SO ORDERED.

SIGNED this 24th day of November, 2014.

Janice Miller Karlin
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

In re: **Eva M. Rodriguez,**	**Case No. 12-41444** **Chapter 7**
Debtor.	
Darcy Williamson, Trustee,	
Plaintiff, **v.**	**Case No. 14-7033** **Adversary Proceeding**
Bank of America, N.A., **Robert A. Johnson, Jr., and** **Erlinda Johnson,**	
Defendants.	

Order Granting in Part and Denying in Part
Defendant Bank of America's Motion to Dismiss

The chapter 7 Trustee, Darcy Williamson (hereinafter, the "Trustee"), filed this adversary proceeding against Defendants Bank of America, N.A. (hereinafter "Bank of America"), Anthony Abeyta, Robert Johnson, Jr., and Erlinda Johnson, to avoid

allegedly fraudulent transfers under 11 U.S.C. § 548 and to recover those transfers for the bankruptcy estate under 11 U.S.C. §§ 550, 551, and 542. The Trustee alleges that the debtor in the underlying bankruptcy case, Eva Rodriguez, sold real property to Defendants Robert and Erlinda Johnson for less than fair market value, and used a portion of the proceeds of that sale to pay off a second mortgage on the real property and other debts to Defendant Bank of America, despite the fact her ex-husband, Defendant Anthony Abeyta, was obligated by their divorce decree to pay the second mortgage loan and the other debts.

Defendant Bank of America has moved to dismiss the counts against it, arguing that the payment of the second mortgage loan is not constructively fraudulent because it gave reasonably equivalent value in the form of a lien release in exchange for the payment. Defendant Bank of America also argues that the Trustee's complaint does not allege actual intent to defraud sufficient to state a claim for actual fraud under § 548.

Because the Court concludes that the payment of the second mortgage loan was not constructively fraudulent as a matter of law, and that the Trustee did not allege sufficient facts to support a claim of actual fraud, the Court finds that the Trustee has failed to state a claim upon which relief can be granted as to those portions of her complaint. Accordingly, the Court grants Defendant Bank of America's motion to dismiss as to those specific claims. The remainder of the alleged claims, however—that payment of unsecured debts by the debtor to Bank of America resulted in a constructively fraudulent transfer—do state a claim for relief, although just barely. As

a result, Bank of America's motion to dismiss is denied as to this small portion of the Trustee's complaint.

I. Background and Procedural History

The factual allegations of the Trustee's complaint, which are assumed true for the consideration of this motion, are included herein. Other procedural facts are included from the docket of this adversary case.

Defendant Anthony Abeyta and Debtor Eva Rodriguez received title to real property located at 1113 Safford, Garden City, Kansas (the "Safford property") via general warranty deed in May 2001. Two years later, they granted Defendant Bank of America a mortgage on the Safford property, and this first mortgage was recorded with the Finney County Register of Deeds in October 2003.

Although the time of the next action on the Safford property is unclear, the Trustee alleges that either in May 2005 or August 2008, Defendant Abeyta and Debtor executed a second mortgage in favor of Bank of America on the Safford property.[1] The second mortgage was recorded with the Finney County Register of Deeds in September 2008. Defendant Abeyta and Debtor were the absolute owners of the Safford property at the time they made, executed, and delivered both the first and second mortgages.

Shortly after the second mortgage was recorded, in November 2008, Defendant Abeyta and Debtor divorced in Finney County and title to the Safford property was

[1] The second mortgage, attached to the memorandum in support of Bank of America's motion to dismiss, states the date as May 14, 2005. Regardless, the precise date of the second mortgage appears to be immaterial to the disputes discussed herein, and neither party raises an issue with regard to that date.

awarded to Debtor. The parties' settlement agreement further required Defendant Abeyta to pay the debt to Bank of America for the second mortgage and to hold Debtor harmless for the payment of that debt. The Trustee alleges that the amount due on the second mortgage loan from Defendant Abeyta was $15,377.13. There is apparently a third loan between Defendant Abeyta and Debtor with Bank of America, and the property settlement agreement also required Debtor to pay that third loan. As of May 2012, the amount due under this third loan was $7474.57.

Several years later, in May 2012, Debtor entered into an agreement with Defendants Robert and Erlinda Johnson to sell them the Safford property for $53,000. Of the $53,000 gross sale proceeds, $27,000.66 was paid to Bank of America to satisfy the first mortgage, and $15,377.13 was paid to Bank of America to satisfy the second mortgage. After costs, Debtor received $9198.31 from the closing. Shortly after closing, Debtor paid $5000 and $4202 from her checking account to unknown sources. The Trustee alleges that Defendant Abeyta and Bank of America "may have been paid by the Debtor on unsecured debts including, but not limited to, credit card obligations."[2]

On May 29, 2012, Bank of America executed a real estate mortgage release acknowledging full satisfaction of the second mortgage on the Safford property, and the next day that release was filed with the Finney County Register of Deeds. On May 31, 2012, Bank of America executed a real estate mortgage release acknowledging full satisfaction of the first mortgage on the Safford property, and that release was filed

[2] Doc. 1 ¶ 19.

with the Finney County Register of Deeds a week later.

In 2012, the Finney County Appraiser's Office valued the Safford property at $77,700. At the time Debtor sold the Safford property to the Johnson Defendants, she did not offer it for sale to any third party buyers to test its value. About three and a half months after the sale of the property—on September 7, 2012—Debtor filed for chapter 7 bankruptcy relief, and her Schedule A discloses no ownership interest in any Safford property. Her Schedule D, however, lists a secured debt to Bank of America on property listed as 704 Safford.[3]

The Trustee's complaint states three claims. Count 1, against Defendants Abeyta and Bank of America, is for avoidance of a fraudulent conveyance under § 548. The Trustee alleges that Defendant Abeyta was responsible for paying the second mortgage loan, and that Debtor's payment of that loan "or potential other unsecured obligations, at the time she closed the sale of 1113 Safford" was a transfer of an interest of the Debtor in property within the two-year period preceding the date of Debtor's bankruptcy petition. The Trustee alleges that the transfers were made to satisfy a debt obligation that Defendant Abeyta owed, and that the transfers were for the benefit of Defendant Abeyta and Bank of America. The Trustee alleges that Debtor made the transfers with the actual intent to hinder, delay, or defraud any entity to which Debtor was indebted, or that Debtor received less than the reasonably

[3] No explanation is given to the parties as to this property (i.e., 704 Safford versus 1113 Safford). Debtor's Schedule D lists her as a codebtor on the property and her Schedule H states that she is co-liable with her ex-husband, Defendant Abeyta, on this debt.

equivalent value in exchange for the transfers. The Trustee alleges that Debtor received no consideration for the transfers from either Defendant Abeyta or Bank of America. And finally with regard to Count 1, the Trustee alleges that Debtor was insolvent or became insolvent as a result of the transfers, as Debtor's bankruptcy schedules reflect $6760 in assets and $116,421 in liabilities.

Count 2 of the Trustee's complaint is against Defendants Robert and Erlinda Johnson and is also for avoidance of fraudulent transfer under § 548. The Trustee alleges that when Debtor sold the Safford property to Defendants Johnson, Debtor received $24,700 less than the appraised value for the property. The Trustee alleges that this below-appraisal sale is a transfer of an interest of Debtor in property, made within the two-year period preceding Debtor's bankruptcy. Again, the Trustee alleges that Debtor made the transfer with the actual intent to hinder, delay, or defraud any entity to which Debtor was indebted, or that Debtor received less than the reasonably equivalent value in exchange for the transfer, and that Debtor was insolvent or became insolvent as a result of the transfer.

And finally, Count 3 of the Trustee's complaint, against all Defendants, is for recovery of the avoided interests under §§ 550, 551, and 542. The Trustee alleges she is entitled to recover the transfers, or the value of such property, from Defendants under § 550(a), that she is entitled to preserve the transfers, or the value of the property, for the benefit of the bankruptcy estate under § 551, and that she is entitled to turnover of the transfers under § 542.

Defendants Robert and Erlinda Johnson answered the Trustee's complaint,

admitting they purchased the Safford property from Debtor for $53,000, but otherwise generally denying the remaining allegations against them.[4] While a motion to extend time to answer was pending as to Defendant Abeyta, the Trustee and Defendant Abeyta jointly moved to dismiss the complaint against him, and an order was entered dismissing the claims against Abeyta on October 21, 2014.[5] Defendant Bank of America, in lieu of answering, filed the motion to dismiss that is the subject of this order.

II. Analysis

A. Standards for Motions to Dismiss

Bank of America moves to dismiss the Trustee's complaint under Federal Rule of Civil Procedure 12(b)(6), for "failure to state a claim upon which relief can be granted."[6] The requirements for a legally sufficient claim stem from Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[7] To survive a motion to dismiss, a complaint must present factual allegations, that when assumed to be true, "raise a right to relief above the speculative level."[8] The

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[4] Doc. 15.

[5] Doc. 26. Notwithstanding this dismissal and the deletion of his name in the caption of the case, this decision will continue to refer to Abeyta as a defendant.

[6] Rule 12 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7012(b).

[7] Rule 8 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7008(a).

[8] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

complaint must contain "enough facts to state a claim to relief that is plausible on its face."[9] "[T]he complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims."[10] The Court must accept the nonmoving party's factual allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.[11]

While the Trustee has repeatedly referred to the Bank of America second mortgage within her complaint, she did not attach a copy of it. Bank of America has attached a copy of the second mortgage to its memorandum in support of its motion to dismiss. In the Tenth Circuit, "[i]t is accepted practice that, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss."[12] Otherwise, "a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff

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[9] *Id.* at 570. The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires more than "a sheer possibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). However, "mere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555).

[10] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

[11] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

[12] *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 961 (10th Cir. 2001) (internal quotations omitted).

relied."[13] Generally stated:

> The Court may consider documents outside of the complaint on a motion to dismiss in three instances . . . First, the Court may consider outside documents pertinent to ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) [relating to subject-matter jurisdiction]. Second, the Court may consider outside documents subject to judicial notice, including court documents and matters of public record. Third, the Court may consider outside documents that are both central to the plaintiff's claims and to which the plaintiff refers in his complaint.[14]

Despite these three exceptions, a court is not *obligated* to consider extraneous documents; the decision to do so is discretionary.[15]

Here, the second mortgage is absolutely central to a portion of the claims the Trustee has made against Bank of America, and the Trustee (in her response to the motion to dismiss) does not dispute the authenticity of the copy of the second mortgage Bank of America attached to its memorandum in support of its motion to dismiss. As a result, the Court will consider the second mortgage provided by Bank of America.[16]

B. Section 548 Fraudulent Transfer

The Trustee's complaint raises two types of fraudulent transfer claims against Bank of America: for contractive fraud and for actual fraud. The relevant portions of

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[13] *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997).

[14] *Driskell v. Thompson*, 971 F. Supp. 2d 1050, 1057 (D. Colo. 2013) (internal citations omitted).

[15] *Prager v. LaFaver*, 180 F.3d 1185, 1189 (10th Cir. 1999).

[16] *See Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941–42 (10th Cir. 2002) (noting holding of *GFF Corp.* that a court "may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute authenticity").

§ 548 state:

> (a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . 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--
>
> (A) made such transfer . . . with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B)
>
> (i) received less than a reasonably equivalent value in exchange for such transfer . . . ; and
>
> (ii) (I) was insolvent on the date that such transfer was made . . . , or became insolvent as a result of such transfer . . . [.]

The Trustee will ultimately bear the burden of proof as to each element of a § 548(a) claim.[17]

1. Constructive Fraud

To prove constructive fraud under § 548(a)(1)(B), the Trustee must allege that Debtor: (1) transferred property within two years of the bankruptcy filing; (2) received less than reasonably equivalent value for the transfer; and (3) was insolvent as a result thereof.[18] Regarding the Trustee's constructive fraud claim, Bank of America focuses its motion to dismiss on the issue of "reasonably equivalent value" and the second mortgage. Although the phrase "reasonably equivalent value" is not defined by the Bankruptcy Code, the word "value" is defined in § 548(d)(2)(A) as "property, or

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[17] *In re Adam Aircraft Indus., Inc.*, 510 B.R. 342, 352 (10th Cir. BAP 2014).

[18] *Id.*

satisfaction or securing on a present or antecedent debt of the debtor."[19]

Bank of America argues that Debtor's payment of $15,377.13 to Bank of America to satisfy its second mortgage loan is not constructively fraudulent because when a fully secured creditor releases its lien in exchange for payment, the fully secured creditor gives reasonably equivalent value to the payor. Bank of America cites two cases for this proposition: *In re Vinzant*[20] and *In re C.W. Mining Co.*[21]

In *In re Vinzant*, the "value" question arose regarding release of judgment liens in exchange for payment.[22] Regarding whether release of a lien in exchange for payment is reasonably equivalent value, the bankruptcy court stated:

> In determining fair consideration the Court must look at what the debtors received regardless of what the creditor may have gained or lost. At the time of the transfer defendant held a valid judgment lien on debtors' property. The transfer (i.e., the release of the lien given in exchange for the payment to the defendant) satisfied an antecedent debt of the debtors. This transfer constituted value under § 548(d)(2). . . . The value was roughly equal and so the Court finds reasonably equivalent value was received by the debtors.[23]

Likewise, the *In re C.W. Mining Co.* decision also stated: "If a fully secured creditor releases its lien in exchange for payment, the fully secured creditor gives value in

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[19] A "debt" is then defined in § 101(12) as "liability on a claim," and "claim" is defined by § 101(5) to include the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

[20] 108 B.R. 752 (Bankr. D. Kan. 1989).

[21] 465 B.R. 226 (Bankr. D. Utah 2011).

[22] 108 B.R at 759.

[23] *Id.* (internal citations omitted).

exchange for the payment and the transfer is not fraudulent."[24] The case here is not distinguishable. Bank of America released its lien in exchange for payment of the secured mortgage, and therefore gave reasonably equivalent value in exchange for the payment.[25]

Bank of America also contends that because the Debtor was jointly obligated under the second mortgage, there was an exchange of reasonably equivalent value when Bank of America released its lien in response to payment of the second mortgage loan, regardless whether her divorce settlement's division of debts and assets required someone else—here, Defendant Abeyta—to repay the loan that both parties signed. The second mortgage defines the borrowers (the "Grantors") as both Anthony Abeyta and Eva M. Abeyta.[26] There is also a clause in the second mortgage stating: "Joint and Several Liability. All obligations of Grantor under this Mortgage shall be joint and several, and all references are to Grantor shall mean each and every Grantor. This means that each Grantor signing below is responsible for all obligations in this Mortgage."[27] The Trustee's complaint acknowledges both that Bank of America was a

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[24] 465 B.R. at 232–33.

[25] Although the Tenth Circuit has not expressly weighed in on the matter, "a number of courts have held that 'a dollar-for-dollar reduction in debt constitutes —as a matter of law—reasonably equivalent value for purposes of the fraudulent-transfer statutes.'" *Gonzales v. Liberman (In re Brutsche)*, Case No. 11-13326-7, 2013 WL 501666, at *6 (Bankr. D.N.M. Feb. 11, 2013) (quoting *In re Southeast Waffles, LLC*, 702 F.3d 850, 857 (6th Cir. 2012) (citing additional cases)).

[26] Doc. 17 Ex. A p.1.

[27] Doc. 17 Ex. A p.7.

properly perfected secured creditor and that Bank of America released its lien in exchange for payment of the second mortgage debt. As a result, reasonably equivalent value was exchanged when Bank of America released its fully secured lien in exchange for payment by Debtor, despite the divorce settlement division of debts. The Court must grant Bank of America's motion to dismiss this portion of the Trustee's constructive fraud claim; the Trustee has failed to "state a claim upon which relief can be granted."[28]

But there is a second portion of the Trustee's claim: namely, that Debtor's payment of "potential other unsecured obligations, at the time she closed the sale of 1113 Safford" was also a fraudulent transfer under § 548. The Trustee alleges that this transfer for the unsecured debt was within the two-year period preceding the date of Debtor's bankruptcy petition, that the transfer was made to satisfy a debt obligation held or co-held by Defendant Abeyta, and that the transfer was for the benefit of Defendant Abeyta and Bank of America. The Trustee alleges that Debtor received $9198.31 at closing of the sale of the Safford property, and that shortly after closing, Debtor paid $5000 and $4202 from her checking account to an unknown source(s). The Trustee also specifically alleges a third loan between Defendant Abeyta and Debtor with Bank of America (with a balance of $7474.57 as of May 2012), and that Defendant Abeyta and Bank of America "may have been paid by the Debtor on unsecured debts

[28] Fed. R. Civ. P. 12(b)(6).

including, but not limited to, credit card obligations."[29]

The motion to dismiss filed by Bank of America ignores this transfer and the allegations with respect to it. As stated above, to prove constructive fraud under § 548(a)(1)(B), the Trustee must allege that Debtor: (1) transferred property within two years of the bankruptcy filing; (2) received less than reasonably equivalent value for the transfer; and (3) was insolvent as a result thereof.[30] Although not a model of clarity, the Trustee's complaint does satisfy this bare minimum. The Trustee alleges that Debtor made two transfers—of $5000 and $4202—after the sale of the Safford property to unknown sources. She then also alleges, however, a loan between Debtor and Bank of America for $7474.57, and that Bank of America may have been paid on credit card obligations (which are presumably this third loan). The transfers occurred within two years of Debtor's bankruptcy petition, and the Trustee alleges Debtor was insolvent at the time of filing her petition, which was only three months after the payments were made. Again, Bank of America's motion to dismiss fails to address this claim at all, and gives no explanation for the conflicting amounts of the debt versus the alleged payments, or what value was given in exchange.

Although not many details are given, the Trustee's complaint does have "enough facts to state a claim to relief that is plausible on its face"[31] with respect to these

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[29] Doc. 1 ¶ 19.

[30] *In re Adam Aircraft Indus., Inc.*, 510 B.R. 342, 352 (10th Cir. BAP 2014).

[31] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

allegations. It is unclear the exact amount and date of transfer that is at issue here—the $5000 or $4202 payments were made to unknown sources and the Trustee does not expressly state that Bank of America was the "unknown source" of the transfers. These links can be implied, however, because the Trustee also alleges that Bank of America was paid on unsecured loan obligations. As a result, the Court finds that this portion of the Trustee's complaint survives, and denies Bank of America's motion to dismiss this portion of the Trustee's constructive fraud claim.

2. Actual Fraud

Finally, with respect to the last substantive portion of the Trustee's § 548 complaint against Bank of America—a claim for actual fraud under § 548(a)(1)(A)—the Trustee must allege actual fraudulent intent. And a claim for actual fraud is subject to heightened pleading requirements found in Federal Rule of Civil Procedure 9(b).[32]

Rule 9(b) requires the party to "state with particularity the circumstances constituting fraud," with general allegations only allowed for "malice, intent, knowledge, and other conditions of a person's mind." The party alleging fraud must "'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'"[33] In other words, the

[32] Rule 9(b) is applicable in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7009.

[33] *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (quoting *Lawrence Nat'l Bank v. Edmonds* (*In re Edmonds*), 924 F.2d 982, 987 (10th Cir. 1992)).

alleging party must specify the "'who, what, where, and when of the alleged fraud.'"[34]

The Trustee here has not met this pleading burden as to Bank of America with respect to any of the payments alleged in the complaint. The only allegations made by the Trustee are a recitation of the "actual intent to hinder, delay, or defraud" language from § 548(a)(1)(A). The complaint alleges no facts by which this Court could reasonably infer that Bank of America acted with actual intent to defraud anyone, let alone the who, what, where, or why of such alleged fraud. There are simply no facts in the complaint to satisfy the pleading requirements for an actual fraud claim under § 548(a)(1)(A), let alone the heightened pleading requirements of Rule 9(b). This portion of Bank of America's motion to dismiss is granted.

C. The Trustee's Claims for Recovery and Turnover

The Trustee's remaining claims against Defendant Bank of America are for recovery of any avoided interest under §§ 550, 551, and 542. The Trustee alleges she is entitled to recover the transfers, or the value of such property, from Defendants under § 550(a), that she is entitled to preserve the transfers, or the value of the property, for the benefit of the bankruptcy estate under § 551, and that she is entitled to turnover of the transfers under § 542. These claims are, of course, dependent on success on the fraudulent transfer claims. Because of the above rulings, Defendant Bank of America's motion to dismiss these derivative claims is also granted in part and

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[34] *Jamieson v. Vatterott Educ. Ctr., Inc.*, 473 F. Supp. 2d 1153, 1156 (D. Kan. 2007) (quoting *Plastic Packaging Corp. v. Sun Chem. Corp.*, 136 F. Supp. 2d 1201, 1203 (D. Kan. 2001)).

denied in part. Only the Trustee's claim for constructive fraud based on the "other payments" for the unsecured debt could support these derivative claims.

III. Conclusion

Defendant Bank of America's motion to dismiss[35] is granted in part and denied in part. Bank of America has shown that the Trustee has failed to state claims as to: 1) any actual fraud, or 2) constructive fraud based on the payment and release of the second mortgage. Bank of America's motion to dismiss is also granted as to the derivative claims based on those allegations. The Trustee's remaining constructive fraud claim based on payment of unsecured debt to Bank of America, is, however sufficient to state a claim for relief, and Bank of America's motion to dismiss as to this portion of the Trustee's complaint, and the derivative claims based thereon, is denied.

It is so ordered.

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[35] Doc. 16.