UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RONALD FRIEDMAN, as trustee for The SportCo Creditors' Liquidation Trust,

Plaintiff,

v.

WELLSPRING CAPITAL MANAGEMENT LLC, WELLSPRING CAPITAL PARTNERS IV, L.P., WCM GENPAR IV, L.P., WCM GENPAR IV GP, LLC, ALEXANDER E. CARLES, BRADLEY JOHNSON, F. HEWITT GRANT, CHARLES E. WALKER, JR., TODD BOEHLY, BERNARD ZIOMEK, and ANDREW KUPCHIK,

Defendants.

Adversary No. 19-80071-dd

REPLY OF TODD BOEHLY IN SUPPORT OF MOTION TO DISMISS

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Defendant Todd Boehly, by and through his undersigned counsel, files this Reply Brief in support of his Motion to Dismiss [Doc. No. 93]. Mr. Boehly joins the arguments made by the Wellspring Defendants[1] in their Reply Brief for the dismissal of Counts 1 and 2 of the Complaint [Doc No. 118], the only Counts pled against Mr. Boehly. He submits this Reply to supplement the first argument for the dismissal of those claims—that the sole "triggering creditor" under Section 544(b) of the Bankruptcy Code, 11 U.S.C. § 544(b), that the plaintiff Trustee has identified, Prospect Capital Corporation ("Prospect"), consented to the transfers at issue and therefore could not avoid those transfers.

As the Trustee acknowledges, "Section 544(b) of the Bankruptcy Code requires a trustee [to] establish the existence of a triggering creditor that holds an allowable, unsecured claim as of the petition pate [sic] who has standing to bring a claim." Trustee's Opp. [Doc. No. 112] at 28. Prospect is the only possible triggering creditor the Trustee identifies, both in his Complaint and his Opposition Brief. But, as a matter of law, Prospect lacks standing to seek to avoid the transfers at issue because it, by the Trustee's own admission (*id.* at 34-35), "consented" to the transfers the Trustee seeks to avoid.

The relevant facts are evident from the face of the Complaint, the loan agreements incorporated therein, and the Trustee's own Opposition Brief. In 2012 and 2013, Prospect loaned money to the Debtors for the purpose of funding the distributions the Debtors made to their shareholders that the Trustee nevertheless now seeks to avoid standing in the shoes of Prospect. Indeed, Prospect required the Debtors to use the money it loaned "solely" for the purposes specified in the loan agreements, the principal one of which was "to pay" those distributions. Wellspring Defendants' Motion to Dismiss, Ex. 2 [Doc. No. 91-3], § 1.1.3; Ex. 3 [Doc. No. 91-4],

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion to Dismiss.

§ 2F. The Trustee does not dispute any of this. To the contrary, he admits that "Prospect consented to a dividend recapitalization." Trustee's Opp. [Doc. No. 112] at 34-35.

The law is also clear. As the Trustee acknowledges, courts around the country have held that a creditor that loaned money to the debtor for the very purpose of enabling the debtor to make a particular transfer cannot later ask for a do-over and seek to avoid that transfer as a fraudulent conveyance. *See, e.g., Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 383-85 (Bankr. S.D.N.Y. 2014), as corrected (Jan. 16, 2014), *abrogated in part on other grounds by Deutsche Bank Tr. Co. Ams. v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.)*, 818 F.3d 98 (2d Cir. 2016), *amended and superseded,* 946 F.3d 66 (2d Cir. 2019); *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 479 B.R. 405, 411 (N.D. Tex. 2012); Wellspring Defendants' Motion to Dismiss [Doc. No. 91] at 13-16 (citing additional authority); Trustee's Opp. [Doc. No. 112] at 34 (acknowledging the holdings of these cases).

The Trustee nevertheless argues that this long-established rule of law does not apply here because *Lyondell*, *Verizon* and the other cases "come from jurisdictions that, unlike South Carolina, view fraudulent transfers as voidable, rather than void." Trustee's Opp. [Doc. No. 112] at 34. But, as the Wellspring Defendants explain, New York, not South Carolina, law applies in this case, and New York treats a fraudulent transfer as voidable, not void. Wellspring Defendants' Motion to Dismiss [Doc. No. 91] at 17-23; Wellspring Defendants' Reply [Doc. No. 118] at 5-13. In any event, even if the law of South Carolina governed, the Trustee misapprehends the distinction between whether a transfer is void or voidable.

Under South Carolina law, *if* a transfer is avoided as a fraudulent conveyance, the transfer is treated as "void" and "of no effect." S.C. Code § 27-23-10. As a result, upon its avoidance, South Carolina law treats the transfer as if it had never occurred. But the legal requirements to avoid the transfer in the first place, including the basic rules of standing, apply just as much under

South Carolina law as they do under the law of states that treat fraudulent conveyances as voidable, rather than void.

The cases the Trustee himself cites so hold. In *Carr v. Guerard*, 365 S.C. 151 (2005) (cited in Trustee's Opp. [Doc. No. 112] at 33), the South Carolina Supreme Court affirmed the grant of judgment for the defendant in a fraudulent transfer case brought under South Carolina law. The plaintiff had been a judgment creditor of the debtor, but it waited more than 10 years to file suit to avoid the transfer, and, accordingly, was no longer a creditor of the debtor. The Supreme Court recognized that South Carolina law treats a transfer that is avoided as "void." *Id.* at 153-54. But it nevertheless held that the plaintiff "lack[ed] standing" to avoid the transfer at all.

> First, as soon as his judgment became more than ten years old, Carr lost his judgment-creditor status. Because he is no longer a creditor, he lacks standing to bring an action under the Statute of Elizabeth.

Id. at 154.

One of the Supreme Court's prior decisions, cited with approval in *Carr* (365 S.C. at 154), *Future Group, II v. Nationsbank*, 324 S.C. 89 (1996), underscores that the basic standing requirements to bring a fraudulent transfer claim exist with the same force under South Carolina law as they do under the law of any other state, notwithstanding that South Carolina treats a transfer that is avoided by a creditor with standing as void. In *Future Group, II*, the Supreme Court reversed a judgment on a fraudulent transfer claim in favor of a shareholder of the debtor on the ground that the shareholder lacked standing to invoke the Statute of Elizabeth.

> Next, Bank contends Runey failed to establish he was entitled to recover pursuant to § 27–23–10 because Agency was not indebted to Runey. We agree. Runey relies solely on his status as a preferred shareholder of Agency's holding company, Future Group, to assert his right to recover as a creditor. In the absence of special statutory or contractual provisions, a preferred shareholder is not a creditor of a corporation by virtue of his ownership of stock. 18A Am. Jur. 2d Corporations § 753 (1985). Accordingly, we hold Runey cannot recover on this cause of action.

Id. at 97-98.

That a transfer that *is* avoided is void under South Carolina law thus does not alter the basic standing requirements to avoid the transfer in the first place. Rather, the import under South Carolina law of treating a transfer that is avoided as void, rather than voidable, is that the transfer is viewed as having never occurred. Another case the Trustee himself cites [Trustee's Opp. [Doc. No. 112] at 33], *In re Amtron, Inc.,* 192 B.R. 130 (Bankr. D.S.C. 1995), makes this clear. The debtor had transferred its rights in patents in 1986, and had thereafter failed to pay taxes, allowing the IRS to obtain a lien on all of the debtor's property in 1989. The debtor filed for bankruptcy in 1990, and the bankruptcy trustee successfully sued to set aside the transfer of the patents as a fraudulent transfer. The question then arose whether the IRS' lien attached to the patents, or whether it did not (as the trustee claimed) because the debtor had transferred the patents before the IRS obtained its lien. Rejecting the trustee's argument, the court held that the debtor's transfer of the patents in 1986, once set aside, was void; as a legal matter, it was as if the debtor had continued to own the patents when the IRS obtained its lien on the debtor's assets in 1989 and, therefore, the IRS' lien attached to the patents. *Id.* at 132.

As all these cases demonstrate, it does not matter for purposes of Mr. Boehly's Motion to Dismiss and those of the other shareholder defendants that South Carolina treats an avoided transfer as void. While a transfer that *is* avoided is void under the Statute of Elizabeth, the standing requirements to avoid the transfer are just as relevant under South Carolina's fraudulent transfer statute as they are under those of all other states. Here, under well-settled law, Prospect cannot avoid the transfers (and nor can the Trustee standing in Prospect's shoes) because Prospect consented to those transfers—indeed, required them under its loan agreements—from the outset.

The Trustee's other arguments are makeweights. Describing "ratification" as "'the affirmance of a prior act done by another,'" the Trustee argues that a fraudulent conveyance cannot

be ratified. Trustee's Opp. [Doc. No. 112] at 34 n.30 (*quoting Hodgin v. UTC Fire & Sec. Americas Corp.*, 885 F.3d 243, 252 (4th Cir. 2018)). But, even if that statement of the law were generally true, it would have no relevance here. Prospect did not simply ratify "a prior act" done by "another." *Prospect*—not someone else— made loans to fund the transfers at issue *at the time they occurred*. From the outset, Prospect itself consented to—indeed, required—the transfers. As *Lyondell*, *Verizon*, and numerous other cases hold, that bars Prospect, and the Trustee standing in Prospect's shoes, from seeking a mulligan to avoid those transfers long after Prospect mandated that they occur.

The Trustee admits that Prospect "consented" to the transfers, but he argues that it did not consent to "Ellett's failure to retain sufficient capital to repay its debt" or to what it characterizes as "Wellspring Capital's mismanagement of Ellett." Trustee's Opp. [Doc. No. 112] at 35. But, even if that is true, it too has no bearing as a matter of law on the Trustee's fraudulent *transfer* claims against Mr. Boehly. By its terms, the Statute of Elizabeth voids a "gift, grant, alienation, bargain, transfer, and conveyance" made in fraud of creditors, not actions (or inactions) that occur long after the transfer. S.C. Code § 27-23-10. And, in all events, the Trustee does not and cannot claim that Mr. Boehly—a small, passive investor in the Debtors—managed (let alone "mismanaged") Ellett or played any role in determining how much capital Ellett did or did not retain.

The Trustee similarly misses the mark in arguing that it does not matter that Prospect made its loans for the purpose of funding the transfers at issue because those transfers occurred before the Debtors failed to repay the loans and thus before the statute of limitations began to run. Trustee's Opp. [Doc. No. 112] at 35. The issue here is not whether the Trustee's claims standing in the shoes of Prospect are time barred. The question is whether those claims fail because, having consented from the outset to the transfers, Prospect lacks standing to demand a do-over and to seek

to have them set aside. The relevant point in time to assess whether the supposed triggering creditor so consented to the *transfers* is at the time it made its loans to finance those *transfers*, as the cases make clear. *See, e.g., Lyondell*, 503 B.R. at 384-85 (focusing on whether the lenders, when they made the loans, agreed that the debtor could use the proceeds to pay its shareholders; the lenders could not have been "ignorant of the fact that [they] w[ere] lending for the purpose of financing an LBO, and that LBO proceeds would then go to stockholders—especially since . . . the loan documents required loan proceeds to be used for that purpose"); *Verizon*, 479 B.R. at 411 (also focusing on whether the lenders, when they made the loans, agreed that the debtor could use the proceeds to pay its shareholders; the lenders "not only *knew* that their loans would be used to pay Verizon, they not only *consented* that their loans be used to pay Verizon; they *required* that their loans be used to pay Verizon").

Left with nothing else to argue, the Trustee claims that whether Prospect can be the triggering creditor cannot be decided on a motion to dismiss. It can be. *Lyondell* and *Verizon* were decided on motions to dismiss (*Lyondell*) or for summary judgment (*Verizon*), and there is no reason why this case cannot be as well. The only fact that is necessary for this motion is that Prospect made its loans agreeing—indeed, requiring—that the Debtors use the proceeds to fund the transfers to their shareholders that the Trustee now seeks to avoid standing in Prospect's shoes. The loan documents, incorporated into the Complaint, make this absolutely clear, specifying that the Debtors could use the proceeds "solely" for the purposes specified, including make the "[d]istribution[s]" to the shareholders. Wellspring Defendants' Motion to Dismiss, Ex. 2 [Doc. No. 91-3], § 1.1.3; Ex. 3 [Doc. No. 91-4], § 2F. As the bankruptcy court held in *Lyondell*, "it is more than sufficient here for the LBO lenders to have known—as the [loan] documents themselves establish—that they were lending for the purposes of an LBO, and that the proceeds of their loans were going to stockholders." 503 B.R. at 385.

Finally, to the extent that the "equities" matter, it is telling that neither in his Complaint nor in his Brief does the Trustee make any suggestion that Mr. Boehly, a small, minority shareholder in the Debtors, played any role at all in causing the transfers to occur. In contrast, the Trustee readily admits that Prospect "consented" to those transfers. It is more than a bit ironic that the Trustee is seeking to avoid, as "fraudulent," a transfer standing in the shoes of a party (Prospect) that required those transfers and recover them from a party (Mr. Boehly) that is not alleged to have had anything to do with them.

For all these reasons, as well as those set forth in Mr. Boehly's Motion to Dismiss, and the papers filed by the Wellspring Defendants, Counts 1 and 2 of the Complaint should be dismissed with prejudice.

Respectfully Submitted,

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