

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 OPENING BRIEF

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Dated: May 2, 2016

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## NATURE OF PROCEEDINGS

This appeal arises from the dismissal of a fraudulent transfer action asserted alternatively under Delaware law and Illinois law.

The action was commenced in the Court of Chancery of the State of Delaware (the “Chancery Court”) by plaintiff Spring Real Estate, LLC d/b/a Spring Capital Group (“Spring Capital”), a judgment creditor of RayTrans Distribution Inc. Spring Capital’s amended complaint asserted fraudulent transfer claims against Echo/RT Holdings, LLC (“Echo/RT”) and its parent, Echo Global Logistics, Inc. (“Echo”), and, nominally, RayTrans Distribution, Inc. (“RT Distribution”), its parent, RayTrans Holdings, Inc. (“RayTrans Holdings”), and their principal, James A. Ray.

Echo/RT and Echo (together, the “Echo parties”) filed an answer and moved to dismiss the amended complaint under Rule 12(b)(6). A43, A208.

Soon after, RayTrans Holdings filed a voluntary chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). David M. Klauder (the “Trustee”) was elected, and thereupon appointed, to serve as chapter 7 trustee for RayTrans Holdings. *See* A551-552; Del. Bankr. Ct. Docket, Case no. 13-11084-CSS.

The Trustee filed an answer to Spring Capital’s complaint, together with cross-claims against the Echo parties (the “Cross-claims”), alleging fraudulent

transfer under Delaware and Illinois law, based on his authority under section 544(b) of the Bankruptcy Code.

The Echo parties moved to dismiss the Cross-claims under Rule 12(b)(6). A482.

On December 31, 2013, the Chancery Court rendered a letter opinion granting the Echo parties' motion to dismiss Spring Capital's amended complaint. A528 *et seq.*

On January 24, 2014, the Chancery Court issued a ruling denying Spring Capital's motion for reconsideration with respect to certain aspects of the December 31, 2013 Opinion. A604 *et seq.*

On February 18, 2016, the Chancery Court issued an Opinion and Order, granting the Echo parties' motion to dismiss the Trustee's Cross-claims. A976 *et seq.*

This is an appeal by the Trustee and Spring Capital (collectively, "Appellants") from the December 31, 2013 Opinion, the January 24, 2014 Ruling, the February 18, 2016 Opinion, and the related orders of dismissal.



## SUMMARY OF ARGUMENT

I. The Chancery Court erred as a matter of law in its dismissal of the Cross-claims based on the Trustee's alleged lack of standing. Under applicable Illinois law, the assets of the dissolved RT Distribution devolved to RayTrans Holdings, as a result of its administrative dissolution. The Trustee adequately pled that RayTrans Holdings is successor to RT Distribution in owning its rights under the APA, including the right to collect earn-out payments from the Echo parties.

II. The *RayTrans Holdings* bankruptcy rendered void the Chancery Court's 2013 Opinion dismissing Spring Capital's fraudulent transfer claims, under clear, applicable federal precedent. It is not waivable. The Chancery Court erred in failing to acknowledge that its earlier opinion as to the Spring Capital complaint was void. The ruling on Spring Capital's motion for reconsideration should be reversed and vacated as it pertained to the void 2013 Opinion.

III. The Chancery Court erred in ruling that the Cross-claims failed to state a claim for constructive or actual fraudulent transfer. Two preliminary matters are the sources of applicable law and the standard for considering the Defendants' Rule 12(b)(6) motion. The Chancery Court looked for the most part just to sources of Delaware law; but Appellants have not conceded that Delaware and Illinois case law applying the UFTA are the same. The Chancery Court correctly identified the applicable standard for a Rule 12(b)(6) motion; but the *de*

*facto* standard that the court applied was overly demanding, for purposes of reviewing a pleading.

Substantially different standards apply to constructive fraudulent transfer and actual fraudulent transfer claims. The Chancery Court's dismissal of both the Trustee's actual fraudulent transfer and constructive fraudulent transfer claim turned on the court's conclusion that "reasonably equivalent value" was exchanged. The Chancery Court erred in deciding that the challenged transfer was made for reasonably equivalent value – *i.e.*, that it was not reasonably conceivable that the challenged transaction could ultimately be found to have entailed an exchange for less than reasonably equivalent value. This was essentially an improper fact-finding by the court, at the pleading stage of the case, and contrary to case law establishing that "reasonably equivalent value" is generally not susceptible to being resolved in a Rule 12(b)(6) motion.

The Chancery Court also erred in rejecting the trustee's claim of actual fraudulent transfer. That ruling was based materially on its finding of reasonably equivalent value – yet reasonably equivalent value is not a factor in a claim for actual fraudulent transfer. Other factors supporting a claim of actual fraudulent transfer were alleged. While the claim could ultimately be determined at the summary judgment stage, the decision to dismiss this claim at the pleading stage was premature.

## STATEMENT OF FACTS

### *A. James A. Ray and His Trucking Companies*

James A. Ray, a young entrepreneur in the trucking and transportation industry, helped form, and served as president and principal of, RayTrans Distribution Services, Inc., an Illinois corporation (“RT Distribution”). RT Distribution was founded in 2000. A181. It provided brokerage services in the commercial trucking market. A181; A977.

James A. Ray participated in forming, and served as principal of, at least three other related entities over the next several years.<sup>1</sup> A656-58. There was RayTrans Trucking, LLC, an Illinois limited liability company, formed in March 2004; and Universal Trans, LLC, an Illinois limited liability company, formed in October 2005. Then, on January 1, 2008, James A. Ray formed RayTrans Holdings, Inc., a Delaware limited liability company. A658. Among them, they developed some proprietary software for use in the logistics of trucking. A656.

As the owner of RT Distribution, RayTrans Trucking, and Universal Trans, James A. Ray gave his stock or membership interests in them to RayTrans Holdings, as he presumably perceived a benefit in controlling the first three entities through a Delaware holding company he also owned.

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<sup>1</sup> This information, to the extent not set forth in a pleading filed below, is publicly available at <http://www.ilsos.gov/corporatellc/CorporateLlcController> and <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx> .

### *B. Creditors of RayTrans Companies*

As businesses do, James A. Ray's businesses incurred liabilities. For present purposes, two are noteworthy. In 2006, Powersource Transportation, Inc. commenced litigation against RayTrans Trucking and Universal Trans in Indiana state court, which later resulted in a judgment entered on November 29, 2011 of approximately \$1.688 million. A659.<sup>2</sup> By then, however, RayTrans Trucking and Universal Trans had been divested of their assets. A659. Powersource's efforts to execute on its judgment came to include pursuit of RayTrans Holdings, RT Distribution (nominally), Echo and Echo/RT. A659.

The bankruptcy estate of Trevi Architectural, Inc. and its affiliate, Sierra Concrete Design, Inc., was another creditor. A530. When the two entities entered bankruptcy in Delaware, their chapter 7 trustee instituted a preference action under 11 U.S.C. §547 against RT Distribution, which resulted in a default judgment of about \$100,000. A530. Spring Capital owns that default judgment, as a result of a court-approved assignment dated August 12, 2012.<sup>3</sup> A531.

### *C. The June 2, 2009 Asset Purchase Agreement*

In 2009, James A. Ray arranged for the sale of RT Distribution, or more

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<sup>2</sup> See also Powersource's proof of claim in the *RayTrans Holdings* bankruptcy case. Claims Register, *Raytrans Holdings, Inc.*, Case no. 13-11084-CSS, Claim no. 3, filed 12-10-13.

<sup>3</sup> The bankruptcy case of Sierra Concrete and Trevi was docketed as Case No. 08-12029-CSS. The adversary proceeding against RT Distribution was docketed as No. 10-52245-CSS.

specifically, substantially all the assets of the business.<sup>4</sup> The sale occurred pursuant to an Asset Purchase Agreement dated June 2, 2009 (the “APA”). A123 *et seq.*<sup>5</sup> The parties to the APA were RT Distribution, RayTrans Holdings, James A. Ray, Echo/RT, and Echo. RT Distribution was identified as the “Seller.” Echo/RT, an entity created for purposes of the transaction, was the “Purchaser.” A127.

Prior to the transaction, and to facilitate it, James A. Ray transferred the assets of RayTrans Trucking and UniTrans to RT Distribution and RayTrans Holdings. A657-58. This was done without the knowledge of Powersource, which was litigating against RayTrans Trucking and Unitrans at the time. A659.

The purchase price was an amount of up to \$12,550,000. A132. The amount of \$6,050,000 was to be paid at closing; up to \$6,500,000 was to be paid out over the ensuing three years according to a formula based on Echo/RT’s level of “EBITDA”.<sup>6</sup> A132. Under § 1.7 of the APA, there were to be three earn-out periods, ending May 31 of 2010, 2011 and 2012. A135-38. The Purchaser was supposed to provide Seller with a statement of its EBITDA within 20 days after the close of books following the end of each month during each earn-out period, and a

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<sup>4</sup> Among the assets transferred to Echo/RT was the proprietary software that supposedly had earlier been transferred to RayTrans Holdings, for the collective use of its subsidiaries. A145-46; A656.

<sup>5</sup> The APA, without the full set of exhibits and schedules (as they were not available to Spring Capital) was attached as Exhibit C to Spring Capital’s original verified complaint. A123 *et seq.*

<sup>6</sup> Earnings before interest, taxes, depreciation and amortization.

cumulative EBIDTA statement for the amount of earnings cumulatively for the period. A138. The Seller and its representatives had the right to inspect the books. A138. So long as the EBIDTA in any year-long earn-out period was greater than \$2 million – a figure easily supported based on prior experience – then Seller was entitled to an additional payout as part of the purchase price. *See* A137.

James A. Ray directly benefited from the transaction: the APA provided that the Purchaser would enter a Consulting Agreement with him. A141.<sup>7</sup> Echo, which was planning for an initial public offering later in 2009<sup>8</sup>, was guarantor to the payment obligations of its subsidiary Echo/RT. A174.

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<sup>7</sup> RayTrans Holdings was a direct participant in a multiple ways. It agreed to provide “transaction processing services” for at least 90 days after closing. A160. With respect to the accounts receivable (“A/R”) being transferred, the APA provided that, to the extent that the transferred A/R remained uncollectible after a half-year, RT Distribution and RayTrans Holdings agreed to be jointly and severally responsible to buy back those receivables at face value; and they could pursue collecting those receivables themselves. A167. In addition, as noted *supra*, it appears that RayTrans Holdings contributed the proprietary software to the sale. A128. A141; A656.

<sup>8</sup> It is a fact publicly available, e.g., through the S.E.C.’s website, that Echo’s IPO took place on October 2, 2009. It is, *inter alia*, set forth in Echo’s first Form 10-K annual report, for the period ending 12/31/2010, at p. 4 of that report. *See* <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001426945&owner=exclude&count=40>.

A copy of Echo’s Form 10-K’s for the years 2010, 2011 and 2012 are attached to the Appendix. Although these S.E.C.-filed documents had not been presented to the Chancery Court (Appellants had not, at the time, been aware that Echo was a public company), judicial notice of them may nonetheless be taken, pursuant to Del. R. Evid. 201(f), which allows a court to take judicial notice at “any stage of the proceeding,” and this Court’s case law, including: *In re Santa Fe Pacific S’holder Litig.*, 669 A.2d 59, 69–70 (Del.1995) (holding that the court may take judicial notice of facts publicly available in filings with the SEC); *CCS Investors, LLC v. Brown*, 977 A.2d 301, 320 (Del. 2009) (taking judicial notice of date when an LLC was formed); *Fowler v. Fowler*, 974 A.2d 858 (TABLE), 2009 WL 1372694 at \*1, n.5 (Del. 2009) (taking judicial notice of Family Court’s Visitation Guidelines); *Whitehair v. State*, 892 A.2d 1085 (TABLE), 2006 WL 298162 at \*1, n.10 (Del. 2006) (taking judicial notice of indictment); and *Johnston v. Chrysler Corp.*, 54 Del. 279, 284 (1962) (Supreme Court could take judicial notice of facts involved in another case pending before it involving a similar claim).

#### D. *The Aftermath to the APA*

Based on the limited available information, there is no indication of any significant problems in the performance of the transferred business after the closing of the APA. Echo completed its IPO, and filed financial reports with the S.E.C. that refer to Echo's acquisition of RT Distribution.<sup>9</sup>

However, although Echo/RT had promised to maintain the business on a separate basis for at least the three earn-out years (APA §1.7(g)), the press release immediately following the closing suggested that the business was to operate as Echo Global Logistics, Inc. (*i.e.*, Echo, the parent) from the outset. A139; A181.

Echo/RT did not make any of the required earn-out payments to Seller. A655. Moreover, Appellants have received no information suggesting that Echo/RT or Echo complied with the obligation of furnishing monthly EBIDTA statements to Seller.<sup>10</sup>

Several months after the APA closed, Illinois's Secretary of State commenced the procedures for administratively dissolving RT Distribution. *See* 805 ILCS 5/12.40. The Illinois procedures provide an opportunity for an entity to correct any identified default of its corporate obligations to the State. 805 ILCS 5/12.40(b). However, James A. Ray disregarded the notice of dissolution for RT

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<sup>9</sup> *See* n. 8, *supra*, and Echo's Form 10-K for 2010.

<sup>10</sup> Appellants had expected to be able to take discovery, to ascertain what happened to the obligation to provide monthly financial data and how it came to be dispensed with.

Distribution, and took no steps to keep it in good standing. *See* A508 (describing James Ray’s §341 meeting testimony).

The dissolution of RT Distribution went into effect on May 14, 2010<sup>11</sup> – roughly two weeks before the end of the APA’s first earn-out period. A136.

The dissolution of RT Distribution meant, for reasons discussed *infra*, that the rights to collect the earn-out payments under the APA passed to RayTrans Holdings, its parent. In turn, creditors of RT Distribution, in general, became creditors of RayTrans Holdings as well.

*E. Spring Capital’s Complaint and the Echo Parties’ First Rule 12(b)(6) Motion to Dismiss*

This action was commenced on October 31, 2012, by Spring Capital in the Chancery Court. By that time, RT Distribution, the judgment debtor, had been administratively dissolved for over two years. But through the June 2, 2009 transaction, RT Distribution had transferred substantially all of its assets to the purchasing entity, Echo/RT. A528.

Spring Capital commenced this suit, principally against Echo/RT and its parent, Echo Global Logistics, Inc., which was a guarantor of its subsidiary’s asset purchase, to challenge the June 2009 transaction as a fraudulent conveyance.

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<sup>11</sup> The process of administrative dissolution likely began in late 2009. *Cf.* Cross-claims, ¶9. A655. Judicial notice may be taken of the Illinois Secretary of State’s corporation search website – <http://www.ilsos.gov/corporatelle/CorporateLlcController> – which was the source for the averment. The online report resulting from a search for “RayTrans Distribution” states: “involuntary dissolution 05 14 10.”



A184. The original complaint named as defendants only Echo/RT and Echo.

A183. An amended complaint added RT Distribution, RayTrans Holdings, and James A. Ray as defendants, albeit nominal ones. A94.

Spring Capital's amended complaint, filed on April 2, 2013, had four counts – for successor liability; fraudulent transfer under Delaware's Uniform Fraudulent Transfer Act; fraudulent transfer under Illinois's Uniform Fraudulent Transfer Act; and declaratory judgment under Illinois's 805 ILCS 5/11.50(a)(5). A103-108.

The Echo parties filed an answer and also moved to dismiss under Rule 12(b)(6). A208. They asserted, *inter alia*, (a) that Spring Capital failed to allege adequately that Echo/RT or Echo could be held liable as successors to RT Distribution, the entity against which Spring Capital holds a judgment; and (b) that the terms of the APA negated any alleged fraudulent transfer in connection with the APA. Later, when the effect of the bankruptcy's automatic stay had been raised, they asserted that it did not apply to Spring Capital's complaint. A895.

Spring Capital attempted to take discovery, but was promptly met with the Echo parties' motion for a protective order and to stay discovery. A80. The Echo parties served only objections to Spring Capital's discovery requests. A88.

#### F. *The RayTrans and James Ray Bankruptcies*

On April 25, 2013, James A. Ray caused RayTrans Holdings to file a voluntary chapter 7 bankruptcy petition in the United States Bankruptcy Court for

the District of Delaware (the “Bankruptcy Court”), docketed as case no. 13-11084-CSS. A373-75. Then on May 9, 2013, James A. Ray filed a voluntary chapter 7 petition for himself individually in the United States Bankruptcy Court for the District of Massachusetts, docketed as case no. 13-412346 HJB<sup>12</sup>. As a result of these petitions, Spring Capital’s action as against RayTrans Holdings and James A. Ray was automatically stayed.

The Schedules that James A. Ray filed on behalf of RayTrans Holdings listed Spring Capital as an undisputed, unsecured creditor, with a claim based on, and in the amount of, the default judgment. A390.

In the *RayTrans Holdings* bankruptcy case, David M. Klauder was elected to serve as chapter 7 trustee for the debtor, and he filed his notice of agreement to serve in that capacity on July 2, 2013. See docket, case no. 13-11084-CSS.

*G. The Trustee’s Cross-claims against the Echo Parties and the Second Motion to Dismiss Under Rule 12(b)(6)*

On September 10, 2013, Mr. Klauder (hereafter, the “Trustee”) filed in the Chancery Court, on behalf of RayTrans Holdings, an answer to the amended complaint and cross-claims against Echo/RT, Echo, and RayTrans Distribution. A459. The Trustee filed amended cross-claims (the “Cross-claims”) on November

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<sup>12</sup> James A. Ray’s bankruptcy petition, schedules and creditor matrix are public documents that can be retrieved from the website of the bankruptcy court in Massachusetts, <https://ecf.mab.uscourts.gov/>. They show that Mr. Ray did not provide list RayTrans Holdings on its creditor matrix (*i.e.*, the list of parties to receive notice of the bankruptcy), despite listing himself as a guarantor for the obligations of RayTrans Holdings and RT Distribution to Echo.

3, 2014. A653.

The Trustee's Cross-claims against the Echo parties assert two counts for avoidance of fraudulent transfer – one under Delaware law and the other under Illinois law – paralleling those asserted by Spring Capital. Under the “strong arm clause” of the Bankruptcy Code, a trustee succeeds to the rights of individual creditors in pursuing state fraudulent transfer claims held by the estate, and creditors may not then pursue such claims independently. *See* 11 U.S.C. §544(b). On that basis, the Trustee succeeded to the state law fraudulent transfer claims asserted by Spring Capital against Echo/RT and Echo. *See infra*. It includes, *inter alia*, allegations about the litigation that Powersource creditor of the RayTrans entities, commenced prior to the June 2009 asset purchase transaction.

The Echo parties moved to dismiss the Cross-claims under Rule 12(b)(6). A699. They asserted, *inter alia*, that RayTrans Holdings needed to be a creditor of RT Distribution in order to have standing to sue the Echo parties. A717.

#### H. *The Trustee's Adversary Proceeding against the Echo Parties*

Separately, the Trustee filed its own independent complaint against the Echo parties in Bankruptcy Court on April 24, 2015, asserting other causes of action, commencing an adversary proceeding docketed as Adv.Pro.No. 15-50273-CSS. A908 *et seq.*<sup>13</sup> More recently, on May 2, 2016, the Trustee filed an amended

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<sup>13</sup> Prior to filing the adversary proceeding complaint, the Trustee attempted to remove the Cross-

complaint against the Echo parties (Dkt. No. 32) (the Am. Bky. Complaint”).

The Am. Bky. Complaint includes, *inter alia*, fraudulent transfer claims under the Bankruptcy Code, and claims for breach of contract and an accounting.

I. *The Chancery Court’s Rulings*

The Chancery Court heard oral argument on both of the Echo parties’ motions to dismiss. A485, A930.<sup>14</sup>

Although the Trustee had succeeded to Spring Capital’s claims, the Chancery Court granted the Echo parties’ motion to dismiss Spring Capital’s amended complaint on December 31, 2013 (the “2013 Opinion” or “2013 Op.”). A528.

On January 24, 2014, the Chancery Court denied Spring Capital’s motion for reconsideration with respect to certain aspects of the Dec. 2013 Opinion (the “2014 Ruling”). A604.

On February 18, 2016, the Chancery Court issued an Opinion (the “2016 Opinion” or “2016 Op.”) and Order, granting the Echo parties’ motion to dismiss the Trustee’s Cross-Claims. A976. This appeal followed. A995.

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claims to Bankruptcy Court; but the Echo parties opposed the removal, and the action was remanded to Chancery Court. A649.

<sup>14</sup> The transcript of the oral argument held on July 9, 2015 and e-filed on Feb. 15, 2016 will be referenced herein simply as the “Transcript” or “Tr.” Any reference to the transcript of the oral argument held on Sept. 11, 2013 and e-filed on Dec. 27, 2013 will as the “9-11-13 Transcript” or “9-11-13 Tr.”

## ARGUMENT

### I. The Chancery Court's Dismissal of the Cross-Claims Based on the Trustee's Alleged Lack of Standing Was Legal Error

A. *Question Presented.* Did the Chancery Court err in dismissing the Cross-claims under Rule 12(b)(6), by holding that the Trustee “has no standing to assert that the Defendants’ transfer of assets pursuant to the APA was fraudulent”?

This issue was raised below and preserved. The Cross-claims allege that RayTrans Holdings continues to have “a right to payment under the terms of the APA.” A664 (Cross-claims, ¶ 47). The Trustee generally defended his standing in his responding brief (p.14) A825); and at oral argument (Tr., pp.27-33) (A956-962). At oral argument, the Trustee’s counsel specifically asserted that any remaining assets and interests of the defunct RT Distribution passed to its sole shareholder, RayTrans Holdings. A962 (Tr., p. 33).

B. *Scope of Review.* This issue presents a question of law, which is reviewed *de novo*. *Gamles Corp. v. Gibson*, 939 A.2d 1269, 1271 (Del. 2007).

#### C. *Merits of Argument.*

1. The Trustee Adequately Pled that Holdings is Successor to RT Distribution in Owning the Right to Collect the Earn-out Payments from the Echo Parties

The Echo parties argued that “the Trustee lacks standing to assert that the APA amounted to a fraudulent transfer.” A891 (2016 Op. at 7). Their reasoning is that, since it was substantially all of RT Distribution’s assets that were

transferred under the APA, only the long defunct RT Distribution could seek to avoid the transaction. RayTrans Holdings, as it has been repeatedly stated, owned all the *stock* of RT Distribution. Echo argued that RayTrans Holdings' interest in the APA was solely as stockholder of RT Distribution, and that such an interest was inadequate to support standing.<sup>15</sup>

At oral argument, the court asked the Trustee's counsel about "connect[ing] the dots" on the issue of standing. A960 (Tr.,p. 31), resulting in this colloquy:

THE COURT: How do the creditors of RayTrans Distribution become creditors of Holdings?

MR. ERNST: Essentially any value of RayTrans Distribution went up to Holdings in the APA. Distribution held the assets. Holdings got the money in terms of the transfer of value there. Anybody that had a claim against Distributions would follow the money and make that claim at the Holdings level. Essentially, that's what we're seeing in the Bankruptcy Court. That's where those claims are coming in. The second part is within a couple months after the APA, Distribution dissolved, and any value again went up to Holdings as the 100 percent owner.

THE COURT: .... Is this really a function of when the subsidiary is dissolved by default everything goes to the 100 percent stock owner? Is that how this is really working out, and that's why the claims against Distribution would become claims against Holdings? Is it that

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<sup>15</sup> In fact, it appears likely that the asset transfer under the APA did also include assets of RayTrans Holdings. As discussed *supra*, the APA provided for the transfer of the seller's proprietary logistics software. But it was also alleged that, in connection with the formation of RayTrans Holdings, James A. Ray transferred to the new holding company the software that was jointly being used by RT Distribution, RayTrans Trucking, and Unitrans. Plainly, that software was part of what was sold. Evidently, James A. Ray treated his entities as having substantial fluidity among them.

RayTrans Holdings *was* also a direct participant in the APA in other ways, as explained *supra*. Statement of Facts, Part C, n.7.

simple?

MR. ERNST: Your Honor, it's one of the positions we are taking, yes. It's the Distributions assets were sold off, anything remaining went up to Holdings, and the sale of those assets, the cash received, actually went to Holdings, so it's two ways to look at there.

THE COURT: Interesting, if it matters, that the cash was paid to Holdings as opposed to Distribution,....

A961-62 (Tr., pp. 32-33). Within the Cross-claims, the Trustee's position was supported by the averments in ¶47, that RayTrans Holdings continues to have "a right to payment under the terms of the APA." A664.

But the court essentially disregarded the answer of the Trustee's counsel, and focused instead on an alternative argument that is more readily challenged. After noting that a parent company's assets generally do not include those of its subsidiaries, the court pointed to the "alter ego" exception. A985-87 (2016 Op. at 10-12). The court observed that the Trustee had not alleged the "alter ego" theory. A987 (2016 Op. at 12). *See also* A960-61 (Tr. at 31-32) (per the Trustee's counsel at oral argument, the Trustee was not asserting that corporate formalities had not been observed). But the court, upon concluding that the "alter ego" theory did not apply, held that the Trustee lacked standing to assert that the Defendants' transfer of assets was fraudulent. A987-88 (2016 Op. at 12-13).

2. Under Applicable Illinois Law, the Assets of the Dissolved RT Distribution Devolved to RayTrans Holdings

The applicable law is that of Illinois – the state of incorporation of RT

Distribution, the dissolved company. Illinois has a statute governing the “effect of dissolution.” 805 Ill. Comp. Stat. Ann. 5/12.30 (West 2016). Most pertinent, Illinois has case law on issues concerning the assets of a dissolved corporation.

Illinois case law holds that, in general, upon dissolution of a corporation, its property vests in the stockholders. *See Dubey v. Abam Bldg. Corp.*, 639 N.E.2d 215, 219 (Ill. App. Ct. 1994), citing *Shute v. Chambers*, 492 N.E.2d 528, 531 (Ill. App. Ct. 1986). *See also In re Ratner*, 146 B.R. 211, 218 (Bankr.N.D.Ill.1992) (holding that, under Illinois law, a corporation's assets upon dissolution belong to its shareholders as tenants in common, subject to rights of creditors and legal claims of third persons). “Th[e] right to bring suit is an asset of the corporation. . . . Like all other corporate assets, the right to bring suit devolves, following dissolution, to the corporation's shareholders, subject to the rights of its creditors.” *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 1057 (2005) (citations omitted).<sup>16</sup> In *Dubey*, the court held that the former shareholders of a dissolved corporation succeeded, by operation of law, to a security deposit under a lease that had been placed by the dissolved corporation. *Id.*

In the instant case, this means that RayTrans Holdings, as RT Distribution’s

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<sup>16</sup> Under 805 Ill. Comp. Stat. 5/12.30, a dissolved corporation that is winding up its affairs should, *inter alia*, and subject to the rights of creditors, distribute its remaining assets among its shareholders. Under 805 Ill. Comp. Stat. 5/12.80, a dissolved corporation has a five year period to wind down its affairs. The case law in Illinois varies somewhat as to *when* the assets of a dissolved corporation devolve to its shareholders. At the latest, though, “a corporation's assets devolve, by operation of law, to its shareholders” when the five year wind-up period has ended. *Hamilton v. Conley*, 356 Ill. App. 3d at 1057.



sole shareholder, succeeded by operation of law to the rights of RT Distribution under the APA to receive the monthly EBITDA statements from Echo/RT, and to receive the earn-out payments due in June of 2010, 2011 and 2012. That this occurred had nothing to do with “alter ego” theory. Since RT Distribution was dissolved, it no longer had a corporate veil to pierce.

By the same token, since the rights held by RT Distribution under the APA devolved to RayTrans Holdings, the estate of RayTrans Holdings is liable to creditors of RT Distribution, to the extent of the value of any assets it received from RT Distribution. *Matos v. Richard A. Nellis, Inc.*, 101 F.3d 1193, 1195 (7th Cir. 1996). As Judge Easterbrook wrote in that case:

[W]hatever this collection proceeding may be, it is not a veil-piercing case.... [T]his case simply can't be about veil piercing, because there is no extant corporation whose separate existence may be disregarded. Nellis Inc. is gone, dissolved under state law, and the investors who received its assets are liable for its debts, to the extent of the distributions they received.... For all practical purposes ... the distributees replace the defunct corporation as the real parties in interest.

*Matos*, 101 F.3d at 1195.

Thus, the Trustee of RayTrans Holdings unquestionably has standing to pursue these state law fraudulent transfer claims against the Echo parties. While this argument admittedly could have been presented in a clearer fashion, nonetheless it was articulated, and a supporting allegation in the Cross-claims was made. Accordingly, the dismissal for lack of standing should be reversed.

## **II. The Chancery Court Erred in Failing to Acknowledge that the *RayTrans Holdings* Bankruptcy Rendered Void Its 2013 Opinion Dismissing Spring Capital's Fraudulent Transfer Claims**

*A. Question Presented.* Did the Chancery Court err, as a matter of law, in failing to declare void its 2013 Opinion, to the extent of its dismissal, pursuant to Rule 12(b)(6), of Spring Capital's two counts alleging the APA should be avoided as a fraudulent transfer under either Delaware or Illinois law?

This issue was raised and preserved below, in the Trustee's brief. A824-25 (T'ee's Resp. Br. at 13-14). It was also raised by Spring Capital at oral argument on the motion to dismiss the Cross-claims. A522 (Tr. at 38).

*B. Scope of Review.* This issue presents a question of law, which is reviewed *de novo*. *Gamles Corp. v. Gibson*, 939 A.2d 1269, 1271 (Del. 2007).

### *C. Merits of Argument.*

RayTrans Holdings had not yet filed for chapter 7 bankruptcy relief when Spring Capital filed its amended complaint, nor when the Echo parties filed their motion to dismiss the amended complaint. One day before the oral argument on the Echo parties' motion to dismiss the Complaint, in September 2013, the Trustee filed his answer and cross-claims. Although the pleading did not use the magic words "automatic stay," it did repeatedly assert: "the Trustee believes that claims exist on his behalf for the bankruptcy estate of Holdings against certain Defendants and intends to pursue those in the context of the Cross-claim;" and the Cross-

claims did include the fraudulent transfer claims that Spring Capital had asserted. The Trustee's counsel did not appear at that oral argument. The Chancery Court ruled on the motion to dismiss at the end of December 2013.

The Bankruptcy Code's automatic stay applied to Spring Capital's continued assertion of fraudulent transfer claims against the Echo parties, pursuant to 11 U.S.C. § 362(a), in tandem with the Trustee's authority to pursue such claims in the shoes of a creditor of the estate, pursuant to 11 U.S.C. § 544(b).

So long as a creditor of a debtor in bankruptcy exists on the bankruptcy petition date, the bankruptcy trustee may, "pursuant to § 544(b)(1), pursue any fraudulent transfer action that [the creditor] could have pursued on that date," including a fraudulent transfer action. *In re Arbogast*, 466 B.R. 287, 300 (Bankr. W.D. Pa.), *aff'd sub nom. Cardiello v. Arbogast*, 479 B.R. 661 (W.D. Pa. 2012) *aff'd*, 533 Fed. Appx. 150 (3d Cir. 2013). In *Arbogast*, the trustee's authority to take advantage of these rights of the creditor, by virtue of § 544(b)(1), "is not changed by the fact that [the creditor], without relief from, and thus in clear violation of, the automatic stay, sought the post-petition entry of [a] ... State Court Order ..., by which order such court granted [the creditor's] motion to strike" a previously entered discontinuance," thereby reinstating the fraudulent transfer action. *Id.* at 301.

The court so held because, first, "a creditor, as of the commencement of a

Chapter 7 bankruptcy case, is dispossessed of standing to further pursue a fraudulent conveyance avoidance action.” *Id.* (emphasis added); *see also In re Forbes*, 372 B.R. 321, 336 (B.A.P. 6th Cir. 2007) (“the filing of the Debtor’s bankruptcy petition generally stays individual creditors’ ‘piece meal’ actions to collect property that may have been fraudulently transferred by a debtor”). Second, the *Arbogast* court so held because the creditor “consequently lacked standing ... to obtain any order from any court that pertained to the ... Fraudulent Transfer Action.” *In re Arbogast*, 466 B.R. at 300. The court ruled that the conduct of the creditor, in pursuit of a fraudulent transfer action, would not be attributed to the Trustee, “who is the party who had standing to pursue such action post-bankruptcy petition.” *Id.*

“Absent relief from the stay, judicial actions and proceedings against the debtor are void *ab initio*.” *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1206 (3d Cir. 1991), *opinion reinstated on reh’g* (Mar. 24, 1992). *See In re Arbogast*, 466 B.R. at 301 (“because such order was entered in violation of the automatic stay, such order, pursuant to automatic stay principles, would generally be void.”).<sup>17</sup>

On the same grounds, the 2013 Opinion was (regrettably, for the Vice

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<sup>17</sup> In so stating, the court noted the possibility – inapplicable here – that the Trustee could affirmatively apply to the federal bankruptcy court to seek reinstatement of the voided judgment. *Id.* at 301.

Chancellor) void.<sup>18</sup> In the 2016 Opinion, the Chancery Court noted that the issue had been raised; and while it did not expressly reach the merits of the argument, it expressed some skepticism about it. A988 (2016 Op., p. 13, n.39). The court based its skepticism on the absence of an identity of interests as between Spring Capital and the Trustee. *Id.* at.n.39. But that analysis entirely missed the point that the stay applies because Spring Capital, being a creditor of RT Distribution and RayTrans Holdings (the owner of its subsidiary's rights under the APA, due to the subsidiary's dissolution), was dispossessed of the right to pursue the fraudulent transfer action once RayTrans Holdings' bankruptcy case commenced.

Accordingly, the court should have declared void its earlier opinion, dismissing the Spring Capital Complaint. On that ground, the 2014 Ruling on Spring Capital's motion for reconsideration should be reversed and vacated, as it pertained to the void Opinion. While the 2013 Opinion is void, the Spring Capital Complaint also remains subject to the automatic stay. The only pending "complaint" on which the action can currently move forward is the Trustee's Cross-claims.

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<sup>18</sup> The Echo parties made a misguided attempt to argue that the automatic stay's application had been *waived* by the Trustee, simply by having entered the state court action and having filed the Cross-claims. A895-97 (Echo's Reply Br. at 11-13). To bolster their waiver argument, the Echo parties cited but one case – *In re Mid-City Parking, Inc.*, 332 B.R. 798 (Bankr. .D. Ill. 2005) – but the case is plainly inapposite, as it involved only a straight litigation commenced prepetition by a creditor against the debtor, with counterclaims asserted by the debtor. The question was simply whether the debtor-in-possession could, post-petition, file an appeal from an adverse ruling (yes). *Id.*

### **III. The Chancery Court Erred in Ruling that the Cross-claims Failed to State a Claim for Constructive or Actual Fraudulent Transfer**

A. ***Question Presented.*** Did the Chancery Court commit legal error in its dismissal on the Cross-claims pursuant to Rule 12(b)(6), by holding that the Cross-claims, even when viewed taking all reasonable inferences in favor of the Trustee, do not set forth a reasonably conceivable claim alleging constructive or actual fraudulent transfer, under Delaware or Illinois law?<sup>19</sup>

This issue was raised below, in the Trustee's brief responding to the Motion to Dismiss. A828-29, A833-37 (T'ee's Resp. Br. at 17-18, 22-26). It was also addressed at oral argument on the motion. A950-57 (Tr. at 21-28).

B. ***Scope of Review.***

This issue presents a question of law, which is reviewed *de novo*. *Gamles Corp. v. Gibson*, 939 A.2d 1269, 1271 (Del. 2007).

C. ***Merits of Argument.***

1. Appellants Do Not Concede that Delaware and Illinois Law Are the Same

The Chancery Court held that the Trustee had not adequately alleged fraudulent transfer under either Delaware law (Count I of the Cross-claims) or Illinois law (Count II of the Cross-claims). However, for its analysis, the court

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<sup>19</sup> Appellants are directing this argument principally to the 2016 Opinion on this ground, but the rationale largely applies as well to the 2013 Opinion. Appellants recognize, however, that (a) the 2013 Opinion is void and, so long as that status is recognized, reversal of the 2013 Opinion is not necessary; and (b) even if the 2013 Opinion is reversed, Spring Capital will not be going forward with its Complaint so long as the Trustee is pursuing the Cross-claims, due to the automatic stay.

only considered and cited to Delaware law. In support of this approach, the court referred to the Echo parties' assertion that the fraudulent transfer laws of Delaware and Illinois are "essentially the same"; and the court suggested that the Trustee did "not challenge" this assertion. A987, 2016 Op. at 12, n. 36.

But the Trustee plainly did not accept that proposition. Rather, the Trustee expressly sought to avoid having to determine, at the pleading stage, which state's law was applicable. A866-68 (T'ee's Resp. Br. at 15-17). Why seek to avoid that determination at a preliminary point in the litigation? The Appellants recognized that, notwithstanding the adoption of the Uniform Fraudulent Transfer Act (UFTA) by both states, the case law under UFTA may vary from one state to another. The Appellants expected that greater clarity about which state's UFTA applies would come after the facts of the case became further developed through discovery.

2. The *de facto* Standard Applied by the Chancery Court to the Defendants' Rule 12(b)(6) Motion was Overly Strict

Both the Chancery Court's 2013 Opinion and its 2016 Opinion gave lip service to the liberal standard applicable to motions under Del. Ch. Ct. R. 12(b)(6) for failure to state a claim upon which relief can be granted. See 2013 Op. at 6; 2016 Op. at 8. In both opinions, the court cited to the "reasonable conceivability" standard – that a complaint should not be dismissed when challenged under Rule 12(b)(6) where the plaintiff might recover "under any reasonably conceivable set

of circumstances susceptible of proof.” *Id.*<sup>20</sup> The court further noted in the earlier opinion that it “accepts all non-conclusory allegations in the Complaint as true and draws all reasonable inferences from those allegations” in favor of the plaintiff or cross-plaintiff. 2013 Op. at 6, *citing Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).<sup>21</sup>

Nonetheless, as discussed *infra*, the scrutiny that the court accorded to the Cross-claims suggests that the court in fact framed very narrowly the question of what was reasonably conceivable within the Cross-claims.<sup>22</sup>

### 3. Substantially Different Standards Apply to Constructive Fraudulent Transfer and Actual Fraudulent Transfer

The UFTA speaks to two types of fraud—“fraud in fact” and “fraud in law.” *In re H. King & Associates*, 295 B.R. 246, 287 (Bankr. N.D. Ill. 2003).<sup>23</sup> Constructive fraudulent transfer is the type that is “fraud in law.”

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<sup>20</sup> See *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813, n.12 (Del. 2013) (reiterating that “reasonable conceivability is the Rule 12(b)(6) pleading standard in Delaware”).

<sup>21</sup> The court also cited – entirely appropriately – Del. Ch. Ct. R. 10(c), as a basis for reviewing and considering the attachments to the complaint [A539 (2013 Op. at 7)]; and Del.R.Evid. 202(b)(1)(B), as a basis for taking judicial notice of information in court-filed documents. A531 (2013 Op. at 4, n.11).

<sup>22</sup> It may be worth noting that courts do *not* apply the elevated pleading standard of Fed. R. Civ. P. Rule 9(b), to which Del. Ch. Ct. R. 9(b) is equivalent, to claims for constructive fraudulent transfer. See, e.g., *In re Mervyn's Holdings, LLC*, 426 B.R. 488, 498 (Bankr. D. Del. 2010); *In re SGK Ventures, LLC*, 521 B.R. 842, 862 (Bankr. N.D. Ill. 2014).

<sup>23</sup> Section 1304 of the Delaware Uniform Fraudulent Transfer Act (6 Del.C. § 1304), titled “Transfers fraudulent as to present and future creditors,” is substantially the same as Section 5 of the Illinois Uniform Fraudulent Transfer Act (740 Ill. Comp. Stat. Ann. 160/5 (West 2016)), titled “Transfer or obligation fraudulent as to creditor--Claim arising before or after transfer.” Subsection (a) of this section, as it appears in the Illinois statutes, provides:



The basic statutory elements of constructive fraudulent transfer are: a transfer by the debtor, without receiving reasonably equivalent value, and following which the debtor was insolvent. Under Illinois law, “[i]n order to establish that a conveyance is fraudulent in law, four elements must be present: (1) the debtor made a voluntary transfer; (2) at the time of the transfer, the debtor had incurred obligations elsewhere; (3) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer; and (4) after the transfer, the debtor failed to retain sufficient property to pay the indebtedness.” *In re H.*

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§ 5. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

- (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
- (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

740 Ill. Comp. Stat. Ann. 160/5. Subsection (b) of §5, too lengthy to quote here in full, sets forth an 11-item list of factors as to which “consideration may be given, among other factors,” in “determining actual intent under paragraph (1) of subsection (a).” *Id.*

Section 1305 of the Delaware Uniform Fraudulent Transfer Act (6 Del.C. § 1305), titled “Transfers fraudulent as to present creditors,” is substantially the same as Section 6 of the Illinois Uniform Fraudulent Transfer Act (740 Ill. Comp. Stat. Ann. 160/6 (West 2016)), titled “Transfer or obligation fraudulent as to creditor--Claim arising before the transfer.” Subsection (a) of this section, as it appears in the Illinois statutes, provides:

§ 6. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

740 Ill. Comp. Stat. Ann. 160/6.

*King & Assoc.*, 295 B.R. at 288-89.

In this case, there is no debate about the sufficiency of the allegations that a transfer occurred, or that RT Distribution – which was dissolved within some months after the transaction – was left insolvent after the transfer. There is also no debate about the Trustee’s allegations that there was a specific and substantial creditor – Powersource – which was known to James A. Ray and his companies, and which RayTrans Holdings and RT Distribution were unable to pay after the transaction. Rather, the Chancery Court’s determination that the allegations of constructive fraudulent transfer were insufficient turned entirely on the element of “reasonably equivalent value.”

4. The Chancery Court’s Dismissal of the Trustee’s Constructive Fraudulent Transfer Claim Turned on the Element of “Reasonably Equivalent Value”

The Chancery Court decided: “[T]he APA provided reasonably equivalent value for the assets transferred. Although Echo/RT paid only \$6,050,000, the APA provided for a purchase price of up to \$12,550,000, provided certain earn-outs were accomplished.” A990. The court added, in a footnote: “Even absent the earn-out provisions, however, the Trustee has not alleged facts from which the Court may reasonably infer that a purchase price of over \$6 million is not reasonably equivalent value in return for RayTrans Distribution’s assets.” A990 (2016 Op., p. 15, n. 41).

The court deemed immaterial the allegation that RT Distribution's assets were valued at \$11,148,000, 18 months before the APA. A989 (2016 Op. at 14).

The court also entirely disregarded RayTrans Holdings' contribution to the consideration. RayTrans Holdings gave, in effect, a guaranty as to the value of the accounts receivable conveyed through the sale – more specifically, it agreed, jointly with its soon-to-be defunct subsidiary, to indemnify the Purchaser, dollar for dollar, for any of the over \$4 million in A/R that were they were not able to collect, within 180 days of closing. This commitment was most likely the basis for James A. Ray listing Echo as a creditor of RayTrans Holdings for \$950,000. Despite the Echo parties' theory that only RT Distribution participated in the exchange with the Purchaser, RayTrans Holdings' conveyance of this indemnity obligation was something for nothing.

5. The Chancery Court Erred in Deciding that it Was Not Reasonably Conceivable that a Court Could Ultimately Find the Challenged Transfer to Have Been Made for Less Than Reasonably Equivalent Value

It was error for the court to have decided that it could discern from the Cross-claims the presence of reasonably equivalent value in the subject exchange, and discern it with such clarity as to compel the court to grant a motion to dismiss the Trustee's Cross-claims under Rule 12(b)(6).

What constitutes "reasonably equivalent value" for purposes of the UFTA has not been defined by Illinois case law. *In re H. King & Assoc.*, 295 B.R. at 289.

A review of Delaware case law suggests that it has not been defined there either. The statute includes a definition of “value,” but not of “reasonably equivalent value.” ‘

“In determining whether reasonably equivalent value was received under the UFTA, courts should consider how that phrase has been construed under the Bankruptcy Code.” *In re H. King & Assoc.*, 295 B.R. at 289. “There is no fixed formula for determining reasonable equivalence, but will depend on all the facts of each case, an important element being fair market value.” *Id.* In the federal courts, “[t]he Third Circuit utilizes a totality of the circumstances test in determining whether reasonably equivalent value was given.” *In re American Bus. Fin. Servs., Inc.*, 361 B.R. 747, 760 (Bankr. D. Del. 2007), citing *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 148–149 (3d Cir.1996); and *Peltz v. Hatten*, 279 B.R. 710, 736 (D.Del.2002). “The test includes consideration of factors such as market value, good faith, and whether the transaction was at arm's length.” *In re Green Field Energy Servs., Inc.*, 2015 WL 5146161 at \*8 (Bankr. D. Del. Aug. 31, 2015).

“That factual inquiry is not suitable for determination on a motion to dismiss.” *In re American Bus. Fin. Servs.*, 361 B.R. at 760. “Given the wide number of variables to consider, and the less stringent pleading requirements of Rule 8(a)(2) to constructive fraud claims, ‘[t]he issue of ‘reasonably equivalent

value’ requires a factual determination that cannot be made on a motion to dismiss.’” *In re Green Field Energy Servs., Inc.*, 2015 WL 5146161, at \*8 (citations omitted).

In this case, the Cross-claims pled lack of market value. That is reflected in the assertions concerning the exchange in which the Purchaser only actually paid \$6,050,000 for assets recently worth over \$11.1 million; and that the failure to pay the balance of what, on paper, was shown as the purchase price, was a substantial factor in rendering the transaction as one for less than reasonably equivalent value.

It is also evident in the allegations (reflected in the terms of the APA) that (a) RayTrans Holdings accepted being guarantor of the accounts receivable transferred to the Purchaser; (b) the Echo parties did not make payment to RayTrans Holdings of the additional \$6.5 million, or any of it; (c) the Echo parties provided no explanation for withholding the additional consideration, such as might have been communicated had they kept up with their obligation to provide the monthly EBITDA earnings statement over three years.<sup>24</sup> Especially in view of the general recognition that “reasonably equivalent value” cannot be readily

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<sup>24</sup> In this regard, it may be noted that, in Echo’s Form 10-K for the year ending 12-31-2010, they let it slip – in the section on Acquisitions – that as of December 31, 2009, Echo had on its books a contingent consideration obligation to RT Distribution of \$3.1 million, but no mention of what their obligation was on May 31, 2010, which was the ending date of the first earn-out period. A1069. The Form 10-Ks do not mention that RT Distribution was being dissolved, but undoubtedly the Echo parties knew – since James A. Ray was working with them as a consultant. After 2010, with RT Distribution having been dissolved, Echo’s next two Form 10-Ks did not even mention it any longer. See A1150, A1233.

assessed at the pleading stage, the Chancery Court’s determination that \$6 million was roughly equivalent to the assets of RT Distribution constituted an over-reaching into fact-finding, and should be reversed.

6. The Chancery Court Erred in Rejecting the Trustee’s Claim of Actual Fraudulent Transfer, Based Materially on Its Finding of Reasonably Equivalent Value

“Fraud in fact” or actual fraud pursuant to § 5(a)(1) of the UFTA occurs when a debtor transfers property with the intent to hinder, delay or defraud his creditors. *In re H. King & Assoc.*, 295 B.R. at 287. The moving party must prove a specific intent to hinder, delay or defraud. *Lindholm v. Holtz*, 581 N.E.2d 860, 863 (Ill. App. 2d Dist.1991). When the “badges of fraud,” such as the 11 factors listed in the statute, are present in sufficient number, it may give rise to an inference or presumption of fraud. *In re H. King & Assoc.*, 295 B.R. at 288 (Illinois law). *See also .Kilber v. Wooters*, 2007 WL 1756595, at \*4 (Del. Ch. June 6, 2007) (“The confluence of several of these factors, without the presence of all of them, is generally sufficient to support a conclusion that one acted with the actual intent to defraud.”).

One key distinction between claims for actual and constructive fraudulent transfer is that equivalent value is *not* a factor for proving constructive fraudulent transfer. “Full consideration for the transfer is not, as a matter of law, an absolute defense to fraud in fact. .... As such, if the moving party proves fraudulent intent,

then explicitly the transfer is deemed fraudulent, even if it is in exchange for valuable or full consideration.” *In re H. King & Assoc.*, 295 B.R. at 288 (citations omitted) (emphasis added).

In this case, the Chancery Court erred by concluding that the Trustee had failed to adequately allege actual fraudulent transfer – for the reason that, in the court’s view, “the APA provided reasonably equivalent value for the assets transferred.” 2016 Op. at 15. As such, the court was simply applying an incorrect standard.

The court also found the claims to have been insufficient to support an inference that RT Distribution intended to defraud its creditors. 2016 Op, at 16. In reaching this conclusion, the court again appeared to be scrutinizing the allegations in a manner that might be appropriate at the summary judgment stage, but not at the motion to dismiss stage. The court discounted all the pertinent allegations:

“The fact that Ray accepted employment with Echo/RT is insufficient, without more, to infer that the transaction took place other than at arm’s length.” A991 (2016 Op. at 16, n. 43).

“While post-transaction insolvency may suggest that a transfer is fraudulent, the transfer here was for reasonably equivalent value.” A991 (2016 Op. at 16).

“That Holdings’ or RayTrans Distribution’s creditors may not have known of the APA is not itself sufficient to infer that the APA was intended to defraud RayTrans Distribution’s creditors, especially where the value received was reasonably equivalent to the value of the assets sold.” A992 (2016 Op. at 17).

The assertion that the APA “was not an arm’s length transaction is unsupported by specific allegations.” A991 (2016 Op. at 16, n. 43).

That the transfer was made “shortly before a substantial debt was incurred (*i.e.*, a judgment in a creditor’s lawsuit)” was deemed immaterial. A989 (2016 Op. at 14).

The Appellants submit that the concatenation of facts alleged in the Cross-claims are more than sufficient, based on pertinent case law, to withstand a Rule 12(b)(6) motion to dismiss. If greater clarity in the pleading is sought, then the court could allow the Trustee to amend the Cross-claims, as was requested.

### **CONCLUSION**

For the foregoing reasons, Appellants respectfully urges this Court to reverse the Chancery Court’s Opinions and Orders and allow the Trustee’s fraudulent transfer claims to proceed.



Respectfully submitted,

**O'KELLY & ERNST, LLC**

and

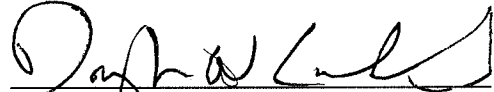
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Dated: May 2, 2016



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## **EXHIBITS**

- A. Court of Chancery Opinion dated February 18, 2016 (A976)
- B. Court of Chancery Ruling dated January 24, 2014 (A604)
- C. Court of Chancery Opinion dated December 31, 2013 (A528)