IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	
	)	Chapter 11
MODIVCARE INC., *et al*.,[1]	)	
	)	Case No. 25-90309 (ARP)
Debtors.	)	(Jointly Administered)

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' REPLY IN FURTHER SUPPORT OF ITS MOTION FOR (I) LEAVE, DERIVATIVE STANDING, AND AUTHORITY TO COMMENCE AND PROSECUTE CERTAIN UPTIER TRANSACTION CLAIMS AND CAUSES OF ACTION ON BEHALF OF THE DEBTORS' ESTATES AND (II) EXCLUSIVE SETTLEMENT AUTHORITY

The Official Committee of Unsecured Creditors (the "**Committee**") appointed in the Chapter 11 Cases of ModivCare, Inc. ("**ModivCare**") and its affiliated debtors and debtors-in-possession (collectively, the "**Debtors**" and, together with their non-Debtor affiliates, the "**Company**"), by and through its undersigned counsel, hereby submits this reply (the "**Reply**") in support of its *Motion of the Official Committee of Unsecured Creditors for (I) Leave, Derivative Standing, and Authority to Commence and Prosecute Certain Uptier Transaction Claims and Causes of Action on Behalf of the Debtors' Estates and (II) Exclusive Settlement Authority* [Docket No. 732] (the "**Standing Motion**").[2]

[1] A complete list of each of the Debtors in these chapter 11 cases (the "**Chapter 11 Cases**") and the last four digits of each Debtor's taxpayer identification number (if applicable) may be obtained on the website of the Debtors' claims and noticing agent at https://www.veritaglobal.net/ModivCare. Debtor ModivCare Inc.'s principal place of business and the Debtors' service address in these Chapter 11 Cases is 6900 E. Layton Avenue, Suite 1100 & 1200, Denver, Colorado 80237.

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Standing Motion and Exhibit A attached thereto (the "**Proposed Complaint**").

PRELIMINARY STATEMENT

1. It is clear from the Debtors' confirmation brief that their refusal to bring the Proposed Claims was not based on a careful weighing of the potential benefits of asserting the claims against the potential costs. As an overarching matter, the Debtors appear to have given little thought to the Proposed Claims, having assumed at the outset that they will prevail on the plan valuation dispute that is presently before this Court and therefore have concluded that the claims are not worth bringing for that reason alone.[3] They argue that "in a best case scenario for the Committee, success on these claims would simply redirect value away from General Unsecured Creditors as a whole to the Subordinated Unsecured Noteholders in particular."[4] This argument is indicative of the fundamental misunderstanding that pervades the Debtors' Confirmation Brief. Depending on the outcome of the plan valuation dispute, success on the Proposed Claims may very well increase recoveries available to pay unsecured creditors as a whole – *i.e.*, that estate value will be enhanced. The Debtors simply assume away this possibility.

2. As to both the actual and constructive fraudulent transfer claims, the Debtors' decision not to pursue the Proposed Claims hinges entirely on the Debtors' view that the claims are barred as a matter of law. But that position is erroneous.

3. With respect to the actual fraudulent transfer claims, it is clear from their objection that the Debtors believe that the "actual intent" standard as applied here requires a plausible allegation that "the Debtors consummated the Uptier Exchange for no reason other than to harm"

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[3] *See Debtors' Omnibus Brief (A) in Support of Plan Confirmation and (B) Objecting to Committee's Motions for Standing to Pursue Claims and Lien Challenges* [Docket No. 921] (the "**Debtors' Confirmation Brief**") ¶¶ 291-292.

[4] *Id*. at ¶ 296.

unsecured creditors.[5] To the contrary, relevant authority supports the Committee's position that it is sufficient to allege that the transfer was made to delay an inevitable bankruptcy, with knowledge that such transfer would hinder creditors in such bankruptcy.

4. With respect to the constructive fraudulent transfer claims, the Debtors made the threshold determination that the Uptier Notes Exchange "secured antecedent debt" and therefore that the Debtors received reasonably equivalent value as a matter of law. But, as a factual matter, the Uptier Notes Exchange plainly did *not* secure (or repay) antecedent debt, but rather it involved the issuance of *new* secured notes in exchange for old unsecured notes. This is not a minor technical distinction. The Uptier Notes Exchange was deliberately structured this way – with the Debtors acquiring, rather than securing or repaying, their existing unsecured notes – in order to "uptier" the Consenting Creditors, because the documents governing the Unsecured Notes would not permit the Debtors to grant security with respect to, or repay, only a subset of the existing notes. Having chosen this structure specifically to disadvantage the remaining holders of Unsecured Notes, the Debtors cannot now argue that the Court should look past that chosen structure and treat the Uptier Notes Exchange as, substantively, a securing or repayment of antecedent debt. That is simply not what happened. By the Debtors' choice, the transaction was an exchange of two sets of transferable debt securities, each of which had a discernable fair market value. The Proposed Complaint more than adequately alleges that the Second Lien Notes issued to the Consenting Creditors had a fair market value that was *far* greater than the Unsecured Notes received in exchange by the Debtors, a fact that the Debtors do not even attempt to dispute. And, tellingly, *none* of the 15 cases that the Debtors claim support their position involved a notes exchange or any similar transaction in which a debtor acquired its own debt securities in the

[5] Debtors' Confirmation Brief ¶ 281.

market, as opposed to actually securing or repaying their existing debt. To the contrary, the case law that is actually analogous to the facts here supports the Committee's position.

5. As to solvency at the time of the Uptier Transaction, that is an issue of fact for which a determination will be made at trial. The Debtors do not take a position at this time on that issue.[6] The Consenting Creditors argue that the Committee has not established insolvency.[7] ***First***, the Committee does not need to prove insolvency now -- all that is required is to sufficiently plead such facts with supporting evidence, which the Committee has done. ***Second***, the Consenting Creditors provide no explanation as to how the Company, in January 2025, had enough distributable value to pay all creditors in full, but just a few months later in August, the Company did not have enough money to pay half of the First Lien Lenders debt. It is in fact the Consenting Creditors who are inconsistent in their positions on value, not the Committee.[8]

6. Worse than being wrong, the Debtors do not even acknowledge the possibility that a court might disagree with their arguments. It is not as if, for example, the Debtors considered the possibility that a court might view a notes exchange as just what it was – an exchange of two sets of debt securities – but assigned a low likelihood to that scenario and therefore refused to bring the constructive fraudulent transfer claims based on a careful cost-benefit analysis. Instead, the

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[6] *Id.* at ¶ 241 n.245.

[7] *Omnibus Response of the Consenting Creditors to the (1) Motion of the Official Committee of Unsecured Creditor for (I) Leave, Derivative Standing, and Authority to Commence and Prosecute Certain Uptier Transaction Claims and Causes of Action on Behalf of the Debtors' Estates and (II) Exclusive Settlement Authority and (2) Omnibus Motion of the Official Committee of Unsecured Creditors (I) Objecting to Claims and (II) For (A) Leave, Derivative Standing, and Authority to Commence and Prosecute Certain Lien Challenge Claims Causes of Action on Behalf of the Debtors' Estates and (B) Exclusive Settlement Authority* [Docket No. 925] ("**Consenting Creditors' Response to Standing Motions**") ¶ 29.

[8] The Committee will prove at trial that the value of the Debtors' business exceeds its secured debt. That, however, does not render the Debtors solvent, as they remain unable to repay all of their unsecured debt.

Debtors apparently made simplistic, binary determinations regarding these legal issues and justified their refusal to bring the claims on those determinations.

7. That being the case, the Debtors' argument that the Committee has not satisfied the "unjustifiable refusal" prong rings hollow. In this regard, the Debtors argue that the Standing Motion fails for the independent reason that the Committee has not, at this stage, locked in a concrete plan for funding the litigation. As an initial matter, the Debtors cannot seriously argue (and do not attempt to argue) that, in the current litigation environment, no law firm would be willing to take the matter on a contingency basis given the sums involved. Instead, they argue that any contingency fee paid out of additional funds recovered for unsecured creditors by unwinding invalid liens would deplete estate assets. But this again reflects the same fundamental misunderstanding referenced above. If invalid liens are unwound, and there is increased value to pay unsecured creditors, then estate value has been enhanced – even if some fraction of that value is used to pay a contingency award. More fundamentally, the Debtors ignore the practical reality of the status of these proceedings. The Committee, if granted standing, would need to pass that standing on to a liquidating trustee to decide how to pursue the claims because the Committee will dissolve at confirmation. The Committee, at this stage, cannot and should not attempt to bind a future liquidating trustee by locking in the terms of an engagement for the prosecution of the claims.

8. In any event, as noted, the Debtors do not argue that the costs of pursuing the claims would justify releasing them if the Debtors' threshold determinations regarding the merits are wrong. Nor could they plausibly make such an argument, given the amount of value transferred in the Uptier Transaction, as alleged in the Proposed Complaint and discussed below. In other words, the Debtors' argument regarding legal costs is a red herring. Because of the position the

Debtors have taken, the entire Standing Motion hinges on the Court agreeing with them that neither the actual fraudulent transfer claims nor constructive fraudulent transfer claims *are even colorable*.

9. As set forth below, the claims are strong, not merely colorable, and the Court should not allow the Debtors to release them for reasons of expediency. Instead, the Court should grant the Standing Motion and allow the Committee to preserve the claims to maximize their value for the estate.

ARGUMENT

I. The Actual Fraudulent Transfer Claims Are Colorable

10. The Debtors and the Consenting Creditors[9] incorrectly posit that the Committee's Proposed Complaint fails to adequately allege actual fraudulent transfer claims. In so doing, they distort both the facts and applicable law to implore this Court to ignore the direct evidence of fraud and the well-pleaded badges of fraud. The facts and law are clear: the Proposed Complaint establishes that an actual fraudulent transfer claim is colorable.

11. A party may demonstrate actual intent for purposes of section 548(a)(1)(A) through "knowledge to a substantial certainty" that a transfer will hinder, delay, or defraud creditors, even if the actor's motive was not specifically to defraud. *See Asarco LLC v. Ams. Mining Corp.*, 396 B.R. 278, 387-88 (S.D. Tex. 2008) (holding that a party acts with actual intent to hinder or delay creditors if it knows that proceeding with a transaction is "certain, or substantially certain" to have that effect, and does so regardless); *see also Faulkner v. Ford Motor Credit Co., LLC (In re Reagor-Dykes Motors, LP)*, No. 18-50214 (RLJ), 2022 Bankr. LEXIS 2815, at *26 (Bankr. N.D. Tex. Oct. 4, 2022) ("Knowledge to a substantial certainty constitutes intent in the eyes of the law,

[9] Neither Mr. Silvers nor his counsel, Quinn Emanuel, has objected to or filed any response in connection with the Standing Motion. The Committee also notes that the Debtors do not rely on the declarations of Mr. Silvers in support of their objections to the Standing Motion.

and a debtor's knowledge that future investors will not be paid is sufficient to establish his actual intent to defraud them." (quoting *Merrill v. Abbott* (*In re Indep. Clearing House Co.*), 77 B.R. 843, 860 (D. Utah 1987) (citations omitted)); *Sher v. JPMorgan Chase Funding (In re Thornburg Mort., Inc.)*, 610 B.R. 807, 827-28 (Bankr. D. Md. 2019) ("§ 548(a)(1)(A) intent is established if the actor believes, appreciates, or knows with substantial certainty that creditors will be hindered, delayed, or defrauded as a natural consequence of the transfer, even if the actor's actual motive is not to hinder, delay, or defraud such creditors."); *In re Am. Props., Inc.*, 14 B.R. 637, 643 (Bankr. D. Kan. 1981) ("The Court finds full knowledge of the effect of this transaction on the creditors of American and Companies and despite this knowledge, the intentionally carrying out of the transaction, to be 'actual intent' to hinder, delay or defraud creditors within the meaning of § 548(a)(1).").

12. The Uptier Transaction was made to delay the Company's inevitable bankruptcy, with knowledge that such transfer would hinder creditors.[10] The Company's CEO's affirmation cannot be overstated. Contemporaneously with the Fifth Amendment, Mr. Sampson explicitly acknowledged the "reality" that the Left Behind Unsecured Noteholders would suffer "substantial losses" as a result of the Uptier Transaction.[11] The Debtors' and Consenting Creditors' concession that the Company was, in fact, facing an impending bankruptcy at this time further bolsters the import of Mr. Sampson's admission.[12] Although the Debtors try to downplay its significance—

[10] *See* Standing Mot. ¶¶ 59-64.

[11] Proposed Compl. ¶ 56.

[12] *See* Consenting Creditors' Response to Standing Motions ¶ 3; Debtors' Confirmation Brief ¶ 41. As sophisticated market participants, the Consenting Creditors' feigned surprise about the Company's financial woes at year end 2024 is perplexing. *See* Consenting Creditors' Response to Standing Motions ¶¶ 2, 26 (complaining that they had "no forewarning" of and were "taken aback" by the Debtors' need for liquidity). Among other facts, in September 2024, the First Lien Lenders provided the Company with covenant relief because it was facing an imminent breach. *See* Proposed Compl. ¶ 25. Almost immediately thereafter, the Company was seeking further covenant relief from the same

suggesting that Mr. Sampson "merely states the obvious reality that secured debt is higher in the recovery waterfall than unsecured debt"—when coupled with the knowledge of an impending chapter 11 filing, the Company irrefutably had "knowledge to a substantial certainty" that the Left Behind Unsecured Noteholders' ability to recover on their outstanding $229 million was hindered and delayed as a direct result of the Uptier Transaction.[13]

13. The Committee has uncovered additional evidence of "knowledge to a substantial certainty" that the Uptier Transaction would hinder, delay, or defraud the Left Behind Unsecured Noteholders through the close of fact discovery. For instance, in negotiating the transaction, Ropes & Gray advised that the right to participate in the Uptier Transaction followed the participating lenders' Unsecured Notes. In other words, no other unsecured noteholder would be able to participate unless the hand-selected lenders decided to sell their notes prior to the exchange.[14] This evidence of disparate treatment solidifies FTI's "thanks, but no thanks" approach to the Left Behind Unsecured Noteholders.[15] Moreover, the Company's attorneys knew that the Left Behind Unsecured Noteholders were being treated "harshly" through the Uptier Transaction and proposed

lenders. *Id.* at ¶ 27. In fact, in its 10Q for the third quarter of 2024, filed on November 7, 2024, the Company disclosed it had substantial doubts about its ability to meet its obligations as they come due.

[13] *See* Standing Mot. ¶¶ 60-64; *see also* Gutierrez Dep. Tr. 95:6-15 (Q. So in what circumstances would [the Left Behind Unsecured Noteholders] have suffered substantial losses? A. If they would have traded those bonds. . . Q. What about in a Chapter 11? MR. FOLEY: Objection to the form. A. Yes, that would be true.").

[14] CX-086.

[15] It also calls into question the Consenting Creditors' portrayal of themselves as a white knight swooping in to save the Company. *See* Consenting Creditors' Response to Standing Motions ¶ 2. Other unsecured noteholders were also trying to "step[] up" and provide funding during the Company's liquidity crisis but were not afforded the opportunity.

to *not* subordinate them, seemingly to avoid imposing the expected harm and delay in recoveries when the Company ended up a bankruptcy a mere six months later.[16]

14. Embracing this uncontroverted evidence fares no better for the Debtors. Contrary to the Debtors' insistence, the Debtors were not allowed to prefer one group of creditors over another without running afoul of fraudulent conveyance law.[17] In *In re Capmark Fin. Grp., Inc.*, the court approved an arm's length settlement plan that occurred *outside* a plan of reorganization and *before* a Chapter 11 filing; having found the process to be fair and equitable, the Court distinguished preferential treatment in the context of "good-faith negotiation" from cognizable fraud and conceit. 438 B.R. 471, *518-20 (Bankr. D. Del. 2010). In *Foxmeyer Drug Co. v. Gen. Elec. Cap. Corp. (In re Foxmeyer Corp.)*, the court held that plaintiffs' claim of fraud could not be inferred through and thus substantiated by mere preferential treatment, but required additional evidence of "intent to (a) utilize the consideration obtained…to pay one or several, but not all, of its antecedent unsecured creditors, and (b) file for bankruptcy shortly subsequent to," all of which occurred in this case as described herein. 296 B.R. 327, 337 (Bankr. D. Del. 2003) And in *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am., Inc.)*, the court concluded that (i) an "actual intent to hinder or delay" payment to an alter ego corporation did not suffice to show "actual intent to defraud," and (ii) that a fraudulent conveyance is conceptually distinct from the payment of debt in good faith "without any design injurious to creditors beyond that implied in giving the preference." 24 B.R. 973, 977-78 (Bankr. N.D. Tex. 1982). As explained below, the Uptier Transaction was injuriously designed with the intent to deny unsecured creditors of crucial protections and equitable payment. In any event, the Debtors did not simply "prefer" one group

[16] CX-078 at 2.

[17] *See* Debtors' Confirmation Brief ¶ 276.

of creditors over another when they entered into the Uptier Transaction. Rather, the Debtors orchestrated, negotiated, and consummated a liability management transaction with the knowledge that the Left Behind Unsecured Noteholders would be harmed and presumed out-of-the money in a looming chapter 11 proceeding, including by stripping standard covenants and other protections from the Unsecured Notes Indenture and releasing the Unsecured Noteholders' affiliate guarantees through the Uptier Transaction.

15. Beyond the direct evidence of fraudulent intent referenced above,[18] the Proposed Complaint provides ample circumstantial evidence of the same.[19] "A court need not find that all—or even a majority—of the badges of fraud are present to find that a debtor acted with actual intent to hinder, delay, or defraud." *In re Our Alchemy, LLC*, 642 B.R. at 164 (citing cases). Here, at least four badges of fraud are present.

16. ***First***, certain Uptiered Creditors are non-statutory insiders.[20] *See* Standing Mot. ¶ 67. In determining whether a party is a non-statutory insider, courts focus on (1) the closeness between transferee and debtor and (2) whether transactions between the transferee and debtor were conducted at arm's length. *See Browning Ints. v. Allison (In re Holloway)*, 955 F.2d 1008, *1010-11 (5th Cir. 1992); *see also In re Vaso Active Pharms., Inc.*, 2012 WL 4793241, *11

[18] The Debtors' position that the "Committee's sole allegation—that the Debtors understood the 2025 Transactions would grant new liens—does not plead actual fraudulent intent" blatantly disregards the dozens of pages of allegations substantiating the colorability of the actual fraudulent transfer claim. *See* Debtors' Brief ¶ 275; *see also* Proposed Compl. ¶¶ 36, 43, 56, 60, 82, 101. Rather than provide a complete recitation of those facts, the Committee only highlights a few of those here.

[19] *See, e.g.*, Proposed Compl. ¶¶ 109-111; *see also Cadle Co. v. Pratt (In re Pratt)*, 411 F.3d 561, 565 (5th Cir. 2005) (listing non-exclusive "badges of fraud").

[20] Courts have repeatedly recognized that the enumerated insiders in section 101(31)(B) and (E) do not constitute an exhaustive list. *See Chapman v. The Chapman Fam. Tr. (In re Chapman)*, 628 B.R. 512, 528 (Bankr. S.D. Tex. 2021) ("The list is non-exclusive and courts have designated entities not listed in § 101(31) as non-statutory insiders.").

(Bankr. D. Del. Oct. 9, 2012) (holding that the defendant was a non-statutory insider even though he did not have actual control because he was a former CEO, held a voting interest in an affiliate and was a majority shareholder of the Company and negotiated the terms of the transactions) (citing *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 396-97 (3d Cir. 2009)); *In re Allegheny Int'l Inc.,* 118 B.R. 282, 298-99 (Bankr. W.D. Pa. 1990) (finding that the creditor was an insider despite not having actual control or legal decision-making power over the debtor because it "received a great volume of information that was not available to other creditors, shareholders, and the general public" and "attempted to influence . . . decisions made by the debtor"). At the pleading stage, a plaintiff only needs to "raise a question as to whether the relationship among the parties was close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *Forman v. DeMaio III (In re CTE 1 LLC)*, No. 19-30256 (VFP), 2023 WL 5257940, *20 (Bankr. D.N.J. Aug. 11, 2023) (quoting *In re AFI Holding*, 530 F.3d 832, 849 (9th Cir. 2008).

17. Here, the Proposed Complaint adequately alleges that, at the time of the Uptier Transaction, the First Lien Lenders (many of which are Second Lien Noteholders) were non-statutory insiders. *See Pryor v. Cohen (In re TC Liquidations LLC)*, 463 B.R. 257, 277 (Bankr. E.D.N.Y. 2011) (holding that the badge of fraud regarding the "relationship between the parties" was present because the defendants were shareholders and officers of the debtors). Immediately prior to the Uptier Transaction, in December 2024, then-shareholder Q Global demanded the Board's Chair, Chris Shackelton resign.[21] Almost immediately thereafter, Mr. Shackelton resigned. Leslie Norwalk, the new Board Chair, testified that Mr. Shackelton was removed at Q

[21] *See* Q Global, Schedule 13-D, Dec. 11, 2024; JX-028.

Global's request.[22] Shortly after the Fifth Amendment was executed—but before the parties fully consummated the Uptier Transaction—the Debtors appointed Erin Russell, one of the First Lien Lenders' nominees, to the Board.[23] In the First Lien Lenders' words, Ms. Russell was a "lender appointed director[]" there to push the First Lien Lenders' agenda and "ensure the company will support the lender's 3 specific candidates at the 2025 annual meeting."[24]

18. ***Second***, as further detailed in the Proposed Complaint, the Debtors were insolvent at the time of the Uptier Transaction under all three applicable tests.[25] The Debtors' Confirmation Brief initially stated that, at the time of the Uptier Transaction, they do not "concede or admit that they were insolvent" but then later appear to wholesale "deny" that they were insolvent.[26] The Debtors' initial hesitation to deny insolvency likely stems from the fact that FTI never performed *any* work relating to the Company's solvency or formed a view as to whether the Debtors were solvent or insolvent under any definition of "solvency."[27] FTI only did a 13-week cash flow analysis to determine whether the liquidity provided by the Fifth Amendment would be sufficient to solve the Company's liquidity concerns going forward.[28] Zul Jamal confirmed this point.

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[22] Norwalk Dep. Tr 82:5-21; 82:25-84:2.

[23] *See* Proposed Compl. ¶ 69.

[24] CX-092 at 3, 10. The increasing level of control the Consenting Creditors exercised over the Company since late fall 2024 has now reached its apex. The Second Amended Plan and Third Plan Supplement, filed on December 5, 2025, discloses that Messers. Yousef and Gart will be members of the reorganized Debtors' Board post emergence. The same two individuals leading the charge on cherry-picking their preferred director nominees, who they believed owed allegiances to their nominators – the Consenting Creditors. *See* CX-092.

[25] *See* Proposed Compl. ¶¶ 88-89, 90-92.

[26] *Compare* Debtors' Confirmation Brief ¶ 241, n.245 *with id.* ¶ 284.

[27] Shandler Dep. Tr. 189:18-22, 189:23-190:5-11, 190:20-191:8.

[28] Shandler Dep. Tr. 191:12-192:6.

Testifying as the Debtors' Rule 30(b)(6) representative on the Uptier Transaction,[29] he admitted that he was unaware of any liquidity forecast presented to the Board in the time leading up to the Uptier Transaction that went beyond 13 weeks.[30] Regardless, the Debtors disclosed that they were balance sheet insolvent both before and after effectuating the Uptier Transaction.[31]

19. ***Third***, even assuming the Company was solvent at the time of the Uptier Transaction, the Uptier Transaction certainly left the Company with insufficient liquidity to operate its business.[32] Mr. Shandler explained that, although the Company was projected to have approximately $100 to $110 million of cash in its balance sheet by year end 2025 to repay the debt incurred through the Fifth Amendment, it would have required at least $65 million to continue operating its business.[33] Thus, repayment of the $75 million incremental term loan would have left the Company with insufficient liquidity to continue to operate its business.[34]

20. ***Fourth,*** as set forth in detail in the Proposed Complaint and as discussed herein in II.B, the Debtors did not receive reasonably equivalent value in exchange for the March 7 Uptier Notes Exchange.[35]

21. The Committee's Standing Motion and Proposed Complaint satisfies the standard set forth in this Circuit to grant standing.[36] However, to the extent the Court believes additional

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[29] Jamal Dep Tr. 8:6-9:21.

[30] Jamal Dep Tr. 301:4-20.

[31] *See* Proposed Compl. ¶¶ 88-89.

[32] *See* Proposed Compl. ¶¶ 84-87.

[33] Shandler Dep. Tr. 193:16-25, 194:2-10, 195:2-16.

[34] Shandler Dep. Tr. 193:16-25, 194:2-10, 195:2-16.

[35] *See* Proposed Compl. ¶¶ 93-95.

[36] *See* Standing Mot. ¶¶ 79-81.

facts would be helpful in further substantiating the colorability of the proposed actual fraudulent claims, the Committee will demonstrate at trial the viability of the valuable claims the Debtors seek to release for no consideration.

II. The Constructive Fraudulent Transfer Claims Are Colorable

A. *For Purposes of Assessing the Constructive Fraudulent Transfer Claims, the Uptier Transaction Should Be Viewed as a Single Integrated Transaction*

22. The Debtors' appear to ignore binding Fifth Circuit precedent which conducts a "totality of the circumstances" test, from the perspective of the unsecured creditors, and attempt to excise certain aspects of the Uptier Transaction, while collapsing others.[37] This is nonsensical, and the entire Uptier Transaction and each component should be viewed for what it really is, a single-integrated transaction between two parties.

23. For purposes of assessing a constructive fraudulent transfer claim, transactions that occur in a series should be collapsed and viewed as a single transaction when the substance of the transactions demonstrate that was the intent and impact of the transactions. *See The Worth Collection, LTD. V. Catterton Mgmt. Co., LLC (In re Worth Collection, Ltd.)*, 666 B.R. 726, 743 (Bankr. D. Del. 2024) ("To determine whether a series of transactions should be 'collapsed' and viewed as a single integrated transaction, courts focus on the substance rather than on the form of the transactions and consider the overall intent and impact of the transactions.") (citing *In re Jevic Holding Corp.*, No. 08-11006 (BLS), 2011 WL 4345204, *5 (Bankr. D. Del. Sept. 15, 2011)). In determining whether to collapse a series of transactions courts have considered the following

[37] *See* Standing Mot. ¶¶ 79-81. Although the Debtors raise this argument that certain components of the Uptier Transaction should not be considered part of the transaction, the Debtors acknowledge that collapsing is appropriate and collapse the notes exchange and new money loans for reasonably equivalent value purposes, as do the Consenting Creditors. *See* Debtors' Confirmation Brief ¶¶ 248-249; *see also* Consenting Creditors' Response to Standing Motions ¶ 38.

factors: (i) whether all parties involved in the individual transactions had knowledge of the other transactions; (ii) whether each transaction sought to be collapsed would have occurred on its own; and (iii) whether each transaction was depending or conditioned on the other transaction. *See In re Jevic Holding Corp.*, 2011 WL 4345204, at *5; *see also The Liquidation Trust of Hechinger Inv. Co. v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co. of Del.)*, 327 B.R. 537, 546-47 (D. Del. 2005); *Mervyn's Holdings, LLC v. Lubert-Adler Grp. IV, LLC (In re Mervyn's Holdings, LLC)*, 426 B.R. 488, 497 (Bankr. D. Del. 2010). As pleaded, the Uptier Transaction was, in effect, one transaction. There is no support to isolate any aspect of the Uptier Transaction, let alone the stripping of the guarantees for the Unsecured Notes (the "**Subsidiary Guarantees**"), the entry into the Subordination Agreement, or the payment of the Uptier Fees.

24. As to the first prong, it is indisputable that all parties were aware of each aspect of the Uptier Transaction, including the release of Subsidiary Guarantees, entry into Subordination Agreement, and payment of the Uptier Fees. The Debtors and Consenting Creditors are both signatories to the Exchange Agreement and were represented by sophisticated advisors in negotiating such agreement, which clearly identifies each aspect of the Uptier Transaction. The Exchange Agreement had certain conditions precedent to closing which refer to or otherwise require the release of Subsidiary Guarantees, entry into the Subordination Agreement, and payment of the Uptier Fees. Article IV, Section 4.3(iii) and (iv) of the Exchange Agreement[38] requires that the Debtors to have received all counterpart signatures to the Note Documents (as defined in the Exchange Agreement), which included the Subordination Agreement and the entry into the amendment to the Unsecured Notes Indenture that released the Subsidiary Guarantees. Also, Article IV, Section 4.1(i) of the Exchange Agreement required that the Fifth Amendment be

[38] JX-076.

in effect, and Fifth Amendment sections 4.1(j) and (l)[39] required the Company to pay the Uptier Fees. Moreover, the Debtors signed an acknowledgment and agreement to the Subordination Agreement, a fact sufficient to satisfy the first prong for treating this as a single integrated transaction.

25. Based on the foregoing analysis of conditions precedent in the Exchange Agreement, it is clear that prongs two and three of the collapsing doctrine are satisfied to collapse each component of the Uptier Transaction as a single-integrated transaction. The release of the Subsidiary Guarantees, the entry into the release of Subsidiary Guarantees, entry into the Subordination Agreement and payment of the Uptier Fees would not have occurred on their own as they each in part relied on other parts of the transaction to fulfill the Debtors' and Consenting Creditors' intent. *See In re Jevic Holding Corp.*, 2011 WL 4345204, at *5 ("[w]hile the transactions that are sought to be collapsed may be structurally independent and distinct from one another, courts focus their analysis 'not on the structure of the transaction but the knowledge and intent of the parties involved in the transaction'" (internal citations omitted). The Exchange Agreement provided the framework for the entire Uptier Transaction and without each condition precedent being satisfied, the Exchange Agreement, and ultimately the entire Uptier Notes Exchange would not have been consummated. Therefore, the release of the Subsidiary Guarantees, entry into the Subordination Agreement and payment of the Uptier Fees all relied on each condition to be satisfied in furtherance of the single-integrated transaction. Finally, each of the components identified by the Debtors are either directly or indirectly a condition precedent to the Exchange Agreement being closed.

[39] JX-002.

B. *The Committee Has Colorably Alleged that the Debtors Did Not Receive Reasonably Equivalent Value for the Uptier Notes Exchange*

26. For purposes of their objection, the Debtors do not contest that the Debtors were insolvent as of the Uptier Transaction, focusing exclusively on the issue of reasonably equivalent value.[40] As set forth below, the Debtors did not receive reasonably equivalent value in connection with at least three individual components of the Uptier Transaction.

27. The Debtors' *sole* argument addressing the merits of the constructive fraud claim as it relates to the Uptier Notes Exchange is that the Debtors received reasonably equivalent value *as a matter of law* because the Uptier Notes Exchange was "was nothing more than the securing of an antecedent debt."[41] This is wrong. The Debtors ignore that the transaction was deliberately structured as an issuance of new secured notes in exchange for old unsecured notes in order to achieve their desired goal of "uptiering" a select group of noteholders. As such, the "antecedent debt" was the debt that was owed under the *old* Unsecured Notes. That antecedent debt was never secured. Instead, the lien was granted to secure the *new* debt issued under the newly issued Second Lien Notes.

28. The foregoing description of the Uptier Notes Exchange is indisputable as a factual matter, yet the Debtors argue that it is somehow an effort to "recast" the transaction using "tortured logic."[42] But the Committee is simply describing what actually happened in the Uptier Notes Exchange. The Court need not take the Committee's word for it. The Exchange Agreement governing the Uptier Notes Exchange describes the "total consideration" as follows:

> **Total Consideration.** Each Holder, severally and not jointly, hereby agrees to exchange and deliver to the Company the aggregate principal amount of Old Notes

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[40] *See* Debtors' Confirmation Brief ¶ 241 n.245.

[41] *Id.* ¶ 237.

[42] *Id.* ¶ 247.

> set forth in Exhibit A hereto, and in exchange therefor the Company hereby agrees to issue to each Holder the Exchange Consideration…."

Exchange Agreement, JX-076 at § 1.1. "Exchange Consideration," in turn, is defined as "the Company's *newly issued* 5.000% / 10.000% Second Lien Senior Secured PIK Toggle Notes due 2029." *Id*. at 2 (emphasis added).

29. The fact that the Unsecured Notes, rather than being secured, were transferred to the Debtors in exchange for new notes is dispositive of the Debtors' argument that the Uptier Notes Exchange "secured antecedent debt." Not surprisingly, despite citing to at least 15 cases on this issue, the Debtors cite no authority supporting the proposition that the issuance of new secured debt securities in exchange for *different* unsecured debt securities constitutes "securing antecedent debt" for purposes of constructive fraudulent transfer law.

30. The Debtors elsewhere contradict themselves and characterize the Uptier Notes Exchange as a "paydown" or "payment" of the old Unsecured Notes and therefore argue that the Uptier Notes Exchange "satisfied" the antecedent Old Unsecured Notes.[43] Of course, if the debt was satisfied by the Uptier Notes Exchange, then it cannot also be the case that the same debt was also secured by that transaction. In any event, as a factual matter, the debt was not paid down or satisfied by the exchange. The Debtors again ignore that they and the Consenting Creditors deliberately and strategically structured the Uptier Notes Exchange as a notes exchange, *not* a paydown of the debt under the Unsecured notes.

31. In fact, the parties went to great lengths to *avoid* paying down the Unsecured Notes because actually paying down the Unsecured Notes, via a redemption or otherwise, would have triggered standard provisions in the Unsecured Notes Indenture that require such paydowns to be

[43] *See* Debtors' Confirmation Brief ¶¶ 237, n.243, 247-248.

made *pro rata* to *all* noteholders.[44] As this Court is aware, the purpose of the Uptier Notes Exchange was exactly the opposite: to favor a preferred set of noteholders (the Consenting Creditors) over another (the Left Behind Unsecured Noteholders). The parties thus avoided those *pro rata* treatment provisions by structuring the transaction as the Debtors *acquiring* their own debt securities, not paying them down.

32. Nor was the debt under the Unsecured Notes "forgiven."[45] Again, as set forth above, the Exchange Agreement makes clear that Unsecured Notes were *acquired* by the Debtors using the new Second Lien Notes as consideration. The Debtors argument in this regard is just another way of saying that the debt was "repaid," as the forgiveness of debt in exchange for consideration is no different from paying the debt.[46] But, again, the Debtors needed to avoid any suggestion that they had paid the debt because the documents governing the Unsecured Notes require that any such payments be *pro rata* to all holders.

33. In sum, the Debtors and the Consenting Creditors deliberately structured the Uptier Notes Exchange as an exchange of transferrable debt securities between two market participants

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[44] "If less than all of the Notes are to be redeemed at any time, the Global Notes to be redeemed shall be selected for redemption *in accordance with DTC's requirements*, or, in the case of Definitive Notes, the Definitive Notes to be redeemed *shall be selected by the Trustee on a pro rata basis*, unless otherwise required by law or applicable stock exchange requirements." Unsecured Notes Indenture, JX-071 at § 3.02(a) (emphasis added). The DTC's requirements, applicable to the Global Notes, require pro rata treatment or by lottery. *See e.g.*, October 2024 DTCC "Important Notice," *available at* https://www.dtcc.com/-/media/Files/pdf/2024/9/30/20767-24.pdf. And this provision could not be amended (and was not amended) by a simple majority of creditors because it would be a "change in the provisions of this Indenture relating to … the contractual rights of Holders to receive payments of principal of, or interest or premium, if any, on, the Notes." Unsecured Notes Indenture, JX-071 at. § 9.02(e)(6).

[45] Debtors' Confirmation Brief ¶ 247.

[46] The fact that the Unsecured Notes were *subsequently* cancelled, after the exchange, is irrelevant. As the Exchange Agreement makes clear, the cancellation of the notes occurred only *after* the exchanging noteholders surrendered "all right, title and interest" in the Unsecured Notes to the Debtors. JX-076. Therefore, the cancellation of notes could not be part of the consideration for the issuance of the new notes, and § 1.1 of the Exchange Agreement titled "Total Consideration" makes clear that it was not.

precisely to circumvent the bargained-for rights of the noteholders to be treated *pro rata*. Having structured the transaction in this manner specifically to achieve that benefit, the Debtors cannot now avoid the consequences of doing so by asking the Court to treat the Uptier Notes Exchange as "practically…a paydown of debt."[47]

34. And while the Debtors cite fifteen cases in support of the generic proposition that securing or satisfying antecedent debt cannot be a constructive fraudulent transfer as a matter of law, *none* of those decisions involved a notes exchange or similar transaction whereby the debtor acquired, rather than secured or paid, the antecedent debt instrument, let alone held that such a transaction would constitute securing or satisfying antecedent debt.

35. In fact, the case law is to the contrary. In *In re Aphton Corp.*, at a time when the debtor was allegedly insolvent, the debtor purchased $15 million of its own notes from its noteholders in exchange for $3 million in cash and certain (presumably worthless) equity securities of the debtor pursuant to an "Exchange Agreement." 423 B.R. 76, 92 (Bankr. D.Del. 2010). The trustee sought to avoid the $3 million "Exchange Agreement Payment" as a constructive fraudulent transfer. Seeking to dismiss the claim, the defendants in *Aphton* argued, as the Debtors do here, that such payment could not be a constructive fraudulent transfer because it was made "in satisfaction of Aphton's antecedent debt as reflected by the Notes." *Id*. at 93. The Court denied the motion to dismiss, determining that it was "inappropriate, at this time, to consider whether the Exchange Agreement Payment was, in fact, satisfaction of antecedent debt," further finding that it was "facially plausible that there was not reasonably equivalent value in the Exchange Agreement Payment." *Id*. In short, the court in *Aphton* rejected the defendants' argument that a debtor's

[47] Debtors' Confirmation Brief ¶ 237, n.243.

payment to acquire its debt securities (for less than the face value of those securities) cannot be a constructive fraudulent transfer as a matter of law.

36. The reason for the Debtors' feigned ignorance about the actual mechanics of the Uptier Notes Exchange is obvious. Because the Uptier Notes Exchange did *not* secure or satisfy antecedent debt (and indeed was deliberately structured not to do so), the Court must evaluate the value of the property exchanged between the parties to determine whether reasonably equivalent value was received. And, again, there is no doubt about what was exchanged for what. As the "Total Consideration" provision of the Exchange Agreement referenced above makes clear, one set of debt securities was traded for another set of debt securities. Each of these debt securities had a discernable market value at the time, a fact question to be determined at trial. The Debtors' assertion that the market or trading value is not the relevant standard is based on case law that it is entirely inapplicable. For this proposition, the Debtors cite *Travelers Int'l AG v. Trans World Airlines, Inc.* (*In re Trans World Airlines, Inc*.), 134 F.3d 188 (3d Cir. 1998), but they do not disclose that the Third Circuit was addressing the proper calculation *for determining insolvency* in the context of a preference action, and that Third Circuit was specifically interpreting the definition of section 101(32)(A) of the Bankruptcy Code, and, specifically, whether the term "fair valuation" applied to liabilities, or just assets. *Id*. at 192. *Trans World Airlines* therefore has nothing whatsoever to do with the issue of whether, in evaluating reasonably equivalent value the context of an exchange of debt securities, a court should consider the market or trading value of those debt securities. And, contrary to the Debtors' argument, the law is clear that the relevant valuation for purposes of section 548 – in the context of a debt exchange – is the *fair market value* of the property exchanged. *See Aphton,* 423 B.R. at 89 (holding that a relevant factor in determining whether

reasonably equivalent value was given is "the 'fair market value' of the benefit received as a result of the transfer") (citation omitted).

37. And while those fair market values are facts are to be determined at trial, the Debtors' own CEO anticipated at the time the Uptier Transaction was executed that the difference in value between the two sets of notes could be as high as **$190 million**.[48] The Debtors do not even attempt to argue that the difference in value between the two sets of notes was insufficient to be a lack of reasonably equivalent value, relying exclusively on their flawed, factually incorrect theory that the Uptier Notes Exchange secured (or repaid?) the Unsecured Notes.

38. The Debtors' argument with respect to the merits of the Uptier Notes Exchange is also wrong for a second reason. Even if the Uptier Notes Exchange secured or satisfied antecedent debt (it did not), substantial authority holds that this does not necessarily mean that the debtors obtained reasonably equivalent value as a matter of law. *See, e.g., Solomon v. Kirtley (In re Solomon)*, 299 B.R. 626, 635 (B.A.P. 10th Cir. 2003). In *Solomon*, the court posited:

> [W]e conclude that if faced with a § 548(a)(1)(B) antecedent debt case like the present case, the Tenth Circuit would examine what the debtor received in exchange for the securing of an antecedent debt to determine REV and would not follow the Anand I per se rule. . . . This brings us to our review of the record. We assess the evidence to determine the benefit or value received by the Debtors in exchange for what the Debtors gave—the March and September Mortgages. . . At best, the Debtors temporarily received forbearance by the Bank from enforcement of the notes and guaranties and a brief extension of the loans. The value of these benefits has not been quantified. . . there is no evidence in the record quantifying these supposed indirect benefits for the time periods they were received by Debtors. . . The

[48] As set forth in the Motion, as the Uptier Transaction was being finalized in early January 2025, in an email to other senior executives, Mr. Sampson conveyed his belief that the newly issued $251 million in Second Lien Notes would be worth "100% of par value," (*i.e.*, a value of $251 million), while the remaining Unsecured Notes would "drop as low as 25" percent. Standing Mot. ¶ 2. If the $251 million in exchanged Unsecured Notes were worth 25 percent of par, then they would have a value of approximately $63 million, for a value differential of $188 million. Again, however, this is illustrative, and precise values are a factual matter to be determined at trial.

> bankruptcy court's conclusion that Debtors did not receive REV for the September Mortgage is substantially supported by the record.

39. The Debtors argue that, although *TOUSA, Inc.* may be factually different, this Court should ignore the legal holding, that is the granting of a lien is not per se reasonably equivalent value, putting form over substance. *See Citicorp. N.A., Inc. v. Off. Comm. of Unsecured Creditors (In re TOUSA, Inc.)*, 680 F.3d 1298, 1301 (11th Cir. 2012) (holding that the bankruptcy court did not clearly err when it found that the subsidiary entities granted a lien in favor of a parent-level debt).[49]

40. However, notwithstanding the factual differences, the bankruptcy court's undisputed facts are instructive. The bankruptcy court found that, because the subsidiaries did not receive any "value", applying the definition in the Bankruptcy Code, they did not receive reasonably equivalent value in the transaction in question. *Id*. at 1304. As the Committee explained in the Standing Motion, the Fifth Circuit views reasonably equivalent value from the perspective of the unsecured creditors and applying the guidance from the *TOUSA* bankruptcy court, the unsecured creditors received no "value" as part of the Uptier Transaction.[50]

41. The Committee has sufficiently pled, for purposes of obtaining derivative standing to pursue the Proposed Claims, that the Debtors did not receive reasonably equivalent value. The precise value will be determined at trial and, although the Debtors attempt to isolate certain components of the Uptier Transaction, as discussed above each aspect is interrelated and therefore a natural consequence of unwinding the Uptier Notes Exchange will naturally unwind the others, in effect, opening the dam of value to fall down the waterfall.

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[49] Moreover, the Committee agrees that *TOUSA* is not factually similar to the case at bar. *TOUSA* did not involve an exchange of antecedent debt for newly issued debt.

[50] *See* Proposed Compl. ¶¶ 3, 64.

C. *The Debtors' Additional Arguments Relating to the Subsidiary Guarantees and the Subordination Agreement Are Meritless*

1. *The Debtors Ignore the Role of the Subsidiary Guarantees in the Overall Transaction*

42. The Debtors argue that the Committee "fails to assert a rational theory" with respect to their request to reinstate the subsidiary guarantees.[51] What the Debtors simply ignore, is that the stripping of the Subsidiary Guarantees was a part of a larger transaction, whereby, among other things, the same subsidiaries immediately provided new guarantees *on a secured basis* with respect to the Second Lien Notes. As set forth above, the entire Uptier Transaction should be collapsed into a single-integrated transaction and to the extent the Committee is successful in unwinding the Uptier Transaction at trial, the Committee can seek the appropriate damages which may include, among other things, cancellation of the Second Lien Notes and reinstatement of the Subsidiary Guarantees.

43. The net effect of unwinding the Second Lien Guarantees and reinstating the unsecured notes guarantees would undoubtedly enhance value for the unsecured creditors as a whole *and* for unsecured creditors at the individual subsidiaries. The value of the reinstatement of the guarantees is inextricably intertwined to other aspects of the Uptier Transaction that the Committee is challenging and, as stated above, the Committee intends to prove its value at trial.

44. Even if the Court agrees that reinstatement of subsidiaries is not an estate cause of action, unwinding the Second Lien Guarantees will unquestionably enhance value for unsecured creditors.

[51] *See* Debtors' Confirmation Brief ¶ 255.

2. *The Subordination Agreement Can Be Challenged Outside of Bankruptcy*

45. As set forth above, the Subordination Agreement is part of the overall Uptier Transaction and can be unwound on that basis. If the Court concludes that certain aspects of the Uptier Transaction cannot be unwound, or that there is an alternative forum that would be more appropriate, such as state court, the Left Behind Unsecured Noteholders may pursue the appropriate remedies there.

46. Finally, even if the Subordination Agreement is not unwound, this does not affect the arguments for unwinding the other aspects of the Uptier Transaction.

D. *Standing Should Not Be Denied Based on the Debtors' Bald Assertion that the Section 546(e) Safe Harbor Applies*

47. It is unclear why the Debtors would articulate an affirmative defense on behalf of the Uptiered Creditors and argue that that the Debtors' own causes of action are meritless on that basis. In any event, the Section 546(e) safe harbor defense is highly factual and not appropriate for a motion to dismiss, which the Debtors' acknowledge should be the relevant standard.[52] It is well settled that the application of the 546(e) safe harbor requires fact-intensive determinations and inappropriate for resolution at the motion to dismiss stage. *See In re Centaur, LLC*, No. 10-10799 (KJC), 2013 WL 4479074 at *4 (Bankr. D. Del. Aug. 19, 2013); *see also Zazzali v. AFA Fin. Grp., LLC*, No. 10-54524, 2012 WL 4903593, at *11 (Bankr. D. Del. Aug. 28, 2012) ("[I]t is premature to dismiss this count on the basis of the 546(e) defense. The application of the defense is a fact-based inquiry.") (citing *Brandt v. B.A. Capital Co. LP* (*In re Plassein Int'l Corp.*), 366 B.R. 318, 323-25 (Bankr. D. Del. 2007), *aff'd*, 590 F.3d 252, 254-56 (3d Cir. 2009)); *Gentle v. Direct Energy, LP (In re Port Neches Fuels, LLC)*, 2024 Bankr. LEXIS 1654, *3, 204 (Bankr. D. Del. July 18,

[52] Debtors' Confirmation Brief ¶ 266-268.

2024) ("The availability of an affirmative defense is typically not a basis on which to dismiss a complaint. . .").

48. Moreover, it is clear that the Debtors have not conducted the necessary analysis to determine whether the defense would apply. By way of example, the Debtors' bare assertion that the Second Lien Noteholders and trustees are qualifying participants—specifically "financial participants"— does not come close to establishing that the safe harbor would apply.[53] Whether an entity qualifies as a "financial participant" under the Code requires a detailed factual showing, often supported by expert testimony, that the entity in question held, at certain specified times, a certain threshold quantity of financial instruments tied to specific outstanding "securities contracts" or other specified financial instruments. 11 U.S.C. §§ 101(22A)(A); 561(a)(1)-(6). The Debtors, however, do not even *mention* this quantity threshold, let alone explain how it is met here, let alone for every single lender defendant under the Proposed Claims. The Consenting Creditors' make the same conclusory assertion, also without any supporting evidence or analysis.[54]

III. The Debtors Have Unjustifiably Refused to Bring the Fraudulent Transfer Claims

49. The Debtors' stated basis for refusing to bring claims is their arguments that the claims are legally barred, not based on any cost-benefit analysis taking into account the possibility that their legal arguments are rejected. Both the Debtors and the Consenting Creditors properly identify that, in considering a debtor's determination not to pursue certain claims, the analysis is "little more than a cost-benefit analysis." Debtors' Confirmation Brief ¶ 287; *see also* Consenting Creditors' Response to Standing Motions ¶ 14. The Committee agrees. The Committee has more

[53] *Id.* ¶ 269 ("[t]he Second Lien Noteholders and the applicable trustees are also clearly financial participants.").

[54] Consenting Creditors' Response to Standing Motions ¶ 42 ("[t]he Participating Noteholders also plainly qualified as financial participations as they were all sophisticated, existing holders of securities.").

than satisfied any burden in that regard by identifying colorable claims worth, potentially, hundreds of millions of dollars to the estate, depending on the outcome of the Plan valuation dispute. The Debtors do not even argue to the contrary, again relying entirely on their flawed, binary determination that the claims have *zero* value.

50. The Debtors and the Consenting Creditors also argue that a successful claim would merely transfer value among creditors and therefore would not bring value to the estate. But they ignore that, under clear Fifth Circuit case law, the relevant determination is the impact on unsecured creditors. *See Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638, 644 (5th Cir. 2000) ("[t]he proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors.") (quoting *Viscount Air Servs., Inc. v. Cole (In re Viscount Air Servs., Inc.)*, 232 B.R. 416, 435 (Bankr. D. Ariz. 1998)); *see also Jalbert v. GmbH (In re La. Pellets, Inc.)*, 838 F. App'x. 45, 49 (5th Cir. 2020) ("the determination of reasonable equivalency is left to courts, which 'judge the consideration given for a transfer from the standpoint of creditors.'" (quoting *Stanley v. U.S. Bank Nat'l Ass'n (In re TransTexas Gas Corp.)*, 597 F.3d 298, 306 (5th Cir. 2010)). "'The proper focus,' we have said, 'is on the net effect of the transfer on the debtor's estate, the funds available to the unsecured creditors.'" *La. Pellets, Inc.*, 838 F. Appx. at *49 (citing *In re Hinsley*, 201 F.3d at 644 (quotation omitted))).[55] The Debtors incorrectly argue that it is the Debtors' perspective that should be considered.

51. The Debtors argue that the Committee is required to identify a firm source of financing or other means of prosecuting the claims at this stage. That is not the standard for pursuing standing in this Circuit, or any other. *See Cooper v. Cooper (In re Cooper)*, 405 B.R. 801, 810-11 (Bankr. N.D. Tex. 2009) (explaining that in the Fifth Circuit generally require

[55] The Debtors cite to *La. Pellets* numerous times in their objection but fail to ignore the plain language.

colorability and unjustifiable refusal be proven for derivative standing, though there is no formalistic checklist). Moreover, notwithstanding the attempt to raise the legal hurdle, the Debtors' argument is inapposite where the Debtors' refusal to bring the claims is not based on an assertion that the costs outweigh the benefits, but rather based on a threshold determination, based on a flawed legal theory, that there are no potential benefits in pursuing it. Again, the Debtors do not even attempt to argue that the costs of litigation would outweigh the benefits in the event that their threshold legal determination regarding turned out to be incorrect.

52. In any event, the Debtors cannot reasonably contend that, in the present litigation environment, no competent law firm would be willing to bring these claims on a contingency basis, or that litigation financing would be unavailable, especially if the Court does not accept the Debtors' threshold legal determination that the claims are barred on the grounds that the Uptier Notes Exchange secured or satisfied antecedent debt.

53. The Debtors also argue that, because the Plan already treats the Second Lien Notes as unsecured claims, challenging the Uptier Notes Exchange would bring no benefit because it would not change any economic outcome. This argument again reflects that the Debtors have not given serious thought to the claims, and instead have assumed as a threshold matter that the Debtors' valuation that supports the Plan's treatment of the Second Lien Notes as unsecured claims will be accepted by the Bankruptcy Court. If the Debtors' *actual* enterprise value extends beyond their first lien secured debt – a disputed matter presently before the Court – then a successful challenge to the Uptier Notes Exchange *would* bring value to the estate – i.e., "the funds available to the unsecured creditors." *In re Hinsley*, 201 F.3d at 644.

54. Finally, the possibility that granting the Standing Motion might delay confirmation of a plan is not a basis to deny the Standing Motion. The additional cost of remaining in bankruptcy

can easily be avoided by modifying the Plan to put the equity interests that are in dispute as a result of the unwinding the Uptier Transaction into escrow to be distributed once the dispute is resolved and for the Plan to go effective and the Debtors emerge from these Chapter 11 Cases and avoid any incidental costs staying in bankruptcy creates.

IV. The Consenting Creditors' Additional Arguments Are Meritless

55. The Consenting Creditors' arguments are largely repetitive of the Debtors' arguments and the responses to such arguments need not be repeated here in response to the Consenting Creditors' Response to Standing Motions.

56. The Committee will, however, respond briefly to one additional argument raised by the Consenting Creditors. The Consenting Creditors allege that the Committee has insufficiently pleaded insolvency. The Committee has met its burden and adequately pled in the Proposed Complaint that at all relevant times the Debtors were insolvent.[56] The Committee analyzed solvency under the three applicable tests and the conclusion was the same under each test.[57] The Consenting Creditors' proposition that the Debtors' reported balance sheet insolvency should be disregarded is erroneous. As an initial matter, their caveat that book value "does not *perfectly* equate" to fair value implicitly acknowledges this argument is weak.[58] Further, the Debtors' CFO at the time of the financial reporting in question could not identify any specific distinction between the Debtors' book value and fair value at that time. The fact is, the Debtors were insolvent at the time of the Uptier Transaction.[59] Regardless, there was no investigation done

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[56] *See* Proposed Compl. ¶¶ 84-92.

[57] *id*.

[58] *See* Consenting Creditors' Response to Standing Motions ¶ 30 (emphasis added).

[59] This reality does not contradict the Committee's assertion that the value of the Debtors' business exceeds the Debtors' secured claims, as the Debtors remain unable to fully repay their unsecured debt.

as to the Debtors' solvency and the Consenting Creditors cannot refute the well-pleaded allegations of insolvency at this stage.

CONCLUSION

57. WHEREFORE, for the reasons stated herein, the Committee respectfully requests entry of an order (a) granting the Committee standing to pursue the Proposed Claims; (b) granting the Committee exclusive settlement authority with respect to the Proposed Claims; and (c) granting the Committee such other and further relief, at law or in equity, as this Court may deem just and proper.

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December 7, 2025
Houston, Texas

/s/ *Charles R. Koster*

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Certificate of Service

I certify that on December 7, 2025, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Charles R. Koster
Charles R. Koster