The relief described hereinbelow is SO ORDERED.

SIGNED this 29th day of November, 2023.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

1 BIG RED, LLC,

Debtor.

Case No. 21-20044
Chapter 7

DARCY D. WILLIAMSON,
Chapter 7 Trustee,

Plaintiff,

v.

GUARDIANS OF TRAVEL, LLC, and
CHEROKEE HOLDINGS, LLC,

Defendants.

Adv. No. 23-6002

ORDER GRANTING MOTION TO DISMISS IN PART

Plaintiff Darcy Williamson is the Chapter 7 Trustee for the bankruptcy estate of debtor 1 Big Red, LLC. Her first amended complaint[1] in this adversary proceeding asserts claims against defendant Guardians of Travel, LLC, for avoidance of fraudulent transfers under 11 U.S.C. §§ 548 and 544(b)[2] (Counts I and II), avoidance of fraudulent obligations under §§ 548 and 544(b) (Counts III and IV), avoidance of preferences under § 547 (Count V), recovery of avoidable transfers under § 550 (Count VI), disallowance of claims under § 502(d) (Count VII), and unjust enrichment/quantum meruit (Count VIII); and against defendant Cherokee Holdings, LLC, for avoidance of fraudulent obligations under § 548 (Count III), recovery of avoidable transfers under § 550 (Count VI), and disallowance of claims under § 502(d) (Count VII).

Before the Court is Defendants' motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[3] The Court will grant the motion in part: Counts III and VII will be dismissed as to Cherokee Holdings and Count VIII, to the extent asserting a claim for quantum meruit under Missouri law, will be dismissed as to Guardians of Travel. Defendants' motion will otherwise be denied.

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[1] ECF 3.

[2] All references to statutes in this order are to Title 11, United States Code, unless otherwise indicated.

[3] ECF 21. This matter involves core proceedings under 28 U.S.C. § 157(b)(2)(B), (F), and (H). Venue is appropriate under 28 U.S.C. § 1409. Defendants appear by attorneys Matthew Mueller and Edward Greim. The Trustee appears by attorneys Eric Johnson and Andrea Chase.

I. Factual Allegations

The Trustee's first amended complaint (the "**complaint**") alleges:

- Debtor **1 Big Red**, LLC, is a limited liability company organized under Missouri law. (First Am. Compl. ¶ 5, ECF 3.)
- 1 Big Red filed for bankruptcy under Chapter 11 on January 15, 2021. (*Id.* ¶ 23.)
- Before it filed for bankruptcy, 1 Big Red was in the business of buying, rehabbing, and selling distressed single-family residential, multi-family residential, and commercial properties. (*Id.* ¶ 16.)
- **Sean Tarpenning** owns 100% of 1 Big Red.[4] (*Id.* ¶ 9.)
- Tarpenning is the president and managing member of 1 Big Red.[5] (*Id.* ¶ 9.)
- Tarpenning exercised complete and total authority and control over 1 Big Red. (*Id.* ¶ 9.)
- Defendant **Guardians of Travel**, LLC,[6] is a limited liability company organized under Missouri law. (*Id.* ¶ 10.)
- **Mackaylee Beach** is the sole member of Guardians of Travel. (*Id.* ¶ 11.)
- Beach resides with Tarpenning. (*Id.* ¶ 12.)
- Defendant **Cherokee Holdings**, LLC, is a limited liability company organized under Missouri law. (*Id.* ¶ 14.)
- Beach acted as a manager of Cherokee Holdings, including executing documents as manager for Cherokee Holdings. (*Id.* ¶ 15.)

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[4] In the alternative, Tarpenning and the Red White and Blue Trust, of whom Tarpenning is the sole beneficiary, own 100% of 1 Big Red. *See* First Am. Compl. ¶ 9, ECF 3.

[5] According to 1 Big Red's second amended statement of financial affairs, Tarpenning is the CEO of 1 Big Red. *See* Case No. 21-20044, Stmt. Fin. Affairs for Non-Individual (Amended), line 28, ECF 396.

[6] The parties frequently refer to Guardians of Travel as "**GOT**."

- Beach also acted as a manager of 1 Big Red, including executing documents as manager for 1 Big Red that were recorded with the recorder of deeds for Jackson County, Missouri. (*Id.* ¶ 13.)

- On June 14, 2020, 1 Big Red executed a deed of trust in favor of Guardians of Travel (the "**Deed of Trust**"). (*Id.* ¶ 42.)

- In the Deed of Trust, 1 Big Red purported to grant a lien to Guardians of Travel on certain tracts of real property. (*Id.* ¶ 43.)

- Around the time the Deed of Trust was executed, 1 Big Red was facing several foreclosure proceedings that included Tracts 1, 2, and 3 listed in the Deed of Trust. (*Id.* ¶ 46.)

- On June 25, 2020, Guardians of Travel executed a deed of release, releasing its interest in Tract 5 listed in the Deed of Trust, referencing a partial payment of debt as the consideration for the release. (*Id.* ¶ 44.)

- On July 31, 2020, Guardians of Travel executed a deed of release, releasing its interest in Tract 4 listed in the Deed of Trust, referencing a partial payment of debt as the consideration for the release. (*Id.* ¶ 45.)

- Prior to August 2020, 1 Big Red owned real property located at 4220 Monroe Avenue in Kansas City, Missouri ("the **4220 Property**"). (*Id.* ¶ 47.)

- On August 4, 2020, 1 Big Red transferred the 4220 Property to Guardians of Travel via warranty deed. (*Id.* ¶ 48.)

- Guardians of Travel transferred the 4220 Property to Cherokee Holdings via warranty deed on September 9, 2020. (*Id.* ¶ 49.)

- Cherokee Holdings transferred the 4220 Property via warranty deed on November 19, 2020. (*Id.* ¶ 50.)

- Prior to August 2020, 1 Big Red owned real property located at 3862 E. 60th Terrace in Kansas City, Missouri (the "**3862 Property**"). (*Id.* ¶ 51.)

- On August 4, 2020, 1 Big Red transferred the 3862 Property to Guardians of Travel via warranty deed. (*Id.* ¶ 52.)

- Guardians of Travel transferred the 3862 Property to Cherokee Holdings via warranty deed on September 9, 2020. (*Id.* ¶ 53.)

- Cherokee Holdings transferred the 3862 Property via warranty deed on June 2, 2021. (*Id.* ¶ 54.)

- Prior to September 2020, 1 Big Red owned real property located at 9812 E. 41st Street in Kansas City, Missouri (the "**9812 Property**"). (*Id.* ¶ 55.)

- On September 1, 2020, 1 Big Red transferred the 9812 Property to Guardians of Travel via warranty deed. (*Id.* ¶ 56.)

- It is unknown what consideration, if any, Guardians of Travel provided to 1 Big Red for the properties. (*Id.* ¶ 58.)

- Tarpenning retained control of the properties after they were transferred to Guardians of Travel. (*Id.* ¶ 71.)

- 1 Big Red's initial bankruptcy schedules, filed January 15, 2021, listed total assets of $3,500,000; total secured claims of $3,094,009; and multiple unsecured claims in unknown amounts. (*Id.* ¶ 33.)

- 1 Big Red's original statement of financial affairs ("**SOFA**"), filed January 15, 2021, did not disclose any transfers to Guardians of Travel. (*Id.* ¶ 33.)

- 1 Big Red's amended SOFA, filed February 23, 2021, did not disclose any transfers to Guardians of Travel. (*Id.* ¶ 35.)

- 1 Big Red's second amended SOFA, filed June 7, 2022, disclosed that 1 Big Red had transferred the 9812 Property to Guardians of Travel. (*Id.* ¶ 57.)

- Guardians of Travel filed a proof of claim for $334,000 for "contractual services performed including marketing and sale of properties" ("**Claim 1-1**") on February 3, 2021. (*Id.* ¶ 60.)

- Attached to Claim 1-1 is a performance contract dated January 1, 2019, providing for a $2,000 payment per house sold (the "**Performance Contract**"); the contract lists 1 Big Red as a party in its recitals but was not executed by 1 Big Red. (*Id.* ¶ 61.)

- Also attached to Claim 1-1 is the Deed of Trust, which references promissory notes for $625,000; however, no promissory notes are attached to the claim. (*Id.* ¶ 62.)

- Claim 1-1 was designated as secured based on the Deed of Trust. (*Id.* ¶ 60.)

- Guardians of Travel filed an amended proof of claim for $334,000 for "services performed and unpaid commissions, deficiency balance" ("**Claim 1-2**") on December 15, 2022. (*Id.* ¶ 63.)

- Claim 1-2 was designated as unsecured. (*Id.*)

- Attached to Claim 1-2 are the Performance Contract and the Deed of Trust. (*Id.* ¶ 64.)

- Claim 1-2 does not provide a list of properties for which Guardians of Travel provided services to 1 Big Red. (*Id.* ¶ 65.)

- 1 Big Red's amended monthly operating report for the period ending June 30, 2021, reflected a cash balance of $48,877 and a negative net worth of $1,647,413. (*Id.* ¶ 38.)

- 1 Big Red's amended monthly operating report for the period ending November 30, 2022, reflected a cash balance of $49,548 and a negative net worth of $1,812,488. (*Id.* ¶ 39.)

- 1 Big Red's bankruptcy case was converted to Chapter 7 on December 28, 2022. (*Id.* ¶ 30.)

- The Trustee was appointed on December 28, 2022, and had seventeen days to retain counsel and investigate potential transfers before filing her complaint.[7] (*Id.* ¶ 59.)

- Substantially all of 1 Big Red's assets had been liquidated as of January 11, 2022. (*Id.* ¶ 40.)

- As of January 14, 2023, the total amount of claims filed and still pending against 1 Big Red's bankruptcy estate was $5,881,468.31. (*Id.* ¶ 41.)

- The Trustee "is continuing her investigation into the books and records of [1 Big Red]." (*Id.* ¶ 59.)

[7] In her objection to Defendants' motion to dismiss, the Trustee explains that because 1 Big Red filed for bankruptcy on January 15, 2021, "the statutes of limitation for both Code § 108(a) and 546(a) could have run as soon as January 17, 2023." *See* Obj. 3-4 & n.1, ECF 31.

II. Analysis

To survive a motion to dismiss under Rule 12(b)(6),[8] a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). In determining whether a claim is plausible, a court must draw all reasonable inferences from the facts in favor of the plaintiffs. *See Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162-63 (10th Cir. 2011)). However, conclusory allegations are not entitled to the assumption of truth, and threadbare recitals of the elements of a cause of action will not suffice. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555); *Brooks*, 985 F.3d at 1281 (citing *Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012)).

The burden is on the party moving for dismissal under Rule 12(b)(6) to show that the complaint does not state a plausible claim for relief. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (3d ed.). Determining whether a complaint states a plausible claim is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Iqbal*, 556 U.S. at 679.

[8] Rule 12(b)(6) applies to this adversary proceeding under Fed. R. Bankr. P. 7012(b).

A. Count III – No obligations to Cherokee Holdings

Count III of the complaint seeks to avoid "2 Year Obligations"[9] under 11 U.S.C. § 548. Defendants argue that Count III should be dismissed as to Cherokee Holdings because the complaint does not allege that 1 Big Red ever incurred any obligations to Cherokee Holdings.[10] The Trustee responds that Count III "only seeks to recover against GOT," and that listing Cherokee Holdings as a defendant in that count was "error."[11] Count III will therefore be dismissed as to Cherokee Holdings.

B. Count VII – No claim filed by Cherokee Holdings

Count VII of the complaint seeks disallowance of Defendants' claims against 1 Big Red's bankruptcy estate under 11 U.S.C. § 502(d). Defendants argue that Count VII should be dismissed as to Cherokee Holdings because Cherokee Holdings has not filed a proof of claim.[12] The Trustee responds that Cherokee Holdings "still has time to do so" because "the deadline to file a claim has not yet begun to run."[13] Because there is no claim to disallow, Count VII will be dismissed as to Cherokee Holdings. *Cf. Redmond v. Progressive Corp. (In re Brooke Corp.)*, 469 B.R. 68, 74 (D. Kan. 2012) (dismissing § 502(d) claim because defendant had not filed proof of

[9] The complaint defines "**2 Year Obligations**" as obligations incurred by 1 Big Red to Guardians of Travel within two years of the petition date, "including, without limitation, any obligations under Claim 1-2 and such additional obligations as may be discovered in discovery." First Am. Compl. ¶ 86, ECF 3.

[10] Mot. 20, ECF 21.

[11] Obj. 13, ECF 31.

[12] Mot. 21, ECF 21.

[13] Obj. 13, ECF 31.

claim). However, the Trustee's right to raise § 502(d) will be preserved if Cherokee Holdings files a proof of claim in the future. *Cf. Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.)*, 429 B.R. 73, 109 (Bankr. S.D.N.Y. 2010) (dismissing § 502(d) claim "without prejudice to renewal in the event Defendants file proofs of claim").

C. Count V – Due diligence and insider status

Count V of the complaint seeks to avoid "GOT 1 Year Transfers,"[14] including the Deed of Trust, as preferences under 11 U.S.C. § 547(b). Section 547(b) provides:

> Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> (B) between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider; and

[14] The complaint defines "**GOT 1 Year Transfers**" as "transfers of an interest of the Debtor in property, including the Deed of Trust, plus such additional amounts as may be discovered in discovery, to or for the benefit of GOT," "during the one year immediately preceding the Petition Date." First Am. Compl. ¶ 103, ECF 3.

> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). Defendants argue that Count V should be dismissed because the complaint does not allege (1) due diligence by the Trustee or (2) Guardians of Travel's insider status at the time of the GOT 1 Year Transfers.[15]

1. Due diligence

Congress added the phrase "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably known affirmative defenses" to § 547(b)'s introductory language in 2019.[16] However, the effect of the added language is unclear. Two bankruptcy courts have held that the added language requires a trustee to plead due diligence as an element of her claim. *See Pinktoe Liquidation Trust v. Dellal (In re Pinktoe Tarantula Ltd.)*, Case No. 18-10344 (LSS), Adv. No. 20-50597 (LSS), 2023 WL 2960894, at *5 (Bankr. D. Del. Apr. 14, 2023) (dismissing preference claim with leave to amend, reasoning that complaint contained "no allegation, general or otherwise, that Plaintiff performed due diligence"); *Husted v. Taggart (In re ECS Refin., Inc.)*, 625 B.R. 425,

[15] Mot. 4, 6, ECF 21.

[16] The amendment took effect on February 19, 2020. *See Collier on Bankruptcy* ¶ 547.02A n.1 (Richard Levin & Henry J. Sommer eds., 16th ed.).

458 (Bankr. E.D. Cal. 2020) (dismissing preference claim, observing that "Plaintiff['s] use of pre-*Iqbal*/*Twombly* notice style pleading and a very general nature of the allegations in the [complaint] suggest a lack of pre-filing due diligence"). Other courts did not rule on whether due diligence must be pleaded, reasoning that *if* due diligence is now an element of a preference claim, the plaintiff had adequately pleaded it. *See, e.g.*, *Tese-Miller v. Lockton Cos. (In re Flywheel Sports Parent, Inc.)*, Case No. 20-12157 (JPM), Adv. No. 22-01109 (JPM), 2023 WL 2245282, at *4 (Bankr. S.D.N.Y. Feb. 27, 2023); *Robichaux v. The Moses H. Cone Mem'l Hosp. Operating Corp. (In re Randolph Hosp., Inc.)*, 644 B.R. 446, 462 (Bankr. M.D.N.C. 2022); *Ctr. City Healthcare, LLC v. McKesson Plasma & Biologics LLC (In re Ctr. City Healthcare, LLC)*, 641 B.R. 793, 802 (Bankr. D. Del. 2022); *Weinman v. Garton (In re Matt Garton & Assocs., LLC)*, Case No. 19-18917 TBM, Adv. No. 21-1215 TBM, 2022 WL 711518, at *12 (Bankr. D. Colo. Feb. 14, 2022); *Insys Liquidation Trust ex rel. Henrich v. Quinn Emanuel Urquhart & Sullivan (In re Insys Therapeutics, Inc.)*, Case No. 19-11292 (JTD), Adv. No. 21-50359 (JTD), 2021 WL 5016127, at *3 (Bankr. D. Del.. Oct. 28, 2021); *Faulkner v. Lone Star Car Brokering, LLC (In re Reagor-Dykes Motors, LP)*, Case No. 50214-RLJ-11, Adv. No. 20-20-05028, 2021 WL 2546664, at *3 (Bankr. N.D. Tex. June 18, 2021) (holding that complaint adequately pleaded diligence as to one of three defendants); *Sommers v. Anixter, Inc. (In re Trailhead Eng'g LLC)*, Case No. 18-32414, Adv. No. 20-3094, 2020 WL 7501938, at *7 (Bankr. S.D. Tex. Dec. 21, 2020). Others dismissed the preference claim on other grounds. *See Miller v. Nelson (In re Art*

Inst. of Phila. LLC), Case No. 18-11535 (CTG), Adv. No. 20-50627 (CTG), 2022 WL 18401591, at *19-20 (Bankr. D. Del. 2022); *In re Reagor-Dykes Motors*, 2021 WL 2546664, at *5 (holding that complaint did not adequately plead diligence as to two of three defendants).

Here, Defendants argue that the Trustee has not adequately pleaded due diligence because her complaint (1) does not recite the language of § 547(b)'s due-diligence requirement; (2) does not allege that the Trustee reviewed specific records; and (3) does not allege that she communicated with Defendants or their counsel before initiating this proceeding.[17] However, as to (1), a recitation of the statutory language would not make the Trustee's claim under § 547(b) any more (or less) plausible; courts disregard formulaic recitations in determining whether a complaint states a plausible claim. *See Bledsoe v. Carreno*, 53 F.4th 589, 606 (10th Cir. 2022); *cf. In re Reagor-Dykes Motors*, 2021 WL 2546664, at *2 ("[Mimicking the language of the statute . . . is not helpful."). And as to (2), the Trustee's complaint contains allegations regarding the contents of 1 Big Red's bankruptcy petition, schedules, SOFAs, and monthly operating reports; Guardians of Travel's proofs of claim; the performance contract between 1 Big Red and Guardians of Travel; the Deed of Trust itself; and other property records related to the Deed of Trust—from which the Court can reasonably infer that the Trustee reviewed those records before filing her complaint.

[17] Mot. 6, ECF 21.

As to (3), the Trustee appears to concede that she did not send a demand letter or communicate with Defendants before filing her complaint. She argues, however, that "there was no time to do so" because she was not appointed until December 28, 2022, and "the statutes of limitation for both Code § 108(a) and 546(a) could have run as soon as January 17, 2023."[18] In other words, the Trustee argues that it would not have been reasonable, in the circumstances of this case, for her to send a demand letter. Defendants reply that § 547(b) "requires more" than the diligence reflected in the Trustee's complaint.[19] However, Defendants do not identify any other diligence that the Trustee *could* have reasonably performed in the time available to her—and a number of cases have found sufficient allegations of due diligence without a demand letter or other pre-filing communications with the defendant. *See, e.g.*, *In re Flywheel Sports Parent*, 2023 WL 2245382, at *4 (observing that trustee reviewed debtor's books, records, and "other available information"); *In re Randolph Hosp.*, 644 B.R. at 462 (observing that complaint contained wire and check records and copy of contract as attachments and described debtor's contractual relationship with defendants); *In re Reagor-Dykes Motors*, 2021 WL 2546664, at *3 (observing that complaint "assert[ed] minimal factual allegations about the relationship between the Debtors and the defendant as well as the circumstances surrounding the transfers"); *In re Trailhead Eng'g*, 2020 WL

[18] Obj. 4, ECF 31.

[19] Reply 4, ECF 45.

7501938, at *7 (observing that complaint referred to several documents and "mapped out the alleged structure of the parties' relationship").

Defendants also reply that the Trustee does not allege "that any potential defenses were considered."[20] But § 547(b) only requires the Trustee to consider "known or reasonably knowable" affirmative defenses that would be revealed by reasonable diligence—and Defendants do not argue that any such defenses actually exist here, nor do they identify any defenses that the Trustee *should* have considered.

Nor does the Trustee's preference claim against Guardians of Travel appear to be the kind Congress likely sought to dissuade when it amended § 547(b) in 2019:

> The most plausible explanation is that it seems to have been the practice for chapter 11 liquidating trusts to employ what are called, in the vernacular, "preference mills." The same practice may also be prevalent in larger chapter 7 cases. These entities pursue preference actions for the trustee and take a percentage of the recovery. Their business model is simple: they take the list from the debtor's statement of affairs of all payments the debtor made in the 90 days before bankruptcy [one year for insiders] and file preference actions against all the recipients without undertaking any investigation of the merits of the causes of action, such as whether the transfer was ordinary course, whether it was COD or otherwise a contemporaneous exchange, or any other defense. . . . It makes economic sense for defendants to settle for nuisance value or the cost of defense.[21]

[20] Reply 4, ECF 45.

[21] *Collier on Bankruptcy* ¶ 547.02A (Richard Levin & Henry J. Sommer eds., 16th ed.).

The Trustee's complaint in this case specifically identifies four transfers from 1 Big Red to Guardians of Travel that occurred within a year of the petition date: the 4220 Property, the 3862 Property, the 9812 Property, and the Deed of Trust. However, Count V singles out the Deed of Trust as a preference under § 547—suggesting that the Trustee considered the merits of her preference claim and based it on more than a transfer date. The complaint suggests the same; it contains specific allegations as to the relationship between 1 Big Red and Guardians of Travel (and their principals, Sean Tarpenning and Mackaylee Beach); the performance contract between 1 Big Red and Guardians of Travel; the promissory note from 1 Big Red to Guardians of Travel; and the Deed of Trust. Nothing in the Trustee's complaint suggests an abusive filing. *Cf. Reagor-Dykes*, 2021 WL 2546664, at *3 (observing that trustee's allegations did "not reflect an abusive filing").

For the reasons stated above, the Court finds—assuming without deciding that the Trustee must plead due diligence as an element of her preference claim[22]—that the complaint adequately pleads it.

[22] Another possibility is that the due-diligence language is about the plaintiff's obligations under Fed. R. Bankr. P. 9011: a trustee who failed to consider the defendant's known or reasonably knowable affirmative defenses (i.e., those that would be obvious upon reasonable diligence in the circumstances of the case) before filing a preference claim would risk sanctions "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Bankr. P. 9011(c)(2); *see* Fed. R. Bankr. P. 9011(c)(1) (excepting "the filing of a petition" from 21-day safe-harbor provision). *Cf.* David H. Taylor, *Filing with Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There Is a Dispositive, Yet Waivable, Affirmative Defense?*, 47 Syracuse L. Rev. 1037 (1997) (comparing availability of Rule 11 sanctions under *Brubaker v. City of Richmond*, 943 F.2d 1363 (4th Cir. 1991), *Souran v. Travelers Ins. Co.*, 982 F.2d 1497 (11th Cir. 1993), and *White v. Gen. Motors Corp.*, 908 F.2d 675 (10th Cir. 1990)).

2. Guardians of Travel as insider

Next, Defendants argue that the Trustee's complaint does not adequately allege that Guardians of Travel was an "insider" of 1 Big Red at the time of the GOT 1 Year Transfers.[23]

In bankruptcy, there are two types of insiders. The first, known as "*per se*" or "statutory" insiders, are those listed in 11 U.S.C. § 101(31). The second, "non-statutory" insiders, are those not listed in § 101(31) but whose relationship with the debtor is "sufficiently close that the two were not dealing at arm's length." *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1079 (10th Cir. 2007). To establish that a creditor is a non-statutory insider of a debtor, a trustee must show that the two (1) had a close relationship and (2) were not transacting business at arm's length.[24] *See Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 (10th Cir. 2008) (holding that close relationship alone is insufficient). The determination of the parties' closeness and the nature of their dealing is a highly fact-intensive endeavor. *Weinman v. Walker (In re Adam Aircraft Indus., Inc.)*, 510 B.R. 342, 350 (B.A.P. 10th Cir. 2014); *cf. In re Kunz*, 489 F.3d at 1079 (observing

[23] Mot. 7-8, ECF 21.

[24] An arm's length transaction is "a transaction conducted as though the two parties were strangers." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. v. The Village at Lakeridge, LLC*, 138 S. Ct. 960, 968 (2018) (citing *Black's Law Dictionary* 1726 (10th ed. 2014)); *see Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.4 (10th Cir. 2008) ("The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction." (quoting *Black's Law Dictionary* 109 (6th ed. 1990)).

that determination of whether creditor is non-statutory insider "requires the weighing of evidence").

Here, Defendants argue that the Trustee has not adequately alleged Guardians of Travel's insider status because her allegations are not about Guardians of Travel *per se*, but rather its sole member, Mackaylee Beach.[25] Defendants point out that even if Beach (who, the Trustee alleges, "acted as a manager of 1 Big Red") is a statutory insider of 1 Big Red, her insider status is not automatically imputed to Guardians of Travel.[26] But to say that Guardians of Travel is not automatically a *per se* insider because of Beach does not mean that Beach is *irrelevant* to whether Guardians of Travel is a non-statutory insider. The issue is whether it is plausible, based on the facts alleged in the Trustee's complaint, that the relationship between Guardians of Travel and 1 Big Red was sufficiently close that the two did not operate at arm's length when the Deed of Trust was executed. *See In re U.S. Med.*, 531 F.3d at 1280.

It is plausible. The Trustee alleges that Beach, the sole member of Guardians of Travel, also "acted as a manager of [1 Big Red], including executing documents as manager for [1 Big Red] that were recorded with the recorder of deeds for Jackson County, Missouri." First Am. Compl. ¶¶ 11, 13. She alleges that Beach lives with

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[25] Reply 4, ECF 45.

[26] *Id.* at 5. *See, e.g.*, *Miller Ave. Pro. & Promotional Servs., Inc. v. Brady (In re Enter. Acquisition Partners, Inc.)*, 319 B.R. 626, 632 (B.A.P. 9th Cir. 2004) (holding that corporation wholly owned by insider was not itself a *per se* insider); *cf. In re U.S. Med.*, 531 F.3d at 1276 n.3 ("Dr. Seitz was a director on Debtor's board, but the question here is whether *Creditor*, as a corporation, was an insider, not Dr. Seitz.").

Tarpenning, the president and managing member of 1 Big Red. *Id.* ¶¶ 9, 11-12. She alleges that 1 Big Red did not sign the performance contract attached to Guardians of Travel's proof of claim. *Id.* ¶ 61. She alleges that Guardians of Travel's proof of claim does not list the properties for which it provided services to 1 Big Red. *Id.* ¶ 65. She alleges that several of the properties subject to the Deed of Trust went into foreclosure around the time the Deed of Trust was executed. *Id.* ¶ 46. She alleges that 1 Big Red fraudulently transferred three other properties to Guardians of Travel around that time. *Id.* ¶¶ 67-74. And she alleges that despite her continuing investigation into the books and records of 1 Big Red, "it is unknown what consideration, if any, was provided by [Guardians of Travel] to [1 Big Red]" in exchange for those transfers. *Id.* ¶¶ 58-59. Taking these allegations as true, it is plausible that the relationship between Guardians of Travel and 1 Big Red was sufficiently close that the two did not operate at arm's length when the Deed of Trust was executed. For that reason, and because "[a] court's determination of the parties' closeness and the nature of their dealing is a highly fact-intensive endeavor," *In re Adam Aircraft Indus.*, 510 B.R. at 351,[27] the Court finds that the complaint adequately pleads Guardians of Travel's insider status.

[27] In *U.S. Medical*, the bankruptcy court had already made that determination; it had "specifically found *no evidence* that [alleged insider's CEO] controlled, sought to control, or exercised any undue influence on Debtor." 531 F.3d at 1274.

D. Counts I-V – Insolvency

Counts I and II of the Trustee's complaint seek to avoid "GOT 2 Year Transfers" and "GOT 4 Year Transfers"[28] to Guardians of Travel, including the transfers of the 4220, 3862, and 9812 Properties and the Deed of Trust, as actual and/or constructive fraud under 11 U.S.C. §§ 548 and 544(b). Counts III and IV seek to avoid "2 Year Obligations" and "GOT 4 Year Obligations" to Guardians of Travel,[29] including any obligations under Claim 1-2, under §§ 548 and 544(b). Count V, as stated on page 9 *supra*, seeks to avoid "GOT 1 Year Transfers," including the Deed of Trust, under § 547. Defendants argue that Counts I through V should be dismissed because, they contend, the Trustee's complaint contains only conclusory allegations that 1 Big Red was insolvent when it made the transfers and incurred the obligations at issue. This argument has two flaws.

First, Counts I through IV do not require the Trustee to plead insolvency. Each of those four counts asserts claims for actual and/or constructive fraud—Counts I and III do so under § 548; Counts II and IV, under § 544(b), through which

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[28] The complaint defines "**GOT 2 Year Transfers**" and "**GOT 4 Year Transfers**" as property transferred by 1 Big Red to Guardians of Travel within, respectively, two and four years of the petition date, "including, without limitation, the 4220 Property, the 3862 Property, the 9812 Property, the Deed of Trust, and such additional amounts as may be discovered in discovery." *See* First Am. Compl. ¶¶ 67, 76, ECF 3.

[29] The complaint defines "**2 Year Obligations**" and "**GOT 4 Year Obligations**" as obligations incurred by 1 Big Red to Guardians of Travel within, respectively, two and four years of the petition date, "including, without limitation, any obligations under Claim 1-2 and such additional obligations as may be discovered in discovery." *See id.* ¶¶ 86, 94. (The complaint's inclusion of Cherokee Holdings in Count III was "error." *See* page 8 *supra*.)

the Uniform Fraudulent Transfer Act, or "**UFTA**," would apply.[30] But a claim for actual fraud, under either § 548 or the UFTA, does not require insolvency—rather, insolvency is one of many "badges of fraud" that may serve as evidence of a debtor's fraudulent intent. *See* Mo. Rev. Stat. § 428.024.1(1), .2(9); Kan. Stat. Ann. § 33-204(a)(1), (b)(9); *Taylor v. Rupp (In re Taylor)*, 133 F.3d 1336, 1338-39 (10th Cir. 1998). A claim for constructive fraud under the UFTA requires *either* insolvency or one of two alternatives. *See* Mo. Rev. Stat. §§ 428.024.1(2), 428.029; Kan. Stat. Ann. §§ 33-204(a)(2), 33-205. And a claim for constructive fraud under § 548 requires either insolvency or one of three alternatives.[31] *See* 11 U.S.C. § 548(a)(1)(B)(ii). Thus, even if Defendants were correct in arguing that the Trustee did not adequately plead that 1 Big Red was insolvent at the relevant times, their argument would not be fatal to Counts I through IV.[32]

Second, as to Counts I through V, the Trustee *has* alleged facts to support her assertions that 1 Big Red was insolvent when it transferred the 4220, 3862, and 9812 Properties to Guardians of Travel; executed the Deed of Trust; and incurred obligations reflected in Claim 1-2. Specifically, the complaint alleges that 1 Big Red

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[30] Counts II and IV cite both the Missouri UFTA and the Kansas UFTA; for purposes of this order, the Court need not decide which one applies.

[31] "Under familiar principles, claims for constructive 'fraudulent' transfers are not really claims for 'fraud' as that term usually is understood." *In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 35-36 (Bankr. S.D.N.Y. 2007). Instead, such claims are "based on the transferor's financial condition and the sufficiency of the consideration provided by the transferee." *In re White Metal Rolling & Stamping Corp.*, 222 B.R. 417, 429 (Bankr. S.D.N.Y. 1998).

[32] A failure to plead 1 Big Red's insolvency would only be fatal as to Count V. *Cf.* 11 U.S.C. § 547(b)(3) ("made while the debtor was insolvent").

was subject to three specific foreclosure actions in July 2020[33] and that 1 Big Red's debts exceeded its assets by somewhere between $1.6 million and $5.88 million when it filed for bankruptcy on January 15, 2021. It is reasonable to infer from those facts—and thus plausible—that 1 Big Red was insolvent in June 2020, when it executed the Deed of Trust, and in August and September 2020, when it transferred the 4220, 3862, and 9812 Properties.[34] And because the obligations reflected in Claim 1-2 were purportedly incurred in $2,000 increments between January 1, 2019, and January 15, 2021,[35] it is likewise plausible that 1 Big Red was insolvent when at least some of those obligations were incurred.

Moreover, the complaint cites 1 Big Red's bankruptcy filings, the proofs of claim filed by 1 Big Red's creditors, and the 2020 bankruptcy filings of 1 Big Red's "sister companies" USREEB and USREEB Dayton[36] to support its factual

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[33] Under the UFTA, a debtor who is generally not paying his debts as they become due is presumed insolvent. *See* Mo. Rev. Stat. § 428.014.2; Kan. Stat. Ann. § 33-202(b).

[34] *See Williamson v. Five Point Ventures, LLC (In re Soc. Networking Tech., Inc.)*, Case No. 18-10177, Adv. No. 18-5091, 2018 WL 6492694, at *2 n.10 (Bankr. D. Kan. Dec. 6, 2018) (citations omitted) (inferring debtor's earlier insolvency from debtor's petition-date insolvency).

[35] The Performance Contract attached to Claim 1-2 was dated January 1, 2019, and provided that 1 Big Red would pay Guardians of Travel $2,000 per house sold. *See supra* page 5.

[36] *See In re US Real Estate Equity Builder LLC* ("**USREEB**"), Case No. 20-21358; *In re US Real Estate Equity Builder Dayton LLC* ("**USREEB Dayton**"), Case No. 20-21359. The Trustee alleges that USREEB, USREEB Dayton, and 1 Big Red "share common ownership," that Tarpenning is the "president, managing member, and controlling individual" of all three companies, and that the three companies' business loans were frequently "cross-collateralized and/or co-signed or guaranteed by the other affiliates and/or Tarpenning." *See* First Am. Compl. ¶¶ 8-9, 18, ECF 3.

allegations—meaning that the Court can consider those documents in ruling on the present motion.[37] The documents cited in the complaint contain additional information as to 1 Big Red's financial situation during the months and years preceding its bankruptcy petition. For example, 1 Big Red's schedules report that most of its secured debt was incurred in 2018 and 2019, prior to the allegedly-fraudulent transfers; its SOFA reports that 1 Big Red lost five properties to foreclosure in July 2020; and its creditors' claims reflect debts far exceeding those reported by 1 Big Red in its schedules—including debts to USREEB and USREEB Dayton, who filed claims for $1,638,065 and $823,459.66, respectively, against 1 Big Red's bankruptcy estate. In light of the documents cited in the complaint, and taking as true the Trustee's factual allegations, it is plausible that 1 Big Red was insolvent when it executed the Deed of Trust in June 2020; transferred the 4220, 3862, and 9812 Properties in June, August, and September 2020; and incurred obligations reflected in Claim 1-2. The complaint thus adequately pleads 1 Big Red's insolvency for purposes of Counts I through V.

E. Counts I through IV – Actual fraud and Rule 9(b)

Counts I through IV of the complaint seek to avoid the GOT 2 Year Transfers, GOT 4 Year Transfers, 2 Year Obligations, and GOT 4 Year Obligations as "actually fraudulent"—Counts I and III, under § 548(a)(1)(A); Counts II and IV,

[37] The Court can consider the additional materials in ruling on the motion to dismiss because they are (1) subject to judicial notice as part of the Court's own files and records and (2) referred to in, and central to, the Trustee's complaint. *See Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006); *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013) (citation omitted).

under § 544(b) and the UFTA.[38] Defendants argue that Counts I through IV should be dismissed because the Trustee has not (they say) pleaded those claims with particularity as required by Fed. R. Civ. P. 9(b).[39]

First, Defendants argue that Counts I through IV do not satisfy Rule 9(b) because the Trustee has not alleged the "value of any property fraudulently transferred" or "the consideration paid, if any."[40] To support their argument, Defendants cite *Generation Resources*,[41] a 2018 decision in which this Court stated that to satisfy Rule 9(b), a plaintiff seeking to avoid a fraudulent transfer must allege "(1) date of transfer; (2) amount of transfer (or if transfer was property rather than money, the property transferred and the value); (3) name of transferor; (4) name of initial transferee; and (5) consideration paid, if any, for the transfer." *Rajala v. Husch Blackwell, LLP (In re Generation Resources Holding Co.)*, Case No. 08-20957-7, Adv. Nos. 18-6016, 18-6020, 2018 WL 40298777, at *5 (Bankr. D. Kan. Aug. 20, 2018) (citing *Spradlin v. Pryor Cashman LLP (In re Licking River Mining*

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[38] Section 548(a)(1)(A) and the UFTA authorize a trustee to avoid certain transfers made with "actual intent to hinder, delay, or defraud" any creditor. *See* 11 U.S.C. § 548(a)(1)(A); Mo. Rev. Stat. § 428.024.1(1); Kan. Stat. Ann. § 33-204(a). Such transfers "go[] by the label 'actual fraud' because of [the] intent ingredient." *In re FBN Food Servs., Inc.*, 82 F.3d 1387, 1394 (7th Cir. 1996).

[39] Fed. R. Civ. P. 9(b) applies in adversary proceedings under Fed. R. Bankr. P. 7009. Rule 9(b) requires a plaintiff to plead fraud claims with particularity. *See Crescent Oil Co. v. Near (In re Crescent Oil Co.)*, Bankr. No. 09-20258, Adv. No. 11-6076, 2011 WL 3878377, at *1 (Bankr. D. Kan. Aug. 31, 2011).

[40] Mot. 15, ECF 21.

[41] *Rajala v. Husch Blackwell, LLP (In re Generation Res. Holding Co. LLC)*, Case No. 08-20957-7, Adv. Nos. 18-6016, 18-6020, 2018 WL 4028777 (Bankr. D. Kan. Aug. 20, 2018).

Co.), 565 B.R. 794, 809 (Bankr. E.D. Ky. 2017)). Defendants' argument has three flaws. First, the Court's prior statements regarding Rule 9(b) were dicta—*Generation Resources* addressed a motion for more definite statement under Fed. R. Civ. P. 12(e). Second, although value and/or consideration may sometimes be required to *identify* the transactions at issue, *cf. In re Licking River*, 565 B.R. at 808-09, neither value nor consideration is needed to identify the Deed of Trust or the 4220, 3862, and 9812 Properties (which "GOT 2 Year Transfers" and "GOT 4 Year Transfers" are defined to include) or the obligations reflected in Claim 1-2 (which "2 Year Obligations" and "GOT 4 Year Obligations" are defined to include). In other words, Counts I through IV each include at least one specifically-identified transaction without reference to value or consideration. Third, a transfer or obligation can constitute actual fraud *even if* made or incurred for reasonably equivalent value. *Cf.* 11 U.S.C. § 548(a)(1)(A); Mo. Rev. Stat. § 428.024.1; Kan. Stat. Ann. § 33-204(a); 5 *Collier on Bankruptcy* ¶ 548.04[1][b][iii] ("When a transfer is made with the requisite actual intent, . . . the debtor's receipt of reasonably equivalent value is immaterial."). Thus, Rule 9(b) does not require the Trustee's actual-fraud claims to include allegations of value or consideration.

Next, Defendants argue that Counts I through IV do not satisfy Rule 9(b) because those counts contain (the defendants say) only a "bare recitation" that 1 Big Red acted with "actual intent to hinder, delay, or defraud."[42] This argument also has three flaws. First, Rule 9(b)'s requirements "are relaxed in the bankruptcy

[42] Mot. 15, ECF 21.

context, particularly in cases such as the present in which a trustee has been appointed." *Zazzali v. Mott (In re DBSI, Inc.)*, 445 B.R. 344, 347-48 (Bankr. D. Del. 2011). Second, Rule 9(b) provides that intent "may be alleged generally." Fed. R. Civ. P. 9(b). Third, the complaint contains more than a "bare recitation" of intent—it alleges several badges of fraud.[43] Namely, the Trustee alleges that Guardians of Travel is an insider (badge 1, *see* pages 16-18 and note 43 *supra*); that 1 Big Red retained control of the transferred properties (badge 2); that 1 Big Red did not disclose (to this Court) its transfer of the 9812 Property until June 17, 2022, nearly 17 months into its bankruptcy case (badge 3); that 1 Big Red never disclosed (to this Court) the other allegedly-fraudulent transfers (badge 3); that 1 Big Red was subject to a number of foreclosure actions in July 2020 (badge 4); and that 1 Big Red was insolvent at the time of the transfers (badge 9, *see* pages 20-22 *supra*).

The purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which they are based." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010) (quoting *Koch v. Koch*

[43] "**Badges of fraud**" that may serve as evidence of a debtor's actual fraudulent intent include whether (1) the transfer was to an insider; (2) the debtor retained possession or control of the property transferred after transfer; (3) the transfer was concealed; (4) before the transfer was made, the debtor had been sued or threatened with suit; (5) the transfer was of substantially all of debtor's assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of consideration received by the debtor was (not) reasonably equivalent to the value of the asset transferred or the amount of obligation incurred; (9) the debtor was insolvent or became insolvent shortly after the transfer was made; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the debtor transferred essential assets of the business to a lienor who transferred the assets to an insider of the debtor. *See* Mo. Rev. Stat. § 428.024.2; Kan. Stat. Ann. § 33-204(b); *In re Taylor*, 133 F.3d at 1338-39 (10th Cir. 1998).

Indus., Inc., 203 F.3d 1202, 1236 (10th Cir. 2000)). The "most basic consideration" in determining whether a complaint satisfies Rule 9(b) is "how much detail is necessary to give adequate notice to an adverse party and enable that party to prepare a responsive pleading." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1298, *quoted in Lemmon*, 614 F.3d at 1172. The Trustee has provided that level of detail here. To the extent Rule 9(b) applies to Counts I through IV, the complaint satisfies it.

F. Counts I through IV – Constructive fraud and (in)consistency

Counts I through IV of the complaint also seek to avoid the GOT 2 Year Transfers, GOT 4 Year Transfers, 2 Year Obligations, and GOT 4 Year Obligations as "constructively fraudulent"—Counts I and III, under § 548(a)(1)(B); Counts II and IV, under § 544(b) and the UFTA. A "constructively fraudulent" transfer was made for less than "reasonably equivalent value." *See* 11 U.S.C. § 548(a)(1)(B); Kan. Stat. Ann. § 33-204(a)(2); Mo. Rev. Stat. § 428.024.1(2). Defendants argue that Counts I through IV should be dismissed because the Trustee "fails to plausibly allege that the Debtor received less than reasonably equivalent value for the alleged constructively fraudulent transfers."[44]

First, Defendants argue that the complaint contains "no allegations regarding the value of the Debtor's interests which were allegedly fraudulently transferred to Guardians."[45] However, Counts I and II concern the 4220 Property,

[44] Mot. 17, ECF 21.

[45] *Id.*

the 3862 Property, the 9812 Property, and the Deed of Trust—which, as real property and liens thereon, plausibly had some nonzero value when 1 Big Red transferred them to Guardians of Travel. And Counts III and IV concern the obligations reflected in Claim 1-2—the value of which, according to the claim, is $334,000.[46] Defendants' first argument is thus incorrect.

Second, Defendants argue that the Trustee's allegations that 1 Big Red received less than reasonably equivalent value are "irreconcilable" with her statement that "it is unknown what consideration, if any," Guardians of Travel provided in return for the GOT 2 Year Transfers, the GOT 4 Year Transfers, the 2 Year Obligations, and the GOT 4 Year Obligations.[47] This argument has two flaws. First, as Defendants acknowledge, Fed. R. Civ. P. 8(d) expressly permits a plaintiff to plead alternative statements and inconsistent claims.[48] *Cf. Boulware v. Baldwin*, 545 F. App'x 725, 729 (10th Cir. 2013) ("Federal pleading rules have for a long time permitted the pursuit of alternative and inconsistent claims."). Rule 8(d) thus permits a plaintiff to plead that a transfer is avoidable as either constructive fraud or a preference, depending on whether the debtor received reasonably equivalent value for the transferred property. *See In re Ctr. City Healthcare*, 641 B.R. at 803.

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[46] *See* First Am. Compl. ¶ 63, ECF 3.

[47] Mot. 17-18, ECF 21 (citing First Am. Compl. ¶¶ 58, 72, 81, 90, 98).

[48] [T]he federal rules recognize that inconsistency in the pleadings does not necessarily mean dishonesty, and that frequently a party, after a reasonable inquiry and for proper purposes, must assert contradictory statements when he or she legitimately is in doubt about the factual background of the case or the legal bases that underlie affirmative recovery or defense." Charles Alan Wright & Arthur R. *Miller, Federal Practice & Procedure* § 1283 (4th ed.).

Second, the Trustee's allegation that consideration is "unknown" must be read in light of her allegations that she "is continuing her investigation into the books and records of the Debtor," and that "Claim 1-2 does not provide a listing of properties for which GOT provided services to Debtor."[49] If the Trustee does not know, despite her continuing investigation of 1 Big Red's books and records, whether Guardians of Travel provided any consideration for the transfers at issue, one can reasonably infer that the materials reviewed by the Trustee did not reflect any consideration—and if that is the case, it is plausible that there *was* none. Similarly, if Guardians of Travel did not identify the properties for which it provided services, one can reasonably infer that Claim 1-2 does not, despite the Performance Contract, actually reflect services for specific properties—and if that is the case, it is plausible that Guardians of Travel did not actually provide any services in exchange for the obligations reflected in its claim. These flaws are fatal to Defendants' second argument.

G. Count VIII – Unjust enrichment/quantum meruit

Count VIII of the complaint asserts claims against Guardians of Travel for unjust enrichment and/or quantum meruit arising out of "GOT Avoidable Transfers,"[50] including the transfers of the 4220 Property, the 3862 Property, the

[49] First Am. Compl. ¶¶ 59, 65, ECF 3.

[50] The complaint defines "**GOT Avoidable Transfers**" as, collectively, the GOT 1 Year Transfers, the GOT 2 Year Transfers, and the GOT 4 Year Transfers. *See id.* ¶ 110.

9812 Property, and the Deed of Trust. The complaint does not specify whether Count VIII arises under Kansas or Missouri law.

Kansas courts appear to use the terms "unjust enrichment" and "quantum meruit" interchangeably. *See Tronsgard v. FBL Fin. Group, Inc.*, 312 F. Supp. 3d 982, 1007-08 (D. Kan. 2018) (citing *Haile Group, LLC v. City of Lenexa*, 242 P.3d 1281, 2010 WL 4977221, at *9 (Kan. Ct. App. 2010) (unpublished)).[51] In Kansas, the elements of a claim for unjust enrichment or quantum meruit are:

> (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd., 910 P.2d 839, 847 (Kan. 1996) (unjust enrichment); *see Krigel & Krigel, P.C. v. Shank & Heinemann, LLC*, 528 P.3d 1030, 1036 (Kan. Ct. App. 2023) (quantum meruit; quoting *Haz-Mat Response*).

Missouri courts consider "quantum meruit and unjust enrichment [as] separate, but related, remedies in quasi-contract." *Weisman v. Barnes Jewish Hosp.*, No. 4:19-CV-75 JAR, 2023 WL 4998859, at *10 (E.D. Mo. Aug. 4, 2023). "[T]he elements of each claim are not identical." *Holliday Invs., Inc. v. Hawthorn Bank*, 476 S.W.3d 291, 296 (Mo. Ct. App. 2015).

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[51] While Kansas courts appear to use the terms interchangeably, "no Kansas Supreme Court authority or other persuasive Kansas state authority 'expressly hold[s] that Kansas does not recognize the two doctrines as separate causes of action.'" *Tronsgard*, 312 F. Supp. 3d at 1008 (quoting *Rezac Livestock Comm'n Co. v. Pinnacle Bank*, 255 F. Supp. 3d 1150, 1174 (D. Kan. 2017) (alteration in original)).

> The essential elements of a claim for quantum meruit are: (1) that the plaintiff provided to the defendant materials or services at the defendant's request or with the acquiescence of the defendant; (2) that the materials or services had reasonable value; and (3) that the defendant has failed and refused to pay the reasonable value of such materials or services despite the demands of plaintiff.

Holliday Invs., 476 S.W.3d at 295 (quoting *County Asphalt Paving Co. v. Mosley Constr., Inc.*, 239 S.W.3d 704, 710 (Mo. Ct. App. 2007)).

> To properly and sufficiently state a claim for unjust enrichment, the plaintiff must prove three elements: (1) the defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit.

Holliday Invs., 476 S.W.3d at 295 (quoting *Brunner v. City of Arnold*, 427 S.W.3d 201, 233 (Mo. Ct. App. 2013), *overruled on other grounds by Tupper v. City of St. Louis*, 468 S.W.3d 360 (Mo. 2015) (en banc)).

Defendants first argue that Court VIII fails to state a claim for quantum meruit under Missouri law because the complaint "conflates the elements of *quantum meruit* and unjust enrichment under Missouri law, focusing on the latter and not the former."[52] In response, the Trustee cites the elements of a claim for quantum meruit under *Kansas* law.[53] Because the complaint does not allege that Guardians of Travel "failed and refused to pay the reasonable value" of any materials or services provided by 1 Big Red, Count VIII will be dismissed to the extent it asserts a claim for quantum meruit under Missouri law.

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[52] Mot. 19, ECF 21.

[53] Obj. 12-13, ECF 31 (quoting *Haz-Mat Response*, 910 P.2d at 847).

Next, Defendants argue that the remainder of Count VIII should be dismissed because the Trustee's allegation that Guardians of Travel did not pay for the benefits it received from 1 Big Red is inconsistent with her allegation that "[a]t this time, it is unknown what consideration, if any, was provided by GOT to the Debtor."[54] This argument fails because the federal rules permit the Trustee to plead alternative statements and inconsistent claims. *See* page 27 & note 48 *supra*.

Defendants also argue that the remainder of Count VIII should be dismissed because "[n]o *facts* are alleged as to the benefit allegedly conferred on Guardians, that Guardians knew or appreciated such benefit, or that the retention of those benefits is inequitable."[55] As to benefit, though, the Trustee alleges that 1 Big Red transferred property, incurred obligations to, and granted liens in favor of Guardians of Travel. As to knowledge, the Trustee alleges that Guardians of Travel subsequently transferred the properties to Cherokee Holdings, released two of the liens, and filed two proofs of claim in 1 Big Red's bankruptcy case—from which one can reasonably infer that Guardians of Travel *knew* it had received the properties, liens, and obligations. The issue is the third element: whether the Trustee has plausibly alleged that it would be "inequitable," or "unjust," for Guardians of Travel to retain the properties and liens without payment. According to the Trustee, "[a]llowing GOT to retain the benefit of the transfers would be inequitable to the

[54] Mot. 19-20, ECF 21.

[55] *Id.* at 19.

remaining creditors."[56] Because Defendants' reply brief does not respond to the Trustee's argument, and because the burden at this stage is on Defendants to explain why the complaint fails to state a plausible claim, *see* page 7 *supra*, the Court will deny the motion to dismiss as to the remainder of Count VIII.

H. Jury demand

Defendants' motion to dismiss includes a demand by Cherokee Holdings for a jury trial on Counts III and VI.[57] The Trustee's objection to the motion includes a request to strike the jury demand.[58] Because Defendants' reply suggests that the jury demand as to Count VI was premised on Count III (which will be dismissed as to Cherokee Holdings), the issue appears to be moot.[59]

III. Conclusion

Counts III and VII are hereby dismissed as to Cherokee Holdings. Count VIII, to the extent asserting a claim for quantum meruit under Missouri law, is hereby dismissed as to Guardians of Travel. The remainder of Defendants' motion is hereby denied.

IT IS SO ORDERED.

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[56] Obj. 13, ECF 31.

[57] Mot. 22, ECF 21.

[58] Obj. 16, ECF 31.

[59] *See* Reply 12, ECF 45 ("Should a jury triable claim be lodged against Cherokee, it reserves and does not waive its jury trial rights as may be asserted in the future.").