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Re: *Spring Real Estate, LLC d/b/a Spring Capital Group v. Echo/RT Holdings, LLC*
C.A. No. 7994-VCN
Date Submitted: September 11, 2013

Dear Counsel:

Plaintiff Spring Real Estate, LLC ("Spring Capital")[1] seeks to recover on a $99,057.50 default judgment (the "RT Default Judgment") entered against Defendant RayTrans Distribution Services, Inc. ("RayTrans"), a dissolved Illinois corporation.[2] Before it was dissolved, RayTrans sold substantially all of its assets to Defendant Echo/RT Holdings, LLC ("Echo/RT"), a Delaware limited liability

[1] Spring Real Estate, LLC operates under the registered trade name Spring Capital Group. First Am. Verified Compl. (the "Complaint" or "Compl.") ¶ 2.
[2] *Id.* ¶¶ 8, 25, Ex. A.

company, through an Asset Purchase Agreement dated June 2, 2009 (the "Purchase Agreement").[3] Defendant Echo Global Logistics, Inc. ("Echo") guaranteed the performance of certain obligations of Echo/RT, its wholly-owned subsidiary, under the Purchase Agreement.[4]

Spring Capital is attempting to collect on the RT Default Judgment from Echo/RT, Echo, and RayTrans. RayTrans Holdings, Inc. ("RayTrans Holdings") and James A. Ray ("Ray") are named as Nominal Defendants. Spring Capital asserts two claims for declaratory judgment against Echo/RT and Echo (together, the "Echo Defendants"): first, that they have successor liability for the RT Default Judgment under the Purchase Agreement or under Delaware law (the "Successor Liability Claim");[5] and second, that they are liable for the RT Default Judgment under the Illinois Business Corporation Act (the "Illinois Claim").[6] Spring Capital also alleges that the Echo Defendants are liable for the RT Default Judgment

[3] *Id.* ¶¶ 7, 9, 30, Ex. C (Purchase Agreement). The Purchase Agreement was by and among Echo/RT, RayTrans, RayTrans Holdings, Inc., and James A. Ray. Purchase Agreement Recitals, Signature Page.
[4] *Id.* Recitals, § 11.16, Signature Page.
[5] Compl. ¶¶ 36-42.
[6] *Id.* ¶¶ 59-62 (citing 805 ILCS 5/11.50(a)(5)).

because the Purchase Agreement was a fraudulent transfer under Delaware and Illinois law (the "Fraudulent Transfer Claims").[7]

The Echo Defendants have moved to dismiss all four claims under Court of Chancery Rule 12(b)(6) for failure to state a claim (the "12(b)(6) Motion").[8] For the following reasons, the Court grants the 12(b)(6) Motion.

I. BACKGROUND

A. *The RT Default Judgment*

Sierra Concrete Design, Inc., and Trevi Architectural, Inc. (together, the "Debtors") filed for Chapter 7 bankruptcy on August 29, 2008.[9] In the ninety days preceding their bankruptcy filings, the Debtors made five payments totaling $98,807.50 to RayTrans.[10] On July 29, 2010, the trustee for the Debtors' estates filed a petition against RayTrans to recover that sum, alleging the payments were

[7] *Id.* ¶¶ 43-58.
[8] Spring Capital argues the 12(b)(6) Motion should be denied as untimely and improper because the Echo Defendants previously filed an answer to the original complaint. Pl.'s Opp'n to Defs. Echo/RT and Echo's Mot. to Dismiss ("Pl.'s Answering Br.") 8. By stipulation among the parties, Spring Capital was permitted to amend the original complaint, and the Echo Defendants expressly reserved the right to move to dismiss any amended complaint. *See* Am. Stip. and Order Governing Pl.'s Amendment of Verified Compl. and Defs.' Resp. Thereto (Apr. 24, 2013). The 12(b)(6) Motion is therefore not procedurally improper.
[9] Compl. ¶¶ 2, 16. The Debtors' estates were consolidated and administrated jointly. *Id.* ¶ 18.
[10] *Id.* ¶ 21.

in violation of the bankruptcy laws.[11] RayTrans did not answer or otherwise respond to the petition, leading to entry of the RT Default Judgment on July 21, 2011.[12] Spring Capital purchased the RT Default Judgment from the Debtors' estates on August 20, 2012, and the RT Default Judgment remains unpaid.[13]

B. *The Transaction Between the Echo Defendants and RayTrans*

Spring Capital alleges generally that Echo/RT is "jointly and severally liable" for the RT Default Judgment "[a]s RayTrans's successor in liability."[14] The specific allegations of how Echo/RT is liable for the RT Default Judgment are not only internally inconsistent, but also in conflict with the Purchase Agreement.

Initially, Spring Capital claims the assumption of liability was "pursuant to the June 2, 2009 Agreement," an allegation it supports by citation to the Purchase Agreement.[15] At this point, it also recognizes that "Echo guaranteed payment and

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[11] *Id.* ¶ 20. The Complaint incorrectly alleges the petition was filed on July 29, 2009. It was actually filed on July 29, 2010. Sauder Aff. Ex. D. at Signature. The Court takes judicial notice of the correct date. *See* D.R.E. 202(d)(1)(B).
[12] Compl. ¶¶ 22-25. The judgment also included court costs.
[13] *Id.* ¶¶ 3-4, 27.
[14] *Id.* ¶ 29.
[15] *Id.* ¶ 30 ("RayTrans transferred all or substantially all of its assets and operations to Echo/RT pursuant to the June 2, 2009 Agreement.").

Echo/RT's performance of the June 2, 2009 Agreement."[16] But, subsequently, Spring Capital alleges the Echo Defendants assumed RayTrans's liability through a merger, citing to a June 10, 2009, Echo press release announcing the transaction (the "Press Release") for support.[17] Several other allegations in the Complaint suggest the transaction was a merger[18]—in fact, Spring Capital even implies that the Purchase Agreement contemplated a merger.[19]

Spring Capital makes generalized allegations about the assets and liabilities Echo/RT assumed in the transaction with RayTrans. The single specific allegation is that the liabilities Echo/RT assumed included

> those directly relating to RayTrans's network of skilled transportation professionals and carriers that relate to RayTrans's specialty in flatbed, over-sized, auto-haul and other specific services, as well as

[16] *Id.*
[17] *Id.* ¶ 32, Ex. D (Press Release) ("Echo Global Logistics, Inc., . . . has acquired RayTrans Distribution Services, Inc. . . . . James Ray, Jr., . . . will continue as General Manager of the RayTrans Division of Echo Global Logistics.").
[18] *See, e.g.*, *id.* ¶¶ 33 ("On or after the June 2009 merger, RayTrans was dissolved and no longer conducted business . . . ."), 37 ("Echo/RT . . . is liable as a result of its acquisition of RayTrans and the merger of the two entities in or about June 2009."), 42 ("Because Echo/RT has merged with RayTrans, . . . Echo/RT is the successor in liability to RayTrans . . . .").
[19] *Id.* ¶ 31 ("In connection with the June 2, 2009 Agreement, Echo/RT has taken the responsibility for RayTrans's pre-merger liabilities . . . .").

> traditional dry van brokerage, coupled with the relationships RayTrans built to service their shippers.[20]

Noticeably absent from this list is an allegation that Echo/RT expressly assumed the RT Default Judgment under the Purchase Agreement. Spring Capital does not otherwise reference, cite to, or quote from any specific provisions of the Purchase Agreement or other transactional document in support of its claims.

II. ANALYSIS

A. *The Standard of Review*

When presented with this 12(b)(6) Motion, the Court accepts all non-conclusory allegations in the Complaint as true and draws all reasonable inferences from those allegations in Spring Capital's favor.[21] Conversely, the Court may disregard conclusory allegations and unreasonable inferences.[22] Thus, the Court should grant the 12(b)(6) Motion only if Spring Capital "could not recover under any reasonably conceivable set of circumstances susceptible of proof."[23]

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[20] *Id.*
[21] *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).
[22] *See Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).
[23] *Cent. Mortg. Co.*, 27 A.3d at 536.

Under Court of Chancery Rule 10(c), "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Accordingly, the Court will consider the Purchase Agreement and the Press Release because they were attached to the Complaint.[24]

B. *The Claims Against Echo/RT*

Viewing the Complaint and the attached documents most favorably to Spring Capital, the only reasonable inference is that the transaction between Echo/RT and RayTrans was an asset purchase governed by the Purchase Agreement, not a merger suggested by the Press Release. The allegations to the contrary are without substance.

1. The Successor Liability Claim

Spring Capital contends that, under its reading of the Purchase Agreement, Echo/RT assumed "all obligations accruing, arising out of or relating to the conduct or operation of RayTrans's business"—which it argues would include the

[24] *See Alliance Data Sys. Corp. v. Blackstone Capital P'rs V L.P.*, 963 A.2d 746, 752 (Del. Ch. 2009), *aff'd*, 976 A.2d 170 (Del. 2009) (TABLE).

RT Default Judgment.[25] Were its contract interpretation incorrect, Spring Capital argues Echo/RT would still be liable for the RT Default Judgment under two alternate theories: either the Purchase Agreement was a de facto merger, or, after the Purchase Agreement, Echo/RT was a mere continuation of RayTrans.[26] Spring Capital further contends that it would be unjust and thus improper for Echo/RT to avoid liability for the RT Default Judgment.[27]

In response, Echo/RT contends Spring Capital has failed to allege an adequate basis for the Successor Liability Claim. Echo/RT opposes Spring Capital's interpretation of the Purchase Agreement, claiming instead that, under the terms of the contract, RayTrans retained the RT Default Judgment as a legal liability arising out of its conduct and operations before the closing date.[28] Separate from the express terms of the Purchase Agreement, Echo/RT argues

[25] Pl.'s Answering Br. 12 (citing Purchase Agreement § 1.3(g)).
[26] *Id.* 12-15 (citing Compl. ¶¶ 38-40).
[27] *Id.* 15.
[28] Defs. Echo/RT and Echo's Reply Br. in Supp. of Their Mot. to Dismiss ("Defs.' Reply Br.") 8-9; Defs. Echo/RT and Echo's Opening Br. in Supp. of Their Mot. to Dismiss ("Defs.' Opening Br.") 12-13.

Spring Capital has failed to allege the elements necessary for the Court to find successor liability under the de facto merger theory[29] or the continuation theory.[30]

Under the Purchase Agreement, Echo/RT assumed certain liabilities, and RayTrans retained all other liabilities.[31] Section 1.3 of the Purchase Agreement provides that Echo/RT assumed, among other specifically enumerated liabilities, "all obligations accruing, arising out of or relating to the conduct or operation of the Business or the ownership of the Purchased Assets from and after the Closing Date, including all such obligations arising out of any action, proceeding or other litigation."[32] Conversely, Section 1.4 provides that RayTrans retained all un-assumed liabilities, specifically including "any Liabilities (including any future

[29] Defs.' Reply Br. 9-11; Defs.' Opening Br. 9-11.
[30] Defs.' Reply Br. 11-12; Defs.' Opening Br. 14-18.
[31] The Court notes the Purchase Agreement provides the state and federal courts sitting in Illinois with exclusive jurisdiction to hear "[a]ny suit brought hereon and any and all legal proceedings to enforce this Agreement, whether in contract, tort, equity or otherwise." Purchase Agreement § 11.3. Because no party raised the question of whether this action is one "brought hereon" or one to "enforce" the Purchase Agreement, the Court declines to examine this issue independently.
[32] *Id.* § 1.3(g).

legal actions) relating to or arising out of the ownership, conduct or operation of the Business or the Purchased Assets on or prior to the Closing Date."[33]

In light of the unambiguous terms of the Purchase Agreement,[34] the Court concludes that Echo/RT did not assume, and thus RayTrans retained, liability for any legal claim arising out of the conduct or operation of RayTrans on or prior to the closing date of June 2, 2009[35]—which would include liability for the five payments in 2008 that comprise the RT Default Judgment. Therefore, as a matter of law, Echo/RT did not assume the RT Default Judgment through the Purchase Agreement.[36] Nonetheless, Spring Capital contends Echo/RT has successor liability under two Delaware law-based theories—namely, the de facto merger theory and the continuation theory.

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[33] *Id.* § 1.4.

[34] Illinois law governs the Purchase Agreement. *Id.* § 11.3. Under Illinois law, if a contract term is clear and unambiguous, the term should be interpreted according to its plain meaning. *See, e.g.*, *Owens v. McDermott, Will & Emery*, 736 N.E.2d 145, 150 (Ill. App. Ct. 2000). A term is ambiguous "when the language used is susceptible to more than one meaning or is obscure in meaning through indefiniteness of expression." *See, e.g.*, *Meyer v. Marilyn Miglin, Inc.*, 652 N.E.2d 1233, 1238 (Ill. App. Ct. 1995) (citations omitted).

[35] Purchase Agreement Recitals, § 2.1, Signature Page.

[36] Based on the contractual language, the Court reaches this conclusion regardless of whether the preference liability arose before or after the closing date of the Purchase Agreement. In addition, under this analysis, it is irrelevant whether the transfers by the Debtors to RayTrans were in the ordinary course of business.

Almost always, a purchaser of assets "is liable only for liabilities it expressly assumes."[37] It has been said that narrow situations, such as "where an avoidance of liability would be unjust," may warrant an exception to this principle.[38] This Court, in discussing general jurisprudence on successor liability for asset purchasers, noted that Pennsylvania law recognizes four specific exceptions:

> (1) the purchaser expressly or impliedly agrees to assume such obligations; (2) the transaction amounts to a consolidation or merger of the selling corporation with or into the purchasing corporation; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape liability for such obligations.[39]

Spring Capital believes these exceptions, particularly the de facto merger and continuation theories, are also recognized under Delaware law.[40] Echo/RT does not challenge the accuracy of Spring Capital's recitation of Delaware law; rather, it

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[37] *Mason v. Network of Wilmington, Inc.*, 2005 WL 1653954, at *5 (Del. Ch. July 1, 2005) (quoting *Corporate Prop. Assocs. 8, L.P. v. AmeriSig Graphics, Inc.*, 1994 WL 148269, at *4 (Del. Ch. Mar. 31, 1994)).
[38] *Id.* (quoting *Fehl v. S.W.C. Corp.*, 433 F. Supp. 939, 945 (D. Del. 1977)).
[39] *Corporate Prop. Assocs.*, 1994 WL 148269, at *4 (quoting *Knapp v. N. Am. Rockwell Corp.*, 506 F.2d 361, 363-64 (3d Cir. 1974) (applying this principle of New York law to Pennsylvania law)).
[40] Pl.'s Answering Br. 13 ("As noted by then Vice Chancellor Chandler in *Corporate Properties*, there are four recognized exceptions to this general rule . . . ."). Spring Capital then focused on the de facto merger and continuation theories.

maintains that the Complaint does not state a claim that should qualify under either theory of successor liability.[41]

The parties rely on a statement of Delaware law not from the Delaware Supreme Court or this Court, but instead from a federal court decision, *Fehl v. S.W.C. Corp.*[42] The *Fehl* court concluded that Delaware courts recognized, but construed narrowly, the de facto merger and continuation theories.[43]

Typically, Delaware does not recognize statutorily compliant asset sales as de facto mergers.[44] In other situations, when courts have recognized de facto

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[41] Defs.' Opening Br. 8-18.

[42] *See, e.g.*, *Fountain v. Colonial Chevrolet Co.*, 1988 WL 40019, at *7 (Del. Super. Apr. 13, 1988) ("The Delaware rule on corporate successor liability was enunciated in *Fehl v. S.W.C. Corp.*."); *see also Magnolia's at Bethany, LLC v. Artesian Consulting Eng'rs, Inc.*, 2011 WL 4826106, at *1 (Del. Super. Sept. 19, 2011) (citing *Fountain*, 1988 WL 40019, at *7); *Ross v. Desa Hldgs. Corp.*, 2008 WL 4899226, at *4 (Del. Super. Sept. 30, 2008) (same).

[43] *Fehl* was a case in which, to determine whether it was consistent with due process to assert personal jurisdiction over the purchaser of assets "based on specific business transactions by its predecessor," the court deemed it appropriate to analogize to "the developing body of substantive law in the area of products liability." *Fehl*, 433 F. Supp. at 943, 945. Finding Delaware's product liability jurisprudence lacking for this purpose, the *Fehl* court again analogized to Delaware's treatment of creditor claims against successor entities. *Id.* at 946-47.

[44] *See generally Hariton v. Arco Elecs., Inc.*, 188 A.2d 123, 125 (Del. 1963) ("[T]he sale-of-assets statute and the merger statute are independent of each other. They are, so to speak, of equal dignity, and the framers of a reorganization plan may resort to either type of corporate mechanics to achieve the desired end."); *see also Nixon v. Blackwell*, 626 A.2d 1366, 1380 (Del. 1993) (noting this distinction and citing subsequent precedent); *but see Orzeck v. Englehart*, 195 A.2d 375, 378 (Del. 1963) (citing *Drug, Inc. v. Hunt*, 168 A. 87 (Del. 1933)) ("We do not intend

mergers, application of the doctrine requires a corporation to have "transfer[red] all of its assets to another," in exchange for stock consideration "issued by the transferee directly to the shareholders of the transferring corporation," and "the transferee [to have] agree[d] to assume all the debts and liabilities of the transferor."[45] Spring Capital did not allege that RayTrans failed to comply with the relevant asset transfer statute. In addition, as a matter of law under the unambiguous terms of the Purchase Agreement, RayTrans did not transfer all its assets;[46] Echo/RT paid consideration in cash;[47] and Echo/RT expressly did not agree to assume all of RayTrans's liabilities.[48] Thus, Echo/RT has no liability for the RT Default Judgment under this theory, regardless of its general viability.

Even if the Court adopts the continuation theory here, it must acknowledge that this exception has been construed very narrowly to require the purchaser of the assets to be a continuation of "the same legal entity," not just a continuation of the

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to be understood as holding that the doctrine of de facto merger is not recognized in Delaware. Such is not the case for it has been recognized in cases of sales of assets for the protection of creditors or stockholders who have suffered an injury by reason of failure to comply with the statute governing such sales.").

[45] *Magnolia's*, 2011 WL 4826106, at *3 (citing *Drug, Inc.*, 168 A. at 96).

[46] Purchase Agreement § 1.2.

[47] *Id.* § 1.5.

[48] *Id.* § 1.4.

same business in which the seller of the assets engaged.[49] The "primary elements" of being the same legal entity have been said to include "the common identity of the officers, directors, or stockholders of the predecessor and successor corporations, and the existence of only one corporation at the completion of the transfer."[50]

Spring Capital alleges generally that the Purchase Agreement "resulted in the continuity of ownership because the stakeholders of RayTrans became stakeholders in Echo/RT and/or Echo," but it notes specifically only that the Echo Defendants have continued the business of RayTrans and that Ray is "continuing to serve in a management capacity within Echo/RT's and/or Echo's enterprises."[51] That, as alleged, Echo/RT continued the business of RayTrans in this way is not a sufficient allegation that Echo/RT was a continuation RayTrans as a legal entity. Neither does the allegation that Ray serves in a management capacity satisfy the element of common stakeholders because there is no allegation that Echo/RT

[49] *Fountain*, 1988 WL 40019, at *8-9 (quoting *Fehl*, 433 F. Supp. at 946).
[50] *Magnolia's*, 2011 WL 4826106, at *3 (citing *In re Asbestos Litig. (Bell)*, 517 A.2d 697, 699 (Del. Super. 1986) (applying Pennsylvania law)).
[51] Compl. ¶¶ 39-41.

shared the same, let alone any, officers, directors, or members (or stockholders) with RayTrans. Furthermore, the Purchase Agreement contemplated that RayTrans would to continue to exist. Thus, regardless of whether the Court recognizes the continuation theory of successor liability, Spring Capital has failed to state a claim under it.[52]

Finally, the facts alleged do not present a situation in which, as Spring Capital argued,[53] the avoidance of liability would be unjust. The opposite is true—it would be unjust to hold Echo/RT liable for the RT Default Judgment, most obviously because it expressly did not assume that type of liability under the Purchase Agreement.

2. The Fraudulent Transfer Claims

Spring Capital contends it has alleged both actual and constructive fraudulent transfer claims against Echo/RT under Delaware and Illinois law.[54] Echo/RT asserts that the relevant statutes and case law of these jurisdictions are

[52] The case law upon which Spring Capital relies for the continuation theory also does not have explicit support in the precedent of the Supreme Court or this Court. Rather, Spring Capital again cites to the same Superior Court decisions that relied exclusively upon *Fehl*.
[53] Pl.'s Answering Br. 15.
[54] *Id.* 15-21.

analogous for the Fraudulent Transfer Claims.[55] Because Spring Capital has not challenged this assertion or otherwise identified how Illinois law differs from Delaware law, the Court assumes the analysis is the same for present purposes.[56]

A transfer by a debtor "[w]ith actual intent to hinder, delay or defraud any creditor of the debtor" may be fraudulent.[57] A non-conclusory allegation of actual intent is necessary to survive a motion to dismiss,[58] but intent may be inferred by allegations of certain "nonexclusive factors" enumerated in the statute.[59] Spring Capital did not argue that it alleged any of the statutory factors favoring its position—in its brief, it did not even identify the existence of the factors.[60] The Court accordingly will not address them.[61]

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[55] Defs.' Opening Br. 18-19.
[56] *Cf. Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999).
[57] 6 *Del. C.* § 1304(a)(1); *see also* 740 ILCS 160/5(a)(1).
[58] *See Metro Commc'n Corp. BVI v. Advanced MobileComm Techs. Inc.*, 854 A.2d 121, 166 (Del. Ch. 2004); *see also Ostrolenk Faber LLP v. Genender Int'l Imps., Inc.*, 2013 WL 1289130, at *6 (Ill. App. Mar. 29, 2013) ("Proof of fraud in fact requires a showing of an actual intent to hinder creditors . . . .").
[59] *See Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at *13-14 (Del. Ch. Aug. 28, 2012) (citing 6 *Del. C.* § 1304(b)(1)-(11)); *see also* 740 ILCS 160/5(b)(1)-(11).
[60] Instead, Spring Capital stated that courts often infer intent from circumstantial evidence, citing to a bankruptcy court decision that is not controlling on this Court. Pl.'s Answering Br. 16 (citing *In re Fedders N. Am., Inc.*, 405 B.R. 527, 545 (Bankr. D. Del. 2009)).
[61] Were it to do so, the Court anticipates the factors would almost certainly not support Spring Capital's otherwise insufficient allegation of intent.

Spring Capital's allegation of intent in the Complaint is entirely conclusory. It merely alleges that "one or more of the Defendants" transferred assets, presumably by the Purchase Agreement, "with the actual intent to hinder, delay, or defraud creditors of RayTrans, including Trustee and/or Plaintiff . . . ."[62] Spring Capital has failed to allege that Echo/RT, or even RayTrans, actually intended to defraud, by the June 2009 Purchase Agreement, a creditor under the RT Default Judgment, which did not exist until July 2011. Thus, the Complaint fails to state a claim against Echo/RT for actual fraud.

A transfer may also be fraudulent if the debtor did not receive reasonably equivalent value and the debtor was rendered insolvent, or at least reasonably should have believed it would become insolvent, by the transfer.[63] Spring Capital argues it alleged RayTrans did not receive reasonably equivalent value under the Purchase Agreement because the RT Default Judgment has not been paid.[64] By the same token, it argues that RayTrans was rendered insolvent.[65]

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[62] Compl. ¶¶ 48, 56.
[63] 6 *Del. C.* § 1304(a)(2); *see also* 740 ILCS 160/5(a)(2).
[64] Pl.'s Answering Br. 20 (citing Compl. ¶¶ 26-27).
[65] *Id.*

The Complaint does not state a claim for constructive fraudulent transfer because these allegations are conclusory and mere recitations of the fraudulent transfer statute.[66] To the extent the allegations are not conclusory, the Complaint still fails to state a claim because it is not reasonably conceivable that the $6,050,000 paid by Echo/RT to RayTrans under the Purchase Agreement[67] was not reasonably equivalent value for the transferred assets. The Court agrees with Echo/RT's statement that, under these facts, "what a debtor like RayTrans decides to do with money it receives from the sale of assets has no bearing on whether the amount paid is a fair price or reasonably equivalent value for the assets sold."[68]

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[66] *See Hospitalists*, 2012 WL 3679219, at *13 ("In the circumstances of this case, even under Delaware's minimal notice pleading standard, simply reciting the statutory or common law elements of [a fraudulent transfer], as Plaintiffs have here, is insufficient to state a claim upon which relief may be granted."); *see also Ostrolenk Faber LLP*, 2013 WL 1289130, at *6.

For example, the paragraphs by which Spring Capital claims it alleged that RayTrans did not receive reasonably equivalent value state, in relevant part, that "the Defendants fraudulently transferred assets held by RayTrans by . . . transferring assets, without receiving reasonably equivalent value in exchange for the transfer" and that "the Defendants fraudulently transferred assets held by RayTrans without receiving a reasonably equivalent value in exchange for the transfer of said assets by . . . distributing these assets to various third-parties at a time when RayTrans was insolvent or the transfer of assets rendered RayTrans insolvent." Compl. ¶¶ 48-49, 56-57. How these allegations are more than a conclusory recitation of the statute remains unclear to the Court.

[67] Purchase Agreement § 1.5. After subsequent earn-out payments, the purchase price could increase up to $12,550,000. *Id.*

[68] Defs.' Reply Br. 14.

Any argument that the Purchase Agreement was not an arm's-length transaction[69] is unsupported by specific allegations and thus without merit.

Moreover, Spring Capital has not alleged any relationship between the Purchase Agreement and the RT Default Judgment—other than the obvious delay of over two years between the events. Thus, particularly when comparing the purchase price of $6,050,000 and the RT Default Judgment of $99,057.50, it is not reasonably conceivable that the unpaid RT Default Judgment demonstrates in any way that the Purchase Agreement caused RayTrans's purported insolvency or even that RayTrans reasonably should have believed the Purchase Agreement would render it insolvent.

3. The Illinois Claim

In its opening brief in support of the 12(b)(6) Motion, Echo/RT argued why the Illinois Claim should be dismissed for failure to state a claim.[70] As Echo/RT subsequently noted,[71] aside from a passing citation to an apparently relevant

[69] Pl.'s Answering Br. 17.
[70] Defs' Opening Br. 22-23.
[71] Defs.' Reply Br. 15.

statute,[72] Spring Capital did not mention, let alone defend the allegations in support of, the Illinois Claim in its answering brief. In this Court, a plaintiff may waive a claim if it does not brief the sufficiency of its allegations in response to a defendant's motion to dismiss.[73] Spring Capital's single citation to an ostensibly governing statute, without an accompanying legal or factual argument about the allegations of the Complaint, is an inadequate response to Echo/RT's arguments. The Illinois Claim has been waived.[74]

C. *The Claims Against Echo*

In its answering brief and at oral argument, Spring Capital relied upon filings from the recent bankruptcy proceeding of RayTrans Holdings in support of its claims against Echo.[75] What those documents purport to show was not alleged in the Complaint. In testing the sufficiency of the Complaint for the 12(b)(6)

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[72] Pl.'s Answering Br. 11 (citing 805 ILCS 5/11.50(a)(5)).
[73] *See Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247, at *11 (Del. Ch. Oct. 9, 2007); *see also Emerald P'rs*, 726 A.2d at 1224 ("Issues not briefed are deemed waived.").
[74] The minimal discussion of the Illinois Claim at oral argument does not change the Court's conclusion. Oral Arg. Defs.' Mot. to Dismiss ("Oral Arg.") 27-28. Regardless, a cursory review reveals that the cited Illinois statute governs a merger or consolidation. 805 ILCS 5/11.50(a)(5). For the reasons set forth earlier, there clearly was no merger or consolidation here. There is no reasonably conceivable basis for this claim.
[75] Pl.'s Answering Br. 11; Oral Arg. 23-24, 29-30, 34, 40.

Motion, the Court's inquiry is limited, with narrow exceptions, to the facts alleged in the Complaint.[76] Spring Capital has not argued that these filings, or what they purport to show, are either incorporated into the Complaint or otherwise integral to its claims. Therefore, the filings are not properly before the Court.

Taking all reasonable inferences from the Complaint in Spring Capital's favor, it is not reasonably conceivable that Echo was anything more than a limited guarantor of certain of Echo/RT's obligations under the Purchase Agreement. As Spring Capital conceded at oral argument, the only facts alleged in the Complaint against Echo, other than the guaranty, are the statements in the Press Release.[77] But, the Press Release is not controlling; the Purchase Agreement is, and the terms of that contract, in which Echo was only a guarantor, "effectively negate" the Successor Liability Claim, the Fraudulent Transfer Claims, and the Illinois Claim

[76] *See Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001); *see also Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612-13 (Del. 1996) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995)) (describing the narrow exceptions as when a document is "integral to a plaintiff's claim and incorporated into the complaint . . . [or] not being relied upon to prove the truth of its contents").
[77] Oral Arg. 33-34; *see also* Compl. ¶ 32.

as a matter of law.[78] As Echo effectively argued,[79] Spring Capital has not alleged or argued a theory of liability to the contrary.

Thus, there is no reasonably conceivable basis for the claims against Echo.[80]

III. CONCLUSION

For the foregoing reasons, the Echo Defendants' 12(b)(6) Motion is granted.

An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Ryan M. Ernst, Esquire
Register in Chancery-K

[78] *See Malpiede*, 780 A.2d at 1083 (noting how a court may conclude, at the motion to dismiss stage, that the exhibits to a complaint "negate the claim as a matter of law").
[79] Defs.' Reply Br. 7, 15; Defs.' Opening Br. 23-24.
[80] Moreover, that Spring Capital failed to state a claim against Echo/RT, as the acquiror, supports the Court's conclusion that Spring Capital also failed to state a claim against Echo, as the guarantor.