets are property of the debtor's estate. The court deemed those cases to be "factually distinguishable in that they speak to the rights of shareholders to assets of *existing* corporations, not dissolved corporations." 2009 WL 3010590, at *2.[13] "The argument and case law is irrelevant in this case and on the issue of a corporation's standing when a shareholder receives all legal and equitable title to unliquidated assets held by a dissolved corporation." *Id.*

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[12] Although the Echo parties also disagree that RayTrans Holdings, having succeeded to the contract rights of RayTrans under the APA, is also liable to RayTrans's creditors [Echo Brief at 19], they again cite no source of law, and their view is contradicted by *Matos*.

[13] In the 2009 opinion, the bankruptcy noted that the trustee was alleging veil piercing and substantive consolidation. *Seminole Walls & Ceilings*, 2009 WL 3010590, at *2. The trustee of Seminole Walls, which was the 100% shareholder of PITA, the dissolved corporation, moved for reconsideration in part because "the trustee [did] not rely exclusively on claims for piercing the corporate veil and for substantive consolidation to obtain PITA's assets, but, also directly [sought] ownership of those assets as the alleged shareholder of PITA." 2010 WL 148239 at *1. In the 2010 opinion, the bankruptcy court granted reconsideration and clarified that the court "did not intend to alter the trustee's pleadings or in any way limit her pled causes of action." 2010 WL 148239 at *2.

III. The Echo Parties' Arguments Aimed at Defeating the Effect of the Automatic Stay on the 2013 Are Without Merit

The Echo parties' half-hearted effort to avert the void status of the Chancery Court's 2013 Opinion, dismissing Spring Capital's complaint for the causes of action taken up by the Trustee in the Cross-claims, is ineffectual.

First, concerning *Arbogast*, the key Third Circuit case cited in the Opening Brief at 21, which lays out the effect of the automatic stay on claims such as were asserted by Spring Capital, the Echo parties have no comment. *See* Echo Brief at 20-22. Second, they counter-factually assert that the Trustee "never raised these arguments in the lower court" [Echo Brief at 22] – notwithstanding that they are contained in the Trustee's brief in Chancery Court [A864-A865], and were addressed in the 2016 Opinion [A981-A982]. Third, they contend that the Trustee did not raise this argument soon enough [Echo Brief at 21]. Yet they make no *express* argument that the time lag effected a waiver, nor cite any law that this is waivable, because the law is contrary to their position. The case law holds that a court opinion entered in violation of the automatic stay is "void, as a matter of law." *In re Solar Trust of Am., LLC*, 2015 WL 1011548, at *4 (Bankr. D. Del. Jan. 12, 2015). *See also In re Iezzi*, 504 B.R. 777, 799 (Bankr. E.D. Pa. 2014) (held, a Pennsylvania Commonwealth Court decision was void, "as having been entered in technical violation of the automatic stay").

IV. The Echo Parties' Arguments Fail to Bolster the Chancery Court's Erroneous Dismissal of the Trustee's Fraudulent Transfer Claims

A. Appellants Did Not Waive Application of Illinois Law to Count II

There are two counts in the Cross-claims: the first is a fraudulent transfer claim under Delaware law; the second is a fraudulent transfer claim under Illinois law. The notion that the Appellants "conceded" that Delaware law applies to count II is, on its face, absurd. That said, in the lower court, the Appellants did not specifically argue that case law under Illinois's UFTA and case law under Delaware's UFTA are inconsistent on any specific legal propositions presented in the Echo parties' motion to dismiss. Nor have they identified specific divergences here. But that should not be construed as a "concession" that only Delaware law applies to both counts of the Cross-claims.

B. To Defend the Dismissal of the Constructive Fraudulent Transfer Claims, the Echo Parties Distort the Cross-claims and the Record

The Echo parties acknowledge, in passing, the "reasonable conceivability" standard applied to a pleading in considering a Rule 12(b)(6) motion. Echo Brief at 24. Still, they argue that the Cross-claims "must *establish* facts" supporting the claims. *Id.* at 27 (emphasis added). And they challenge some of the averments in the Cross-claims as lacking "credible support" [*id.*] – though there is no call for assessing credibility at the pleading stage.

1. The allegations that the transfer was for less than reasonably equivalent value. The Echo parties are dismissive of the allegations reflecting

that, a little more than a year before the APA was negotiated,[14] RayTrans's assets were valued at a figure close to double the $6,050,000 actually paid for the RayTrans business. *Id.* at 28. First, they argue that the figure is "irrelevant" due to the temporal distance between the date of the valuation and the date of the closing of the APA, which they exaggerate as being "almost two years." *Id.* Even the Chancery Court did not regard the valuation allegations as irrelevant. [15] Second, they argue that the "actual purchase price" in the APA was "in excess of $12 million," subject to "certain performance benchmarks." *Id.*

With the value of RayTrans at the time of the APA pinned to a figure of roughly $12.5 million, allegations of an actual payment of *half* this amount (*i.e.*, the $6,050,000) should suffice for alleging less than reasonably equivalent value.[16] The Echo parties do not attempt to defend the Chancery Court's apparent conclusion that $6 million was simply close enough to $12 million. A990.

To challenge the apparent sufficiency of these allegations for pleading purposes, the Echo parties turn to the matter of the earnings benchmarks, to defend the Chancery Court's overreaching conclusion that the transaction was made for

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[14] The valuation in the Cross-claims was "as of December 31, 2007." A657-A658. The APA was signed one year and five months later, on June 2, 2009. Necessarily, the APA was negotiated earlier than the closing date.

[15] The Chancery Court considered the valuation allegations, but discounted their weight. A990.

[16] Indeed, since the exchange of the RayTrans business for that cash payment included over $4,040,000 of current, trade accounts receivable [A788], guaranteed to be collectable in full [A776], the amount paid for the RayTrans business, exclusive of those receivables, was only slightly more than $2 million.

reasonably equivalent value. A990. To this end, the Echo parties spuriously assert that it "is undisputed that these benchmarks were not met." Echo Brief at 28. That statement is not true. To the contrary, the Cross-claims' averments, together with such external matter as to which judicial notice can be taken here, do not support that contention. This is discussed at length in Part I.E., pp. 4-7, *supra.*

2. The allegations of insolvency. The Cross-claims allege that, at the time of the APA, RayTrans had unsecured liabilities of at least $1.7 million in excess of its ability to pay its debt; and that it allowed itself to be dissolved shortly after the transaction, without waiting for the earn-out portion of the purchase price. *See* A659. *See also* A750 (re lender pay-off letters at closing); Opening Brief at 9-10 (re the dissolution). That these are sufficient allegations that insolvency existed at the time of the APA transaction, or resulted from it, should be self-evident.

The Echo parties attack this conclusion by engendering confusion between the purchase price paid at closing and a balance sheet. Echo Brief at 30-31, 33. That is, they disregard the existence of *other* debts of RayTrans that had to be satisfied from the cash paid *at closing* in 2009, and pretend that $6,050,000 was fully available to satisfy the then-existing $1.7 million debt to Powersource and the other debts on the Schedules filed in 2013 for RayTrans *Holdings* (collectively, about $3.1 million). Surprisingly, the Chancery Court was swayed by this sleight

of hand, in treating the issue as simply one of how the proceeds were allocated. A990. As best as can be surmised, the court misunderstood the allegations.

C. The Echo Parties' Arguments Are Insufficient to Defend the Chancery Court's Dismissal of the Intentional Fraudulent Transfer Claims

It is well established that claims based on an intent to hinder, delay or defraud are typically alleged and proven through circumstantial facts. One would not expect to see an averment, for example, that James A. Ray was overheard saying "I'm going to stiff those creditors, yes I will." Appellants submit that the group of circumstantial facts set forth by the Trustee in the Cross-claims, before the opportunity for discovery, suffice at least at the pleading stage.

In two sentences in the 2016 Opinion, the Chancery Court articulates its reasons for finding the averments of intent inadequate. A991-A992. Both sentences rely on the court's restated conclusion that the transfer was for "reasonably equivalent value." *Id.* The Echo parties seek to defend the court's reasoning, by pointing out that the two elements of good faith and reasonably equivalent value are a defense to a claim for intentional fraudulent transfer. Echo Brief at 31 and n.10. *See* 6 Del.C. §1308(a); 740 ILCS § 160/9(a). But this provision of UFTA provides for a *defense*, which a defendant may assert in its answer and prove after discovery. *See, e.g., Corporate Comm'n of Mille Lacs Band of Ojibwe Indians v. Money Centers of Am., Inc.*, 2014 WL 625682, at *9 (D. Minn. Feb. 18, 2014) (applying Delaware law). This is an affirmative defense,

which the transferee bears the burden of establishing. *Armstrong v. Collins*, 2010 WL 1141158, at *19 (S.D.N.Y. Mar. 24, 2010) (citing Del., Cal., and N.J. law). Otherwise, the value of the consideration is simply not a factor in a claim based on a showing of fraudulent intent. *Scholes v. Lehmann*, 56 F.3d 750, 756-57 (7th Cir. 1995); *see In re Spatz*, 222 B.R. 157, 169 (N.D. Ill. 1998).

Next, the Echo parties introduce the argument (without case law support) that, because RayTrans Holdings was a party to the APA and was the sole shareholder of RayTrans, it cannot now assert fraudulent transfer claims. Echo Brief at 32. But the Echo parties errantly disregard the critical fact that it is a bankruptcy trustee, and not RayTrans Holdings, that is pursuing these claims.

In actions where a bankruptcy trustee, as successor to the debtor, is representing the interests of innocent creditors by pursuing its avoidance powers under 11 U.S.C. § 544(b), the trustee will not be held subject to the defense, otherwise applicable to the debtor, of having been a participant in the transaction. *See, e.g, In re David Cutler Indus., Ltd.*, 502 B.R. 58, 71-72 (Bankr. E.D. Pa. 2013); *In re Fordu,* 209 B.R. 854, 863 (6th Cir. BAP 1997).[17]

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[17] As the Bankruptcy Appellate Panel for the Sixth Circuit explained:

> [In exercising the Bankruptcy Code's avoidance powers, a] trustee not only stands in the shoes of a debtor, but is accorded this footwear unsoiled by the debtor's previous steps. In addition, a trustee can further choose the footwear of any creditor holding an allowable unsecured claim under applicable law. .... Additionally, courts have consistently recognized that the Trustee may pursue fraudulent ... transfers despite the fact that the debtor was a knowing and willing participant to such conveyances. The distinction recognized repeatedly by the

V. Echo Can Indeed Be Liable on the Fraudulent Transfer Claims

The Echo parties speciously argue that Echo (the parent company) cannot be liable to the Trustee on the Cross-claims because: (a) even though the Chancery Court did ***not*** rule that Echo cannot be liable to the Trustee on its claims, in the 2016 Opinion (as it did in the 2013 Opinion as to Spring Capital), (b) Appellants' Opening Brief should have argued *as though* the court had ruled on it as to the Trustee's Cross-claims. *See* Echo Brief at 34-35. For this convoluted argument, the Echo parties cite Rule 8. *Id.*

But for reasons explained *supra*, the 2013 Opinion is void due to the operation of the automatic stay. The Chancery Court did not rule that Echo could not be liable to the Trustee in the 2016 Opinion. Echo did not cross-appeal on that issue. It is not properly presented here now. Moreover, for reasons indicated in Part I.A., *supra*, Echo is most certainly an appropriate defendant.

For the above reasons and those set forth in the Opening Brief, Appellants respectfully urges this Court to reverse the 2016 Opinion, declare void the 2013 Opinion, and allow the Trustee's fraudulent transfer claims to proceed.

> courts is that ... privity does not bar causes of action brought by the trustee as a representative of creditors.

In re Fordu, 209 B.R. at 863.

Respectfully submitted,

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