SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

John and Ultima Morgan, TGHI II LLC, Prime Overseas Investments and Enterprises Ltd., and Techview Investments Ltd.,

Plaintiffs,

v.

Surterra Holdings Inc. dba Parallel, SH Parent Inc., PE Fund LP, WWJr. Enterprises Inc., William "Beau" Wrigley, Jr., Talladega LP, Talladega, Inc., and Acquiom Agency Services LLC,

Defendants.

Index No.: 651041/2022

Hon. Barry Ostrager, J.S.C.

Part 61

Mot. Seq. No. _____

MEMORANDUM OF LAW IN SUPPORT OF PE FUND LP, WWJR ENTERPRISES INC., AND WILLIAM "BEAU" WRIGLEY, JR.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

WILLKIE FARR & GALLAGHER LLP

787 Seventh Avenue
New York, NY 10019
Telephone: (212) 728-8000

300 N. LaSalle Drive
Chicago, IL 60654
Telephone: (312) 728-9000

Attorneys for Defendants PE Fund LP, WWJr. Enterprises Inc., and William "Beau" Wrigley, Jr.

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PE Fund LP ('PE Fund"), WWJr. Enterprises Inc. ("WWJR"), and William "Beau" Wrigley, Jr. ("Wrigley"), respectfully submit this Memorandum of Law in support of their Motion to Dismiss all claims against them in Plaintiffs' Second Amended Complaint ("SAC"), specifically the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Causes of Action, pursuant to CPLR § 3211(a)(1) and (a)(7).

PRELIMINARY STATEMENT

As Plaintiffs acknowledge, "[t]he cannabis business . . . is an inherently risky business." (¶ 37.)[1] As sophisticated investors, and with full knowledge of the risks, Plaintiffs invested in the privately held cannabis business operated by Surterra Holdings Inc. dba Parallel and SH Parent Inc. (the "Company"). By their own telling, they were fully aware of the Company's leadership structure, its performance, its capital structure, and the terms of the Note Purchase Agreement ("NPA") and related contracts, which governed all holders (including Plaintiffs) of Senior Notes ("Senior Noteholders") issued by the Company. Unfortunately, as a result of market and regulatory headwinds, including the effects of the COVID-19 pandemic, the Company has struggled and was unable to close a planned acquisition by a special purpose acquisition company. The Company's independent directors, in their ongoing efforts to keep the Company afloat and avoid precipitous losses for its stakeholders while simultaneously evaluating strategic alternatives, approved a Bridge Credit Agreement (the "Bridge") between the Company and, among others, PE Fund, in a manner permitted by, and entirely consistent with, the NPA. Notwithstanding the much-needed lifeline that the Bridge afforded the Company in the midst of its current financial troubles—

[1] PE Fund, WWJR, and Wrigley accept as true, solely for the purposes of this Motion, the allegations in the SAC. Citations to the SAC (denoted by "¶__") refer only to Plaintiffs' allegations, and are not admissions by PE Fund, WWJR, or Wrigley of the truth, veracity, or accuracy of the allegations. PE Fund, WWJR, and Wrigley expressly reserve all rights and defenses.

which obviously inures to the benefit of all its stakeholders, including Plaintiffs—Plaintiffs have filed this action challenging that transaction based on nothing more than fanciful conspiracy theories and speculative harms. Plaintiffs' challenge to the Bridge is all the more hollow given that they were invited to participate in it *pro rata* and on the ***same economic terms*** as PE Fund, but they declined to do so.

As demonstrated below, all of Plaintiffs' claims against PE Fund, WWJR, and Wrigley fail as a matter of law. To start, Plaintiffs' assertion that PE Fund breached the terms of the NPA and related contracts ignores the plain language of those agreements, which permitted the Company to enter into the Bridge. Plaintiffs' duplicative claims for breaches of the implied covenant of good faith and fair dealing are likewise flawed, including because they seek to impermissibly rewrite the terms of the NPA. Plaintiffs' claims for supposed "tortious interference" with contract cannot survive because, among other things, the SAC pleads no underlying breach of the NPA and, in any event, the allegations show that WWJR and Wrigley were acting in furtherance of their own (and, ironically, Plaintiffs') economic interests. Nor does the SAC adequately allege any facts, particularized or otherwise, showing that PE Fund or Wrigley owed fiduciary duties to any of the Plaintiffs, let alone that any such duties were breached. Finally, Plaintiffs' claim for violations of the Georgia Uniform Voidable Transaction Act fails to meet the elements of the statute and rests instead on conclusory allegations of "fraud" that are insufficient as a matter of law.

While Plaintiffs may now be dissatisfied with the performance of their investment, they have not, and cannot, articulate any viable claims against PE Fund, WWJR, and Wrigley. The Second Amended Complaint, Plaintiffs' third pleading in this case, should therefore be dismissed with prejudice.

BACKGROUND

To avoid unnecessary repetition, PE Fund, WWJR, and Wrigley refer to and incorporate by reference the factual background set forth in the Motions to Dismiss filed by the Company and Talladega LP and Talladega, Inc. (together "Talladega"), respectively, and only highlight below factual allegations relevant to this Motion.

Wrigley serves as Chairman and CEO of WWJR, which, in its capacity as and for the benefit of certain entities and trusts, invests in a variety of businesses and for-profit enterprises. It is incorporated under the laws of the State of Delaware. WWJR is the general partner of PE Fund, which is a Delaware limited partnership. PE Fund is the holder of a Senior Note, holding more than 50% in value of the outstanding Senior Notes under the NPA, as well as other investments in the Company. (¶ 23, Ex. A.) Under the terms of the NPA, PE Fund serves as the "Required Holders." (¶ 66, Ex. A, Sch. A at 14.)

Wrigley became Chairman of the Board of Directors of the Company in August 2018 and continued in that position until on or about December 28, 2021. Wrigley assumed the role of CEO in November 2018 as a result of the Company's separation with its prior CEO. He resigned from that position effective as of November 19, 2021. Thus, contrary to the impression that Plaintiffs seek to create in the SAC, Wrigley stepped down from any managerial or board role at the Company well before any of the events underlying Plaintiffs' supposed "Scheme" are alleged to have occurred, including the negotiations between the Company's independent directors and Talladega and PE Fund that led to execution of the Bridge in March 2022. (*See* ¶¶ 65-68.)[2]

[2] Plaintiffs devote considerable space in the SAC to allegations about Wrigley's management of the Company dating back to 2018—several years before the alleged conduct underlying Plaintiffs' claims occurred. (*See, e.g.*, ¶¶ 41-43; 57-60.) These thinly pled and conclusory allegations bear no relation whatsoever to Plaintiffs' claims in this action and should be disregarded.

ARGUMENT

When considering a motion to dismiss under CPLR § 3211(a)(7), courts assess "whether the facts as alleged fit within any cognizable legal theory." *Richards v. Sec. Res*., 187 A.D.3d 452, 452 (1st Dep't 2020) (citation omitted); *Moskovits v. Grigsby*, 2020 WL 6704176, at *3 (Sup. Ct. N.Y. Cnty. Nov. 12, 2020) (Ostrager, J.). While a plaintiff is entitled to reasonable inferences, "[b]bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true," *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 2022 WL 1040367, at *5 (N.Y. App. Div. Apr. 7, 2022) (citation omitted), "nor are they accorded every favorable inference." *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 704 (2d Dep't 2008); *see also Barnes v. Hodge*, 118 A.D.3d 633, 633 (1st Dep't 2014) (holding that conclusory allegations do not state a claim).

Likewise, pursuant to CPLR § 3211(a)(1), if "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law, dismissal is warranted." *Excel Graphics Techs., Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 A.D.3d 65, 69 (1st Dep't 2003) (cleaned up); *see also 150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 5-6 (1st Dep't 2004) (affirming dismissal where the parties' contract "unambiguously contradicts the [complaint's] allegations").

As demonstrated below, applying these standards, the SAC should be dismissed.

I. PLAINTIFFS' BREACH OF CONTRACT CLAIMS (FIRST, THIRD, AND FIFTH CAUSES OF ACTION) FAIL BECAUSE THE BRIDGE FINANCING DID NOT VIOLATE THE NPA OR ANY RELATED AGREEMENTS.

Plaintiffs assert claims for breach of contract against, among others, PE Fund in the SAC's First, Third, and Fifth Causes of Action. For the reasons set forth in the Company's Motion to Dismiss, which PE Fund adopts and incorporates herein, those claims fail to state a cause of action and should be dismissed. (*See* Company Mot. at Sections II, III, and V.)

II. PLAINTIFFS' CLAIMS AGAINST PE FUND BASED ON THE ALLEGED GRANTING OF DEFAULT WAIVERS UNDER THE NPA (SECOND AND TENTH CAUSES OF ACTION) SHOULD BE DISMISSED.

In their Second Cause of Action, Plaintiffs assert that PE Fund breached the implied covenant of good faith and fair dealing by waiving purported defaults under the NPA and permitting the agreement to be amended. (*See* ¶¶ 122-129; *see also id.* ¶¶ 13, 96-97.) In their Tenth Cause of Action, Plaintiffs seek a declaration that PE Fund cannot serve as the "Required Holders" for any "waiver or amendment" of the NPA "in which PE Fund has a conflict of interest." (*Id.* at ¶ 224.) According to Plaintiffs, "Section 17 of the Note Purchase Agreement does not allow the PE Fund to act in a manner that benefits PE Fund to the detriment of other parties to the Note Purchase Agreement." (*Id.* ¶ 96.) These claims fail as a matter of law.

First, the implied covenant claim is duplicative of Plaintiffs' breach of contract claim in the SAC's Fifth Cause of Action, which also alleges that certain "consents, waivers, and/or amendments" of the NPA provided by PE Fund constitute a breach of the NPA and related contracts. (*Id.* ¶¶ 159-62.) As relief for both those claims, Plaintiffs seek to invalidate such waivers or amendments. (*See id.* ¶¶ 128, 162.) New York law is clear that where an implied covenant claim "arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed." *Mill Fin., LLC v. Gillett*, 122 A.D.3d 98, 104-05 (1st Dep't 2014) (reasoning that where such claims "arise from the same operative facts" the "conduct alleged . . . need not be identical in every respect" for the claims to be nevertheless dismissed); *see also Churchill Real Estate Holdings LLC v. CBCS Wash. St. LP*, 171 A.D.3d 426, 427 (1st Dep't 2019) (dismissing implied covenant claim as "duplicative" of a breach of contract claim); *MUFG Union Bank, N.A. v. Axos Bank*, 2020 WL 5807718, at *5, * (Sup. Ct. N.Y. Cnty. Sept. 25, 2020) (Ostrager, J.), *aff'd as modified*, 196 A.D.3d 442 (2021) (same). Further, as demonstrated in the Company's Motion to Dismiss, Plaintiffs' First, Third, Fourth, and Fifth Causes of Action for

putative breaches of contract fail as a matter of law and Plaintiffs' implied covenant claim "may not be used as a substitute for a nonviable claim of breach of contract." *StarVest Partners II, L.P. v. Emportal, Inc.*, 101 A.D.3d 610, 613 (1st Dep't 2012) (citation omitted); *see also Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, 2021 WL 3671541, at *13 (Sup. Ct. N.Y. Cnty. Aug, 16, 2021).

Second, Plaintiffs' implied covenant claim fails because the NPA expressly permits the challenged waivers and amendments. Section 17 of the NPA unambiguously provides, "This Agreement and the Notes may be amended, and the observance of any term hereof or of the Notes may be waived (either retroactively or prospectively), ***only with the written consent of the Company and the Required Holders***" (*i.e.*, PE Fund). Settled New York law precludes use of the implied covenant to "nullify [] express terms of the contract" or "create independent contractual rights." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Xerox Corp.*, 25 A.D.3d 309, 310 (1st Dep't 2006); *see also Chase Equip. Leasing Inc. v. Arch. Air, L.L.C.*, 84 A.D.3d 439, 439 (1st Dep't 2011) (rejecting implied covenant claims where plaintiffs seek to "imply obligations inconsistent with contractual provisions"); *MUFG*, 2020 WL 5807718, at *7.

Plaintiffs, sophisticated parties represented by counsel, were always aware that PE Fund was both the Required Holder under the NPA, and a substantial equity investor in the Company and was affiliated with Wrigley. (*See* ¶¶ 41-42; Ex. A § 21.6(a)-(b).) That Plaintiffs may now have second thoughts about the rights they wish the NPA provided is insufficient to support an implied covenant claim. *United Natural Foods, Inc. v. Goldman Sachs Grp., Inc.*, 2020 WL 2135803, at *13 (Sup. Ct. N.Y. Cnty. May 5, 2020) (holding that defendant was "not denying plaintiff the fruits of the contract" where plaintiff's consent was not required under the contract because "this is precisely what plaintiff bargained for"). Indeed, as one court cautioned, "courts

should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *ELBT Realty, LLC v. Mineola Garden City Co.*, 144 A.D.3d 1083, 1084 (2d Dep't 2016) (dismissing implied covenant claim where defendant had express right to terminate the contract).

Third, Plaintiffs allege that "the purported waiver ostensibly would allow the Company and PE Fund to enter into prohibited insider transactions that violate the NPA and then allow themselves to waive any default caused by violation" and that "the implied covenant would clearly be violated by such conduct." (¶ 126.) This claim rests entirely on a vague unrealized fear of some future purported bad act or injury, and Plaintiffs concede that the feared outcome has not yet happened—they allege only that "the purported waiver ***ostensibly would allow***" prohibited insider transactions. *Id.* The mere threat of an unwanted outcome at some unspecified future time as a result of negotiated provisions in a contract is not sufficient to support a claim for a breach of an implied covenant. *See Celauro v. 4C Foods Corp.*, 2013 WL 2363094, at * 5 (Sup. Ct. Kings Cnty. May 28, 2013) (dismissing implied covenant claim as "premature" because no grounds were alleged "from which any cognizable damage may be inferred").

Plaintiffs' claim for declaratory judgment (Tenth Cause of Action) that PE Fund breached the implied covenant fails for identical reasons. The SAC alleges no facts in support of that separate cause of action sufficient to overcome the numerous fatal defects in their implied covenant theory outlined above. (*See, e.g.*, ¶¶ 214-227.) Dismissal is also warranted because Plaintiffs' request for declaratory judgment is duplicative of their implied covenant claim. *See Artech Info. Sys., L.L.C. v. Tee,* 280 A.D.2d 117, 125 (1st Dep't 2001) (affirming dismissal of declaratory judgment claim where breach of contract claim afforded plaintiff an adequate remedy); *Eaton*

Vance Mgmt. v. Wilmington Sav. Fund Soc., 2018 WL 1947405, at *4-11 (Sup. Ct. N.Y. Cnty. Apr. 25, 2018) (same).

III. PLAINTIFFS' TORTIOUS INTERFERENCE CLAIMS AGAINST WRIGLEY (SIXTH AND SEVENTH CAUSES OF ACTION) AND WWJR (SEVENTH CAUSE OF ACTION) FAIL AS A MATTER OF LAW.

To survive a motion to dismiss, Plaintiffs' tortious interference claims must be supported by non-conclusory allegations showing "the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of the contract without justification, actual breach of the contract, and damages." *Influx Cap., LLC v. Pershin*, 186 A.D.3d 1622, 1624 (2d Dep't 2020). Plaintiffs' tortious interference claims against WWJR and Wrigley fail for at least four reasons.

First, as a threshold matter, as demonstrated in the Company's Motion (Company Mot. at Sections III, IV, and V), which WWJR and Wrigley incorporate herein, the SAC fails to allege any underlying breach of the NPA or related agreements. *Murataj v. Dream Dragon Prods., Inc.*, 72 A.D.3d 527, 527 (1st Dep't 2010) (where "there was no breach of the contract between plaintiff and his crew, plaintiff's claim of tortious interference with contract fails as a matter of law"); *Levy v. Zimmerman*, 2021 WL 3280577, at *9 (Sup. Ct. N.Y. Cnty. July 30, 2021) (Ostrager J.) (dismissing tortious interference claim and denying discovery as a "fishing expedition" because of the "obvious deficiency . . . that there was no breach of the contract").

Second, Plaintiffs' own allegations—that PE Fund (which is a party to the NPA) is Wrigley's "alter ego" (¶¶ 42, 197)—preclude a tortious interference claim against Wrigley.[3] Under settled law, defendants "cannot be simultaneously alter egos and tortious intervenors." *New Media*

[3] For the reasons stated below, Plaintiffs' alter ego allegations themselves are deficient. *See infra* at Section V.

Holding Co., LLC v. Kagalovsky, 118 A.D.3d 68, 80 (1st Dep't 2014); *UBS Sec. LLC v. Highland Cap. Mgmt., L.P.*, 86 A.D.3d 469, 477 (1st Dep't 2011) (where "the complaint is thoroughly suffused with allegations that [the defendant] was essentially the alter ego of the parties it induced to breach the agreements . . . [it] cannot be considered a 'stranger' to the contractual relationship …, and there can be no claim for tortious interference with contract").[4]

Third, Plaintiffs' claims fail because the SAC's allegations show that WWJR and Wrigley's challenged conduct was in furtherance of protecting their economic interest in the Company's business. *See Johnson v. Cestone*, 162 A.D. 3d 526, 527 (1st Dep't 2018) (dismissing claim because "the allegations show that [the director defendant] was acting in the economic interest of the corporate defendants"); *Wilmington Trust Co. v. Burger King Corp.*, 34 A.D.3d 401, 402 (1st Dep't 2006) (dismissing tortious interference claim, reasoning that a creditor "had an economic interest justifying interference with plaintiff's loan agreements with the franchisees").

Specifically, the SAC alleges that WWJR and Wrigley hold, among other things, significant indirect equity interests in the Company. (*See* ¶¶ 2, 23-25, 41, 44-45.) Therefore, based on Plaintiffs' own allegations, WWJR and Wrigley each have an economic interest in the survival and performance of the Company. Here, procuring the Bridge provided the Company much needed time to evaluate strategic options to preserve value and avoid massive losses to its stakeholders, including WWJR and Wrigley. *See Audax*, 2021 WL 3671541, at *14 ("Because the defendants were significant stockholders in the breaching party's business and acted to protect the financial value of their stakes, the economic interest defense bars Plaintiffs' claim.") (cleaned up).

[4] Nor can Wrigley be liable for tortious interference in his capacity as a former officer of the Company. *See Ashby v. ALM Media, LLC*, 110 A.D.3d 459, 459 (1st Dep't 2013) (finding that a defendant "was not a stranger to plaintiff's contract with [the company] as he was one of [the company's] executives").

Plaintiffs conclusory allegations of "malice" and "bad faith" (¶ 179), are insufficient to overcome this defense. *See id.* at 15; *Rather v. CBS Corp.*, 68 A.D.3d 49, 60 (1st Dep't 2009) (holding "bare allegations of malice do not suffice to bring the claim under an exception to the economic interest rule").

Fourth, Plaintiffs fail to allege facts showing that they suffered any damages as a result of the supposed interference by WWJR and Wrigley. Instead, Plaintiffs' allegations boil down to the conclusory assertion that "Wrigley's conduct damaged Plaintiffs." (¶¶ 170, 181.) Such boilerplate need not be accepted as true. *See ERE LLP v. Spanierman Gallery, LLC*, 94 A.D.3d 492, 493 (1st Dep't 2012) (a pleading containing "only boilerplate allegations of damage" is "not sufficient to sustain a complaint") (citation omitted); *Schoenbach v. Insight Venture Mgmt., LLC*, 2019 WL 954758, at *13 (Sup. Ct. N.Y. Cnty. Feb. 27, 2019) (dismissing tortious interference claim where "vague and conclusory" allegations that defendant's conduct "caused harm did not explain how the plaintiff "sustained damages because of [the alleged] interference"). In fact, the Bridge benefits Plaintiffs, because the alternative—a "fire sale" liquidation of the Company in a non-operational, defunct state—would result in the worst possible return on all parties' investments in the Company.[5]

IV. PLAINTIFFS' GEORGIA UNIFORM VOIDABLE TRANSACTIONS ACT CLAIM (EIGHTH CAUSE OF ACTION) FAILS AS A MATTER OF LAW AGAINST PE FUND, WWJR AND WRIGLEY.

The Eighth Cause of Action asserts a claim against, among others, PE Fund, WWJR, and Wrigley for violating the Georgia Uniform Voidable Transactions Act ("GUVTA"). While Plaintiffs cite O.G.C.A. § 18-2-74 generally, the SAC only argues the elements of an "actual fraud" claim under O.G.C.A. § 18-2-74(a)(1). (*See, e.g.*, ¶¶ 184, 185, 187, 189.) Thus, to survive a

[5] Indeed, even in a non-fire sale scenario, a bridge financing would have been necessary given the length of time between the signing of any transaction and its closing.

motion to dismiss, Plaintiffs must plead with particularity the elements of O.G.C.A. § 18-2-74(a)(1), *i.e.*, "A transfer made or obligation incurred by a debtor . . . With actual intent to hinder, delay, or defraud any creditor of the debtor."[6] Plaintiffs fail to state a cause of action under the GUVTA.

A. WWJR and Wrigley Are Not Proper Defendants Under the GUVTA.

A claim under O.G.C.A. § 18-2-77(a)(1) may be brought against the initial transferee, an immediate or mediate transferee (subject to the "good faith transferee for value" defense), or the person for whose benefit the transfer was made. *See CSX Transp., Inc. v. Leggett*, 2008 WL 11409920, at *4 (N.D. Ga. April 11, 2008). The SAC does not allege that WWJR or Wrigley are initial transferees or that they were "persons" for whose benefit the obligations were incurred. Their affiliations with PE Fund are not enough to qualify them as "person[s] for whose benefit the transfer was made" under the GUVTA. *See Atlanta Fiberglass USA, LLC v. KPI, Co.*, 911 F. Supp. 2d 1247, 1264 (N.D. Ga. 2012) ("Because [the debtor]'s individual owners are not alleged 'debtors' of [the plaintiff], or transferees of the property that allegedly was fraudulently conveyed, there is no basis on which [plaintiff] possibly could assert its claim for fraudulent transfer against them."); *RES-GA YPL, LLC v. Rowland*, 340 Ga. App. 713, 720–21 (2017) (affirming dismissal of a GUVTA claim against a debtors' relatives and their companies, *despite* allegations that they jointly participated in the debtor's fraudulent scheme, because they were not debtors themselves and did not receive any interests in the transferred property).[7]

[6] The heightened particularity standard under CPLR § 3016(b) applies to the Eighth Cause of Action because those pleading requirements "are a matter of procedure, governed by the law of the forum." *S'holder Representative Servs. LLC v. Sandoz Inc.*, 2015 WL 1209358, at *5 (Sup. Ct. N.Y. Cnty. Mar. 16, 2015).

[7] Plaintiffs' passing allegation that "the Company is obligating itself to indemnify other Defendants for their role in the Scheme" (¶ 184) does not repair this defect because it is conclusory and made only on "information and belief," without explaining what that information or belief is founded

Nor do Plaintiffs' perfunctory, one-line allegations of alter ego (¶ 42), and aiding and abetting liability (*id*. ¶ 81), save their GUVTA claim against any of the non-transferee defendants. *See* Section V, *infra*; *Hays v. Paul, Hastings, Janofsky & Walker LLP*, 2006 WL 4448809, at *12 (N.D. Ga. Sept. 14, 2006) ("There is no language in [Georgia's] UFTA that suggests the creation of a distinct cause of action for aiding and abetting claims against non-transferees."). Accordingly, the Eighth Cause of Action should be dismissed as to WWJR and Wrigley.

B. Plaintiffs Fail to Allege The Necessary Elements To Support A Claim Under the GUVTA Against PE Fund.

As a threshold matter, for the reasons set forth in Talladega's Motion to Dismiss, which are incorporated herein, Plaintiffs' GUTVA claim fails because the collateral at issue here was subject to a valid lien at the time of the challenged transfer and, therefore, falls outside the scope of "assets" as defined under the GUVTA. Talladega Mot. at Section III.D.i; *see also Windward Campus Owner, LLC v. Good Night Med. Of Ohio, LLC*, 2022 WL 712455, at *3-4 (Ga. Ct. App. Mar. 10, 2022).

Further, Plaintiffs fail to allege any, let alone multiple, badges of fraud with the particularity required under CPLR § 3016(b). Under GUVTA, "badges of fraud are [ ] mere 'circumstances, signs, marks, suspicions, not of themselves sufficient to authorize a finding [of fraud], ***unless more than one [are] combined***.'" *Tindall v. H & S Homes, LLC*, 757 F. Supp. 2d 1339, 1350–51 (M.D. Ga. 2011) (emphasis added). Here, despite claiming that the challenged transaction "reflect[s] ***many*** of the badges of fraud set forth in Section 18-2-74(b)" (¶ 187) (emphasis added), Plaintiffs' allegations focus on only two—transfer to an insider and

upon. *See Avilon Auto. Grp. v. Leontiev*, 194 A.D.3d 537, 539 (1st Dep't 2021) ("The complaint fails to plead the [UVTA] claim with sufficient particularity. . ., since the allegations . . .were all made 'on information and belief.'")

concealment (O.G.C.A. §§ 18-2-74(b)(1) and (3), respectively)—but neither is sufficiently pleaded.

As to the first "badge," Plaintiffs fail to allege that PE Fund satisfies the definition of "insider" at the time the Bridge was entered into. The sole basis for Plaintiffs' "insider" theory is that "Wrigley is [the Company's] controlling shareholder, CEO, and Chairman" (¶ 200), and PE Fund is Wrigley's "alter-ego," (¶ 197). But, as noted below, Plaintiffs fail to meet the high bar for showing that Wrigley and PE Funds are alter egos. *See* Section V, *infra.* Further, conclusory allegations of "control" are wholly insufficient to meet the statutory definition of an insider under the GUVTA. *See In re Marketxt Holdings Corp.*, 361 B.R. 369, 391-92 (Bankr. S.D.N.Y. 2007) (dismissing breach of fiduciary duty and fraudulent conveyance claims where complaint failed, among other things, to sufficiently allege that creditor controlled debtor company). Plaintiffs' assertions are also undercut by the undisputed fact that Wrigley was no longer an officer or director of the Company at the time the Bridge was negotiated and executed, and that the Company's majority independent directors (assisted by independent legal and financial advisors) led the arms' length negotiations over the terms of the Bridge and related agreements on behalf of the Company. *See In re Parker Sch. Uniforms, LLC*, 2021 WL 4553016, at *6 (Bankr. D. Del. Oct. 5, 2021) (plaintiff failed to allege that "major lender" with equity interest in debtor exercised "high level of control" required for "insider" status where defendant was not a director or officer and could not appoint managers to board); *In re Raytrans Holding, Inc.*, 573 B.R. 121, 132 (Bankr. D. Del. 2017) (conclusory allegations of "insider" status insufficient where transaction at issue was conducted at arm's length and putative insider was not a director or officer of debtor); *accord Matter of Donnan*, 2016 WL 1085499, at *11-12 (Bankr. M.D. Ga. Mar. 17, 2016) (plaintiff failed to establish

"insider" status where defendant was no longer affiliated with debtor and no facts were alleged showing coercion in connection with an arm's length transaction).

As to the second "badge," PE Fund incorporates by reference the arguments set forth in Talladega's Motion to Dismiss, which demonstrate that the SAC fails to allege any facts showing "concealment" of the transaction from Plaintiffs by PE Fund or any other Defendant. (Talladega Mot. at Section III.D.iii.) Indeed, Plaintiffs' admitted knowledge of the purported "Scheme" ***before*** any part of it was allegedly implemented—as evidenced by their filing of this lawsuit one week before the Bridge was executed—belies any suggestion of concealment.

Because the SAC fails to allege sufficient "badges" of fraud with the requisite particularity, Plaintiffs' claim under the GUVTA should be dismissed. *Brennan v. 3250 Rawlins Ave. Partners, LLC*, 171 A.D.3d 603, 604 (1st Dep't 2019) (reversing denial of a motion to dismiss a UVTA actual fraud claim where allegations of badges of fraud did not satisfy CPLR § 3016(b)).

V. PLAINTIFFS' CLAIMS AGAINST PE FUND AND WRIGLEY FOR BREACH OF FIDUCIARY DUTY (NINTH CAUSE OF ACTION) SHOULD BE DISMISSED.

To sufficiently plead a claim for a breach of fiduciary duty, Plaintiffs must allege "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Litvinoff v. Wright*, 150 A.D.3d 714, 715 (2d Dep't 2017). Further, under CPLR § 3016(b), the claim must be pleaded with particularity, and the circumstances constituting the alleged wrong must be stated in detail. *Peacock v Herald Sq. Loft Corp.*, 67 A.D.3d 442, 443 (1st Dep't 2009); *Rosenberg v. R & B Realty Grp.*, 2021 WL 1331351, at *4 (Sup. Ct. N.Y. Cnty. April 9, 2021) ("A cause of action sounding in breach of fiduciary duty must be pleaded with particularity.") As demonstrated below, Plaintiffs have failed to state a cause of action for breach of fiduciary duty against either PE Fund or Wrigley.

First, no fiduciary breach claim can be asserted against Wrigley based on purported "special circumstances" existing between Plaintiffs and PE Fund, as co-lenders, because PE Fund is not an alter-ego of Wrigley. "[D]isregard[ing] the corporate entity is a difficult task." *Altabef v. Neugarten*, 2021 WL 5919459, at *12 (Del. Ch. Dec. 15, 2021).[8] "Piercing the corporate veil under the alter ego theory requires that the corporate structure cause fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud." *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999) (citations omitted). To conclude that PE Fund or WWJR are Wrigley's alter egos, and set aside the corporate form, Plaintiffs must allege that Wrigley's purported "wrongful acts [are] tied to the manipulation of the corporate form." *Doberstein v. G-P Indus., Inc.*, 2015 WL 6606484, at *4 (Del. Ch. Oct. 30, 2015).

Plaintiffs fail to do that. Their allegations on this front are meager and conclusory—they assert that PE Fund and WWJR "are Wrigley's alter egos," and that "Wrigley exercises complete domination and control over PE Fund." (¶¶ 42, 197.) But they do not tie any alleged wrongdoing to any putative manipulation of the corporate form. Nor do they allege any facts courts consider when deciding whether to set aside the corporate form, namely "(1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the dominant shareholder siphoned company funds; and (5) whether, in general, the company simply functioned as a facade for the dominant

[8] Delaware law governs Plaintiffs' alter-ego claims because both PE Fund and WWJR are Delaware entities. "Under New York's choice of law rules, the law of the state of incorporation determines when the corporate form will be disregarded." *Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P.*, 491 B.R. 335, 346 (Bankr. S.D.N.Y. 2013) (citation omitted); *see also Nat'l Gear & Piston, Inc. v. Cummins Power Sys., LLC*, 975 F. Supp. 2d 392, 401-02 (S.D.N.Y. 2013).

shareholder." *Doberstein*, 2015 WL 6606484, at *4; *see also Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003). Indeed, the SAC is devoid of any allegations that would support a finding on any one of these factors. Plaintiffs opt instead to merely assert the ultimate *legal* conclusion that PE Fund or WWJR are Wrigley's alter egos. This is not enough. *DG BF, LLC v. Ray*, 2021 WL 776742, at *27 (Del. Ch. Mar. 1, 2021) (holding that conclusory allegations that a corporation was an individual's "personal piggy bank" are insufficient).

But even if PE Fund was an alter-ego of Wrigley (and it is not), the fiduciary breach claim fails because it is premised on the same alleged conduct underlying Plaintiffs' claim that the Company and PE Fund breached the NPA. (*See* ¶ 208 ("Wrigley and PE Fund breached their fiduciary duty to Plaintiffs because they caused the Company to breach the Note Purchase Agreement").) New York courts routinely dismiss breach of fiduciary duty claims that are "duplicative of the breach of contract causes of action." *Nineteen Eight-Nine, LLC v. Icahn,* 96 A.D.3d 603, 604 (1st Dep't 2012); *see also Nostalgic Partners, LLC v. New York Yankees P'ship*, 2021 WL 4143121, at *6 (Sup. Ct. N.Y. Cnty. Sept. 9, 2021) (Ostrager, J.) (dismissing claims for breach of fiduciary duty where "the relationship between the parties [wa]s based on commercial contracts, and no fiduciary duty exist[ed] that [wa]s separate and apart from the contractual duties").[9]

Second, Plaintiffs cannot satisfy their burden of showing that Plaintiffs were owed fiduciary duties by PE Fund, much less by Wrigley. In determining whether parties, such as co-creditors, owe one another fiduciary duties, courts consider the sophistication of the parties.

[9] Plaintiffs also appear to imply that Wrigley breached a fiduciary duty by stepping down as the Company's CEO and Chairman (¶ 198) but the NPA specifically contemplates and allows for Wrigley's resignation. *See* Ex. A, § 10.15. Accordingly, these allegations also cannot support a breach of fiduciary duty (or any other) claim.

Sebastian Holdings, Inc. v. Deutsche Bank AG, 78 A.D.3d 446, 447 (1st Dep't 2010) (affirming dismissal of fiduciary breach claim because no fiduciary duties arose between "parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities"). Here, as in *Sebastian Holdings*, Plaintiffs are sophisticated parties who engaged in arm's length negotiations, and no "special circumstances" existed between them and PE Fund so as to create a fiduciary relationship. *Id*.; *see also Saul v. Cahan*, 153 A.D.3d 947, 949 (2d Dep't 2017) (affirming dismissal where the complaint failed to allege special circumstances that transformed the alleged business relationship into a fiduciary one, such as control by one party of the other for the good of the other). Notably, Plaintiffs were well aware of the relationships between PE Fund, Wrigley, and the Company at the time they made their investment.[10] *See* Ex. A § 21.6(b) (disclosing that PE Fund is an affiliate of Wrigley). These undisputed facts are fatal to Plaintiffs' claims. *See Benzies v. Take-Two Interactive Software, Inc.*, 159 A.D.3d 629, 630-31 (1st Dep't 2018) (affirming dismissal of fiduciary breach claims because the complaint alleged only arm's length business transactions and failed to identify special circumstances). Moreover, the express language of the NPA made it clear to Plaintiffs that the business relationship between the parties "does not create, by implication or otherwise, any fiduciary duty." *See* Ex. A § 21.6(c).

Nor can Plaintiffs meet their burden of showing that they were owed fiduciary duties as co-venturers. (¶ 204.) The elements of a joint venture include "an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill, or knowledge), some degree of joint proprietorship and control over the enterprise[,] and a provision for the

[10] Indeed, Plaintiffs allege that they invested in the Senior Notes, in part, due to Wrigley's role as CEO and Chairman of the board. (¶ 193.)

sharing of profits and losses." *Mawere v. Landau*, 130 A.D.3d 986, 988 (2d Dep't 2015) (citation omitted). In "[t]he absence of any agreement to share losses, an 'essential' element of a joint venture, . . . no joint venture exists that would create a fiduciary duty." *Tri-City ValleyCats, Inc. v. Houston Astros Inc.*, 2021 WL 3745410, at *4 (Sup. Ct. N.Y. Cnty. Aug. 24, 2021) (Ostrager, J.) (dismissing fiduciary duty claim where none of the "various written agreements . . . that cover[ed] the nature and duration of the parties' relationship" described the relationship as a joint venture or included provisions for sharing losses, or continuing the agreement in perpetuity); *see also Andrews v. Cerberus Partners*, 271 A.D.2d 348, 348 (1st Dep't 2000) ("Plaintiff's attempt to establish an oral agreement to enter into a joint venture must fail because of the absence of any allegation that the parties were to share losses."). Here, Plaintiffs allege only in a conclusory manner that they are co-venturers (¶ 207) without specifically alleging *how* they are co-venturers with PE Fund, let alone Wrigley. Indeed, Plaintiffs bargained to be co-creditors and, as explained above, fail to show special circumstances that created a fiduciary relationship.

Third, Plaintiffs have not pled with the requisite particularity the existence of the so-called "Scheme" (¶ 209), that serves as the core predicate for their fiduciary duty claim. Plaintiffs' allegations of a "Scheme" to "diminish or destroy Plaintiffs' interest in the Company by subordinating Plaintiffs['] Senior Notes," *id.*, falter because they fail to plead sufficient facts establishing the existence of this "Scheme." *Peacock*, 67 A.D.3d at 443 (finding allegations of wrongdoing "lacked the specificity required to adequately state a claim for breach of fiduciary duty"). Instead, Plaintiffs concede that "it is unclear what specific maneuvers are being taken" to effectuate such a "Scheme." (¶ 67.) Plaintiffs likewise concede that the parties' rights with respect to the pursuit of consents and waivers from applicable stakeholders—all supposedly components of the "Scheme"—are arguably ambiguous. (*Id.* ¶¶ 124-125). Plaintiff's allegations of a "Scheme"

also suffer from their facial implausibility. While Plaintiffs assert that "[t]he Scheme would be enormously beneficial to Wrigley [and] PE Fund" (*id.* ¶ 70), they also allege that the "Scheme" involves the Company borrowing money at "an exorbitant interest" rate on "usurious terms" (*id.* ¶ 68), with an ultimate aim of causing the Company to fail so that Defendants can foreclose on the Company. As a significant shareholder who has invested substantial capital in the Company (through, as Plaintiffs allege, PE Fund and WWJR), it would be economically irrational for Wrigley to intentionally cause the Company to fail. Indeed, his serial investment in the Company, at various levels in the capital structure, reflects his commitment to its success, and allegations to the contrary are facially implausible. *See Brehm v. Eisner*, 746 A.2d 244, 257 (Del. 2000) (affirming dismissal of fiduciary duty claims as "illogical and counterintuitive" where alleged misconduct "would not be in the defendant's economic interest" because "such a gesture would … dilute the value of the defendant's own very substantial holdings") (cleaned up).

CONCLUSION

For the reasons stated above, and the reasons stated in the Company's and Talladega's Motions to Dismiss, which PE Fund, WWJR, and Wrigley adopt and join, Plaintiff's Second Amended Complaint should be dismissed with prejudice.

Dated: New York, New York
May 9, 2022

Respectfully Submitted,

WILLKIE FARR & GALLAGHER LLP

By: */s/ Sameer Advani*

Sameer Advani
Brittany M. Wagonheim
787 Seventh Avenue

New York, NY 10019
Telephone: (212) 728-8000
sadvani@willkie.com
bwagonheim@willkie.com

Craig C. Martin (admitted pro hac vice)
Aaron J. Hersh (admitted pro hac vice)
300 N. LaSalle Drive
Chicago, IL 60654
Telephone: (312) 728-9000
cmartin@willkie.com
ahersh@willkie.com

Attorneys for Defendants PE Fund LP, WWJr. Enterprises Inc., and William "Beau" Wrigley, Jr.

CERTIFICATE OF WORD COUNT

The foregoing document contains 6,179 words, excluding the parts of the document that are exempted by Commercial Division Rule 17, according to the word-processing system (Microsoft Word) used to prepare the document. Accordingly, as required by Commercial Division Rule 17, I certify that the foregoing document complies with the word count limit.

Dated: May 9, 2022
New York, New York

Respectfully submitted,

By: */s/ Sameer Advani*

Sameer Advani
Brittany M. Wagonheim
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 728-8000
sadvani@willkie.com
bwagonheim@willkie.com

Craig C. Martin (admitted pro hac vice)
Aaron J. Hersh (admitted pro hac vice)
300 N. LaSalle Drive
Chicago, IL 60654
Telephone: (312) 728-9000
cmartin@willkie.com
ahersh@willkie.com

Attorneys for Defendants PE Fund LP, WWJr. Enterprises Inc., and William "Beau" Wrigley, Jr.