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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/ Appellants,	:	
and	:	
SPRING REAL ESTATE, LLC d/b/a SPRING CAPITAL GROUP,	:	No. 133, 2016
Plaintiff Below/ Appellant,	:	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.	:	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The proceedings that have led to this point and this appeal have not only been lengthy, costly and time-consuming, but paint the picture of a bankrupt debtor and a Trustee that will use any means possible to try to pin liability on two defendants who did nothing wrong, other than greatly overpay for the assets of a company related to the debtor in 2009. The nature and history of these proceedings illustrates a Trustee that has abandoned losing arguments, untimely raised new arguments, and blatantly attempted to forum shop this case when faced with decisions and rulings that stood in his way of trying to collect against a deep pocket defendant. An affirmance of the Court of Chancery's well-reasoned decisions will (hopefully) put an end to this wasteful litigation.

On October 31, 2012, Spring Real Estate, LLC d/b/a Spring Capital Group ("Spring Capital") an action in the Court of Chancery against Defendants Echo/RT Holdings, LLC ("Echo/RT") and Echo Global Logistics, Inc. ("Echo"). (A18.) After the Echo Defendants moved to dismiss, Spring Capital amended its complaint to assert causes of action against the Echo Defendants for (1) successor liability under the de facto merger and continuation theories, (2) fraudulent transfer under Delaware law, (3) fraudulent transfer under Illinois law, and (4) a claim under the Illinois Business Corporation Act pertaining to liability for merged or consolidated companies. (A94.) In addition, the Amended Complaint added

RayTrans Holdings, Inc. ("Holdings") as a nominal defendant (no affirmative relief was sought against Holdings). All of Spring Capital's claims arose out of the Asset Purchase Agreement dated June 9, 2009 (the "APA"), entered into between Echo/RT, as purchaser, Echo, solely as a guarantor of payments, RayTrans Distribution Services, Inc. ("RayTrans"), as seller, Holdings, as the sole shareholder of RayTrans, and James Ray, as the sole stockholder of Holdings.

Shortly after the Amended Complaint was filed, Holdings filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). (A373.) David M. Klauder (the "Trustee") was then appointed to serve as Chapter 7 trustee for Holdings.

The Echo Defendants filed a Motion to Dismiss Spring Capital's First Amended Verified Complaint on May 1, 2013. (A208.) On the eve of oral argument on Echo's Motion to Dismiss, the Trustee, on behalf of Holdings, filed its Answer to Plaintiff's First Amended Verified Complaint and Cross-Claims Against the Echo Defendants, asserting the exact same two fraudulent transfer claims against Echo under both Delaware and Illinois law that Spring Capital asserted in its Amended Complaint. (A459.) At that time, neither the Trustee nor Spring Capital asserted that the automatic stay pursuant to the Bankruptcy Code applied to this action or precluded the Court of Chancery from moving forward and

reaching a decision on the Echo Defendants' then-pending Motion to Dismiss Spring Capital's Amended Complaint.

The Court held oral argument on Echo Defendants' Motion to Dismiss on September 11, 2013. (A481.) The Court issued a Letter Opinion on December 31, 2013, dismissing Spring Capital's First Amended Complaint in its entirety and with prejudice. (Appellants' Opening Brief, Ex. C, cited herein as the "2013 Opinion.") Spring Capital filed a motion for reconsideration, which the Echo Defendants opposed, and which the Court denied. (*Id*., Ex. B.)

Holdings, realizing that the exact claims it had just filed against the Echo Defendants in this action were dismissed with no further recourse for Spring Capital, filed a Notice of Removal to the Delaware Bankruptcy Court on April 10, 2014. (A611.) The Echo Defendants then filed a Motion to Remand the Trustee's Cross-Claims back to the Court of Chancery for determination, which the Bankruptcy Court granted, finding that Holdings' attempt to remove this action to federal court was "a clear case of forum shopping." (A652.)

On November 3, 2014, the Trustee filed his Amended Verified Cross-Claims. (A699.) The Echo Defendants filed a Motion to Dismiss and on February 18, 2016, the Court issued an Opinion and Order granting the Echo Defendants' Motion to Dismiss the Trustee's Amended Cross-claims. (Appellants' Opening Brief, Ex. A, cited herein as the "2016 Opinion.")

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery correctly held that the Trustee (and Holdings) does not have standing to bring fraudulent transfer claims against the Echo Defendants under Delaware or Illinois law. In reaching this conclusion, the Court of Chancery correctly held that, as a matter of law, the assets transferred by RayTrans under the APA prior to its dissolution, and prior to Holdings filing for bankruptcy, did not, and could not, become property of Holdings' estate, and therefore were not subject to avoidance by the Trustee. Holdings' assertion that, by virtue of the fact that it owned all of the stock of RayTrans before it dissolved, it owned all of the property of RayTrans after it dissolved, including even property RayTrans no longer owned at the time of its dissolution, was correctly rejected by the trial court.

Holdings failed to plead that it now owns RayTrans' rights under the APA, but even if it had properly pled this claim, and even if RayTrans' dissolution vested in Holdings RayTrans' contractual rights under the APA, the result would not entitle the Trustee to pursue a fraudulent transfer claim against the Echo Defendants under the APA. Under no scenario, and even if this Court now considers the entirely new arguments raised by the Trustee on appeal, has the property transferred by RayTrans before it dissolved now "magically" become the property of Holdings, and therefore vested in the Trustee the right to avoid those

prior transfers. Only those creditors pursuing claims against RayTrans, not Holdings, would have standing to bring a fraudulent transfer claim arising out of the assets sold under the APA.

II. Denied. The Court of Chancery correctly ignored the Trustee's argument that the automatic stay applicable to Holdings' bankruptcy prohibited it from ruling on the Echo Defendants' Motion to Dismiss Spring Capital's Amended Complaint. The Court of Chancery correctly determined that the automatic stay did not apply to separate claims brought by Spring Capital against the Echo Defendants, when no relief was sought as to Holdings. The stay only acts to preclude proceedings against the Debtor (Holdings) or the estate of the Debtor. Spring Capital's claims against the Echo Defendants under the APA are clearly not proceedings against Holdings, and have no impact on Holdings' estate as the property at issue in Spring Capital's Amended Complaint was transferred long before Holdings filed for bankruptcy (which is precisely why Holdings and the Trustee have no standing to pursue fraudulent transfer claims against Echo).

Moreover, neither Spring Capital nor the Trustee ever raised the application of the stay until after Spring Capital's claims were dismissed by the lower court, despite the fact that Holdings had filed bankruptcy protection months earlier and already filed its Answer and Cross-claims in this case. Therefore, they should be estopped from doing so now. Had the Trustee actually believed that the automatic

stay prevented the Court of Chancery from ruling on Spring Capital's fraudulent transfer claims against the Echo Defendants, surely it would have raised the issue either at the time it filed its answer and cross-claims, at oral argument on the Echo Defendants' Motion to Dismiss Spring Capital's Amended Complaint, or at any time prior to the Court of Chancery's decision on the Echo Defendants' Motion (which came months after oral argument). It did not. Rather, the Trustee sat back and let the lower court rule on the Motion to Dismiss, expecting a favorable outcome to lend support to his fraudulent transfer claims.

When that support did not arrive, the Trustee still did not assert the automatic stay, but instead attempted to remove his claims to the Bankruptcy Court where he hoped for a better result. It was only after his claims were remanded and he was forced to respond to the Echo Defendants' Motion to Dismiss that the Trustee raised, for the first time, that the stay voided the 2013 Opinion dismissing Spring Capital's claims. The Trustee's motives in asserting this argument were obvious -- to avoid the effects of an adverse ruling on the same claims that he was attempting to bring. Such motivations aside, the Trustee was wrong then and he is wrong now, and his attempt to use the automatic stay improperly to avoid what he believes to be an adverse ruling against another party should be rejected.

III. Denied. The Court of Chancery correctly held that the Trustee's cross-claims failed to state a claim for actual or constructive fraudulent transfer

under both Delaware and Illinois law. First, both Spring Capital and the Trustee did not oppose, and indeed conceded, that the Uniform Fraudulent Transfer Act applied to both state's laws, and that there was no substantive difference in the application of either state's laws. Thus, they should be foreclosed from complaining now about whether the Court of Chancery mainly applied Delaware law to its analysis.

Moreover, the Court of Chancery correctly held that the cross-claims failed to plead facts that could establish, under any interpretation, a claim for actual or constructive fraud under the statute. Similarly, the Court of Chancery correctly held that, based on the facts as pled, the Trustee could not establish his claim that RayTrans had not received reasonably equivalent value for the assets sold under the APA, or that it was the sale of the assets that led to the dissolution or insolvency of RayTrans one year after the closing. In short, even if the Trustee did have standing to pursue a fraudulent transfer claim under the APA, based on the allegations in the cross-claims, there is no basis on which it can be found that RayTrans, as seller of the assets in question, did not receive reasonably equivalent value or was rendered insolvent as a result of the transfer.

Finally, even if the Trustee had standing to pursue a fraudulent transfer claim against Echo/RT, as the buyer of the assets under the APA, and even if the Trustee had adequately pled that claim to survive a Motion to Dismiss, the Trustee

does not contend, and therefore waives the argument, that he can pursue a fraudulent transfer claim against Echo. There was nothing ambiguous about the Court of Chancery's ruling when it dismissed Spring Capitals' claims against Echo (the exact same claims brought by the Trustee) and held:

> [T]aking all reasonable inferences from the Complaint in Spring Capital's favor, it is not reasonably conceivable that Echo was anything more than a limited guarantor or certain of Echo/RT's obligations under the Purchase Agreement . . . the Purchase Agreement is [controlling], and the terms of that contract, in which Echo was only a guarantor, "effectively negate" the . . . Fraudulent Transfer Claims . . . as a matter of law . . . us, there is no reasonably conceivable basis for the claims against Echo.

(2013 Opinion at 21-22.)

STATEMENT OF FACTS

A. The Parties

Holdings is a company created, upon information and belief, to "hold" the stock of various other companies created and operated by James Ray. (A654.) Currently, Holdings is a Chapter 7 debtor in the District of Delaware. (A654.)

Spring Real Estate, LLC d/b/a Spring Capital Group ("Spring Capital"), has never conducted any business with either of the Echo Defendants, nor has it ever conducted any business with RayTrans. Spring Capital's involvement relates to its attempt to try to collect on a $99,057.50 default judgment (the "Default Judgment") that Spring Capital purchased, together with four other judgments, for $5,500 from a bankruptcy trustee. (A113-115, 99-100.)

Echo is a Delaware corporation with its principal place of business in Chicago, Illinois. (A97.) Echo is a third party logistics broker that locates carriers for shippers at discounted rates and then schedules pickup and delivery of the shipment. Echo/RT is a Delaware limited liability company with its principal place of business in Chicago, Illinois. (A97.)

RayTrans, at the time that Echo/RT purchased its assets, was in essentially the same business as Echo, only on a smaller and more limited scale. Almost one year after the closing of the APA, James Ray allowed RayTrans to dissolve under Illinois law.

B. The Asset Purchase Agreement

On June 2, 2009, RayTrans entered into an asset purchase agreement for the sale of certain of its assets to Echo/RT (the "APA"). (A723). The purchase price was $12,550,000 cash (the "Purchase Price"), with $6,050,000 cash being paid at Closing and the remainder to be paid out if the purchased accounts achieved certain earn-out revenue milestones. (A741.)[1] These facts are undisputed.

Echo was a party to the APA solely to guaranty the payment obligations of Echo/RT. Similarly, Holdings was a party to the APA as the sole shareholder of RayTrans and to guaranty the accounts receivable, and James Ray was a party to the APA as the sole shareholder of Holdings. The APA identified the specific RayTrans assets that would be included in the sale and it specified what liabilities would be assumed by Echo/RT and retained by RayTrans. (A739-740, A290-896.) The assumed liabilities generally related to claims and obligations that arose from Echo/RT's business operations after closing on the asset purchase from RayTrans.

The APA also provides that no third party beneficiary rights will be conferred by the terms of the agreement. Section 11.10 of the APA states: "[N]othing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement… ." (A781.)

[1] In considering a motion to dismiss, the Court may consider documents referred to in the Complaint and may also take judicial notice of matters "not subject to reasonable dispute." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006); *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

C. RayTrans Fails To Achieve Any Additional Earn-Out Payments Under the APA

The Trustee's contention that the Echo Defendants may have failed to pay the additional payments required under the APA if RayTrans achieved certain minimum EBITDA thresholds relating to the assets transferred is not only wrong, but irrelevant.

First, the parties to the APA, which would include RayTrans, James Ray, and even 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. (A389.) The APA requires that $1 million of the initial cash paid by Echo at closing be refunded to Echo if the EBITDA numbers are not achieved over the three year period. (A745-748.) This is the sole basis for identifying Echo as a creditor on Holdings' schedules, and tantamount to an admission that RayTrans is owed no additional sums of money under the APA.[2]

Second, even if the Trustee were correct and there was a claim under the APA that RayTrans could bring as a result of the future earn-out payments not being made, that claim is nothing more than a breach of contract claim, not a claim for fraudulent transfer. The Trustee has not alleged any such breach of contract

[2] Echo had received a payment of $50,000 prior to Holdings' bankruptcy which is why the debt is listed at $950,000 on the schedules. (A389.)

claim in this action, and therefore the issue of future payments or earn-out requirements has absolutely no bearing on this appeal.

D. The Powersource Claims Are Immaterial And Irrelevant to Holdings' Cross-claims and This Appeal

In support of its fraudulent transfer claim, both actual and constructive, the Trustee relies heavily on a judgment obtained by a company called Powersource Transportation ("Powersource") in Indiana in 2011 (two years after the APA was consummated). (A658-659.) The judgment was obtained by Powersource not against RayTrans or Holdings, but rather against two separate James Ray entities that were not parties to the APA or this case. (A658-659.) After obtaining the judgment, Powersource initiated garnishment proceedings against Holdings and others (including the Echo Defendants) to try to collect on the judgment it obtained. These garnishment proceedings were stayed with the bankruptcy filings of James Ray and Holdings.

After the Echo Defendants' Motion to Dismiss Spring Capital's Amended Complaint was granted (originally the Trustee's fraudulent transfer claims were identical to those of Spring Capital), the Trustee amended his Cross-claims of fraudulent transfer against Echo to include the allegation that the asset transfer in the APA was hidden from Powersource, and that the APA left RayTrans unable to pay its creditors, including Powersource. (A658-659.) The problem with this strained logic is that the facts and chronology do not support it. First, there was

nothing to hide from Powersource as Powersource was not suing, and had brought no claims against, any of the parties to the APA, including RayTrans and Holdings. Second, Powersource was not a creditor of RayTrans at any time before it dissolved, both before and after the APA was consummated, and therefore the ability to pay the Powersource judgment—which was not a judgment against RayTrans, Holdings, or James Ray, has no bearing on the solvency or insolvency of RayTrans. The Court of Chancery correctly determined that the Powersource lawsuit and subsequent judgment has no bearing on the fraudulent transfer claims brought by the Trustee.

ARGUMENT

I. The Court Of Chancery's Dismissal Of The Amended Cross-Claims Based On The Trustee's Lack Of Standing Was Proper

A. Question Presented

Did the Court of Chancery properly dismiss 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"?

B. Scope of Review

The Trustee accurately states the standard for review.

C. Merits of Argument

1. The Trustee's arguments on the issue of standing to bring a fraudulent transfer claim were not asserted in the trial court and thus are waived

Under Supreme Court Rule 8, "[o]nly questions fairly presented to the trial court may be presented for review." Del. Supr. Ct. R. 8; s*ee also Knott v. LVNV Funding*, LLC, 95 A.3d 13, 20 (Del. 2014) (finding party "waived an [] argument... by failing to present that argument to the" trial court).

As his central argument on appeal seeking reversal of the trial court's holding that the Trustee lacks standing to bring the fraudulent transfer claims asserted below, the Trustee raises a proposition that he did not fairly raise below. Namely, the Trustee asserts that "under applicable Illinois law, the assets of the dissolved RT Distribution devolved to RayTrans Holdings." (Opening Brief at

17.) In his brief below opposing Defendants' Motion to Dismiss, however, the Trustee's *sole* argument on standing was that the powers authorized pursuant to Section 544 of the Bankruptcy Code for the Trustee to assert avoidance actions somehow conferred standing on the Trustee to assert the state law fraudulent transfer actions below solely as a result of Holdings stock ownership in RayTrans. (A865-A866.) The Trustee appears to have abandoned that meritless argument on appeal and instead asserts a new argument that was not fairly presented below, citing Illinois statutes and case law that were *never* presented to the trial court below. (*Compare* A847-A851, A865-866 *with* Opening Brief at 17-19.)

At most, the Trustee points to a vague colloquy at oral argument, which was unsupported by *any* authority, much less the authority that he is attempting to now present on appeal. (*See* Opening Brief at 16.) Indeed, the Trustee readily acknowledges that "this argument admittedly could have been presented in a clearer fashion." (*Id*. at 19.) Under Delaware law, a vague and unsupported reference to an argument, articulated for the first time at a hearing, is wholly insufficient to preserve the issue for appeal purposes. *See Roofers, Inc. v. Delaware Dep't of Labor*, 2014 WL 7010733, at *1 (Del. Nov. 24, 2014) (holding that "a single reference to [an] issue in a lengthy oral argument" is not considered to be fairly raising the issue below). For that reason alone, the Court should reject

the Trustee's standing argument and affirm the Court of Chancery's ruling on this issue.

2. The Dissolution of RayTrans does not devolve to Holdings property of RayTrans that was transferred prior to its dissolution, or the rights of those creditors of RayTrans that had claims relating to that property

Even if this Court were to consider the new arguments raised by the Trustee for the first time on this appeal, the Trustee has still failed to establish standing to assert a fraudulent transfer claim against the Echo Defendants.

As discussed above, the Trustee argues for the first time on appeal that, based upon Illinois law, upon the dissolution of RayTrans, all of its property devolved to Holdings, subject to the claims of RayTrans' creditors. (Opening Brief at 18.) Based on this entirely new argument, the Trustee argues that it acquired "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." (*Id*. at 19.) The Trustee further reasons that, as a result of it acquiring all of RayTrans' assets upon dissolution, it became "liable to creditors of RayTrans, to the extent of the value of any assets it received from RT Distribution." (*Id*.) This reasoning has incorrectly led the Trustee to the conclusion that it now has standing to pursue fraudulent transfer claims as if it were pursuing them on behalf of the creditors of RayTrans.

In his opening brief, the Trustee relies on the reasoning in *Matos v Richard A. Nellis, Inc.*, 101 F.3d 1193, 1195 (7th Cir. 1996) to support his arguments. The Trustee's reliance on *Matos* is misplaced.

Matos simply holds that if a corporation dissolves, its stockholders, to the extent they received property of the dissolved corporation upon its dissolution, can be liable for the corporation's unpaid debt up to the amount of the distribution they received. *Matos* does not stand for the proposition, or support the conclusion, that the stockholders step into the shoes of the dissolved corporation, becoming liable for all of its debts or having an interest in all of its property, even property transferred before it dissolved. Put into the context of this case, *Matos* merely stands for the proposition that Holdings is a debtor to the creditors of RayTrans only to the extent of money or property it received upon RayTrans' dissolution. In the instant case it is undisputed that, upon the dissolution of RayTrans, Holdings could not have received the assets sold under the APA, the very transfer it now seeks to unwind as that property had been sold long before RayTrans dissolved. Put simply, the Trustee fails to present any argument, case law or statute to support its conclusion that, based upon *Matos*, he can pursue fraudulent transfer claims on behalf of RayTrans' creditors.

Although 11 U.S.C. §544, gives the Trustee the power to "avoid any transfer of property of the debtor or any obligation incurred by the debtor…", it does not

give the Trustee the ability to avoid transactions of creditors of third-party debtors. In this case, Holdings never owned the assets that were transferred under the APA, and thus it never actually transferred those assets -- RayTrans did. As such, the Trustee has no power under §544 to seek to avoid this transfer. As the Court of Chancery properly analyzed:

> A challenged transfer "must be a transfer "of an interest of the debtor in property."[3] Property of the debtor "is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings."[4]

(2016 Opinion at 9.) Thus, as *no property of Holdings* was transferred, and because it is undisputed that at the time of the transfer under the APA RayTrans was a completely separate entity, the Trustee cannot pursue claims of RayTrans' creditors under §544.

3. The Trustee's argument that Holdings succeeded by operation of law to the rights of RayTrans under the APA does not, under any circumstances, allow Holdings (or the Trustee) to bring a fraudulent transfer claim to unwind the sale of the assets

The Trustee, for the first time in these appeal proceedings, now argues that because Holdings succeeded to RayTrans' contractual rights under the APA (to

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[3] *In re Am. Int'l Refinery*, 402 B.R. 728, 741 (Bankr. W.D. La. 2008)(emphasis removed)(quoting 11 U.S.C. §547(b)).

[4] *Begier v I.R.S.*, 496 U.S. 53, 58 (1990). Essentially, an interest is property of the debtor "for purposes of Section 547(b) if its transfer will deprive the bankruptcy estate of something which could otherwise be used to satisfy the claims of creditors." *In re Am. Int'l Refinery*, 402 B.R. at 741 (quoting *In re Bullion Reserve of N. Am.*, 836 F.2d 1214, 1217 (9th Cir. 1988)).

receive EBITDA statements, possible earn-outs, etc.), Holdings is also liable to the creditors of RayTrans to the extent of the value of assets it received, and therefore it has the right to pursue fraudulent transfer claims on behalf of those creditors. (Opening Brief at 19.) Again, not only has this argument been waived because it was timely raised in the Court of Chancery, but the Trustee is wrong. Even assuming that Holdings somehow succeeded to RayTrans' contractual rights (a point which the Echo Defendants do not concede), those contractual rights have nothing to do with whether the creditors of RayTrans are now creditors of Holdings -- they simply are not. And to the extent they become creditors of Holdings upon the dissolution of RayTrans, even the Trustee is forced to concede that it is only to the extent of the value of assets Holdings received from RayTrans upon its dissolution (*see* Opening Brief at 19), which cannot possibly include the value of assets transferred long before its dissolution.

II. The Court Of Chancery Correctly Held That Holdings' Bankruptcy Had No Impact On Spring Capital's Claims Or The Court Of Chancery's Ability To Decide Those Claims, Including The Claims For Fraudulent Transfer

A. Question Presented

Did the Court of Chancery correctly determine that the Holdings bankruptcy had no impact on Spring Capital's claims or its ability to decide the merits of those claims, including Spring Capital's fraudulent transfer claims?

B. Scope of Review

The Trustee accurately states the standard for review.

C. Merits of Argument

It cannot be disputed that the automatic stay in bankruptcy precludes only those actions taken against the debtor or the debtor's property. *See, e.g., In re Conference of African Union First Colored Methodist Protestant Church*, 184 B.R. 207, 214 (Bankr. D. Del. 1995) (noting that 11 U.S.C. 362(a) "only stays actions against the debtor and its property.") Spring Capital's Amended Complaint, which has now been dismissed by the Court of Chancery for more than three years, had no impact on Holdings or Holdings' property. Spring Capital sought relief only from the Echo Defendants. If this were not the case, then surely the Trustee would have asserted the automatic stay immediately after Holdings filed for bankruptcy. The Trustee did not do so. Or, alternatively, surely the Trustee would have asserted the automatic stay when he filed the answer to Spring Capital's Amended

Complaint, in which Holdings was named as a nominal defendant.[5] Once again, the Trustee did not do so. Instead, he brought affirmative claims against the Echo Defendants.

Once the Trustee filed his answer and cross-claims against the Echo Defendants, he was content to sit back and wait for a ruling from the lower court on the Echo Defendants' Motion to Dismiss Spring Capital's claims. Clearly, the Trustee expected the Motion to be denied, at which time he would have stepped in to pursue his same claims in the Court of Chancery as well. When the lower court granted the Echo Defendants' Motion to Dismiss Spring Capital's claims, the Trustee still failed to assert the stay, instead opting to remove his cross-claims to the Bankruptcy Court where he hoped for a better result than the one that awaited him in the Court of Chancery. Only when his claims were remanded to the Court of Chancery and he was forced to respond to the Echo Defendants' Motion to Dismiss did the Trustee, for the first time, raise the argument that automatic stay voided the Court of Chancery's prior decision dismissing Spring Capital's claims. The Trustee's motives in raising this argument for the first time were obvious. Having brought the exact same claims as Spring Capital, the Trustee was desperate

[5] In his Opening Brief, the Trustee admits he never asserted the stay in his answer and cross-claims, yet claims he stated his intent to pursue the fraudulent transfer claims, which should suffice. (Opening Brief at 20-21.) Of course, the Trustee is wrong.

to avoid the precedential impact of the Court of Chancery's decision on Spring Capital's claims.

The Trustee seems to understand that only claims against a debtor or property of the estate are subject to the bankruptcy stay. Relying on the same analysis to support his standing argument, the Trustee argues that the assets of RayTrans became assets of Holdings upon RayTrans' dissolution, and therefore creditors with claims as to those assets became creditors of Holdings. (Opening Brief at 21-22.) And because only the Trustee can pursue claims to avoid a transfer of, or seek to recover, property, Spring Capital had no right to pursue its fraudulent transfer claims once Holdings filed for bankruptcy, and therefore the subsequent decision to dismiss those claims is void.

As set forth above (*see supra* at Section I.C), the Trustee is wrong because (1) it never raised these arguments in the lower court and is precluded from doing so now for the first time on appeal and (2) the property of the dissolved corporation (RayTrans) that was sold or transferred prior to its dissolution does not, and cannot, devolve to stockholders of the dissolved corporation.

III. The Court of Chancery Did Not Err In Ruling That The Cross-claims Failed To State A Claim For Constructive Or Actual Fraudulent Transfer

A. Question Presented

Assuming the Trustee had standing to bring the fraudulent transfer claims, did the Court of Chancery correctly dismiss the Cross-claims pursuant to Rule 12(b)(6), by holding that the Cross-claims do not set forth a reasonably conceivable claim alleging constructive or actual fraudulent transfer, under Delaware or Illinois law?

B. Scope of Review

The Trustee accurately states the standard for review.

C. Merits of Argument

1. The Trustee did not challenge, and therefore conceded, that the application of either Delaware or Illinois law to this issue is essentially the same, and therefore the application of Delaware law by the Court of Chancery was entirely appropriate

The Trustee, in his amended complaint, asserted separate counts of fraudulent transfer under Delaware law (Count I) and Illinois law (Count II). (A660-666.) Both Delaware and Illinois have adopted the Uniform Fraudulent Transfer Act ("UFTA"). The Trustee does not dispute that Delaware and Illinois statutes are verbatim almost identical. And the Trustee did not challenge the Echo Defendants' assertion that the fraudulent transfer laws of Delaware and Illinois are

essentially the same (*see* 2016 Opinion at 12, n.36), and thus conceded this issue. As a result, the Court of Chancery mainly applied Delaware law to its analysis.

Yet now the Trustee has had a change of heart. Without a single citation to support the contention that that the Illinois courts would interpret the UFTA differently than the Delaware courts would interpret it, the Trustee merely postulates that "the case law under UFTA may vary from one state to another." (Opening Brief at 25). In trying to explain why he did not raise this argument earlier, the Trustee claims that he "expected that greater clarity about which state's UFTA applies would come after the facts of the case became further developed through discovery." (Opening Brief at 25.)

If the Trustee truly believed that the determination of the feasibility of his fraudulent transfer claims depended on whether Delaware or Illinois law was applied (which is obviously not the case or the Trustee would have cited the relevant law on appeal), then he had the obligation in the trial court to present argument explaining this position in the Court of Chancery. The Trustee failed to do so, thus this argument is waived. *See* Del. Supr. Ct. R. 8.

2. The Court of Chancery applied the proper standard of review

There is no dispute that the "reasonable conceivability" standard is the appropriate standard. However, the Court of Chancery was not required to "accept

every strained interpretation proposed by the plaintiff."[6] The Trustee's assertion that the Court of Chancery applied this standard too narrowly is not correct, as will be discussed *infra.*

3. The Court of Chancery Applied The Appropriate Standards Of Review In Dismissing The Trustee's Claims For Constructive Fraudulent Transfer And Actual Fraudulent Transfer

The requirements of 6 *Del. C.* § 1304 have been summarized by the courts as follows:

> To maintain a cause of action for fraudulent transfer, Plaintiff must show that the transfer was made, whether before or after the creditor's claim arose, (1) with actual intent to hinder, delay or defraud any creditor of the debtor; (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor" either (a) was insolvent or became insolvent as a result of the transfer, (b) engaged in or was about to engage in a transaction with respect to which its remaining assets would be unreasonably small; or (c) intended to incur or reasonably should have believed it would incur debts beyond its ability to pay.[7]

The Amended Cross-claims brought by the Trustee, based on the undisputed facts and giving the Trustee every reasonable inference, fail to properly assert a claim under either subsection of the fraudulent transfer statute.

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[6] *Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine P'rs 2006, L.P.,* 93 A.3d 1203, 1205 (Del. 2014).

[7] 6 *Del. C.* §1304*; Seiden v Kaneko,* 2015 WL 7289338, at *13 (Del. Ch. Nov. 3, 2015); *In re Plassein Int'l Corp.,* 428 B.R. 64, 67 (D. Del. 2010).

a. The dismissal of the Trustee's constructive fraudulent transfer claims was appropriate because the allegations in the amended cross-complaint were insufficient to state a claim

After determining that the Trustee did not have standing to bring the fraudulent transfer claims against the Echo Defendants, the Court still looked to the substance of the claims to determine whether they were subject to dismissal even if the Trustee did have standing, and properly dismissed the claims for failure to state a claim.

First, the mere recitation of the statutory elements of fraudulent transfer does not suffice to state a claim that can survive a motion to dismiss. *Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at *13 (Del. Ch. Aug. 28, 2012). In *Lutz*, the Court encountered a complaint that, like this one, consisted mainly of language lifted from 6 *Del. C.* § 1304, and on that basis dismissed the complaint. The decision was a particular application of the general rule that a court may disregard conclusory statements in a complaint that are unsupported by particular factual allegations. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006). Illinois law follows the same principle, requiring plaintiffs to offer more than conclusory allegations if they wish to survive a motion to dismiss. *See, e.g.*, *Ostrolenk Faber LLP v. Genender Intern. Imports, Inc.*, 2013 WL 1289130, at *6 (Ill. App. 1 Dist. Mar. 29, 2013) (dismissing a fraudulent transfer claim that alleged generically that the transfer was made "without adequate consideration"

because "[w]ithout specific facts, Ostrolenk fails to state a claim for fraud in law.").

Thus, the Amended Cross-claims must establish facts that, if proven, would demonstrate entitlement to relief. They do not. While it is true that the Trustee, when it amended these claims after the matter was remanded by the Bankruptcy Court, attempted to solve the deficiencies of Spring Capital's pleadings by adding allegations of RayTrans' worth and the extent of its creditors at or near the time of the APA, these facts, even accepting them as true, were found to be irrelevant and of no bearing on whether the APA is a fraudulent transfer. In fact, the allegations in the amended Cross-claims establish that the money paid pursuant to the APA was more than sufficient to satisfy all of RayTrans' liabilities.[8]

b. Holdings alleged "Facts" provide no support for its contention that the APA did not provide reasonably equivalent value.

As the lower court found **twice**, first when analyzing the claims of Spring Capital and again when analyzing the identical claims of the Trustee, there was no reasonable basis to conclude that the amount paid by Echo/RT pursuant to the APA was not reasonably equivalent value for the assets received. (2013 Opinion at 18; 2016 Opinion at 15.) Without a shred of credible support, the Trustee alleges that

[8] The amount paid pursuant to the APA was $6,050,000, while RayTrans Distributions' liability to creditors, as represented in Paragraph 13 of the Amended Cross-Complaint was only $3,126,000. (A656.) Clearly, the proceeds from the APA were sufficient to satisfy RayTrans' indebtedness.

in December of 2007, RayTrans assets were worth approximately $11 million.[9] (A657.) In addition to the fact that there is no support for this assertion, it is irrelevant and has no bearing on a determination of whether RayTrans received reasonably equivalent value for the assets sold. First, this valuation is almost two years prior to the execution of the APA. The time to determine whether adequate consideration was paid is the time the APA was executed, not two years prior. Second, it is undisputed, as held by this Court in dismissing Spring Capital's Amended Complaint, that RayTrans, as a company, was not purchased. Rather, only certain of its assets and liabilities were purchased. As such, its alleged "total" value has no relevance because the company, as an entity, was not purchased. Third, even if the Court were to accept the assertion that the value of the assets purchased could possibly be $11 million, the actual purchase price agreed to by the parties to the APA (which included Holdings) was in excess of $12 million, and would have been achieved by RayTrans had certain minimum performance benchmarks been met. It is undisputed that these benchmarks were not met, and in fact Echo/RT is entitled to a refund under the APA. The Trustee cannot seriously

[9] The Trustee asserts a new argument that the value of RayTrans was actually greater than $11 Million because that amount does not take into account the guaranty that Holdings gave concerning the accounts receivables. (Opening Brief at 31.) Although this argument should be disregarded as it was not preserved, it is specious as Holdings' guaranty is clearly valueless since it is in bankruptcy and cannot satisfy its obligations as guarantor. Further, under this logic, the guaranty that Echo made as to payments that Echo/RT was required to make under the APA were also not factored into the amount that RayTrans received. At least as to Echo's guaranty, Echo is actually able to satisfy its obligations (although it has no such obligations).

dispute this fact, despite the rhetoric in its opening brief on appeal, as it voluntarily listed Echo as a creditor on Holdings bankruptcy schedules in the amount of this unpaid refund. (A389.)

In a tacit admission that his Amended Cross-claims failed to plead that less than reasonably equivalent value was received, the Trustee claims that "[i]t was error for the court to have decided that [issue] 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)" (Opening Brief at 29), and proceeds to cite to irrelevant Bankruptcy law. (Opening Brief at 30-31.) That meritless argument ignores the Trustee's initial pleading burden to state facts sufficient to state a claim, and his failure to do so mandates dismissal under Rule 12(b)(6).

c. No viable claim of insolvency resulting from the transfer of assets under the APA has been, or can be, made by the Trustee

In addition to the requirement that the Trustee establish that reasonably equivalent value was not received by RayTrans, which it has failed to do, the Trustee must also properly allege that the transfer of assets left RayTrans insolvent and unable to pay its debts. The Trustee disingenuously claims that "there is no debate about the sufficiency of the allegations that" RT Distribution "was left insolvent after the transfer." (Opening Brief at 28.) This point is vigorously

disputed by the Echo Defendants. Indeed, the allegations in the Amended Cross-claims clearly establish that RayTrans was solvent and did not become insolvent as a result of the transfer. (*See supra* at Section III. C. b.) The Trustee's allegation that RayTrans "faced certain liabilities, including a lawsuit by a competitor, Powersource" (A658; *see also* Opening Brief at 28) prior to the execution of the APA is a flat out misrepresentation. There was no Powersource lawsuit against RayTrans pending prior to the execution of the APA; rather, the only Powersource lawsuit pending was against separate and distinct entities. (A659.) Schedule 1.3 of the APA (Seller's Liabilities) establish that RayTrans' total liabilities at the time of execution of the APA was only $19,291. (A799.) Schedule 1.2(a) of the APA lists two of the assets retained by RayTrans as having a face value of $615,000. (A796.)

In short, there is no set of facts that have been (or could be) alleged that could support the required element under the statute that RayTrans was insolvent at the time the APA was entered into. Further, there is no set of facts that have been (or could be) be alleged that would support the conclusion that RayTrans became insolvent as a result of the APA. Echo/RT paid $6,050,000 as required under the APA. Even if one were to assume that the $3,126,000 in liabilities alleged by the Trustee (A653), all of which were unsecured, were liabilities at the time of execution of the APA (which they were not), the payment by Echo/RT of

$6,050,000 was more than sufficient to pay these liabilities and remain in business. The Trustee stubbornly refuses to confront the reality of his own allegations, which is fatal to his cross-claims. As the Court of Chancery correctly held, "what a debtor like RayTrans [Distribution] decides to do with money it receives from the sale of assets has no bearing on whether the amount paid is a fair price or reasonably equivalent value for the assets sold." (2016 Opinion at 15-16 (*quoting* 2013 Opinion at 18).)

d. The allegations in Holdings Amended Cross-Claims do not establish actual intent to defraud creditors of RayTrans

The Court of Chancery correctly concluded that "because RayTrans Distribution had no intent to defraud its creditors and received reasonably equivalent value in return for its assets, the APA did not amount to a fraudulent transfer." (2016 Opinion at 17.)[10] An examination of 6 *Del. C.* § 1304 and 740 ILCS 160/5 further demonstrate the shortcomings of the Trustee's Cross-claims.

A claim under § 1304(a)(1) should be dismissed when no particular facts demonstrate actual intent to "hinder, delay or defraud creditors" on the part of the

[10] The Trustee, citing to *In re H. King & Associates*, 295 B.R. 246, 287 (Bankr. N.D. Ill. 2003), incorrectly concludes that the Court of Chancery erred by considering whether or not the APA provided reasonably equivalent value. (Opening Brief at 33.) The court in *In re H. King & Associates* stated that a defense for a UFTA claim asserting fraud in fact "consists of two elements: good faith and reasonably equivalent value." *Id.* at 288. Thus, the Court of Chancery in reaching its conclusion was correct in considering both factors, contrary to the Trustee's assertion.

transferor in the challenged transfer. *Metro Comm'n Corp. BVI v. Advanced MobileComm Techs., Inc.*, 854 A.2d 121, 166 (Del. Ch. 2004) (dismissing §1304(a)(1) claim because plaintiff could not provide any explanation consistent with undisputed facts of how the defendant transferor's transaction was intended to hinder, delay or defraud the plaintiff creditors). The same is true for a claim brought under ILCS 740 ILCS 160/5(a)(1). *See Ostrolenk Faber*, 2013 WL 1289130, at *6 ("Proof of fraud requires an actual showing of intent to hinder creditors"). While Holdings (or rather the Trustee for Holdings) has alleged that RayTrans failed to pay its creditors or advise them of the terms of the APA, Holdings fails to acknowledge that as a party to the APA it was fully aware of its terms. Moreover, it was the sole shareholder of RayTrans. Holdings cannot now complain about what it and RayTrans did or failed to do, and then assert fraudulent transfer claims as if it were a creditor of RayTrans.

As a result of Holdings direct involvement in the APA, it cannot establish, much less even credibly argue, that RayTrans possessed the intent necessary to prevail on its claim under 6 *Del. C.* § 1304(a)(1) and 740 ILCS 160/5(a)(1). It is not a creditor of RayTrans, as required under the statute. Moreover, asserting such a claim would be tantamount to an admission that Holdings committed fraud.

Further, a claim under both §1304(a)(2) and 740 ILCS 160/5(a)(2), as well as 1305 and 740 ILCS 160/6, should be dismissed if the plaintiff fails to make a

threshold showing demonstrating that the defendant transferor did not receive "reasonably equivalent value" for the asset sale. In *Lutz*, the Court dismissed a claim under § 1304(a)(2) because the complaint contained no facts that would provide a basis under which the Court could decide whether the amount paid constituted reasonably equivalent value. *Lutz*, 2012 WL 3679219, at *15 (dismissing claim under § 1304(a)(2) because the complaint failed to include specific facts supporting the § 1304(a)(2) requirements).

Finally, Holdings' Cross-Claims fail to allege any facts that demonstrate § 1304(a)(2)(A) or (B), or 740 ILCS 160/5(a)(2)(A) or (B), apply here. RayTrans retained assets after the sale, and if it needed anything else to continue its business, Echo/RT provided it with $6 million it could have used to fund operations. Further, none of Holdings' claims contain any reason to believe that RayTrans would no longer be able to meet its obligations as they came due.

The APA was consummated through arms-length negotiations and resulted in RayTrans retaining assets and receiving over $6 million in cash, with only -- assuming the allegations in the Complaint are true -- $3,126,000.00 in liabilities. (A656.) The fact that RayTrans later failed to pay its creditors does not give rise to a fraudulent transfer claim under either Delaware or Illinois law. In fact, it gives rise to no claim against Echo or Echo/RT.

The Court of Chancery correctly reached these conclusions twice and there is no argument on appeal that supports a reversal of the Court of Chancery's well-reasoned decisions.

e. Echo is not, and cannot be, liable on the fraudulent transfer claims

The Trustee did not argue, and did not preserve the issue of whether or not Echo could be liable under the APA or the guaranty. The fact of the matter, as demonstrated in the APA, is that Echo was not the purchaser of RayTrans' assets under the APA, and so the only claims against Echo must therefore arise under Echo's limited guaranty of the purchase price paid by Echo/RT. As the Court of Chancery noted:

> Taking all reasonable inferences from the Complaint in Spring Capital's favor, it is not reasonably conceivable that Echo was anything more than a limited guarantor or certain of Echo/RT's obligations under the Purchase Agreement . . . the Purchase Agreement is [controlling], and the terms of that contract, in which Echo was only a guarantor, "effectively negate" the . . . Fraudulent Transfer Claims . . . as a matter of law . . . us, there is no reasonably conceivable basis for the claims against Echo.

(2013 Opinion at 20-22.)

The Trustee never responded to this argument in his opposition brief to the motion to dismiss, nor did he address it in his Opening Brief on this appeal; thus,

the Trustee has effectively waived the argument, and Echo cannot be found liable under any claim for fraudulent transfer. *See* Del. Supr. Ct. R. 8.[11]

CONCLUSION

For the foregoing reasons, the Echo Defendants respectfully request that the Court affirm the judgments of the Court of Chancery.

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[11] In the final sentence of his Opening Brief, the Trustee states that "[i]f greater clarity in the pleading is sought, then the Court could allow the Trustee to amend the Cross-claims, as was requested." (Opening Brief at 34.) The Trustee fails to make any attempt to satisfy the "good case" requirement of Rule 15(aaa) and, therefore, the Court should (like the Court of Chancery) reject this request.