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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Case No. 19-34054-sgj11**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Chapter 11**
	§	
Debtor	§	

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	§	
	§	
Plaintiff,	§	
	§	**Adversary No. 20-03195**
vs.	§	
	§	
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§	
	§	
Defendants.	§	

DEFENDANT GRANT SCOTT'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendant Grant Scott ("**Scott**") files this Motion to Dismiss and Brief In Support (the "**Motion**") pursuant to Federal Rule of Bankruptcy Procedure 7012(b)(6), and respectfully moves the Court to dismiss as to him, either in whole or in part, the Amended Adversary Complaint ("**Complaint**") [ECF Doc. 6] filed by the Plaintiff Official Committee of Unsecured Creditors ("**Plaintiff**" or the "**Committee**"). In support of this Motion, Scott respectfully shows the Court as follows:

I.
RULE 7012(B) STATEMENT

1. Scott states, under Federal Rule of Bankruptcy Procedure[1] 7012(b), that he does not consent to the entry of final orders or judgment by the Bankruptcy Court.

II.
FACTUAL OVERVIEW

2. The Committee's Complaint asserts that all of the named defendants, with Scott among them, engaged in purportedly unlawful conduct with respect to a transaction that occurred more than four years ago, on or about December 28, 2016 (the "**CLO Holdco Transaction**"), concerning an alleged "swap" transaction between the Debtor and The Get Good Nonexempt Trust ("**Get Good**") (ECF 6, ¶ 30). According to Plaintiff, the Debtor received a 97.6835% interest in a promissory note held by Defendant Get Good (which Plaintiff summarily categorizes as "overvalued"), in exchange for the Debtor's transfer of three separate assets to Defendant Get Good (the "**Transferred Assets**"), which thereafter were "funneled down" to CLO Holdco, Ltd. ("**CLO Holdco**") through a series of transfers allegedly orchestrated by Defendant James D. Dondero ("**Dondero**") and consummated through Scott.

[1] The Federal Rules of Bankruptcy Procedure shall be hereafter referred to as the "**Bankruptcy Rules**" and each a "**Bankruptcy Rule**".

3. The Committee exhaustingly emphasizes Dondero as the leading antagonist in its Complaint, and portrays the CLO Holdco Transaction as a nefarious and "convoluted" scheme to denude Highland Capital Management, L.P. (the "**Debtor**") to the detriment of its creditors. Lacking from the Committee's Complaint, however, are the necessary allegations to support its claims against Scott.

4. As detailed below, the Committee's allegations meet neither the standard nor heightened pleading requirements applicable to its claims sounding in fraud, and should therefore be dismissed. The Committee's other asserted claims also fail for independent reasons. Further, the Committee provides no legal predicate to support its conspiracy claims against Scott. As a result, those claims should be dismissed.

III.
THE COMMITTEE'S CLAIMS AND CAUSES OF ACTION

5. The general premise of the Complaint is that the CLO Holdco Transaction was concocted by Dondero to transfer and conceal assets from the Debtor's creditors, using the named defendants, including Scott, as purported instrumentalities for Dondero's alleged fraud. The Complaint asserts five Causes of Actions against various named defendants; as to Scott, Plaintiff asserts three: 1) Actual Fraudulent Transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"); 2) Constructive Fraudulent Transfer under TUFTA; and 3) Conspiracy.

6. As demonstrated below, the Committee has failed to adequately plead *any* claim warranting liability against Scott, and therefore failed to state a claim upon which relief can be granted against Scott.

IV.
ARGUMENTS & AUTHORITIES SUPPORTING DISMISSAL

A. APPLICABLE STANDARD – 12(B)(6) MOTION TO DISMISS

7. To survive a Rule 12(b)(6) motion to dismiss, the Plaintiff's Complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Federal Rule of Civil Procedure[2] 8(a)(2) "requires a showing, rather than a blanket assertion, of entitlement to relief." *Id.* at 556 n.3. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, [the complaint] 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557. After all, "where the well-pleaded facts do not permit the court to infer more than the mere *possibility* of misconduct, the complaint has alleged—but it has not shown—the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (emphasis added, internal quotations removed).

8. The Supreme Court's interpretation of Rule 8, incorporated here pursuant to Bankruptcy Rule 7008(a), requires pleadings that demonstrate "facially plausible claims," a standard satisfied when "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Courts should not strain to find inferences favorable to the plaintiff or accept "conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (citations omitted).

9. With respect to Plaintiff's First Cause of Action for Actual Fraudulent Transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), several courts within the Fifth Circuit have stated that "where plaintiffs seek to establish the actual intent of the debtor [with respect to a fraudulent transfer], the enhanced pleading requirements of Rule 9(b) should apply."[3]

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[2] Federal Rules of Civil Procedure shall be hereafter referred to as the "**Rules**" and each a "**Rule**".

[3] *Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners)*, 498 B.R. 679, 711–12 (Bankr. N.D. Tex. 2013) (Jernigan, J.) (applying Rule 9(b) to fraudulent transfer claims); *Clapper v. Am. Realty Inv'rs, Inc.*,

Accordingly, Rule 9(b) imposes a heightened pleading standard for Plaintiff's First Cause of Action for Actual Fraudulent Transfer under TUFTA, and requires that a party state with particularity facts supporting each element of fraud and the particulars of time, place, and contents of the false or fraudulent conduct, as well as the identity of the person(s) acting fraudulently and what each actor thereby obtained—i.e. the "who, what, when, where, and how" of the fraud.[4]

B. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR ACTUAL FRAUDULENT TRANSFER AGAINST SCOTT.

10. Under either Rule 8's general pleading standard or Rule 9(b)'s heightened pleading requirements, the Committee has failed to state a claim for Actual Fraudulent Transfer against Scott. To properly plead a claim under TUFTA, a Plaintiff must allege that (1) [it] is a "creditor" with a claim against a "debtor"; (2) the debtor transferred assets after, or a short time before, the plaintiff's claim arose; and (3) the debtor made the transfer with the intent to hinder, delay, or defraud the plaintiff.[5]

11. Where, as here, the Plaintiff seeks to establish the actual fraudulent intent of a defendant under TUFTA, the Court may consider, among other factors, various statutory "badges of fraud" under Section 24.005.[6] TUFTA's statutory list of "badges of fraud" is neither exhaustive nor

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No. 3:14-CV-2970-D, 2018 WL 3868703, at *8 (N.D. Tex. Aug. 14, 2018) (citing *In re: Brown Med. Ctr., Inc.*, 552 B.R. 165, 168 (S.D. Tex. 2016) (applying Rule 9(b) to fraudulent transfer claim based on actual fraudulent intent) and *E. Poultry Distributors, Inc. v. Yarto Puez*, 2001 WL 34664163, at *2 (N.D. Tex. Dec. 3, 2001) (Lynn, J.) ("If the fraudulent transfer statute Plaintiffs want the Court to apply requires intent to defraud, the enhanced pleading requirements of Rule 9(b) apply; if the statute allows for fraudulent transfer without intent to defraud, however, only the general pleading rules of Rule 8(a) must be satisfied.")).

[4] *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, No. 3:17-CV-1147-D, 2019 WL 329545, at *5 (N.D. Tex. Jan. 25, 2019) (citing *Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 453 (5th Cir. 2005)).

[5] *Clapper v. Am. Realty Inv'rs, Inc.*, No. 3:14-CV-2970-D, 2018 WL 3868703, at *7 (N.D. Tex. Aug. 14, 2018) (citing *Dontos v. Vendomation NZ Ltd.*, 582 Fed. Appx. 338, 344 (5th Cir. 2014)).

[6] TEX. BUS. & COM. CODE ANN. § 24.005 (West). In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether: (1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) the transfer was of substantially all the debtor's assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset

exclusive, but at least one or more "badges of fraud" must be sufficiently pled with particularity to support a claim under TUFTA for actual fraudulent intent.[7]

12. Despite its conclusory labeling of the CLO Holdco Transaction being "convoluted", the Committee has alleged that the series of transactions constituting the CLO Holdco Transaction moved the Transferred Assets from the Debtor to CLO Holdco. That transaction does not support a finding of any badges of fraud under TUFTA's actual fraudulent transfer statute. For example, CLO Holdco is not an insider of the Debtor and was not an insider in 2016. As this Court is aware, CLO Holdco has been referred to as a "Related Entity" but not an "Affiliate" of the Debtor throughout the Debtor's bankruptcy case. Moreover, the Debtor did not retain possession or control of the Transferred Assets. While the Debtor advised Scott and CLO Holdco, Scott was obligated to make the final decision with regard to any proposed investment or transaction. Plaintiff pleads no facts with particularity to suggest that the Debtor retained control over the Transferred Assets through purported control over CLO Holdco. For instance, as to CLO Holdco, the Committee suggests that because the DAF and its general partner Charitable DAF GP, LLC held and/or controlled the equity interest in CLO Holdco, that CLO Holdco has no independence or separation from Dondero's ultimate control. ECF Doc. 6, at ¶ 21. Plaintiff fails to plead any facts that actually evidence Dondero or the Debtor's control over CLO Holdco. Instead, Plaintiff asserts only that "upon information and belief Dondero indirectly controls CLO Holdco", among other

transferred or the amount of the obligation incurred; (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

[7] *Royalty Clearinghouse, Ltd. v. CTS Properties, Ltd.*, No. 1:16-CV-1342-LY, 2018 WL 5778676, at *5 (W.D. Tex. July 31, 2018), report and recommendation adopted, No. 1:16-CV-1342-LY, 2018 WL 5733138 (W.D. Tex. Sept. 19, 2018) ("A single badge of fraud is not enough to find a fraudulent transfer occurred, but a few badges together can support an inference of actual fraudulent transfer."); *In re Cyr*, 602 B.R. 315, 329 (Bankr. W.D. Tex. 2019) ("It is not necessary that all or any one of the badges of fraud be established to support a finding of actual fraudulent intent by the debtor; however, more than one badge of fraud must be shown to establish actual fraudulent intent. Moreover, courts—including this Court—have required the "confluence" of multiple badges of fraud to establish actual fraudulent intent.").

entities (see ECF Doc. 6, at ¶ 25). That conclusory statement cannot support a badge of fraud, let alone an actual fraud claim under TUFTA.

13. While the Debtor asserts that the CLO Transaction was concealed, it pleads no specific facts to support that conclusory allegation, and previously stipulated to the admissibility of the Debtor's December 31, 2016 audited financial statement, which expressly identifies and addresses the CLO Holdco Transaction. The CLO Holdco Transaction did not involve substantially all of the Debtor's assets. Plaintiff does not plead that the Debtor absconded. Plaintiff does not plead that the Debtor removed or concealed assets, but that it exchanged assets for a nearly $24 million note. Further, Plaintiff fails to plead with any particularity that the Debtor was insolvent at the time of the transfer or was made insolvent as a result of the transfer. Plaintiff's suggestion that litigation filed mere months prior to the CLO Holdco Transaction, and years before the Debtor's bankruptcy, evidenced the Debtor's insolvency at the time of the transfers is illogical and purely conclusory.

14. Finally, and importantly, Plaintiff's allegation that the CLO Holdco Transaction was in exchange for less than reasonably equivalent value is patently erroneous and highlights the duplicity of Plaintiff's claims. Plaintiff alleges that the Crusader Litigation, and the claims included therein, eventually rendered the Debtor insolvent or were sufficiently damning to cause the Debtor to transfer the Crusader Interests to CLO Holdco. Those interests, however, are worth $0. In fact, the Debtor demanded during its bankruptcy case that CLO Holdco amend its proof of claim to reflect the $0 value of the Crusader Interests. While Plaintiff is quick to suggest that the Dugaboy Note was worth considerably less than its face value as a result of certain risk factors (though Plaintiff admits that the Debtor has received millions of dollars in payments under the note), Plaintiff patently ignores similar risk factors associated with the transferred Crusader Interests which were, as Plaintiff notes, subject to pending litigation at the time.

15. Even construed liberally with all indulgences in Plaintiff's favor, Plaintiff's Complaint alleges, at best, only one badge of fraud: that the Debtor was subject to pending litigation at the time of the CLO Holdco Transaction. That badge cannot, however, support any of the Committee's claims. Doing so would be patently illogical for the following reason: In the CLO Holdco Transaction, the Debtor transferred to CLO Holdco *participation interests* in the Debtor's interests in the Crusader funds. The Debtor retained legal title to the interests in the Crusader funds. If the Debtor succeeded in the Crusader litigation, the Debtor would not have faced insolvency and, presumably, the participation interests would be valuable. If the Debtor lost the Crusader litigation and, as became reality, the Debtor's interests in the Crusader funds were cancelled, then CLO Holdco received no benefit from the transfers and the Debtor was "denuded" of a valueless asset. In the latter instance, the Debtor received an approximately $24 million note on which it has received more than $7.5 million in payments in exchange for assets worth far less. Had the earlier instance played out, the Debtor would not have been insolvent and the CLO Holdco Transaction could not possibly have caused the Debtor to become insolvent. As a result, the CLO Holdco Transaction could not have constituted a fraudulent conveyance under TUFTA.

16. The remainder of the Plaintiff's allegations are conclusory and unsupported (and even negated by other facts), and therefore fall well short of the normal pleading standard, much less the heightened pleading standard of Rule 9(b). District courts in the Fifth Circuit have dismissed claims for actual fraudulent transfer due to similar pleading deficiencies as those in the Committee's Complaint. In *In re: Brown Medical Center, Inc.*, the district court held that the plaintiff failed to state with particularity a claim under TUFTA § 24.005(1) for actual fraudulent intent, because the plaintiff had only alleged that the value of consideration the debtor received was not reasonably equivalent to the value of the funds transferred and that the debtor was insolvent or became insolvent shortly

after the transfers were made, which pursuant to TUFTA did not support any *actual* fraudulent intent.[8]

17. Similarly, in *In re Cyr*, the district court dismissed claims for both actual and constructive fraudulent transfer due to pleading deficiencies that are present in this case. Similar to the Committee's allegations regarding Dondero's close personal relationship with Scott, the *Cyr* trustee relied on its allegations that there was a family, friendship, or close associate relationship between the parties during a time when the debtor was contemplating bankruptcy, and the debtor thereafter conducted transactions to place assets with the defendants while retaining possession, benefit, and use of the assets. In dismissing the *Cyr* Trustee's claim for actual fraudulent transfer, the district court disagreed with the trustee's characterization of its pleadings, and opined that:

> The Trustee does not specify which badge of fraud is manifested by such factual allegations and it is not clear to the Court which badge of fraud these facts are intended to support. At least two badges of fraud deal with the financial condition of the Debtor at the time of the transfer; however, the Court is not convinced that the Trustee has properly plead facts demonstrating either badge of fraud. For example, one badge of fraud involves the financial condition of the party sought to be charged both before and after the transaction in question. The Trustee has not asserted any facts alleging the financial condition of Debtor before each transfer. The Court is not convinced that contemplating bankruptcy and/or filing bankruptcy is sufficient to demonstrate the status of Debtor's financial condition. As acknowledged below, individuals seek protections provided by the Bankruptcy Code for a myriad of reasons, not solely because they are experiencing financial ruin. The second badge of fraud dealing with a debtor's financial condition involves the existence or cumulative effect of the pattern or series of transactions or course of conduct after the onset of financial difficulties. Again, the Court is not convinced that contemplating and/or filing bankruptcy is sufficient to demonstrate that Debtor was experiencing financial difficulties.[9]

Additionally, the district court noted that the *Cyr* trustee did not allege any facts indicating "that creditors were pursuing claims against Debtor at the time of or after the transfers were made," and

[8] *In re: Brown Med. Ctr., Inc.*, 552 B.R. 165, 172 (S.D. Tex. 2016) (claim for actual fraudulent transfer dismissed as to all Defendants).

[9] *In re Cyr*, 602 B.R. 315, 331 (Bankr. W.D. Tex. 2019).

as such, "[w]ithout the allegations that such creditors existed, there can[not] be intent to hinder, delay, or defraud present or future creditors."[10]

18. In sum, Plaintiff's Complaint does not sufficiently allege the requisite "badges of fraud" demonstrating actual fraudulent intent, or the "who, what, when, where, and how" of any fraud related to or in connection with the CLO Holdco Transaction, and any opportunity to amend its pleading is likely futile.

19. Regardless, there is no legal basis for any individual liability on the claims asserted against Scott under TUFTA, based on the facts alleged by the Committee. Under Texas law applying TUFTA's provisions, no individual liability can attach unless (i) the defendant is a transferor or transferee in the purported fraudulent transfer,[11] or there are other allegations that (ii) the alleged fraudulent transfer provided a benefit or interest in the assets to the defendant.[12] In other words, absent allegations that Scott was a direct or indirect recipient or beneficiary of the Transferred Assets, Texas law does not permit claims based on derivative liability for fraudulent transfers.[13]

20. The Complaint lacks any such allegations against Scott. To the contrary, Plaintiff alleges that the CLO Holdco Transaction provided personal tax benefits to Dondero, not Scott. ECF Doc. 6, at ¶ 36. In fact, ***Plaintiff pleads zero facts that suggest Scott received any personal benefit from the CLO Holdco Transaction or that he was a transferee***. The Plaintiff's actual fraudulent transfer claim against Scott must therefore be dismissed.

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[10] *Id.*

[11] *In re Silver State Holdings, Assignee-7901 Boulevard 26 LLC*, No. 19-41579-MXM, 2020 WL 7414434, at *31 (Bankr. N.D. Tex. Dec. 17, 2020) (analyzing TUFTA and its precursor statute, and disallowing recovery "from a party who was not a direct or indirect recipient of a fraudulent transfer.").

[12] *Ron v. Ron*, No. 20-40248, 2020 WL 6494223, at *2 (5th Cir. Nov. 4, 2020) (citing *Mack v. Newton*, 737 F.2d 1343 (5th Cir. 1984) ("The magistrate judge held that her claim failed because Stein did not benefit from or receive a property interest in the alleged fraudulent transfer of community property. We agree with this reasoning.").

[13] *In re Silver State Holdings*, 2020 WL 7414434, at *32 (Bankr. N.D. Tex. Dec. 17, 2020) (citing *Mack v. Newton*, 737 F.2d 1343, 1361 (5th Cir. 1984)) (making distinction as to "if the transferee directed the property to be turned over to his creditor, he [the subsequent-transferee creditor] would be as much liable as though he received it himself.").

C. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONSTRUCTIVE FRAUDULENT TRANSFER AGAINST SCOTT

21. The Committee's claim for constructive fraudulent transfer against Scott is implausible on its face and lacks support for the requisite elements under TEX. BUS. & COMM. CODE Section 24.005(a)(2)(B). In order for the Committee to assert its constructive fraudulent transfer claims, it must plead that, "without receiving a reasonably equivalent value in exchange for the transfer or obligation," the Debtor "intended to incur, or believed or reasonably should have believed that the Debtor would incur, debts beyond the Debtor's ability to pay as they became due." The Committee fails to plead any facts that link the CLO Holdco Transaction and the Debtor's purported belief that it would incur debts that it could not pay as they came due. While the Committee asserts that the Crusader Litigation was pending at the time of the transfers, the Committee does not assert that the Debtor believed or should have reasonably believed at the time that it had incurred or would incur debts beyond its ability to repay when due. To the contrary, the Committee's pleadings acknowledge that the Crusader Litigation was contested over a period of years, and that the Debtor successfully operated and paid its debts as they came due until at least October, 2019 when it filed for bankruptcy relief. Thus, it is implausible for the Committee to base its constructive fraudulent transfer claim on allegations that at the time of the CLO Holdco Transaction, the Debtor believed or reasonably should have believed it would incur debts it could not pay when due.

22. As to the threshold element of the Debtor receiving less than reasonably equivalent value in exchange for the Transferred Assets, the Committee has offered no more than unsupported, conclusory allegations that the Dugaboy Note first transferred from Get Good to the Debtor was less than reasonably equivalent value for the Transferred Assets. Indeed, the Committee robustly argues for a reduction of the value of the Dugaboy Note, which it summarily

terms as "overvalued", based on application of a discount rate to calculate the value of the Dugaboy Note (see ECF Doc. 6, at ¶¶ 41-42). In doing so, the Committee underscores the duplicity of its position: while the Court ***should*** discount the Dugaboy Note to account for risks, it ***should not*** perform a similar analysis for *participation interests* in the Debtor's interests in funds subject to just-commenced litigation. The Committee's position is a classic "have your cake and eat it too argument" that would require this Court to ignore the phrase "reasonably equivalent" contained within "reasonably equivalent value".

23. As detailed above and in the Debtor's bankruptcy case, the Committee's discount analysis and real-value comparison has already proven false. The Debtor has received far more from Dugaboy Note than CLO Holdco received from the CLO Holdco Transaction. As previously stated, CLO Holdco's participation interests in the Debtor's interests in the Crusader Funds was cancelled out and deemed worthless as a result of the Crusader Litigation and settlement in the Debtor's bankruptcy case.

24. Again, the Committee's argument belies an obvious reality. Either the Committee: (A) believes the Debtor was certain to lose the Crusader Litigation, which would likely result in adverse consequences for the Debtor's interests involved in the litigation, thereby devaluing the transferred interest; or (B) the Committee believes there was a high likelihood that the Debtor would succeed in the Crusader Litigation, which would mean the Debtor would not reasonably believe it incurred or would incur debts that it was incapable of paying when due. Under either scenario, the Committee's claim falls to pieces. A litigation discount renders the assets reasonably equivalent in value or, alternatively, the Debtor had no reason to believe it would lose the Crusader Litigation and so the Committee cannot satisfy the second element of its claim.

25. Further, the Committee has no legal basis pursuant to which Scott can be liable to the Committee under a theory of constructive fraud because he was not a transferor or transferee.

Again, as a threshold issue for any alleged transferee in a purported chain of transfers, the Complaint must demonstrate how the alleged fraudulent transfers directly or indirectly benefitted each of the named defendants, such that each would qualify as a transferee under TUFTA.[14] As addressed above, Plaintiff does not allege that Scott received any of the purportedly fraudulent transfer or any other benefit associated with the transfers. Again, **the Committee pleads zero facts alleging that Scott was a transferee or that Scott received any benefit from the CLO Holdco Transaction**. Accordingly, the constructive fraudulent transfer claim against Scott should be dismissed.

D. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR CONSPIRACY AGAINST GRANT SCOTT.

26. Civil conspiracy is not an independent cause of action, but rather a derivative claim dependent on an underlying tort.[15] Accordingly, because the Committee's allegations of conspiracy to commit a fraudulent transfer are derivative of its TUFTA claims, its deficient pleading of claims for fraudulent transfer (as discussed above) are necessarily fatal to the claims for conspiracy to commit a fraudulent transfer.[16]

27. Further, as discussed above, there is no legal basis for secondary or derivative liability against Scott, individually, as a non-transferee and non-beneficiary of the Transferred Assets.[17] Additionally, the Committee has not alleged that any creditor of the Debtor is more than general

[14] *In re Northstar Offshore Grp., LLC*, 616 B.R. 695, 729 (Bankr. S.D. Tex. 2020) (arguing in motion to dismiss that "Plaintiff must allege facts explaining how or why that purchase was made for Movants' benefit. Plaintiff wholly fails to do so" and "at most, [the Trustee] implies that [the NGP Directors] 'benefitted' from money paid to an investment belonging to entities in which [the NGP Directors] held unspecified 'financial interests.").

[15] *Basic Capital Mgmt., Inc. v. Dynex Capital, Inc.*, No. 3:17-CV-1147-D, 2019 WL 329545, at *7 (N.D. Tex. Jan. 25, 2019) (granting motion to dismiss fraudulent transfer claim as well as conspiracy claim).

[16] *ClaimHub, Inc. v. Universal Risk Ins. Servs., Inc.*, No. H-10-2841, 2011 WL 13247456, at *7 (S.D. Tex. July 25, 2011).

[17] *Official Stanford Inv'rs Comm. v. Greenberg Traurig, LLP*, No. 3:12-CV-4641-N, 2014 WL 12572881, at *10 (N.D. Tex. Dec. 17, 2014) (citing *FDIC v. White*, 1998 WL 120298, at *2 (N.D. Tex. 1998) (holding TUFTA "do[es] not create personal liability on the part of a co-conspirator for fraudulent conveyances to an extent or in an amount beyond property which a co-conspirator actually receives or in which he acquires an interest")); *see also Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 386–87 (Tex. App. – Houston [1st Dist.] 2012, pet. denied) (recognizing a claim for conspiracy to commit fraudulent transfer, but acknowledging Mack as restricting the claim to defendants who were parties to the transfer)).

creditor as to the Transferred Assets at issue in the CLO Holdco Transaction, and therefore its conspiracy claim fails for this additional reason. A "mere general creditor may take advantage of the Texas fraudulent conveyance statute, but may not recover damages for conspiracy to commit a fraudulent conveyance."[18] Where, as here, "a debtor's property is [allegedly] conveyed to others to evade payment," a mere general creditor "does not have a cause of action for civil conspiracy."[19]

V.
PRAYER

28. Defendant Grant Scott respectfully prays that the Court grant this Motion in its entirety, dismiss the Complaint as to him, and grant such other relief, at law or in equity, to which they may be entitled.

Respectfully submitted,

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[18] *Mack v. Newton*, 737 F.2d 1343, 1362 (5th Cir. 1984).

[19] *Id.* citing *Stonecipher's Estate v. Butts' Estate*, 591 S.W.2d 806 (Tex. 1979).

CERTIFICATE OF SERVICE

This is to certify that on April 14, 2021, a true and correct copy of the foregoing has been served by ECF on all counsel of record.

/s/ John J. Kane
John J. Kane