This Opinion is not intended for full-text publication.

**Dated: November 14, 2013**
**The following is SO ORDERED:**

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

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**UNITED STATES BANKRUPTCY COURT**
**WESTERN DISTRICT OF TENNESSEE**
**EASTERN DIVISION**

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| **In re** | ) | |
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| **DENTIS SISSON and** | ) | **Case No. 11-12502** |
| **CATHY SISSON,** | ) | |
| **Debtors .** | ) | **Chapter 11** |
| | ) | |
| **DENTIS SISSON and,** | ) | |
| **CATHY SISSON,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **Adv. Proc. No. 12-5027** |
| | ) | |
| **FIRST BANK,** | ) | |
| | ) | |
| **Defendant.** | ) | |

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**MEMORANDUM OPINION RE: FIRST BANK'S MOTION TO DISMISS ADVERSARY PROCEEDING PURSUANT TO FED. R. CIV. P. 12(B)(6)**

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This matter is before the Court on First Bank's motion to dismiss the debtors' adversary complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court conducted a hearing on First Bank's motion to dismiss on September 5, 2013. This memorandum opinion shall serve as the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

## I. FACTS

The debtors in this case, Dentis and Cathy Sisson ("Debtors"), filed a chapter 11 petition for bankruptcy relief on August 17, 2011. Prior to filing bankruptcy, the Debtors operated an over-the-road trucking business known as Sisson Transportation, Inc. The corporate assets included a fleet of tractor-trailer trucks and the corporation's place of business at 137 Law Road in Jackson, Tennessee ("Law Road Property"). Navistar Financial Corporation ("Navistar") financed the fleet of trucks, while First Bank ("Bank") financed the Law Road Property. The Law Road Property included the real property and the buildings located thereon.

Between 1998 and February 2008, the Debtors executed a total of six master promissory notes in favor of the Bank. The Debtors executed these notes in either their individual names or in the name of the corporations they owned. The notes were secured by the Debtors' personal guaranties and various pieces of collateral including a Kubota tractor, the Law Road Property, accounts receivable, and 33 vehicles and trailers.

In July 2009, Dentis Sisson notified a loan officer at the Bank, Dudley Myracle ("Myracle"), that the Debtors had made the decision to dissolve Sisson Transportation, Inc., and wind down the trucking business. In order to facilitate liquidation of the corporate assets, the Debtors entered into a Forbearance Agreement ("Agreement") with the Bank on August 7, 2009. The relevant factual recitations of the Agreement are as follows:

> K. Corporation has represented to Bank that it has closed its business and is in the process of liquidating its assets, which constitutes an event of default on the Notes. Bank has agreed to allow Corporation time to complete an orderly liquidation.
>
> L. The parties desire to provide for payment of the Notes and liquidation of Corporation's assets upon the terms of this Agreement.

> M. The Notes and Loan Documents are fully enforceable and not subject to any defense or counterclaim, or any claim of setoff or recoupment.
>
> N. The parties acknowledge that they have been represented by legal counsel of their choice, if desired, that this Agreement represents an arms-length transaction and that each party has acted in good faith in entering into this Agreement.

(Forbearance Agreement ¶¶ K-M, Bankr Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-2 at 2-3.)

Pursuant to the terms of the Agreement, the Bank agreed to forbear from exercising its remedies under the six outstanding promissory notes in exchange for three things. First, Sisson Corporation and the Debtors would grant the Bank liens on and security interests in additional collateral. This additional collateral included deeds of trust on the Debtors' residence and farm at 21 Sherman Blankenship Road in Beech Bluff, Tennessee, and a deed of trust on 161 acres of land on Hamlett Road. (Proof of Claim at Parts 8, 9, and 11, Bankr. Case No. 11-12502, Proof of Claim No. 12-1; Second Amended Complaint at 4, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 30.) Second, Sisson Corporation, Inc., would execute a master promissory note for a $175,000 line of credit with the Bank, the proceeds of which were to be used for expenses associated with liquidation of the corporation and its assets. Third, the Debtors and/or Sisson Corporation, Inc., would make quarterly interest-only payments throughout the duration of the forbearance period. (Forbearance Agreement at ¶¶ J, 2(c), and 3, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-2 at 2, 4-5.) As of August 2010, the quarterly payments amounted to $16,358.80 every three months. (See Exhibit B to Complaint for Damages and Declaratory Judgment, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 3-3 at p. 20.) The initial forbearance period was the earlier of one year or the occurrence of an event that constituted termination pursuant to the terms of the Agreement.

The Agreement also contained the following recitations:

> 7. <u>Effectiveness of Loan Documents</u>. This Agreement shall not constitute a novation of any of the Loan Documents and all the Loan Documents shall survive the execution of this Agreement and remain

> in full force and effect, subject only to the Bank's agreement to forbear as set forth herein. There are no oral representations or assurances from Bank to Corporation or Sissons which survive the execution of this Agreement.
>
> 8. Release and Waiver. Corporation and Sissons hereby acknowledge and stipulate that they have no claims or causes of action of any kind whatsoever against Bank. Corporation and Sissons represent that they are entering into this Agreement freely and with the advice of legal counsel if they chose. Corporation and Sissons hereby release Bank from any claims, causes of action, demands and liabilities of any kind, whatsoever, whether direct or indirect, fixed or contingent, liquidated or unliquidated, disputed or undisputed, known or unknown, which Corporation or Sissons have or may acquire in the future relating in any way to any event, circumstance, action or failure to act from the beginning of time to the date of this Agreement. The release by Corporation and Sissons herein, together with the other terms and conditions of this Agreement, are executed by Corporation and Sissons advisedly and without coercion or duress from Bank, Corporation and Sissons having determined that the execution of this Agreement is in the best economic interest of Corporation and Sissons. . (Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-2 at 7.)
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> . . . .
>
> 12. Entire Agreement. This Agreement contains the entire agreement of the parties and supercedes any other discussions or agreements relating to the subject of this Agreement.

(Forbearance Agreement at ¶¶ 7, 8, and 12, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-2 at 6-8.)

Six days after the Debtors and the Bank entered into the Agreement, the Debtors defaulted on their loan obligations with Navistar. In accordance with the terms of the financing agreements, Navistar repossessed twenty-one of the Debtors' trucks.

After contacting the Bank and requesting a new payment structure in August 2010, the Sissons and the Bank amended the Agreement. (See Complaint for Damages, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 3-3 at ¶ 12). The amendments extended the forbearance period through April 1, 2011, and replaced the quarterly interest-only payments with monthly payments of $2,500.00. The other relevant provisions of the amendments are as follows:

> 5. All other terms, conditions, covenants and warranties set forth in the Forbearance Agreement shall remain in full force and effect except as amended herein and the prior covenants and warranties are hereby renewed.
>
> 6: Corporation and Sissons hereby acknowledge and stipulate that they have no claims or causes of action of any kind whatsoever against Bank. Corporation and Sissons represent that they are entering into this Agreement freely and with the advice of legal counsel if they choose. Corporation and Sissons hereby release Bank from any and all claims, causes of action, demands and liabilities of any kind whatsoever, whether direct or indirect, fixed or contingent, liquidated or unliquidated, disputed or undisputed, known or unknown, which Corporation or Sissons have or may acquire in the future relating in any way to any event, circumstance, action or failure to act from the beginning of time to the date of this Agreement. The release by Corporation and Sissons herein, together with the other terms and conditions of this Agreement, are executed by Corporation and Sissons advisedly and without coercion or duress from Bank. Corporation and Sissons having determined that the execution of this Agreement is in the best economic interest of Corporation and Sissons.

(Amendment to Forbearance Agreement, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-2 at 2.)

On July 20, 2011, Navistar filed suit against the Debtors based on their default on the tractor-trailer notes. Navistar sought damages from the Debtors in the amount of $470,110.95 plus interests, costs, and attorneys fees.

A short time prior to filing for bankruptcy relief, the Debtors defaulted on their payments to the Bank under the Agreement and the Bank foreclosed on the Law Road Property. That property was sold at a public auction and resulted in a deficiency balance of $400,000.00. The Bank then gave notice of its intent to foreclose on the Debtors' residence and farm, both of which had been pledged as additional collateral under the Agreement.

Before the Bank could foreclose on the additional collateral, however, the Debtors filed for bankruptcy relief. Thereafter, the Debtors sought permission from this Court to employ an attorney and pursue a cause of action against the Bank for lender liability and other issues related to execution of the Agreement. The Court granted the Debtors' motion on September 19, 2011, and on January 17, 2012, the Debtors filed a "Complaint for Damages and Declaratory Judgment" against the Bank in the Chancery Court for Henderson County, Tennessee. The Debtors sought recovery from the Bank under legal theories of bad faith dealing, material misrepresentation, fraudulent inducement to contract, and breach of contract.

In their state court complaint, the Debtors alleged that the Bank knew, or should have known, at the time of entering into the Agreement that the Debtors were insolvent, had no legitimate source of income to support the notes, and did not have sufficient collateral to guarantee the notes. Because the Bank was allegedly undercollateralized, the Debtors asserted that the Bank knew it would not be paid in full in the event of a general liquidation absent the Agreement. The Debtors also alleged that the Agreement provided the Bank with an advantage over other secured creditors without requiring the Bank to extend any risk.

Turning to the misrepresentation claims, the Debtors alleged that Myracle urged the Debtors to sign the Agreement without providing time for careful review of the documents. The Debtors also alleged that Myracle misrepresented the purpose and the impact of the Agreement, as well as the fact that the Agreement provided the Bank with a superior position over other general creditors. Lastly, the Debtors alleged that Myracle assured them that various lien-free assets the Debtors pledged as collateral for the Agreement would be released once portions of the debt were paid and would remain property of the Debtors.

Pursuant to the complaint, the Debtors sought three forms of relief from the state court: (1) an order setting aside the Agreement and declaring it invalid; (2) an order requiring the Bank to provide the Debtors with a full accounting of all transfers of monies and assets made under the Agreement; and (3) an award of monetary damages.[1]

On February 16, 2012, the Bank filed a "Notice of Removal" in the United States District Court for the Western District of Tennessee. As grounds for this notice, the Bank asserted that the Debtors' causes of action against the Bank were civil proceedings arising in or related to a pending bankruptcy proceeding. After the matter was removed from state court, the United States District Court issued an order referring the Debtors' complaint to this Court pursuant to 28 U.S.C. § 157(b).

In its answer to the Debtors' complaint, the Bank asserted that the Debtors failed to state a claim upon which relief may be granted and that the Debtors failed to plead fraud with particularity. The Bank also asserted a counter-claim against the Debtors for the Bank's reasonable costs and attorney's fees.

On October 9, 2012, First Bank filed a motion to dismiss the Debtors' adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6). In so doing, the Bank asserted that the Debtors' complaint was factually vague and legally insufficient such that it failed to state a claim upon which relief could be granted under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) which requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face" in order to survive a Rule 12(b)(6) motion to dismiss. *Id.* The Bank also argued that the Debtors' complaint was not only barred under the statute of frauds, but that it was also barred by the terms of the Agreement and the parole evidence rule.

On June 24, 2013, the Debtors filed a motion to amend their complaint to set forth specific causes of action under 11 U.S.C. § 544 and the Tennessee Uniform Fraudulent Transfer Act ("TUFTA") codified at Tennessee Code Annotated § 66-3-301 *et seq.* The Bank filed a response to the Debtors' motion on July 9, 2013, in which they objected to the

[1]On January 30, 2012, the Debtors filed an amended complaint in the state court action to correct an error in the docket number appearing on the original complaint. Other than this alteration, the amended complaint was identical to the original complaint.

Debtors' proposed amendments on the basis of undue delay and prejudicial effect. The Court granted the Debtors' motion to amend on August 1, 2013. The Debtors filed a second amended complaint that same day.[2]

The Debtors' second amended complaint did not contain any new factual allegations. It simply added one new form of requested relief and two new causes of action. As for additional relief, the Debtors requested disallowance of the Bank's claims pursuant to 11 U.S.C. § 502(d). The new causes of action consisted of claims for intentional fraudulent transfers and constructive fraudulent transfers.[3]

In their claim for intentional fraudulent transfers, the Debtors alleged that within four years of filing for bankruptcy relief they themselves transferred an interest in property to the Bank "with actual intent to hinder, delay or defraud creditors of Debtors . . . ." (Second Am. Compl. at ¶ 36, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 30.) The Debtors alleged that they were insolvent at the time of the transfer or became insolvent as a result of the transfer and that they did not receive reasonably equivalent value for the assets they transferred to the Bank under the Agreement. For these reasons, the Debtors asserted that they were entitled to avoid the transfers pursuant to Tenn. Code Ann. § 66-3-305(a)(1) and 11 U.S.C. § 544 and to recover the value of the transfers pursuant to 11 U.S.C. § 550(a). In setting forth this claim, the Debtors did not identify or allege that there was a creditor with an allowable unsecured claim who would be entitled to seek avoidance of the transfers under Tennessee law. In fact, nowhere in their complaint did the Debtors identify any unsecured creditors, let alone ones with allowable claims who could avoid the transfers.

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[2]The Debtors titled their amended complaint "Second Amended Complaint" because of the prior amendment they made in state court to correct the docket number. *See* note 1 *supra.*

[3]The amended complaint also contained the causes of action listed by the Debtors in their original complaint.

Turning to their claim of constructive fraudulent transfers, the Debtors alleged that they were insolvent on the date the transfers were made and that they received less than reasonably equivalent value for the transfers. The Debtors also alleged that they (1) were engaged or were about to be engaged in a business or transaction for which any property remaining with the Debtors was unreasonably small in relation to the transaction and (2) intended to incur, or believed they would incur, debts that would be beyond their ability to pay as they became due. As a result of these allegations, the Debtors asserted that they were entitled to avoid the transfers pursuant to Tenn. Code Ann. § 66-3-305(a)(2) and 11 U.S.C. § 544 and to recover the value of the transfers pursuant to 11 U.S.C. § 550(a).

As with their claim for avoidance of the intentionally fraudulent transfers, the Debtors did not allege that there was a creditor with an allowable unsecured claim who would be entitled to seek avoidance of the constructively fraudulent transfer under state law. The only statement regarding a creditor in the amended complaint consisted of the statement in this count of the complaint that "[t]here exists at least one creditor whose claim against Debtor arose prior to the date that the transfers were made, i.e. Navistar." (Second Am. Compl. at ¶ 46, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 30.) The Debtors did not, however, allege that Navistar was an unsecured creditor with an allowable claim who would have been entitled to bring suit under Tennessee law to recover the constructively fraudulent transfer. The Debtors also failed to offer any support for their claim that they received less than reasonably equivalent value for the transfers made under the Agreement. Rather, they make the plain statement that they "received less than a reasonably equivalent value in exchange for the transfers." (Second Am. Compl. at ¶ 42, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 30.)

In response to the Debtors' second amended complaint, the Bank filed a supplemental brief in support of their motion to dismiss. The Bank filed this brief for the sole purpose of addressing the new causes of action in the Debtors' second amended complaint.[4] In so doing, the Bank offered three legal arguments in support of its motion.

First, the Bank addressed the nature of an avoidance action under TUFTA. A necessary element of such a claim is that the "the debtor made the transfer or incurred the obligation . . . With actual intent to hinder, delay, or defraud any creditor of the debtor . . . ." Tenn. Code Ann. § 66-3-305(a)(1). In order to successfully avoid the Agreement under this statute, the Bank asserted that the Debtors would have to demonstrate that *they themselves* intended to defraud their creditors. If the Debtors did, in fact, intend to plead this fact, then the Bank asserted that the Debtors were barred from seeking such relief under the equitable doctrines of unclean hands and estoppel. If, however, the Debtors did not intend to plead this fact, then the Bank argued that the Debtors could not state a claim for relief under § 66-3-305(a)(1) of TUFTA "because the requisite statutory intent is lacking." (Supplemental Memo. of Law in Support of Mot. to Dismiss at 4, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 27.)

Second, the Bank argued that the equitable doctrine of laches barred the Debtors' claims. The Debtors waited nearly four years to claim that they fraudulently entered into the Agreement with the Bank despite having knowledge of their fraud at the time of executing the Agreement. To allow the Debtors to make such a claim at this juncture in the case would prejudice the Bank since the deadline to object to the Debtors' discharge expired in December 2011.

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[4]The Debtors attached a copy of the second amended complaint to their motion for leave to amend their complaint. The Court granted that motion on July 18, 2013. Thereafter, on July 29, 2013, the Bank filed its supplemental brief/memorandum of law in support of their motion to dismiss which contained their arguments with regard to the new counts added by the Debtors. Due to oversight, the Debtors did not file their second amended complaint with the Court until August 1, 2013; however, because the Debtors had attached a copy of the amended complaint as an exhibit to their motion to amend, the Bank was in possession of a copy of the amended complaint as of June 24, 2013. For these reasons, the Bank's supplemental brief was actually filed before the second amended complaint. Once the second amended complaint was filed, the Bank filed a second motion to dismiss which incorporated its July 29, 2013 supplemental brief.

The third argument the Bank made in support of its second motion to dismiss was that the Debtors' constructive fraud claims must fail because they received reasonably equivalent value under the Agreement. The Bank argued that a debtor receives reasonably equivalent value when he pledges collateral to secure an antecedent debt and obtains a modification or forbearance.

The Debtors filed a response in opposition to the Bank's motions to dismiss on September 4, 2013. In the supporting memorandum filed contemporaneously therewith, the Debtors failed to address the legal arguments presented in the Bank's motions to dismiss or to advance arguments in support of their TUFTA claims. Instead, the Debtors' response consisted solely of a litany of allegations regarding the Bank's "financial abuses and irregularities" in dealing with the Debtors. The Debtors did not dispute the Bank's assertion that the Debtors were "[i]n essence, . . . now suing themselves for fraud to recover alleged fraudulent pledges of collateral that they made to FirstBank under the Forbearance Agreement." (Supplemental Memorandum of Law in Support of Motion to Dismiss at 2, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 27.) The only reference in the Debtors' response to "fraud" or "fraudulent actions" consisted of the following:

> The Debtors would respectfully submit to the Court that the Amended Complaint and the original Complaint which had been filed in State Court and removed to this Court sets forth colorable claims of fraud and financial abuses and irregularities so as to warrant the denial of FirstBank's Motion to Dismiss.
>
> The Debtors and Counsel respectfully submit to the Court that there are numerous issues of material fact as to the actions of First Bank, it employees and others acting on behalf of the bank which will arise to fraudulent actions and if properly before this Court will cry out for a Judgment for the Debtors. (Fed. R. Civ. P. 12)

(Br. in Support of Obj. To FirstBank's Mot. to Dismiss at 5, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 45.)

In their Supplemental Memorandum of Law, the Debtors also failed to address the Bank's assertions that (1) the Debtors received reasonably equivalent value under the Agreement and (2) the equitable doctrines of unclean hands and estoppel barred the Debtors' claims.

## II. ANALYSIS

### A. Federal Rule of Civil Procedure 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 8(a)(2), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7008, "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If, in the eyes of the defendant, the plaintiff has not satisfied this pleading requirement, the defendant may seek dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012. When considering a Rule 12(b)(6) motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff, accept the allegations of the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Tam Travel, Inc. v. Delta Airlines, Inc.* (*In re Travel Agent Com'n Antitrust Litigation*), 583 F.3d 896, 903 (6th Cir. 2009). The court need not, however, "accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Id.* (citations omitted) (internal quotation marks omitted.) "[O]n a 12(b)(6) motion, the moving party bears the burden of demonstrating that the plaintiff failed to state a claim" for relief. *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (citation omitted).

In the case of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), the Supreme Court concluded that in the face of a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face."

*Id.* at 570. Two years later in the case of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), the Supreme Court further explained this pleading requirement:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant's liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ”

*Id.* at 678 (citing *Twombly*, 550 U.S. at 556-57). “[T]o survive a [Rule 12(b)(6)] motion to dismiss, the complaint must contain either direct or inferential allegations respecting *all material elements* to sustain a recovery under some viable legal theory.” *Tam Travel,* 583 at 903 (emphasis added) (citation omitted). Although the allegations as to each element of a claim need not be detailed, a plaintiff’s obligation to provide the “grounds” of his entitlement to relief requires more than “labels and conclusions,” and “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citations omitted).

When a claim is for fraud, Federal Rule of Civil Procedure 9(b), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7009, requires the pleader to “state with particularity the circumstances constituting fraud . . . .” The purpose behind this pleading requirement is one of notice. “[T]he circumstances of fraud [must] be pled with enough particularity to put the party on notice as to the nature of the claim.” *J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1489 (6th Cir. 1991). The Sixth Circuit interprets Rule 9(b) liberally, but at a minimum requires “plaintiffs to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.” *Bennett v. MIS Corp.*, 607 F.3d 1076, 1100 (6th Cir. 2010) (citation omitted). When bringing a claim for fraud under state law in federal court, the plaintiff must satisfy the pleading requirements of Federal Rule of Civil Procedure 9(b). *James v. McCoy*, 56 F.Supp.2d 919, 942 (S.D. Ohio 1998).

## B. Debtors' Causes of Action

### 1. Lender Liability Claims

The Debtors' original complaint against the Bank sought relief under state law based on allegations that the Bank engaged in bad faith dealing, material misrepresentations, fraudulent inducement to contract and breach of contract in entering into the July 2009 Forbearance Agreement and the August 2010 Amendment to the Agreement. Pursuant to their original complaint, the debtors asked the Court to set aside the Agreement and declare it invalid, order the Bank to provide a full accounting of all transfers of monies and assets, and award the Debtors monetary damages.

In paragraph 31 of the Debtors' second amended complaint, the Debtors state that they "are entitled to recover the damages sustained by Debtors pursuant to applicable non-bankruptcy law and 11 U.S.C. § 544." (Second Am. Compl. at ¶ 31, Bankr. Case No. 11-12502, ECF No. 12-5027, ECF No. 30.) This citation to § 544, however, is incorrect. Section 544 allows a trustee or debtor-in-possession to *avoid* certain transfers of property. 11 U.S.C. § 544(a), (b) (emphasis added). It does not entitle a trustee or debtor-in-possession to assert a state law claim for recovery of damages against defendants. *Rieser v. Hayslip* (*In re Canyon Sys. Corp.*), 343 B.R. 615, 656 (Bankr. S.D. Ohio 2006) (citation omitted) (internal quotation marks omitted) ("It is only the power to *avoid* transfers or obligations that the trustee receives through § 544(b)."); *see also Tronox Inc. v. Anadarko Petroleum Corp.* (*In re Tronox Inc.*), 429 B.R. 73, 103 (Bankr. S.D.N.Y. 2010) (citations omitted) (internal quotation marks omitted) ("Courts that have considered the question whether a claim for damages may be pursued under § 544(b) have concluded that it only permits the trustee to avoid a fraudulent transfer regardless of whether any state law recognizes such a claim."); *Official Committee of Unsecured Creditors v. Goldman Sachs Credit Partners, L.P.* (*In re Fedders N. Am., Inc.*), 405 B.R. 527, 548 (Bankr. D. Del. 2009) ("This holding is consistent with other cases that have refused to allow trustees to use section 544(b) to assert claims for damages under state law . . . ."). Nowhere in their original or amended complaint do the Debtors assert their state law lender liability claims entitle them to avoid the transfers they made to the Bank under the Agreement. Rather, they ask the Court to declare the Agreement invalid and award them damages for the Bank's alleged lender liability violations.

Because the Debtors' original causes of action against the Bank were based on the pre-petition Agreement and because the causes of action could have been asserted at the time the case was filed, they became property of the estate when the Debtors filed their chapter 11 petition pursuant to 11 U.S.C. § 541(a)(1). This section of the Bankruptcy Code provides that "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). As the Sixth Circuit recognized in the case of *Tyler v. D.H. Capital Management, Inc.*, – F.3d –, 2013 WL 5942072 (6th Cir. 2013):

> [Under § 541(a),] "[p]roperty" is construed generously under the Bankruptcy Code. Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541. Consequently, most courts analyze whether the asset is "sufficiently rooted in the pre-bankruptcy past" of the debtor [in determining whether property is property of the estate.]
>
> How this test should be applied to causes of action is the subject of further disagreement. Some courts have applied the test expansively, including contingent and unripe claims as property of the estate. Others have treated the test as equivalent to the determination of when the cause of action accrues under the substantive law. Both sides, however, agree to some basic boundaries to this test.
>
> First, pre-petition conduct or facts alone will not root a claim in the past; there must be a pre-petition violation. In this case, for example, the mere fact that the debt was incurred years before the bankruptcy is irrelevant to the analysis–the question is when the violation occurred.
>
> Second, all causes of action that hypothetically could have been brought pre-petition are property of the estate. This is the case even if the debtor was unaware of the claim. Further, the entire cause of action is property of the estate, even if further post-petition damages were incurred.

*Id.* at *5 (internal citations omitted) (internal quotation marks omitted); *see also Stevenson v. J.C. Bradford & Co.* (*In re Cannon*), 277 F.3d 838, 854 (6th Cir. 2002) ("[I]f the debtor could have raised a state claim at the commencement of the bankruptcy case, then that claim is the exclusive property of the bankruptcy estate . . . ."); *In re Fritzsch Custom Builders, LLC*, 474 B.R. 515, 517 (Bankr. S.D. Ohio 2010) (citation omitted) ("The rule is well-established that causes of action are estate property if a debtor could have asserted the action at the commencement of the bankruptcy case."). In the case at bar, the Debtors recognized that they had a pre-petition property interest in the state law claims when they listed "a potential cause of action against FirstBank for claims including, but not limited to lender liability" on Schedule B of their petition.

**2. Fraudulent Transfer Claims**

When the Debtors amended their complaint on August 1, 2013, they added two new causes of action to the adversary proceeding. In addition to the state law lender liability claims, the Debtors were now asserting that the interests they transferred to the Bank under the Agreement were avoidable as fraudulent conveyances pursuant to 11 U.S.C. § 544(b) and the Tennessee Uniform Fraudulent Transfer Act ("TUFTA"), codified at Tenn. Code Ann. § 66-3-301 *et seq.*

Pursuant to § 544(b) of the Bankruptcy Code, a trustee[5] may

> avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b); 11 U.S.C. § 1107(a). Under TUFTA, a creditor may avoid a transfer that was made with (1) actual fraudulent intent or (2) constructive fraudulent intent. Tenn. Code Ann. §§ 66-3-305(a), 66-3-308. The Debtors in this case have alleged they can avoid the transfers made pursuant to the Agreement under both subsections of § 66-3-305(a).

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[5]Pursuant to Federal Rule of Bankruptcy Procedure 9001(11), the term " 'Trustee' includes a debtor in possession in a chapter 11 case." Fed. R. Bankr. P. 9001(11).

### a. Actual Fraudulent Intent

Section 66-3-305(a)(1) of TUFTA provides that

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;

Tenn. Code Ann. § 66-3-305(a)(1). "Whether a transfer is fraudulent is determined by the facts and circumstances of each case." *Macon Bank & Trust Co. v. Holland*, 715 S.W.2d 347, 349 (Tenn. Ct. App. 1986). This type of fraud is typically referred to as "fraud in fact" or "actual fraud." Section 66-3-305(a)(1) is analogous to 11 U.S.C. § 548(a)(1)(A). As a result, case law interpreting § 548(a)(1) is equally applicable to Tenn. Code Ann. § 66-3-305(a)(1). *Bankeast v. Shirley* (*In re Shirley*), Bankr. No. 09-35259, Adv. Nos. 10-3031, 10-3032, 2011 WL 4054773, *13 (Bankr. E.D. Tenn. Sept. 12, 2011); *see also Creditor's Comm. of Jumer's Castle Lodge, Inc. v. Jumer*, 472 F.3d 943, 947 (7th Cir. 2007) (concluding that "because the [Uniform Fraudulent Transfer Act] is a uniform act, we may look to cases decided under 11 U.S.C. § 548, as well as cases interpreting other states' versions of the Uniform Fraudulent Transfer Act . . . .").

Because transferors rarely admit to having a fraudulent intent, parties may present circumstantial evidence of intent. Section 66-3-305(b) contains a list of 11 factors, or "badges of fraud," courts may consider in analyzing whether a transfer was actually fraudulent. *See* Tenn. Code Ann. § 66-3-305(b)(1)-(11). Although the factors listed in § 66-3-305(b) are objective ones, "the ultimate question remains whether the transferor subjectively intended to defraud the creditor." *Eastwood v. United States*, NO. 2:06-cv-164, 2007 WL 2815560, at *5 (E.D. Tenn. Sept. 25, 2007) (citing Tenn. Code Ann. § 66-3-305(a)(1), (b)). "Whether there is actual intent to hinder, delay, or defraud under UFTA is a question of fact . . . ." *Wolkowitz v. Beverly* (*In re Beverly*), 374 B.R. 221, 235 (B.A.P. 9th Cir. 2007) (interpreting the actual fraudulent transfer provision in California's Uniform

Fraudulent Transfer Act which contains identical language to Tenn. Code Ann. § 66-3-305(a)(1)).

The necessary elements of a claim under Tenn. Code Ann. § 66-3-305(a)(1) brought pursuant to a trustee's or debtor-in-possession's avoidance powers are (1) there is an unsecured creditor with an allowable claim who would be entitled to bring an action to avoid the transfer under non-bankruptcy law; (2) the debtor transferred an interest in property; and (3) the debtor acted with the intent to hinder, delay or defraud any creditor. *Lyon v. Eiseman* (*In re Forbes*), 372 B.R. 321, 330 (B.A.P. 6th Cir. 2007). With regard to the first element, the "Trustee or debtor-in-possession is required to allege the existence of" an unsecured creditor who could bring an avoidance action under state law. *In re D'Angelo*, 491 B.R. 395, 404 (E.D. Pa. 2013); *Official Comm. of Unsecured Creditors v. Chinery* (*In re Cybergenics Corp.*), 226 F.3d 237, 243 (3d Cir. 2000). "The Trustee bears the burden of proving the existence of a qualified unsecured creditor, and if the creditor is estopped or barred from recovery for some reason, so is the Trustee." *Welt v. Jacobson* (*In re Aqua Clear Techs., Inc.*), 361 B.R. 567, 583 (Bankr. S.D. Fla. 2007) (citation omitted).

To satisfy this pleading requirement, "courts do not generally require a trustee to plead the existence of an unsecured creditor by name . . . ." *D'Angelo*, 491 B.R. at 405 (citation omitted); *see also David Cutler Indus., Ltd. v. Pa. Dep't of Revenue* (*In re David Cutler Indus., Ltd.*), 471 B.R. 110, 114 n.8 (Bankr. E.D. Pa. 2012); *Liquidating Tr. of App Fuels Creditors Trust v. Energy Coal Res.* (*In re Appalachian Fuels, LLC*), Bankr. No. 09-10343, Adv. No. 11-1041, 2012 WL 4059911, *3 (Bankr. E.D. Ky. Sept. 14, 2012) (citation omitted); *Picard v. Madoff* (*In re Bernard L. Madoff Inv. Sec. LLC*), 458 B.R. 87, 109 (Bankr. S.D.N.Y. 2011); *Aqua Clear Techs*, 361 B.R. at 583; *Giuliano v. U.S. Nursing Corp.* (*In re Lexington Healthcare Grp., Inc.*), 339 B.R. 570, 576 (Bankr. D. Del. 2006); *see also* Collier on Bankruptcy ¶ 544.06 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) ("the trustee need not identify a specific creditor by name"). This same standard applies when analyzing a complaint pursuant to Rule 12(b)(6). *D'Angelo*, 491 B.R. at 405 (citation omitted).

To satisfy Federal Rule of Civil Procedure 8, however, a trustee must at least identify a category of unsecured creditors who could avoid the transfer under § 544(b) or "the existence of an unsecured creditor" with an allowable claim. *Picard v. Estate of Stanley Chais* (*In re Bernard L. Madoff Inv. Sec. LLC*), 445 B.R. 206, 234 (Bankr. S.D.N.Y. 2011) (citing *In re RCM Global Long Term Capital Appreciation Fund, Ltd.*, 200 B.R. 514, 523-24 (Bankr. S.D.N.Y. 1996)); *Lexington Healthcare Grp.*, 339 B.R. at 576; *Appalachian Fuels, LLC*, 2012 WL 4059911, *3. Failure "to allege in the complaint the existence of an unsecured creditor" who could avoid the transfers serves as grounds for dismissal of a § 544(b) claim under Rule 12(b)(6). *D'Angelo*, 491 B.R. at 405 (concluding that the debtor's identification of unsecured creditors on schedule F of his petition was not sufficient to state a viable claim under § 544(b) given that the debtor failed to allege existence of an unsecured creditor in his complaint.); *Pardo v. Avanti Corporate Health Sys., Inc.* (*In re APF Co.*), 274 B.R. 634, 639-40 (Bankr. D. Del. 2001) (determining that "conclusory assertion that '[t]he Debtors' transfers of property . . . constitute fraudulent transfers under applicable nonbankruptcy law, which are avoidable and recoverable by the Trustee pursuant to 11 U.S.C. § 544 and applicable state law' " was insufficient to state a claim for relief when debtor "fails to identify an unsecured creditor under whose rights the [Debtors are] claiming."); *see also Tabor v. Kelly* (*In re Davis*), Bankr. Case 05-15794-E, Adv. No. 07-05181-L, Proposed Findings of Fact and Conclusions of Law, slip op., (Bankr. W.D. Tenn. Mar. 11, 2013), adopted in Misc. No. 11-00012-JDT-egb, slip op. (W.D. Tenn. July 26, 2013) (concluding that (1) the trustee's statement in complaint that there were creditors who held allowable unsecured claims coupled with (2) the fact that Schedule F listed numerous unsecured creditors was sufficient to establish a prima facie case for a fraudulent transfer under Tenn. Code Ann. § 66-3-305(a)(1)).

The remaining elements of a claim under Tenn. Code Ann. § 66-3-308(a) include that the *debtor* transferred an interest in property and the *debtor* acted with the intent to hinder, delay or defraud any creditor. *Brennan v. Slone* (*In re Fisher*), 296 Fed. App'x 494, 499 (6th Cir. 2008); *Forbes*, 327 B.R. at 330. It does not provide for the avoidance of transfers made by a creditor. Tenn. Code Ann. § 66-3-305(a)(1); *Gold v. Winget* (*In re NM*

*Holdings Co., LLC*), 407 B.R. 232, 261 (Bankr. E.D. Mich. 2009). The heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply to claims for intentional fraud. *Id.* at 260; *Wagner v. Galbreth*, – B.R. –, 2013 WL 5670866 (D.N.M. 2013).

If the creditor can establish that the transfer was fraudulent as to the creditor, the relief to which the creditor is entitled under [TUFTA] is specifically set forth in Tenn. Code Ann. § 66-3-308(a)." *Perkins v. Brunger*, 303 S.W.3d 688, 691 (Tenn. Ct. App. 2009). Such relief allows "a creditor . . . [to] obtain . . . Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." Tenn. Code Ann. § 66-3-308(a)(1).

In the case at bar, it is unnecessary for the Court to examine the factors set forth in Tenn. Code Ann. § 66-3-305(b) to determine whether the Debtors acted with the requisite fraudulent intent. In a rather unusual stance, the Debtors stated in their second amended complaint that when they transferred interests to the Bank under the terms of the Agreement, they did so "with actual intent to hinder, delay or defraud creditors of Debtors . . . . ." (Second Am. Compl. at ¶ 36, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 30.) In making this allegation, the Debtors are, in essence, attempting to undo the transaction with the Bank based on the Debtors' own fraudulent intent to hinder, delay or defraud their creditors. Such a statement constitutes a judicial admission. *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000) (citation omitted) (internal quotation marks omitted) ("Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.").

"Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." *Id.* A judicial admission "may not be controverted at trial or on appeal." *NM Holdings Co.,* 407 B.R. at 285 (citation omitted); *see also Cadle Co. II, Inc., v. Gasbusters Prod. I L..P.*, 441 Fed. App'x 310, 312 (6th Cir. 2011). "A statement must be deliberate, clear and unambiguous to be considered a judicial admission. In order to satisfy these elements, the statement in context must amount to an express concession of a fact." *Marc A. Goldman and Assocs., P.C., v. Kattouah* (*In re*

*Kattouah*), 452 B.R. 604, 608 (E.D. Mich. 2011) (internal citations omitted) (internal quotation marks omitted). Although judicial admissions are binding on the party making them, a court does have broad discretion " 'to relieve parties from the consequences of judicial admissions in appropriate cases.' " *MacDonald v. General Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997) (quoting *United States v. Belculfine*, 527 F.2d 941,944 (1st Cir. 1975)). "For example, the court may relieve a party from its admission if it was the result of inadvertence or mistake." *Kattouah*, 452 B.R. at 608 (citation omitted).

As stated *supra*, whether the debtor acted with the requisite fraudulent intent is a question of fact in a fraudulent conveyance proceeding. *Beverly*, 374 B.R. at 235. In their second amended complaint, the Debtors deliberately, clearly, and unambiguously stated that in executing the Agreement they themselves transferred interests to the Bank "with actual intent to hinder, delay or defraud" their creditors. (Second Amended Complaint at ¶ 36, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 30.) At no time during these proceedings did the Debtors assert that they made this claim through mistake or inadvertence. For these reasons, the Court concludes that the Debtors' statement in the second amended complaint that they transferred an interest in property to the Bank "with actual intent to hinder, delay or defraud" creditors is a binding judicial admission. This admission dispenses with the need for proof on the issue of the Debtors' actual fraudulent intent.

**b. Constructive Fraudulent Intent**

Section 66-3-305(a)(2) of TUFTA provides that a transfer is constructively fraudulent if

> (2) Without receiving a reasonably equivalent value in exchange for the transfer of obligation, and the debtor:
>
> > (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

> (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Tenn. Code Ann. § 66-3-305(a)(2). The subsection allows a party to avoid a transfer that was constructively fraudulent. Section 66-3-305(a)(2) is substantially similar to 11 U.S.C. § 548(a)(1)(B) which provides

> (a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured;

11 U.S.C. § 548(a)(1)(B). "Whether a transfer is fraudulent is determined by the facts and circumstances of each case . . . " *Holland*, 715 S.W.2d at 349.

Both 11 U.S.C. § 548(a)(1)(B) and Tenn. Code Ann. § 66-3-305(a)(2) are written in the conjunctive. Therefore, in order to survive a Rule 12(b)(6) motion for failure to state a claim under either statute, "the complaint must contain sufficient facts plausible on their face that establish that [1] the debtor" did not receive reasonably equivalent value, and (2) one of the other enumerated requirements is satisfied. *Southeast Waffles, LLC, v. U.S. Dep't of Treasury* (*In re Southeast Waffles, LLC*), 460 B.R. 132, 138 (B.A.P. 6th Cir. 2011) (citation omitted). If the complaint fails to contain facts that are plausible on their face that demonstrate the debtor received "less than reasonably equivalent value," the inquiry is over and it is unnecessary for the court to determine whether the complaint contains sufficient factual allegations regarding the second prong. *Whitaker v. Mortg. Miracles, Inc.* (*In re Summit Place, LLC*), 298 B.R. 62, 73 (Bankr. W.D.N.C. 2002); *see also, Southeast Waffles*, 462 B.R. at 138; *Image Masters, Inc., v. Chase Home Fin.*, 489 B.R. 375, 383 (E.D. Pa. 2013).

In examining the "reasonably equivalent value" issue under Rule 12(b)(6), the inquiry is not whether less than "reasonably equivalent value" was in fact received by the debtor, but rather, did the debtor's complaint contain sufficient facts plausible on their face to establish that it received less than "reasonably equivalent value." "Because a motion under Rule 12(b)(6) is directed solely at the complaint itself, the court must focus on whether the claimant is entitled to offer evidence to support the claims, rather than whether the plaintiff will ultimately prevail." *Unencumbered Assets, Trust v. JP Morgan Chase Bank* (*In re Nat'l Century Fin. Enterps., Inc.*), 604 F.Supp.2d 1128, 1136 (Bankr. S.D. Ohio 2009) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974)). If the complaint does not satisfy this requirement, dismissal under Rule 12(b)(6) is appropriate. *Southeast Waffles*, 462 B.R. at 138.

Neither the Bankruptcy Code nor the Tennessee Uniform Fraudulent Transfer Act define "reasonably equivalent value." While value given on account of an antecedent debt is usually considered reasonably equivalent value, whether reasonably equivalent value has been given for a transfer of property is a question of fact. *Suhar v. Bruno* (*In re Neal*), – Fed. App'x –, 2013 WL 5734120, *2 (6th Cir. 2013). Determining whether the debtor received reasonably equivalent value is a two step inquiry. *Gold v. Marquette Univ.* (*In re Leonard*), 454 B.R. 444, 457 (Bankr. E.D. Mich. 2011) (citing *Lisle v. John Wiley & Sons, Inc.* (*In re Wilkinson*), 196 Fed. App'x 337, 342 (6th Cir. 2006) (unpub.)). The first step of the inquiry requires a court to determine whether the debtor received any value for the exchange. *Id.* In analyzing this issue, "a court must consider whether, 'based on the circumstances that existed at the time' of the transfer, it was 'legitimate and reasonable' to expect some value accruing to the debtor." *Pension Transfer Corp. v. Beneficiaries*

*Under the Third Amendment to Fruehauf Trailer Corp. Retirement Plan No. 003* (*In re Freuhauf Trailer Corp.*), 444 F.3d 203, 212 (3rd Cir. 2006) (citing *Mellon Bank, N.A. v. Official Committee of Unsecured Creditors* (*In re R.M.L., Inc.*), 92 F.3d 139, 152 (3rd Cir. 1996)). Although "value can be in the form of either a direct economic benefit or an indirect economic benefit," the benefit received must be "economic." *Wilkinson*, 196 Fed. App'x at 342. Such an indirect benefit must be (1) economic, "(2) concrete and (3) quantifiable." *Id.*

Both the Bankruptcy Code and TUFTA define "value" for purposes of fraudulent transfers. Under TUFTA,

> (a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.
>
> . . .
>
> (b) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

Tenn. Code Ann. § 66-3-304(a), (c).[6] The Bankruptcy Code defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A).

Once the court determines that value was received, it must determine if the value was reasonably equivalent to the value surrendered. *Fordu*, 201 F.3d at 707-08. "The determination of whether reasonably equivalent value was received requires the court to compare what was given with what was received." *Coan v. Fleet Credit Card Servs., Inc.* (*In re Guerrera*), 225 B.R. 32, 36 (Bankr. D. Conn. 1998). In making this inquiry the

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[6]Tenn. Code Ann. § 66-3-304(b) defines "reasonably equivalent value" solely for purposes of foreclosure sales and, as such, is inapplicable to the case at bar.

"proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors." *Fordu*, 201 F.3d at 707 (quoting *Harman v. First Am. Bank* (*In re Jeffrey Bigelow Design Grp., Inc.*), 956 F.2d 479, 484 (4th Cir.1992)). "As long as the unsecured creditors are no worse off because the debtor, and consequently the estate, has received an amount reasonably equivalent to what it paid, no fraudulent transfer has occurred." *Harman*, 956 F.2d at 484. A debtor need not receive a dollar-for-dollar equivalent in order for a court to find he received reasonably equivalent value. *Congrove v. McDonald's Corp.* (*In re Congrove*), 222 Fed. App'x 450 (6th Cir. 2007). For purposes of this inquiry, the relevant date is the date of the transfer. *Southeast Waffles,* 460 B.R. at 139.

As the Bank stated in its motion to dismiss, the prevailing view among courts is that collateral pledged by a debtor to a legitimate creditor to secure an antecedent debt and obtain a modification or forbearance constitutes "reasonably equivalent value." *Official Comm. Of Unsecured Creditors v. BNP Paribas* (*In re Propex, Inc.*), 415 B.R. 321, 325 (Bankr. E.D. Tenn. 2009) ("By agreeing to forbear and to relax the financial covenants, the lenders gave Propex 'breathing room'—an opportunity to avoid default, to facilitate its rehabilitation, and to avoid bankruptcy. The court holds that that opportunity constitutes reasonably equivalent value for the interest rate increase as a matter of law, irrespective of the fact that '[t]he 'breathing room' turned out to be short-lived."); *Anand v. Nat'l Republic Bank of Chicago*, 239 B.R. 511, 517-18 (N.D. Ill. 1999) (concluding that bank's agreement to forbear from exercising its remedies under notes, extend the maturity date of a loan, and waive past-due payments constituted reasonably equivalent value for purposes of fraudulent transfer statute); *Eide v. Mason* (*In re Mason*), 189 B.R. 932, 935 (Bankr. N.D. Ia. 1995). This conclusion is bolstered when a debtor receives additional value at the time of securing the antecedent debt. *Reaves v. Comerica Bank-Cal.* (*In re GTI Cap. Holdings, LLC*), 373 B.R. 671, 678 (Bankr. D. Ariz. 2007) (citing *In re Applied Theory Corp.*, 330 B.R. 362, 363-64 (S.D.N.Y. 2005)); *Anand*, 239 B.R. at 518; *Southmark Corp. v. Riddle* (*In re Southmark Corp.*), 138 B.R. 820, 829 (Bankr. N.D. Tex. 1992)).

Although the Debtors in the case at bar argued that what they transferred to the Bank under the Agreement was disproportionate to what it received under the Agreement, this argument is without merit. "[T]he grant of collateral does not expand the amount of a creditor's debt and only prioritizes the payment of the debt from specific assets." *Pfeifer v. Hudson Valley Bank* (*In re Pfeifer*), Case No. 12-13852, Adv. Proc. No. 13-1320, 2013 WL 3828509, * 4 (Bankr. S.D.N.Y. July 23, 2013) (citation omitted) ("The value of collateral securing antecedent debt, and the attendant determination as to whether a lender is undersecured, is irrelevant for fraudulent transfer purposes because the rights of a secured creditor are always limited to the amount of its debt."); *see also Johnson v. First Nat'l Bank*, 81 B.R. 87, 89 (Bankr. N.D. Fla.1987) (holding that "the extent of the interest transferred is only the amount of the loan secured by the mortgage, not the value of the property encumbered.")

### C. Unclean Hands and *In Pari Delicto*

In response to the Debtors' claims for relief, the Bank asserted the affirmative defense of "unclean hands." Tennessee courts have long recognized the doctrine of unclean hands as a bar to equitable relief. *C.F. Simmons Medicine Co. v. Mansfield Drug Co.*, 23 S.W. 165 (Tenn. 1893). Courts have explained the doctrine as follows:

> The principle is general, and is one of the maxims of the court, that he who comes into a court of equity, asking its interposition in his behalf, must come with clean hands; and if it appears from the case made by him or by his adversary that he has himself been guilty of unconscionable, inequitable, or immoral conduct in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of or depends upon or is inseparably connected with his own prior fraud, he will be repelled at the threshold of the court.

*Id.* at 168. As the Tennessee Court of Appeals explained in *Continental Bankers Life Ins. Co. of the South, Inc. v. Simmons*, 561 S.W.2d 460 (Tenn. Ct. App. 1977):

> None of the parties to the fraud can have the assistance of the Court to compel either the enforcement or cancellation of the contract or to have property interests transferred thereunder restored. Equity will leave such

> parties where they have placed themselves, and will refuse all affirmative aid to either of the fraudulent parties.

*Id.* at 465 (citation omitted).

In order for a court to apply the doctrine of unclean hands,

> the alleged misconduct on the part of the plaintiff relate directly to the transaction about which the plaintiff has made a complaint. Thus, the doctrine is to be applied only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. The unclean hands doctrine can be applied only to conduct relating to the matter in litigation. Finally, the doctrine is not to be used as a loose cannon, depriving a plaintiff of an equitable remedy to which he is otherwise entitled merely because he is guilty of unrelated misconduct.

*Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6th Cir. 1995) (internal citations omitted) (internal quotation marks omitted); *see also Chappell v. Dawson*, 308 S.W.2d 420 (Tenn. 1957). The party seeking to assert the affirmative defense of "unclean hands" bears the burden of proof by a preponderance of the evidence. *In re Estate of Boote*, 265 S.W.3d 402, 417 (Tenn. Ct. App. 2007) (footnotes omitted). A court has considerable discretion in determining whether to apply the "unclean hands" doctrine and such a determination is fact intensive. *Id.* at 418.

The doctrine of "unclean hands" is closely related to the equitable defense of *in pari delicto*. *Pinter v. Dahl*, 486 U.S. 622, 108 S. Ct. 2063 (1988). In *Dahl*, the Supreme Court explained the defense as follows:

> The equitable defense of *in pari delicto*, which literally means "in equal fault," is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct. Traditionally, the defense was limited to situations where the plaintiff bore at least substantially equal responsibility for his injury, and where the parties' culpability arose out of the same illegal act. Contemporary courts have expanded the defense's application to situations more closely analogous to those encompassed by the "unclean hands" doctrine, where the plaintiff has participated in some of the same sort of wrongdoing as the defendant.

*Id.* at 632 (internal citations omitted) (internal quotation marks omitted). "This doctrine prevents a party from recovering for its own wrongful acts because no court will lend aid to one who acted illegally itself." *Bash v. Textron Fin. Corp.*, 483 B.R. 630, 650 (N.D. Ohio 2012). In order for the *in pari delicto* doctrine to apply, the party against whom the doctrine is asserted must be "*at least* as culpable as the defendants . . . ." *Terlecky v. Hurd* (*In re Dublin Sec., Inc.*), 133 F.3d 377, 380 (6th Cir. 1997). If a plaintiff concedes in the complaint or some other pleading that he perpetrated a fraud, dismissal of the action pursuant to Federal Rule of Civil Procedure 12(b)(6) may be appropriate. *Id*.

In the Sixth Circuit, the "unclean hands" defense and the *in pari delicto* doctrine may both apply in bankruptcy proceedings. *Id.*; *McLemore v. Regions Bank*, 682 F.3d 414 (6th Cir. 2012). Whether a bankruptcy court dismisses a cause of action under one of these equitable doctrines, however, depends upon the facts of the case and the nature of the proceedings. *Id*. As it relates to the latter, courts typically break down actions into two categories:

> "(1) those brought by the trustee as successor to the debtor's interest included in the estate under Section 541 [of the Bankruptcy Code], and (2) those brought under one or more of the trustee's avoiding powers."

*Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 356 (3d Cir. 2001) (quoting 3 Collier on Bankruptcy ¶ 323.03[2] (15th rev. ed. 2001)). If an action is brought pursuant to 11 U.S.C. § 541, the majority of courts have held that

> if *in pari delicto* would apply under state law to bar claims brought by the debtor, then *in pari delicto* likewise bars the same claims even if brought by a bankruptcy trustee. The legal underpinning most prevalent in these cases is that a debtor's claims at the commencement of the bankruptcy case become property of the debtor's bankruptcy estate under § 541(a)(1). The trustee therefore prosecutes such claims standing in the shoes of the debtor, subject to any state law defenses that would be applicable to the claims if they were brought by the debtor.

*Kohut v. Metzler Locricchio Serra & Co., P.C.,* (*In re MuniVest Servs., LLC*), – B.R. –, 2013 WL 5636706, *9 (Bankr. E.D. Mich. 2013) (collecting cases) (footnote omitted); *Grayson Consulting, Inc. v. Wachovia Sec., LLC* (*In re Derivium Capital LLC*), 716 F.3d 355, 367

(4th Cir. 2013); *Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1275 (10th Cir. 2008); *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150 (11th Cir. 2006); *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 836 (8th Cir. 2005); *Lafferty*, 267 F.3d at 356. As recognized by the court in *Munivest Services*, the Sixth Circuit adheres to this rule. *Dublin Sec.*, 133 F.3d at 381.

Although "unclean hands" or *in pari delicto* are available as affirmative defenses to claims that are property of the estate under § 541, neither defense applies when a trustee is exercising his avoidance or preference powers under 11 U.S.C. §§ 544, 547 or 548. *Gecker v. Goldman Sachs & Co.,* (*In re Auto. Prof'ls, Inc.* 398 B.R. 256, 262 (Bankr. N.D. Ill. 2008); *see also McNamara v. PFS* (*In re Personal & Bus. Ins. Agency*), 334 F.3d 239, 245-47 (3d Cir. 2003); *Fordu*, 209 B.R. at 863. The reasoning for this limitation is based on the fact that when a trustee pursues an avoidance or preference action, he "stands in the place of a *creditor* who would have standing to pursue" the claim, not in the shoes of the debtor. *Terlecky v. Abels*, 260 B.R. 446, 453 (S.D. Ohio 2001) (emphasis added) (citing *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996)); *Belfance v. Bushey* (*In re Bushey*), 210 B.R. 95, 100 (B.A.P. 6th Cir. 1997)); *Fordu*, 209 B.R. at 863; *see also Inskeep v. Grosso* (*In re Fin. Partners, Ltd.*), 116 B.R. 629, 638 (Bankr. N.D. Ill. 1989) (citation omitted) (concluding that because the trustee serves as a representative for the general unsecured creditors, "the inequitable conduct of the debtor cannot be asserted as a defense to the trustee's preference action.").

There are very few reported decisions in which courts have addressed the issue of whether the "unclean hands" doctrine or the *in pari delicto* defense apply when a debtor-in-possession, rather than a trustee, brings an avoidance or preference action; however, the majority of the courts that have dealt with the issue have concluded that neither defense applies regardless of who brings the action. In *Shults & Tamm v. Tobey* (*In re Hawaiian Telecom Communications, Inc.*), 483 B.R. 217 (Bankr. D. Haw. 2012), the bankruptcy court determined that the *in pari delicto* defense did not bar a litigation trustee's avoidance action.

> No reorganization trustee was ever appointed in Debtor's bankruptcy case. Therefore, the avoiding powers at issue in this adversary proceeding initially belonged to Debtor, as debtor in possession. Pursuant to Debtor's plan of reorganization and the Litigation Trust Agreement, Debtor's avoiding powers were transferred to the Litigation Trust and Plaintiff, as trustee.
>
> *In pari delicto* can be used as a defense against claims owned by a debtor before the filing of a bankruptcy petition, but not against a trustee's avoiding powers. It does not matter whether the plaintiff, in an avoiding power adversary proceeding, is a trustee in bankruptcy, a debtor in possession, the trustee of a litigation or liquidation trust or the underlying trust.

*Id.* at 222. The rationale for this approach is based on the fact that pursuant to 11 U.S.C. § 1107 "[a] debtor in possession stands in the shoes of the bankruptcy trustee, generally having the same rights, powers, duties, and functions, with certain exceptions." *Soto-Rios v. Banco-Popular de P.R.*, 662 F.3d 112, 115 n.2 (1st Cir. 2011) (citing § 1107); *see also Wagner v. Wilson* (*In re Vaughan Co. Realtors*), Bankr. No. 11-10-10759 JA, Adv. No. 12-01142J, 2013 WL 960143, *6 n.9 (Bankr. D.N.M. March 11, 2013) (stating in a footnote that the *in pari delicto* doctrine does not bar a trustee's action under §§ 544(b), 547 or 548 "where the Chapter 11 case was originally administered by the" debtor-in-possession); *Ross v. Maryland* (*In re Ross*), 475 B.R. 279, 281 (Bankr. D.D.C. 2012) (holding that "[t]he doctrine of 'unclean hands' is no defense to a preference action" brought by a debtor-in-possession pursuant to 11 U.S.C. § 547(b)); *Advanced Telecomm. Network, Inc. v. Allen* (*In re Advanced Telecomm. Network, Inc.*), Bankr No. 6:03-bk-00299-KSJ, Adv. No. 6:03-ap-122, 2010 WL 273428, *5 (Bankr. M.D. Fla. Jan. 15, 2010) (internal citations omitted) (internal quotation marks omitted) (recognizing that "it is well established that [a bankruptcy trustee or] even a debtor-in-possession which is, in actuality, the same entity as the debtor is nevertheless deemed to be separate and distinct from the debtor under bankruptcy law, and is armed with Section 544 powers without regard to any notice or knowledge of the Debtor's practices.").

## D. Analysis of Causes of Action in Case at Bar

For purposes of the case at bar, there are three main causes of action: (1) the state law lender liability claims; (2) the actual fraudulent transfer claim under Tenn. Code Ann.

§ 66-3-305(a)(1) and 11 U.S.C. § 544(b); and (3) the constructive fraudulent transfer claim under Tenn. Code Ann. § 66-3-305(a)(2) and 11 U.S.C. § 544(b). The Court will address each cause of action separately.

**1. Lender Liability Claims**

As for the Debtors' lender liability claims, those claims became property of the Debtors' estate when they filed their Chapter 11 petition pursuant to 11 U.S.C. § 541(a)(1). *See Cannon*, 277 F.3d at 854; *Tronox*, 429 B.R. at 103. As stated *supra*, the equitable defenses of "unclean hands" and in pari delicto may apply to defeat causes of action that are solely property of the estate. *See Kohut*, 2013 WL 5636706 at *9. Both doctrines "prevent [ ] a party from recovering for its own wrongful acts because no court will lend aid to one who acted illegally itself." *Bash*, 483 B.R. at 650. If a debtor concedes in a pleading that he acted fraudulently, dismissal pursuant to Rule 12(b)(6) is appropriate. *Dublin Sec.*, 133 F.3d at 380.

In the case at bar, the Debtors stated in their second amended complaint that they entered into the Agreement with the actual intent to hinder, delay or defraud their creditors. That averment is a judicial admission which the Debtors have not alleged was made through mistake or inadvertence. For that reason, it is binding on the Debtors. *NM Holdings*, 407 B.R. at 285. Because the Debtors admitted they entered into the Agreement with the actual intent to commit fraud upon their creditors, their "unclean hands" bar them from pursuing their state law lender liability claims. *See Kohut*, 2013 WL 5636706 at *9. Accordingly, the Court will grant the Bank's motion to dismiss the Debtors' lender liability claims against the Bank pursuant to Rule 12(b)(6).

**2. Actual Fraudulent Transfer**

Turning to the Debtor's cause of action against the Bank under Tenn. Code Ann. § 66-3-305(a)(1), the Court initially notes that neither the "unclean hands" doctrine nor the *in pari delicto* defense bar the Debtors' avoidance action for an actually fraudulent transfer. *See Fordu*, 209 B.R. at 863 (citation omitted) ("[C]ourts have consistently recognized that the Trustee may pursue fraudulent or preferential transfers despite the fact that the debtor was a knowing and willing participant to such conveyances.")

To survive a Rule 12(b)(6) motion to dismiss, a "complaint must contain either direct or inferential allegations respecting all material elements to sustain recovery . . . ." *Tam Travel*, 583 F.3d at 903. The necessary elements of a claim to avoid an actually fraudulent transfer pursuant to 11 U.S.C. § 544(b) and Tenn. Code Ann. § 66-3-305(a)(1) include (1) there is an unsecured creditor with an allowable claim who would be entitled to bring an action to avoid the transfer under state law; (2) the *debtor* transferred an interest in property; and (3) the *debtor* acted with the intent to hinder, delay or defraud any creditor. *Forbes*, 327 B.R. at 330 (emphasis added). With respect to the first element, courts do not require a trustee or debtor-in-possession to identify the creditor by name; *D'Angelo*, 491 B.R. at 405; however, the plaintiff must indicate that there is at least one unsecured creditor or a category of unsecured creditors who could avoid the transfer. *Bernard L. Madoff Inv. Sec.*, 445 B.R. at 234.

In the case at bar, the Debtors failed to make a statement anywhere in their second amended complaint that there were creditors who held allowable unsecured claims who could avoid the actually fraudulent transfer. That failure to make some allegation, even a very vague one, that an unsecured creditor existed who could avoid the transfer is fatal to the Debtors' Tenn. Code Ann. § 66-3-305(a)(1) cause of action. *D'Angelo*, 491 B.R. at 405. Although the Debtors stated in their claim to avoid the transfer as constructively fraudulent that Navistar was a creditor at the time of the transfer, that statement did not include any allegation that Navistar was an unsecured creditor who would be entitled to avoid the transfer. The Court, therefore, concludes that the Debtors have not stated a claim for relief that is plausible and that dismissal of the Debtors' claim to avoid the transfer as actually fraudulent pursuant to Rule 12(b)(6) is appropriate. *See Id.*

Additionally, as noted *supra,* in their brief in support of their objection to the Bank's motion to dismiss, the Debtors make a statement that could indicate that they are alleging the Bank made the fraudulent transfers. *See* (Br. in Support of Obj. To FirstBank's Mot.

To Dismiss at 5, Bankr. Case No. 11-12502, Adv. Pro. No. 12-5027, ECF No. 45.) If this is true, then the Debtors have also failed to satisfy one of the other necessary elements of a claim to avoid an actually fraudulent transfer: the *Debtor* actually intended to hinder, delay or defraud their creditors. For this reason also, the Court finds that dismissal of the Debtors' actual fraud claim is appropriate under Rule 12(b)(6).

**3. Constructive Fraudulent Transfer**

As the Court stated *supra*, neither the "unclean hands" doctrine nor the *in pari delicto* defense bar the Debtors' avoidance action for a constructively fraudulent transfer. *See Fordu*, 209 B.R. at 863 (citation omitted) ("[C]ourts have consistently recognized that the Trustee may pursue fraudulent or preferential transfers despite the fact that the debtor was a knowing and willing participant to such conveyances.")

A claim for avoidance of a constructively fraudulent transfer has a threshold issue: the Debtor made a transfer for which he did not receive reasonably equivalent value. As a result, a complaint to avoid a constructively fraudulent transfer must contain sufficient allegations that demonstrate the debtor did not receive reasonably equivalent value for the transfer. This pleading requirement obligates a plaintiff to use "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Additionally, a plaintiff's conclusory allegations that the debtor did not receive reasonably equivalent value, "[s]tanding alone, . . . merely parrot the relevant statutory provision and do not provide a factual foundation that would permit a court to conclude that the Complaint states a plausible claim for relief." *Goldstein v. BRT, Inc.* (*In re Universal Mktg., Inc.*), 460 B.R. 828, 837 (Bankr. E.D. Pa. 2011).

Aside from stating that they did not receive reasonably equivalent value for the transfers they made under the Agreement, the Debtors offered no other allegations or argument as to the veracity of their assertion. The Court concludes that this bare statement is not sufficient to satisfy the requirements of Federal Rule of Civil Procedure 8(a). In addition, as noted by the Bank in its motion to dismiss, collateral pledged by a debtor to a legitimate creditor to secure an antecedent debt in order to obtain a forbearance coupled with the receipt of additional value constitutes "reasonably equivalent value." *GTI Cap. Holdings*, 373 B.R. at 678. Had the Debtors made any attempt to offer an argument that contradicted this view either in their objection to the motion to dismiss or at the hearing on the motion to dismiss, the outcome might be different. Further, based on the Debtors' allegations that they committed actual fraud by entering into the Agreement, the Court finds it difficult to conclude that the issue of whether the Debtors received reasonably equivalent value impacted their decision to enter into the Agreement.

Because the Court concludes that the Debtors did not plead sufficient facts to support their claim that they did not receive reasonably equivalent value for the transfers they made under the Agreement, the Court will grant the Bank's Rule 12(b)(6) motion to dismiss the Debtors' cause of action to avoid the transfers as constructively fraudulent.

**E. Attorney's Fees**

In its supplemental memorandum of law in support of their motion to dismiss, the Bank asks the Court to award attorney's fees to the Bank pursuant to the terms of the Agreement. The Court was unable to find any provision in the Agreement or the amendment thereto that provided for the Bank's recovery of its attorney's fees. Although the promissory note, the security agreement, and the continuing guaranties include "attorney's fees and costs" provisions, those state that

> The Maker and Guarantors agree to pay costs of *collection* incurred by Payee in the event this note is not paid as herein provided, including reasonable attorneys' fees if any part hereof is collected with the aid of an attorney, whether or not suit is instituted.

(Promissory Note at ¶ 5, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-3 (emphasis added).);

> 13. Remedies*.* Upon an Event of Default, Security Party shall have the following remedies hereunder:
>
> a. Default Costs. Debtors will pay the Secured Party all costs reasonably incurred by Secured Party for the purpose of enforcing its rights hereunder, including but not limited to, costs of foreclosure,

> costs of obtaining money damages, and a reasonable fee for the services of attorneys employed by Secured Party, whether or not litigation is prosecuted.

(Security Agreement at ¶ 13a, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-5.);

> This guaranty shall be construed according to the laws of the State of Tennessee, and all expenses, costs and attorneys' fees incurred by Bank in the enforcement hereof shall be paid by Guarantor.

(Continuing Guaranties at ¶ 16, Bankr. Case No. 11-12502, Adv. Proc. No. 12-5027, ECF No. 10-6.). The Court concludes that none of these provisions entitle the Bank to an award of attorney's fees in defending the Debtors' complaint. This determination is made without prejudice to the Bank filing a motion for attorney's fees with argument as to why these provisions, or any other law, entitles them to an award of fees in this matter. *See* Fed. R. Civ. P. 54(d); Fed. R. Bankr. P. 7054.

**D. Conclusion**

The Court concludes that dismissal of the Debtors' complaint is appropriate under Federal Rule of Civil Procedure 12(b)(6). The Debtors' unclean hands bar recovery under their lender liability claims and, because the Debtors failed to properly plead their actual and constructive fraudulent transfer claims, these claims must be dismissed as well. The Court will enter an order in accordance herewith.

<u>Mailing List:</u>

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