Court File No.: CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

(Applicant)

AIDE MEMOIRE OF THE TERM LOAN B LENDERS

(Case Conference scheduled for December 3, 2025)

December 1, 2025

Bennett Jones LLP
One First Canadian Place
100 King Street West, Suite 3400
Toronto ON M5X 1A4

Preet K. Gill (#55526E)
Tel.: 416.777.6513
Email: gillp@bennettjones.com

Jesse Mighton (#62291J)
Tel.: 416.777.6255
Email: mightonj@bennettjones.com

Shawn Kirkman (#92214U)
Tel.: 416.777.7499
Email: kirkmans@bennettjones.com

Lawyers for the Ad Hoc Group of Term Loan B Lenders

TO: **THE SERVICE LIST**

1. As indicated in this Court's November 24th endorsement, the purpose of this case conference is "to address next steps and scheduling." For the three reasons set out below, the position of the Ad Hoc Group of Term Loan B Lenders (the "**Secured Lenders**") – supported by Bank of America, N.A. in its capacity as Administrative Agent to the Lenders to LoyaltyOne, Co. ("**LoyaltyOne**") and Loyalty Ventures Inc. ("**LVI**") – is that at this Case Conference, the Court should decline to schedule further litigation on the Tax Matters Agreement (the "**TMA**") pending a determination in the Texas Litigation (defined below) with respect to the TMA.

2. In the alternative, the Secured Lenders request that the threshold issue of whether litigation on the TMA in Ontario should be stayed pending resolution of the Texas Litigation (the "**Threshold Issue**") be the subject of a judicial decision, with proper briefing by the parties, on the proposed timetable attached at Schedule "A".

3. *First,* issues relating to the TMA, and entitlements to the Tax Refund (defined below) thereunder, are now before the U.S. Bankruptcy Court and heading to trial. In a recent Motion to Dismiss filed by Bread Financial Holdings Inc. ("**Bread**") before the U.S. Bankruptcy Court (the "**Motion to Dismiss**"), Bread argued that the claims[1] with respect to the TMA in Texas should be dismissed *because of* this Court's prior determinations on the TMA. The Motion to Dismiss was denied as to Count XIII in June 2025, while Bread's attempt to dismiss the other Counts was converted to a Motion for Partial Summary Judgment which is currently awaiting a decision from Bankruptcy Judge Lopez. The U.S. Bankruptcy Court is therefore currently seized of the potential avoidance of the obligation to transfer the Tax Refund under the TMA. As such, there is a material risk of inconsistent decisions and prejudice should a further determination on entitlement under

[1] Counts XIII, XIV, XV, XVI, XVII, XVIII.

the TMA be rendered by this Court while the Texas Litigation is extant, necessitating a delay in the timing of this Court's adjudication of that issue.

4. *Second,* there is no urgency to continuing litigation on the TMA in Ontario at this time, nor is there any prejudice to any of LoyaltyOne's stakeholders, including Bread, if the Ontario TMA litigation is delayed. On the other hand, there is potential material prejudice to LoyaltyOne and its creditors if litigation continues in Ontario while the Texas Litigation is proceeding to trial.

5. *Third,* LoyaltyOne has limited financial resources and recoveries for its creditors will already be fractional. Therefore, pushing forward on further litigation will expend what limited resources are left, to the detriment of LoyaltyOne's creditors, and unnecessarily occupy judicial time, while the Texas Litigation proceeds to trial. If, at this Case Conference, the Court is not prepared to delay the scheduling of the Ontario litigation pending the outcome of the Texas Litigation, fairness requires, at a minimum, that this Court make a reasoned and reported decision following proper briefs and submissions by the parties on the Threshold Issue of whether the Texas Litigation should result in a stay of further litigation on the TMA in Ontario.

The Impact of the Texas Litigation

6. The LoyaltyOne CCAA proceeding has been moving in parallel with litigation commenced in 2024 in the United States Bankruptcy Court for the Southern District of Texas between Pirinate Consulting Group, LLC, as Trustee of the Loyalty Ventures Liquidating Trust, and Bread (the "**Texas Litigation**").[2]

7. The Texas Litigation seeks to avoid four components of the leveraged spinoff and related

[2] Captioned *Pirinate Consulting Group, LLC v. Bread Financial Holdings Inc. et al*, Adv. Pro. No. 24-03027 (Bankr. S.D. Tex.).

transactions completed on November 5, 2021 involving LVI, the parent company of LoyaltyOne, which rendered it insolvent (the "**Spinoff Transaction**"). One component of the Spinoff Transaction is the TMA which addresses the rights and obligations of multiple parties, including LVI, Bread and their respective subsidiaries.[3] In other words, the TMA as a whole does not solely concern LoyaltyOne (which is not even a signatory to the TMA).

8. Count XIII of the Texas Litigation Complaint seeks the avoidance of the obligation to transfer the proceeds of litigation with the Canada Revenue Agency relating to the 2013 tax year (the "**Tax Refund**") under the TMA.[4] The relevant sections of the Texas Litigation Complaint cited herein are attached at Schedule "B".

9. In May 2024, Bread filed its Motion to Dismiss the Texas Litigation including Count XIII. Bread's Motion to Dismiss included a discussion of the TMA as a component of the broader Spinoff Transaction[5] and alleged that Count XIII, among others, should fail. The relevant portions of Bread's Motion to Dismiss cited herein are attached at Schedule "C".

10. In Bread's reply filed August 23, 2024 in support of its Motion to Dismiss, Bread raised an additional ground that Count XIII, among others, should be dismissed in light of this Court's decision on July 10, 2024:

> Fourth, **the Trustee's claims seeking to avoid the Tax Litigation Proceeds Transfer Obligation should be dismissed in light of a decision issued last month by the Ontario Superior Court of Justice** in connection with the bankruptcy of [LoyaltyOne], a wholly owned subsidiary of LVI. The Canadian court held that there was not sufficient evidence to find that Sobeys' departure was reasonably foreseeable. The court further held that the potential tax refund was an asset of non-Debtor [LoyaltyOne]—that is, it was not an asset of Debtor LVI. Because the

[3] Adversarial Complaint of Pirinate Consulting Group, LLC, as Trustee of the Loyalty Ventures Liquidating Trust dated February 20, 2024 (Redacted) at paras 13 & 282-284 [*Redacted Complaint in Texas Litigation*] relevant portions attached at Schedule "B".
[4] *Redacted Complaint in Texas Litigation*, *ibid* at paras 483-502.
[5] Motion to Dismiss of Bread Financial Holdings, Inc. dated May 20, 2024 (Redacted) at page 15 [*Bread's Redacted Motion to Dismiss*] relevant portions attached at Schedule "C".

> Debtor here (LVI) did not own the asset, it has no legal ability to transfer it, and therefore the Tax Litigation Proceeds Transfer cannot be avoided in this action.[6]
>
> …
>
> On July 10, 2024, the Ontario Superior Court of Justice issued a decision holding, *inter alia*, that the Monitor had *not* proven that Sobeys' departure was reasonably foreseeable, and, therefore, the Court was "not persuaded that [LoyaltyOne] was insolvent on the Spin Date." (*Id.* ¶¶ 46–47.) The Court held accordingly that the TMA was valid and LoyaltyOne remains subject to its obligations thereunder, including its obligation to turn over the potential $96 million tax refund to ADS if and when received. (*Id.* ¶¶ 7, 64.) As relevant here, the Court held that the potential tax refund was an asset of LoyaltyOne (*id.* ¶ 2)—in other words, *not* an asset of LVI. The implication is that the Tax Litigation Proceeds Transfer Obligation could not have been transferred to ADS by LVI. In other words, the transfer was by a *non*-debtor and therefore cannot, as a matter of law, be a fraudulent transfer. *See Tareco Props., Inc.*, 2008 WL 1836377, at *11. **Accordingly, the Trustee's claims relating to the Tax Litigation Proceeds Transfer Obligation should be dismissed**.[7] [emphasis added]

11. While the Secured Lenders disagree with the above characterization of this Court's decision by Bread (as further discussed below), the point is that Bread directly put in issue before the U.S. Bankruptcy Court the notion that this Court had decided matters in respect of the TMA and argued that, as a result, the Texas Litigation in respect of the TMA should be dismissed.

12. Bread's Motion to Dismiss on those grounds was denied by the U.S. Bankruptcy Court.[8] As such, Count XIII will be proceeding to trial before the U.S. Bankruptcy Court,[9] with the discovery process now already underway, and a determination as to the avoidance of the obligation to transfer the Tax Refund will be made by the U.S. Bankruptcy Court in due course.

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[6] Reply of Bread Financial Holdings, Inc. in Further Support of its Motion to Dismiss at page 2 [*Bread's Reply in the Motion to Dismiss*] relevant portions attached at Schedule "D".

[7] *Bread's Reply in the Motion to Dismiss*, *ibid* at pages 20-21.

[8] Transcript of Hearing Before the Honourable Christopher M. Lopez United States Bankruptcy Judge dated June 11, 2025 at page 40 [*Motion to Dismiss Decision Transcript*] complete transcript attached at Schedule "E".

[9] While Bread's Motion to Dismiss also included an allegation that Counts XIV–XVIII fail because of the application of the "safe-harbor" defence contained in section § 546(e) of the U.S. Bankruptcy Code, that argument did *not* include Count XIII because Count XIII is brought under 11 U.S.C. § 548(a)(1)(A) and Bankruptcy Code section § 546(e)'s safe-harbor does not apply to a cause of action asserted under 11 U.S.C. § 548(a)(1)(A). *See* 11 U.S.C. § 546(e). ("Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer …"). Therefore, when Bread's Motion to Dismiss was denied by the U.S. Bankruptcy Court, Count XIII began proceeding to trial.

13. As a result of the U.S. Bankruptcy Court's denial of Bread's Motion to Dismiss (which determination was made on the basis of materials referencing this Court's prior decision) the U.S. Bankruptcy Court is now seized with the potential avoidance of the TMA and the obligations and entitlements thereunder. To that end, Bread filed its Answer to Complaint in the Texas Litigation on June 25, 2025 and has answered allegations with respect to avoidance of the TMA.[10]

14. Given the current status of the Texas Litigation, there is now a material risk of inconsistent decisions, and resulting prejudice, should this Court continue to litigate the matter of entitlements under the TMA while this component of the Texas Litigation proceeds to trial.

15. From the perspective of the Secured Lenders, this Court's prior decision on the TMA appropriately dealt with matters of Canadian law *in respect of LoyaltyOne* under the TMA – namely, whether LoyaltyOne is a party to the TMA despite not being a signatory; the Monitor's claim that the TMA was a TUV under the CCAA; and whether LoyaltyOne's disclaimer of the TMA under the provisions of the CCAA should be approved. While the choice of law clause under the TMA is Delaware law, the relief being sought on that prior motion was grounded in the CCAA and was related to the obligations of LoyaltyOne.

16. However, this Court did not decide all of the issues put before it on that motion. This Court rightly held that any determination with respect to entitlements under the TMA was premature:

> …it is **premature to determine the nature of Bread's rights** with respect to the Tax Refund at this time.
>
> In my view, it is **premature to make any of the orders sought** by the parties. The TMA remains in effect.[11] [emphasis added]

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[10] See e.g. Answer to the Adversary Complaint of Bread Financial Holdings, Inc. dated June 25, 2025 (redacted) at pages 7 & 118-119 for examples of Bread responding to allegations regarding the avoidance of the TMA [*Bread's Answer to Complaint in Texas Litigation*] excerpts attached at Schedule "F".

[11] *LoyaltyOne, Co. (Re)*, 2024 ONSC 3866 at paras 7 & 64 [*July 2024 Decision*].

17. In light of the intervening developments in the Texas Litigation outlined above, the issue of whether the TMA continues to remain in effect – and the corresponding issue of the entitlements thereunder – is before the U.S. Bankruptcy Court and on its way to trial, and therefore remains premature for determination by this Court. Further, LoyaltyOne was only bound by the TMA because LVI signed on its behalf. Consequently, the U.S. Bankruptcy Court's determination of the validity of the TMA as between Bread and LVI is clearly relevant to entitlements as between Bread and LoyaltyOne. As such, further litigation in Ontario on the TMA could result in a decision that conflicts with any decision ultimately made by the U.S. Bankruptcy Court on Count XIII.

18. As one example, if this Court was to order a payment of the net Tax Refund to Bread, and the U.S. Bankruptcy Court subsequently found the TMA to be void under U.S. law, Bread would be in possession of funds that it never should have had and would have no juristic reason to keep. This would force LoyaltyOne – or whatever is left of LoyaltyOne at that time – and/or LVI's estate to try to recoup those funds from Bread. Given the limited resources these insolvent entities have, this is not a practical route when the alternative is simply to await the outcome of the Texas Litigation before scheduling any further litigation on the TMA in Ontario.

19. Issues of comity and *forum non conveniens* must also now be considered as the U.S. Bankruptcy Court knew about this Court's decision when determining that Count XIII should still proceed to trial. This Court's prior decision on the TMA did not impact the U.S. Bankruptcy Court's decision to remain seized of Count XIII and the issue of avoidance of the TMA and the entitlements, obligations and remedies thereunder. As such, this Court must consider whether it is appropriate to proceed to litigate the issue of entitlement with Count XIII now proceeding to trial in Texas. In the Secured Lenders' respectful submission, it is not.

20. That approach – deferring to the U.S. Bankruptcy Court on certain matters – is consistent with the approach this Court has already taken in this CCAA proceeding. For example, this Court chose to defer to the U.S. Bankruptcy Court on the factual issues involving Sobeys:

> The evidence before me is conflicting and does not provide sufficient context as to what was actually going on with Sobeys prior to the Spin Date. There are issues of credibility in making these determinations. **The findings are critical and central to allegations made in the U.S. litigation. I simply cannot make these factual findings on the record before me.** I have therefore not factored any findings with respect to Sobeys into my analysis of the issues.[12] [emphasis added]

21. Leaving aside for a moment that it was disingenuous of Bread to put before the U.S. Bankruptcy Court on its Motion to Dismiss the inaccurate submission that this Court had conclusively determined the Sobeys' issues in favour of Bread, this Court safeguarded its decision from the risk of inconsistent findings with the U.S. Bankruptcy Court on that issue. It follows that the same approach should be taken in connection with the entitlements under the TMA.

22. To be clear, this is solely a matter of timing – a delay of further adjudication in Ontario while the Texas Litigation proceeds to trial to ensure there are no inconsistent decisions, and to ensure the preservation of already limited resources and judicial time.

No Prejudice to any Delay, and a Potential Benefit to Stakeholders

23. Overlaying the legal issues above is that there is no material prejudice to Bread in having the Texas Litigation proceed first. Pursuant to this Court's October 17, 2025 Order, once received, the Monitor is directed to deposit the Tax Refund into a segregated interest-bearing bank account.[13] In contrast, there could be material prejudice to LoyaltyOne and all of its creditors if TMA entitlement issues are adjudicated by this Court while the Texas Litigation is still pending, and an

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[12] *July 2024 Decision*, *ibid* at para 30.

[13] *In The Matter Of The Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, As Amended And In The Matter Of A Plan Of Compromise Or Arrangement of LoyaltyOne, Co.*, CRA Tax Matters Resolution Order of Justice Steele dated October 17, 2025, Ontario Superior Court of Justice (Commercial List) Court File No. CV-23-00696017-00CL, at para 5.

actual payment to Bread is made under an agreement that is subsequently avoided by order of the U.S. Bankruptcy Court.

24. In addition to the irreconcilable legal outcome that could result in this situation, the proliferation of professional fees that would occur in both Canada and the U.S. to address such a scenario would be unwarranted. The Secured Lenders remain concerned about further expenditure of LoyaltyOne's limited remaining resources towards an uncertain outcome that could potentially conflict with the Texas Litigation.

25. The most efficient use of resources and time is to allow the Texas Litigation to proceed to judgment, as it is proceeding to trial in any event on Count XIII, prior to expending more resources in Ontario on the overlapping issue of entitlement.

26. Alternatively, it would be a more efficient use of resources and time to have the Threshold Issue determined by a judicial decision by this Court after a fulsome briefing, prior to the parties expending further resources (from an insolvent entity where creditor recoveries will already be fractional, and professional fees incurred are already substantial) on more litigation with respect to the TMA. Should the Court be inclined to choose that alternative option, the Secured Lenders' proposed briefing schedule is attached at Schedule "A".

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of December, 2025.

Pursuit

BENNETT JONES LLP

SCHEDULE "A"

Event	**Date**
Secured Lenders to deliver their materials and factum on the Threshold Issue	January 21, 2026
Bread (and any other opposing parties) to deliver their responding materials and factum on the Threshold Issue	February 6, 2026
Secured Lenders to deliver their reply factum on the Threshold Issue	February 13, 2026
Brief hearing on the Threshold Issue	Week of February 23, 2026 (subject to Court availability)

SCHEDULE "B"

Redacted Complaint in Texas Litigation

(Excerpts)

feedback, investors were concerned about the customer concentration in Canada (BMO, Sobey's), the near-term contract maturities and the lingering impact of Covid. Several sizable investors declined to participate."[8] Nonetheless, acting at the direction of Andretta, Beberman, and the members of the ADS Board, BofA Securities, Inc. ("BofA Securities")[9] and the members of the Spin Team (under duress) pushed forward with the marketing and sale of what would become the financing for the Spinoff Transaction. In the process they forced LVI to agree to financing under far more onerous economic terms (through a much higher annual amortization payment of 7.5%) than had been originally contemplated by ADS/Bread (1% annual amortization payments) in a hollow attempt to alleviate the educated, but deliberately uniformed, concerns of potential lenders.

13. In the final Spinoff Transaction, ADS mandated and caused LVI, the entity that would 'acquire' the AIR MILES business, as well as ADS's separate BrandLoyalty business, (i) to borrow $675 million[10] from third-party lenders and use $650 million of it (nearly all of the net proceeds of those loans) to pay ADS for the stock of the subsidiaries who conducted the AIR MILES and BrandLoyalty businesses (the "$650M Transfer"), (ii) to cause Debtor Rhombus Investments L.P. ("Rhombus") to pay $100 million purportedly due under a promissory note to an ADS wholly owned subsidiary (the "$100M Transfer"), with $50 million to repay principal and $50 million to pay interest due under that note, (iii) on behalf of L1 Canada, to purport to transfer to ADS/Bread the right to receive the proceeds of an ongoing litigation between L1 Canada and Canada Revenue Agency, which, if successful could result in proceeds of up to

[8] LVR-001-0000308.

[9] BofA Securities, Inc. is the global banking and global markets divisions of Bank of America Corporation. "Bank of America, N.A." refers to one of the banking affiliates of Bank of America Corporation.

[10] *All* dollar figures in this Complaint are in U.S. dollars, unless otherwise noted.

CAD[11] 75-80 million to which L1 Canada may become entitled (the "Tax Litigation Proceeds Transfer Obligation"), and (iv) to assume liability for certain class action lawsuits consisting of claims that were based on and arose from actions that the ADS Board had directed prior to the Spinoff Transaction (the "Liability Assumption").

14. Yet, the Spinoff Transaction was not in the best interests of LVI or its creditors. The Spinoff Transaction was made when, and/or resulted in LVI being balance sheet insolvent and inadequately capitalized. As noted at the outset, the fair value of LVI's business (and thus its assets) at the time of the Spinoff Transaction was less than the value of LVI's obligations incurred in the Spinoff Transaction, at fair value. Plaintiff believes that the LoyaltyOne Business was worth less than $450 million, at a fair valuation, at the time of the Spinoff Transaction. LVI could not support $675 million in secured indebtedness. ADS forced LVI to incur obligations in the Spinoff Transaction that contained overly burdensome economic terms which, in combination with LVI's diminishing prospects, would foreseeably deprive LVI of the necessary capital to run its business. For example, the Credit Agreement for the loans that funded the $650M Transfer required LVI to pay burdensome amortization payments equal to 7.5% of the initial $675 million principal balance per annum plus additional annual prepayments equal to up to 50% of LVI's excess cash, all of which severely strained LVI's available cash flows. These required amortization payments deprived LVI of the cash it needed to remain viable after the Spinoff Transaction, a fact that was never disclosed to lenders or to the ratings agencies.

15. Throughout the lead up to the Spinoff Transaction, ADS, the ADS Board, ADS's senior executives, and LVI's sole director Motes, did nothing to ensure that the Spinoff Transaction was in the best interests of LVI. Rather, they ignored the evidence that clearly

[11] "CAD" references the Canadian Dollar Currency.

that purpose when ADS demanded that $750 million be paid to it in the Spinoff Transaction, with $100 million coming from Rhombus in the $100M Transfer.

278. The $100 million that Rhombus transferred to ADI Crown Helix Limited was first transferred to ADILC, and then distributed up ADS's corporate chain from ADILC, to ADFH, to ADSFH, and finally to ADS, all as part of a single scheme to move $100 million from Rhombus (and what would become LVI's operating subsidiaries) to ADS.

279. As part of the corporate reorganization that occurred in connection with the Spinoff Transaction, but after the $100M Transfer occurred, ADI Crown Helix Limited became a wholly owned subsidiary of LVI. ADI Crown Helix Limited was dissolved immediately prior to the Debtors' Petition Date. Upon ADI Crown Helix Limited's dissolution, its rights under the Rhombus Promissory Note passed to LVI.

5. The Liability Assumption Under the SDA

280. Under the SDA, LVI was forced to assume the Liability Assumption. The Liability Assumption is comprised of obligations identified on Schedule 4.02(a) of the SDA.

281. While the SDA was filed publicly with the U.S. Securities and Exchange Commission, the Schedules to the SDA were not filed publicly. Thus, Schedule 4.02(a), titled "Loyalty Ventures Assumed Actions," was not publicly filed. That Schedule 4.02(a) lists eleven (11) 'actions' allegedly related to either AIR MILES or BrandLoyalty businesses. The lack of public disclosure of this Schedule 4.02(a) had the effect of obscuring the liabilities assumed by LVI as part of the Spinoff Transaction.

6. The Tax Matters Agreement

282. As part of the Spinoff Transaction, LVI and ADS also entered into the "Tax Matters Agreement", dated as of November 5, 2021 (the "TMA"). The TMA addresses the rights and obligations of ADS/Bread, LVI and, purportedly, their respective subsidiaries with respect to

various tax obligations, tax litigation proceeds, and tax refunds. Under the TMA, ADS/Bread caused LVI to agree to pay over to ADS/Bread any tax litigation proceeds which could be as much as CAD 75-80 million to which L1 Canada may become entitled within thirty (30) days of receipt thereof.

283. Section 8(a) of the TMA provides that "ADS shall be entitled to all Tax Refunds received by any member of the ADS Group or any member of the Loyalty Ventures Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C."[263] TMA Schedule C specifically lists "[L1 Canada] income tax payments made in order to appeal and litigate the 2013 tax assessments (and additional assessments in 2014-2016) issued by both Canadian federal and provincial tax authorities."[264]

284. The TMA was executed by Jeff Fair, as Senior Vice President of "Loyalty Ventures on its own behalf and on behalf of the members of the Loyalty Ventures Group." Fair also co-signed the TMA, as Senior Vice President of "ADS on its own behalf and on behalf of the members of the ADS Group."

P. THE SPINOFF TRANSACTION LEFT LVI LEGALLY AND EQUITABLY INSOLVENT, AND WITH UNREASONABLY SMALL CAPITAL FOR THE BUSINESS IN WHICH IT WAS ENGAGED, UPON THE COMPLETION OF THE DISTRIBUTIONS TO ADS ON NOVEMBER 3, 2021

285. As a result of LVI's transfer of $650 million to ADILC (which it then distributed upstream to ADS) on November 3, 2021, LVI became legally insolvent. Upon the completion of that transfer, (a) LVI's debts totaled no less than the $675 million of Term Loan A and Term Loan B indebtedness, but (b) its only assets and property were the Contributed Shares of the entities comprising the LoyaltyOne Business, and at a fair valuation, the LoyaltyOne Business

[263] TMA, §8(a).

[264] TMA, Schedule C.

such assets now held by Bread, or other property of Bread, and/or to hold Bread liable for any damages or other remedies that may be awarded by the Court or jury under this Complaint.

COUNT XIII
Avoidance and Recovery of Actual Fraudulent Transfer
Pursuant to 11 U.S.C. §§ 548(a)(1)(A) & 550(a)
(Against Bread)
(Related to the Incurrence of the Tax Litigation Proceeds Transfer Obligation)

483. Plaintiff restates and re-alleges the allegations of each of the prior and following paragraphs as if fully set forth herein.

484. Plaintiff seeks avoidance of the incurrence of the Tax Litigation Proceeds Transfer Obligation pursuant to 11 U.S.C. § 548(a)(1)(A).

485. On November 3, 2021, a date within two years before the filing of its Chapter 11 petition, LVI incurred the Tax Litigation Proceeds Transfer Obligation – i.e., the right of L1 Canada to recover up to CAD 75-80 million resulting from ongoing litigation between L1 Canada and Canada Revenue Agency –to ADS pursuant to the Tax Matters Agreement, which was entered into at the same time as and in conjunction with the SDA. The incurrence of the Tax Litigation Proceeds Transfer Obligation was one step in the multi-step Spinoff Transactions, and was done in contemplation of the completion of the Spinoff Transaction following the incurrence of the indebtedness under the Credit Agreement.

486. By virtue of the knowledge and intent of the members of the ADS Board and ADS's officers who controlled LVI at the time, including Andretta, Ballou, Beberman, and Motes, LVI involuntarily incurred the Tax Litigation Proceeds Transfer Obligation with actual intent to hinder, delay, or defraud LVI's then present and future creditors, including the Credit Agreement's lenders. The intent of the members of the ADS Board and ADS's officers who controlled LVI at the time of the incurrence of the Tax Litigation Proceeds Transfer Obligation to hinder, delay, or defraud LVI's then present and future creditors can be reasonably inferred

from numerous badges of fraud surrounding the transfer and the Spinoff Transaction of which it was an essential part.

487. **The incurrence of the Tax Litigation Proceeds Transfer Obligation was a transfer to ADS, an insider of LVI**. The incurrence of the Tax Litigation Proceeds Transfer Obligation was made to an insider, namely, ADS. ADS was a person in control of LVI at the time of the transfer by virtue of both its indirect ownership of 100% of voting common stock of LVI and its appointment of its own General Counsel, Motes, as the sole Director of LVI. Motes acted solely in the interest of and in accordance with the directions of ADS and the ADS Board, the latter of which acted through its members. Motes authorized and directed the incurrence of the Tax Litigation Proceeds Transfer Obligation from LVI to ADS on the day of the transfer, in accordance with a previously determined plan and scheme to put the Tax Litigation Proceeds Transfer Obligation in ADS's hands.

488. **The value of the consideration received by LVI was inadequate and not reasonably equivalent to the incurrence of the Tax Litigation Proceeds Transfer Obligation transferred to ADS.** LVI entered into the Tax Matters Agreement as one step in the multi-step Spinoff Transaction, and in contemplation of the completion of the Spinoff Transaction. LVI received no additional value from ADS under the Tax Matters Agreement aside from the value that LVI otherwise received in the Spinoff Transaction, which consisted of the Contributed Shares. As noted above, the Contributed Shares received by LVI were far less in value than $650 million in cash transferred to ADILC at the time of the Spinoff Transaction (*see* ¶¶ 336, 355), and the additional incurrence of the Tax Litigation Proceeds Transfer Obligation to ADS only served to increase the discrepancy in value between the Contributed Shares and the transfers made by LVI in the Spinoff Transaction.

489. **LVI was insolvent or became insolvent shortly after the incurrence of the Tax Litigation Proceeds Transfer Obligation to ADS.** LVI was insolvent at the time of the incurrence of the Tax Litigation Proceeds Transfer Obligation as a result of the $650 million payment it made to ADILC (which was ultimately transferred to ADS). *See* ¶¶ 337, 356. The Tax Litigation Proceeds Transfer Obligation was additional property that ADS took from LVI in the Spinoff Transaction.

490. **The incurrence of the Tax Litigation Proceeds Transfer Obligation occurred shortly after LVI incurred a substantial debt.** The incurrence of the Tax Litigation Proceeds Transfer Obligation to ADS occurred shortly after LVI incurred a substantial debt in the amount of $675 million under the Credit Facilities, including the Term Loan A debt and the Term Loan B debt.

491. The financial condition of LVI's business was distressed both before the Spinoff Transaction and became even more so after the Spinoff Transaction. *See* ¶¶ 339, 358. The incurrence of the Tax Litigation Proceeds Transfer Obligation meant that LVI lost a potential source of additional funds as part of the Spinoff Transaction.

492. **The extent of the incurrence of the Liability Assumption was concealed.** SDA Schedule 4.02(a), titled "Loyalty Ventures Assumed Actions," was not publicly filed. Similarly, none of the other SDA schedules were publicly filed.

493. **LVI had been sued at the time of the $650M Transfer.** As outlined in SDA Schedules 4.02(a), and 4.02(b), ADS and the businesses that would become LVI as a result of the Spinoff Transaction had been sued at the time of the $650M Transfer.

494. The chronology of events leading up to the incurrence of the Tax Litigation Proceeds Transfer Obligation as part of the Spinoff Transaction confirms the actual intent of

Motes, the members of the ADS Board, as well as Andretta (in his capacity as ADS's Chief Executive Officer) and Beberman --who together controlled LVI--to delay, hinder, and defraud LVI's present and future creditors, including most immediately the Credit Agreement's lenders who lent the $650 million transferred to ADS.

495. Prior to the Spinoff Transaction, ADS had tried and failed to sell the BrandLoyalty and AIR MILES businesses over the course of three years from 2019 to 2021. ADS's efforts to sell BrandLoyalty in 2019, with the assistance of a prominent investment banking firm, led only to a single verbal offer of a mere $30 million. ADS's efforts to sell the AIR MILES business in 2020 and 2021, with the assistance of another prominent investment banking firm, yielded no offers to purchase the business for anything approaching $650 million, except on conditions that required commitments and participation of third parties that ADS did not control and whose agreement to those terms ADS had no ability to deliver.

496. When ADS's years' long efforts to unload the ailing and unwanted LoyaltyOne businesses failed, ADS hatched the scheme to get rid of them in the leveraged Spinoff Transaction, the principal object of which was to generate the $750 million in proceeds for ADS that it could not obtain through an arms'-length sale of the businesses to any third party.

497. ADS pursued the Spinoff Transaction with singular urgency to complete it before the even more disappointing fourth quarter 2021 results became known, and the intended departure of Sobeys from the AIR MILES program—of which the members of the ADS Board and ADS's senior executives were well aware—materialized. Once those facts became known, prospective lenders would likely shun the transaction even on the onerous terms that ADS, the ADS Board's members, Beberman, and Motes had caused LVI to agree to in order to entice the Lenders. Consistent with this, the E&Y Report, August ADS Board Audit Committee

Presentation, and the final presentation for the October 13, 2021 "go or no go" Board meeting each acknowledged that the timing of the Spinoff Transaction would be "favorable" because "[s]ponsor contract renewal dates are upcoming."

498. The members of the ADS Board, as well as Beberman, Motes, and others, contemplated the prospect of a near-term bankruptcy of LVI as a result of the Spinoff Transaction, including the incurrence of the Tax Litigation Proceeds Transfer Obligation transfer that Plaintiff hereby seeks to avoid, and privately conceded that the transaction required LVI to bear too much debt.

499. Plaintiff, as the assignee and transferee of LVI's Preserved Estate Claims (as defined in the Plan), is therefore entitled to avoid the incurrence of the Tax Litigation Proceeds Transfer Obligation pursuant to 11 U.S.C. § 548(a)(1)(A).

500. Under 11 U.S.C. § 550(a), to the extent that a transfer is avoided under 11 U.S.C. § 548, the trustee (or a debtor-in-possession acting in lieu of a trustee) may recover for the benefit of the estate, the property transferred, or the value of such property, from (1) the initial transferee of such transfer or the entity for whose benefit the transfer was made, or (2) any immediate or mediate transferee of such initial transferee.

501. ADS (now known as Bread) was the initial transferee of the Tax Litigation Proceeds Transfer Obligation incurred by LVI.

502. Pursuant to 11 U.S.C. § 550(a)(1), (2), Plaintiff seeks (a) the avoidance of the Tax Litigation Proceeds Transfer Obligation, (b) a judgment in the amount of any Tax Refund actually transferred to Bread, (c) the attachment or other provisional remedy (including levy) against any assets transferred to Bread, or the proceeds of such assets now held by Bread, or

other property of Bread, and/or (d) to hold Bread liable for any damages or other remedies that may be awarded by the Court or jury under this Complaint.

COUNT XIV
Avoidance and Recovery of Actual Fraudulent Transfer
Pursuant to 11 U.S.C. §§ 544(b)(1) & 550(a) and
Tex. Bus. & Comm. Code §§ 24.005(a)(1) & 24.008(a)(1)
(Against Bread) (Related to the Incurrence of the Tax Litigation Proceeds Transfer Obligation)

503. Plaintiff restates and re-alleges the allegations of each of the prior and following paragraphs as if fully set forth herein.

504. Plaintiff seeks avoidance of the Tax Litigation Proceeds Transfer Obligation pursuant to 11 U.S.C. § 544(b) and Tex. Bus. & Comm. Code § 24.005(a)(1).

505. On November 3, 2021, a date within two years before the filing of its Chapter 11 petition, LVI incurred the Tax Litigation Proceeds Transfer Obligation – i.e., the right of L1 Canada to recover up to CAD 75-80 million resulting from ongoing litigation between L1 Canada and Canada Revenue Agency–to ADS pursuant to the Tax Matters Agreement, which was entered into at the same time as and in conjunction with the SDA. The incurrence of the Tax Litigation Proceeds Transfer Obligation was one step in the multi-step Spinoff Transactions, and was done in contemplation of the completion of the Spinoff Transaction following the incurrence of the indebtedness under the Credit Agreement.

506. By virtue of the knowledge and intent of the members of the ADS Board and ADS's officers who controlled LVI at the time, including Andretta, Ballou, Beberman, and Motes, LVI involuntarily incurred the Tax Litigation Proceeds Transfer Obligation with actual intent to hinder, delay, or defraud LVI's then present and future creditors, including the Credit Agreement's lenders. The intent of the members of the ADS Board and ADS's officers who controlled LVI at the time of the incurrence of the Tax Litigation Proceeds Transfer Obligation

SCHEDULE "C"

Bread's Redacted Motion to Dismiss

(Excerpts)

with Section 5.02(a), the "ADS Indemnification Obligation," as defined in the Complaint). (¶ 273–74.)

Additionally, as part of the Spinoff, ADS and LVI entered into a Tax Matters Agreement dated as of November 5, 2021 (the "TMA"), which addressed the parties' rights and obligations with respect to taxes. (¶ 282.) One of the tax issues addressed in the TMA related to a potential adjustment of amounts previously paid to the Canada Revenue Agency. At the time of the Spinoff, L1 Canada, the primary operating company for AMRP, was engaged in litigation with the Canada Revenue Agency regarding certain tax assessments from 2013 to 2016, a period when L1 Canada was a wholly owned subsidiary of ADS. (¶¶ 156, 283.) As of the date of this filing, the litigation remains pending. In the TMA, the parties agreed that if L1 Canada were to prevail, any tax refund would go to ADS (the "Tax Litigation Proceeds Transfer Obligation," as defined in the Complaint). (¶ 270.) The stated rationale for these provisions was that any Canada tax receivables "should accrue to the benefit of ADS since the taxes [] paid [] years ago were part of 'enterprise ADS resources.'" (¶ 200.) LVI's lenders were fully aware of this allocation of the tax refund, and agreed to exclude the tax refund from the collateral securing the LVI credit agreement. Ex. G (LVI Credit Agreement) § 1.01 ("Excluded Property" includes "tax refund proceeds subject to rights of ADS under the Form 10 Transaction Documents"); § 6.15(a) (excluding "Excluded Property" from the affirmative covenant to grant first priority security interest in LVI's property).

On November 5, 2021, ADS distributed 81% of the LVI shares to ADS stockholders and retained the remaining 19%. (¶ 272.) ADS applied 100% of the $750 million in proceeds it had received to pay down principal on the ADS Credit Agreement. Ex. L (Columbus Business First Article) (cited in ¶ 295).

SCHEDULE "D"

Bread's Reply in the Motion to Dismiss

(Excerpts)

connection therewith, further underscore that it is implausible to infer that Sobeys' decision to withdraw was final. The Trustee also attempts to plead intent through other badges of fraud, but these badges are either not plausibly alleged or else insufficient to support a finding of intent.

Second, the Trustee has not stated a claim for constructive fraudulent transfer. Nor could it, because the Complaint and documents incorporated therein demonstrate that each of the challenged transfers is safe-harbored by Section 546(e) of the Bankruptcy Code. And even if the Transfers were not shielded by the safe harbor, there is no basis for the constructive fraudulent transfer claims because the Trustee has not adequately pleaded insolvency.

Third, the Trustee's Section 544(b) fraudulent transfer claims should be dismissed for the independent reason that LVI's creditors ratified the Transfers the Trustee seeks to avoid.

Fourth, the Trustee's claims seeking to avoid the Tax Litigation Proceeds Transfer Obligation should be dismissed in light of a decision issued last month by the Ontario Superior Court of Justice in connection with the bankruptcy of L1 Canada, a wholly owned subsidiary of LVI. The Canadian court held that there was not sufficient evidence to find that Sobeys' departure was reasonably foreseeable. The court further held that the potential tax refund was an asset of non-Debtor L1 Canada—that is, it was not an asset of Debtor LVI. Because the Debtor here (LVI) did not own the asset, it has no legal ability to transfer it, and therefore the Tax Litigation Proceeds Transfer cannot be avoided in this action.

Finally, the Trustee's claims for claim disallowance and equitable subordination should be dismissed because the Trustee has not sufficiently pleaded any predicate wrongdoing.

For these reasons, and as set forth further below, each of the Trustee's claims should be dismissed with prejudice.

here, the Tax Litigation Proceeds Transfer Obligation cannot be avoided in this action because it belongs to the *non-Debtor* L1 Canada, and not the *Debtor*, LVI. *See Tareco Props., Inc. v. Morriss*, 2008 WL 1836377, at *11 (E.D. Tex. Apr. 23, 2008) (absent allegations that the debtor and the transferor are "alter ego[s]," "[w]ithout a transfer from . . . the debtor, there can be no" fraudulent transfer claim).

When LVI filed for Chapter 11 bankruptcy protection in this Court, L1 Canada simultaneously filed an equivalent petition under the Canadian Companies' Creditors Arrangement Act, RSC 1985, c C-36 (the "CCAA"). (¶¶ 3, 43.) L1 Canada and L1 Canada's Canadian Monitor (the "Monitor")—an officer appointed by the CCAA Court to monitor the business and financial affairs of the debtor company—brought an action in Canadian court to avoid L1 Canada's obligations under the TMA. (*See* Ex. S (Reasons for Decision, *LoyaltyOne, Co. (Re)*, 2024 ONSC 3866 (July 10, 2024)) ¶ 5.[7]) Among other things, L1 Canada and the Monitor asserted a theory similar to the Trustee's here: that the TMA was unenforceable as a "transfer under value"—analogous to fraudulent transfer under U.S. law—including because L1 Canada was purportedly insolvent at the time of the Spinoff based on the foreseeability of Sobeys' departure. (*Id.* ¶¶ 24–25, 37–40.)

On July 10, 2024, the Ontario Superior Court of Justice issued a decision holding, *inter alia*, that the Monitor had *not* proven that Sobeys' departure was reasonably foreseeable, and, therefore, the Court was "not persuaded that [L1 Canada] was insolvent on the Spin Date." (*Id.* ¶¶ 46–47.) The Court held accordingly that the TMA was valid and L1 Canada remains subject to

Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C." (Ex. S (Reasons for Decision, *LoyaltyOne, Co. (Re)*, 2024 ONSC 3866 (July 10, 2024)) ¶ 20 (quoting Tax Matters Agreement § 8(a).)

[7] References to Ex. S are to Exhibit S to the Declaration of Benjamin S. Kaminetzky, filed herewith.

its obligations thereunder, including its obligation to turn over the potential $96 million tax refund to ADS if and when received. (*Id.* ¶¶ 7, 64.) As relevant here, the Court held that the potential tax refund was an asset of L1 Canada (*id.* ¶ 2)—in other words, *not* an asset of LVI. The implication is that the Tax Litigation Proceeds Transfer Obligation could not have been transferred to ADS by LVI. In other words, the transfer was by a *non*-debtor and therefore cannot, as a matter of law, be a fraudulent transfer. *See Tareco Props., Inc.*, 2008 WL 1836377, at *11. Accordingly, the Trustee's claims relating to the Tax Litigation Proceeds Transfer Obligation should be dismissed.

V. If the Fraudulent Transfer Claims Are Dismissed (as They Must Be), the Trustee Has Not Alleged a Predicate for its Claim Disallowance and Equitable Subordination Claims (Counts XXV, XXVI, XXVII)

If the fraudulent transfer claims are dismissed, so too must the claim disallowance and equitable subordination claims against Bread and Motes. That is because the bases for these claims are the alleged fraudulent transfers and Defendants' alleged breaches of fiduciary duties, but the Trustee has not stated a claim for fraudulent transfer and has not asked the Court to make the requisite finding of breach of fiduciary duty. In fact, the Trustee continues not to lodge such a request even though Defendants identified this shortcoming in the Motion. (Mot. at 43–44.) Accordingly, these follow-on claims are ungrounded and must be dismissed.

CONCLUSION

For the reasons set forth in the Motion and above, Defendants respectfully request that the Complaint be dismissed in its entirety with prejudice. Dismissal with prejudice is warranted given the Trustee has already had the benefit of books and records, personnel, and extensive Rule 2004 discovery, so the opportunity to amend would do nothing to save the Trustee's claims.

SCHEDULE "E"

Motion to Dismiss Decision Transcript

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LOYALTY VENTURES INC., et al., Debtors.	CASE NO: 23-90111 (CML) Houston, Texas Wednesday, June 11, 2025 1:01 p.m. to 1:50 p.m.
PIRINATE CONSULTING GROUP, LLC, AS TRUSTEE OF THE LOYALTY VENTURES LIQUIDATING TRUST, Plaintiffs, Vs. BREAD FINANCIAL HOLDINGS, INC. f/k/a Alliance Data Systems Corporation, in its own name and as successor-in-interest to Alliance Data Foreign Holdings LLC, and ADS Foreign Holdings, LLC; and JOSEPH L. MOTES III, Defendants.	CASE NO: 24-03027 (CML) ADVERSARY

HEARING

BEFORE THE HONORABLE CHRSTOPHER M. LOPEZ
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Plaintiff: JOSEPH COLEMAN
Kane Russell Coleman & Logan
3700 Thanksgiving Tower
1601 Elm Street
Dallas, TX 75201

	Gordon Z. Novod Grant & Eisenhofer P.A. 485 Lexington Avenue, 29th Floor New York, NY 10017
For Defendant:	MEGAN YOUNG-JOHN JOHN HIGGINS Porter Hedges 1000 Main Street, Suite 3600 Houston, TX 77002
	TINA HWA JOE BENJAMIN KAMINETZKY Davis Polk 450 Lexington Avenue New York, NY 10017
ALSO PRESENT:	MORGAN MITCHELL
Court Reporter:	YESENIA LILA
Courtroom Deputy:	YESENIA LILA
Transcribed by:	Veritext Legal Solutions 330 Old Country Road, Suite 300 Mineola, NY 11501 Tel: 800-727-6396

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Transcript produced by transcription service.

HOUSTON, TEXAS; WEDNESDAY, JUNE 11, 2025; 1:01 P.M.

(Call to Order)

THE COURT: All right. Good afternoon. This is Judge Lopez. Today is June the 10th. I'm going to call the 1:00 p.m. status conference. I want to get the case right. 24-03027, Pirinate Consulting as Trustee v. Bread Financial.

I'll take appearances in the courtroom. If there's anyone on the line who wishes to make an appearance, please hit 5-star and I will unmute your line.

MR. COLEMAN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. COLEMAN: We made our electronic appearances, but I'm Joe Coleman, Kane Russell Coleman & Logan, along with Gordon Novod and Frank Griffin, from the Grant & Eisenhofer firm. And Mr. Novod will be making his arguments or --

THE COURT: Okay.

MR. COLEMAN: -- responding to Your Honor.

THE COURT: Thank you. Good afternoon.

MS. YOUNG-JOHN: Good afternoon, Your Honor. Megan Young-John and John Higgins, of the Porter Hedges firm, joined today by Tina Hwa Joe and Benjamin Kaminetzky from Davis Polk.

I'd also like to take a moment to introduce you today to one of our summer associates, who's also attending

to observe today, Morgan Mitchell. She is a 2L at the University of Houston Law Center.

THE COURT: Fantastic. Pleasure. Welcome. Anyone else wish to make an appearance on the line? Okay. Folks, I want to thank everyone. I think this makes a lot of sense. I don't know if the parties have continued to talk, or I can share thoughts, or how do parties wish to proceed?

MR. NOVOD: Your Honor, good afternoon. Gordon Novod, of the law firm of Grant & Eisenhofer. Thank you again, Your Honor, for having us today. We're happy to follow the Court's lead as the Court would prefer. I have a few prepared remarks I'm happy to make, but would, of course, defer to Your Honor as to how you'd like to proceed today.

THE COURT: Let me ask this. Have the parties reached any consensus or agreement on anything since pleadings have been filed? That's the way -- that's the thing that I'm really trying to get to. If the answer is no, then I can start. But sometimes it's best for me to not --

MR. NOVOD: No, the only thing that --

THE COURT: -- put my foot on the gas.

MR. NOVOD: Candidly, Your Honor, the only thing that the parties have agreed to, which is a tentative

agreement at this point, is a mediation that's going to occur at some point in the either late summer or early fall. It would be a global mediation. But that's down the road. We've selected a mutually acceptable mediator, but we haven't engaged the mediator yet. And this --

THE COURT: Okay. No, I don't want to know who that is.

MR. NOVOD: Yeah.

THE COURT: Okay.

MR. NOVOD: But we have not discussed anything directly as to Your Honor's order.

THE COURT: Let me tell the parties what my thinking was. And I've read all the papers, and I very much appreciate it.

Plaintiff's office obviously took an incredible amount of time drafting, I'm sure what they were hoping was, a bulletproof get-past-motion-to-dismiss phase pleading. You don't write 200 pages just for that.

The motion to dismiss was filed. As I was reading the document and reading case law in the Fifth Circuit, what became apparently clear to me is to what extent I could rely on documents that were referenced in the motion to dismiss that were referenced by Defendants that were, at the same time, not particularly expressly referenced in the complaint. I'm thinking about, the ADS credit agreement was

one, and what Fifth Circuit guidance requires there, at the same time, thinking there's a pending motion to dismiss with respect to actual and constructive fraud and just broad buckets.

And Fifth Circuit case law requires at a minimum that parties have an opportunity to re-plead. Even if I grant a motion to dismiss, it's always granted with leave. Fifth Circuit guidance is pretty clear on that.

And so, in weighing the options, I considered -- I'm convinced that if I rule on everything, I can't rule on the 546(e)(1) without all the docs. And I wanted parties to have an opportunity to present. I want to read all the credit agreements. I want to read everything.

I think there should be, if anything, limited discovery in connection with the 546(e)(1). I don't think you need to see drafts of documents, or not the doc -- whatever the final document is, is the final document because that's the one that we'll either rely on for 546(e) purposes.

And I think I can resolve -- I think I can rule on that once I get everything that I need, which are really just docs that are -- yeah, I can take judicial notice of things, but I'd rather just have the docs admitted into a record that I can then rule on. I feel far more comfortable doing that on a summary judgment phase.

So, with respect to the 546(e), converting to summary judgment made the most sense. And I read the supplemental pleadings. You know, I think what made the most sense was converting everything to summary judgment. Could I make the Trustee re-plead, he has something here or there, nibble around the corners? Maybe so. But I think they established prima facie on a 548(a)(1)(A) basis just as a complaint that is pled. I think it's different than a 10(b), 10(b)5 issue in terms of pleading it.

So, I thought converting everything at one time so that we didn't have a redrafting of a complaint, while I converted another motion for summary -- while I have at the same time -- might be something pending for summary judgment. So, I thought (indiscernible) converting everything, because the parties have waited a long time, and partially it has been me.

You mentioned mediation. Other than that, I -- obviously, if the parties agree to it, I won't get in the way of it. But absent that, I'm ready to go, and I'm ready to rule on summary judgment on the constructive fraud issues. I just need the docs into the record. And I think the ADS credit agreement -- I think discovery can be really minimal there. That's the way the statute is designed, to be -- you can avoid long, protracted litigation on that issue, if it can be resolved.

So, what I really wanted to know from the parties was, does it make sense to grant you limited discovery on a few things? Do you want to stage it out and let me just rule on the constructive fraud issue up front and wait on the other -- on the actual fraud?

And now that I'm hearing about potential mediation, do you want me to just not put my thumb on the scale on one of these issues, or do you want to dual track it?

I'll hear from the Trustee, and then I'll hear from opposing counsel.

MR. NOVOD: Your Honor --

THE COURT: You can take it up in any order that you want.

MR. NOVOD: Your Honor, I'm happy to take it in the order that you've asked for, and to address those points. And there are a few contours here, I think, that actually make it more than just the documents and needing a final version of the credit agreement. As I was --

THE COURT: Not for the 546. You're going to have a tough time convincing me of that.

MR. NOVOD: Well, let me walk you through a few of the things that I was thinking about in advance of today, which would be things that actually, as a matter of fact, need to be established for a 546(e) defense.

THE COURT: Okay.

MR. NOVOD: The first would be what I'd describe as mechanical. How much money moved, and when did it move? And how did the money move first from -- and we allege in our complaint, Paragraph, I think, 333, and Paragraph -- bear with me -- 406, that it's when we first -- we first talk about in each of those paragraphs when the money moved from Loyalty Ventures to the first transferee. So that would be, in the case of the $100 million transfer, $100 million moving from Rhombus to ADI Crown Helix Limited. That's paragraph 406 of our complaint.

In addition -- and we know, and we allege in the complaint, that that occurred on October 25, 2021.

THE COURT: Mm hmm.

MR. NOVOD: So, two weeks before the spin actually happened, that's when the money moved.

When we think about these things, we need to know, how did the money move from first the transferor to the first subsequent transferee, then through the wedding cake, as I'll describe it, up to ultimately what is now Bread, but what was ADS; and then from ADS laterally, via its side agreement with its lenders, over to the agent first, who is Wells Fargo. We identify that in our letter --

THE COURT: Mm hmm.

MR. NOVOD: -- or statement that we submitted to

the Court. It wasn't part of the record in our complaint, so it's not incorporated by reference. And when did that money actually --

THE COURT: And I will tell you, part of my concern is that you all pled this in a way where you obviously didn't -- it wasn't entirely obvious to me that it wasn't intentional to the way things were described in a way that you could get past the motion to dismiss phase.

MR. NOVOD: But that's not --

THE COURT: That's what -- I'm not saying it was ill intent. I'm not saying it was bad faith. But it seemed to me -- I don't understand how you didn't plead the ADS credit agreement.

MR. NOVOD: Because the ADS credit agreement is so far afield. There is not a single case that supports that application of 546(e). That's why. And there isn't -- we haven't identified one. The Defendants didn't identify one in any of their papers. And, Your Honor, when you think about it -- and I don't want to go back and re-argue 546(e) --

THE COURT: Neither do I. I mean, it just --

MR. NOVOD: -- but 546(e) does say "for the benefit of." And it's the same way that that text is used in --

THE COURT: I agree.

MR. NOVOD: -- 547 of the Bankruptcy Code, not the way it's used in 550. And so, one of the key issues here --

THE COURT: I remember your argument.

MR. NOVOD: Pardon?

THE COURT: I remember the argument.

MR. NOVOD: Yeah. And so, one of the key issues here, there isn't a case that talks about that.

Now, one could look at this transaction and say, was it for the benefit of the ADS credit agreement lenders or was it for the benefit of ADS itself? Or, in our case -- and this is where we submitted supplemental authority from Judge Wiles in New York in the IIG case --

THE COURT: Mm hmm.

MR. NOVOD: -- and we didn't say -- we just said, Your Honor, here's a case you should read. You know, he takes a fairly in-depth look at that question, and ultimately part of his thinking and analysis in that case is you're really looking at the subsequent -- you're only looking at the initial transfer, not the subsequent transferees.

And so, when I was here, Your Honor, on September 24th --

THE COURT: Mm hmm.

MR. NOVOD: -- 2024, arguing this to Your Honor --

THE COURT: Mm hmm.

MR. NOVOD: -- the way that we drafted the complaint and thought about these issues wasn't that the money would go up to ADS and then ultimately as a byproduct be paid for the lenders. Our complaint actually does say that the money was to be used by Bread ADS --

THE COURT: Mm hmm.

MR. NOVOD: -- same party, for the purpose of reducing its indebtedness. We don't specify who it was reducing its indebtedness to, and the separation and distribution agreement here, which is not the securities contract, which is the contribution agreement. But the separation and distribution agreement doesn't actually identify paying off the ADS credit agreement lenders.

THE COURT: Mm hmm.

MR. NOVOD: It just says -- and this is Section 3.02 that we identified of Exhibit K that the Defendants filed -- it's that 3.02(c), that says third-party lenders. That doesn't say credit agreement lenders. In fact, if you think about the indebtedness of Bread at the time --

THE COURT: Mm hmm.

MR. NOVOD: -- they had $2.8 billion worth of debt, and they used a portion to pay back a certain type, but not the notes, for example.

So, to Your Honor's point, you may have the separation and distribution agreement, but we actually think

that one has to analyze when that agreement was being drafted, who were the third-party lenders? Because the agreement itself doesn't identify the credit agreement lenders.

THE COURT: No, I got it. I don't want to -- so, tell me, you think -- and I don't want to -- I read the agreements. I'm not -- I don't want to speak about the cases because --

MR. NOVOD: Yep.

THE COURT: -- that kind of puts my thumb on the scale preliminarily for folks, and I don't want to say whether I -- how I think about it with respect to the Wiles decision and the other decisions. Obviously, they're incredibly thoughtful. But I don't -- I'm going to intentionally --

MR. NOVOD: Mm hmm.

THE COURT: -- stay kind of within the four corners of where we are at this point. So, you think you'd need discovery on how the money moved?

MR. NOVOD: Yeah, so that's --

THE COURT: That's my understanding.

MR. NOVOD: Let me just run through the --

THE COURT: Mm hmm.

MR. NOVOD: -- identified --

THE COURT: The buckets.

MR. NOVOD: -- topics.

THE COURT: Go ahead.

MR. NOVOD: So, it's how did the money move and when did it move? So, we need actual proof that ADS actually transferred $650 million to the ADS credit agreement lenders. Then in the second instance, we need proof that ADS actually transferred $100 million, because remember, those are two different transactions.

THE COURT: Mm hmm.

MR. NOVOD: It's all part of the larger spin transaction that they're --

THE COURT: But don't they need to do that to prove that -- all right.

MR. NOVOD: Pardon?

THE COURT: I'm saying -- go ahead. Go ahead. Keep going.

MR. NOVOD: Okay. So, you need proof of those two things. We also need to know, who were the ADS credit agreement lenders? We don't even know that. That's not part of the record. It's not part of the complaint. It's certainly not incorporated by reference.

THE COURT: What do you need to know that for?

MR. NOVOD: Well, they need to qualify --

THE COURT: For a 546(e) defense?

MR. NOVOD: They need to qualify as a financial

institution or financial participant.

THE COURT: No, no, I'm just making sure --

MR. NOVOD: Yeah.

THE COURT: -- we have a clean record.

MR. NOVOD: Yeah, yeah.

THE COURT: I'm not disagreeing with you.

MR. NOVOD: No.

THE COURT: I'm just saying -- go ahead.

MR. NOVOD: That's -- exactly. So, that's the reason why, even in this application of 546(e), which we've argued now, you'd have to know that.

In addition, you'd also need to know, and some meaning needs to be given to the phrase, "for the benefit of." And you'd need evidence as to whose benefit that transfer actually occurred. Because one could look at it this way, Your Honor, and our complaint addresses this.

Bread, or ADS, had way too much goodwill on its balance sheet, and it was way too levered. But they weren't doing this transaction to satisfy the lenders because the credit agreement lenders were asking for it. They were doing this transaction to advance their own -- to reduce their capital, or to improve their capital adequacy ratios, which --

THE COURT: Is there a way in which your clients have pled it was -- your alleging constructive fraud. So,

in theory, you're alleging to who it was a benefit of, right, for the benefit of? Can they come in -- in other words, they have to prove that it was for the benefit of someone. In their summary judgment, they're going to have to prove it, right?

MR. NOVOD: They're going to have to prove it's for the benefit, not just of anybody, not even for Bread, because they haven't taken the position that it's for the benefit of Bread. They have to say it's for the benefit of these specific lenders, and all of these specific lenders.

THE COURT: Your point is, if someone is going to argue that, we're going to need discovery on that?

MR. NOVOD: On all of that. And now I'm going to loop back in a moment. I just want to go through the topics of information and tell you why I think fulsome discovery is the most efficient way to pursue this here.

THE COURT: Mm hmm.

MR. NOVOD: And I'm going to fill that in in a moment. But when you have the separation and distribution agreement -- and again, part of the reason why we're here is because the Defendants, through their litigation strategy, chose to put 14 documents that weren't incorporated by reference into the record --

THE COURT: I'm trying to avoid the spin.

MR. NOVOD: Okay.

THE COURT: So, let's just stick with where we are.

MR. NOVOD: So, avoiding the spin, Documents 15 and 16, one is the private letter request --

THE COURT: Mm hmm.

MR. NOVOD: -- private letter ruling request, which goes to the IRS, that's not in the record. It's not incorporated by reference. But in order to actually read the separation and distribution agreement and to read their argument that it's for the benefit of, that needs to come in. In addition, the ruling that comes from the IRS needs to come in.

And then when we read these things and we see that certain defined terms weren't used in a consistent way, so for example, cash proceeds is a defined term under the separation and distribution agreement.

THE COURT: Mm hmm.

MR. NOVOD: In 3.01(c)(i), it's used. 3.01(c)(iv), it's the lowercase version of it. And if you're using the same defined term in the same paragraph, but one has a capitalization suggesting that it's a defined term and the other does not, we need to understand, well, why didn't they do it?

Nobody -- and by the way, Davis Polk defense counsel here, they were the transactional counsel. They had

full access to everything. We have a limited access as a Trustee, but they have full access to the entire record. They haven't come forth, Your Honor, and said there was a scrivener's error in making this argument, or to address it otherwise. So, there's a factual question as to why does that distinction between 3.01(c)(i) versus (iv), why the difference?

And also, when looking at each of the Romanettes (i) and (iv), why don't they say, "the credit agreement lenders," if that's really whose benefit this was for? And that's not spin. That's just pointing out they use the phrase "third-party lenders" there in lowercase terms. Again, an undefined term when you're dealing with a very sophisticated corporate agreement that defines everything, even in cross-reference to the tax matters agreement and otherwise.

So, we think that that's an important question. And that may come down to a drafting question, which can't be resolved based on looking at necessarily a final document. And certainly, when it comes to drafting corporate documents, sometimes you actually do need to take depositions of the people that write these things.

And having litigated cases where we've been questioned and trying to understand the meaning of an indenture or a no-purchase agreement, sometimes you've got

to take the depositions of the lawyers who are responsible. And I've done it before. It's what it is. Will lawyers remember? Sometimes they do, maybe they don't. But these are factual questions.

THE COURT: I know. The reason I -- I don't disagree conceptually with that, but I will tell you that I'm pretty textual. So, in other words, I'm not really interested in what people thought when they meant -- what they did. I'm far more interested in what they wrote --

MR. NOVOD: Sure.

THE COURT: -- and that's what I'll enforce. So, I got it. But there's kind of a gateway issue there for me.

MR. NOVOD: Yeah, I'm looking at the question, and I'm saying, all right, so you can have a provision, which maybe I don't think there's any ambiguity, because I think when you intend to use capital letters and define the term, then you adopt the term. And if you didn't, you deliberately did it. But if there's an argument that's to come that there was a scrivener's error and the reason why they didn't define the cash distribution --

THE COURT: That means that somebody would then have to plead that to me, and then I would make a determination as to whether that's --

MR. NOVOD: Right.

THE COURT: -- I enforce it as written or someone

comes in. But I agree with you. If someone argues it, then --

MR. NOVOD: Right.

THE COURT: -- there's discovery on it.

MR. NOVOD: But here's the thing. Summary judgment. We're going to get to summary judgment. We need to know what the discovery is before you get to summary judgment.

THE COURT: Agreed.

MR. NOVOD: Right? I can't possibly know how to defend a case for discovery I haven't taken, and I need to have the opportunity to do that. Now, we've only gotten a small snippet here. But remember, when we go to summary judgment, the only way that a party who's asserting and asking for the Court to grant summary judgment can win is if there are no disputed facts, if there are no issues which are subject to material disagreement over what the facts are.

And my only point to that, Your Honor, in just thinking about all the different categories of information and questions I don't know --

I'll apologize for my colleague.

THE COURT: No, that's fine.

MR. NOVOD: So, the reason why that's relevant is because we're in a position where there are other things

going on outside the courtroom. So, in one regard, the mediation. I mention that because Your Honor asked, but that shouldn't be a reason, other than to say --

THE COURT: Agreed.

MR. NOVOD: -- the pendency of mediation potentially and the pendency of a motion practice can sometimes force parties to the table. But that's -- it remains to be seen.

That all being said, when we brought this case, Your Honor, we filed this case here. We filed a separate case first at the Delaware District Court and then separately later in the Delaware Court of Chancellery after determining we didn't have proper diversity jurisdiction.

THE COURT: Mm hmm.

MR. NOVOD: And that case itself is against Mr. Motes, who is a defendant in both cases. In addition, it's against each of the members of ADS's board, so Bread's board, as well as their audit committee. And it revolves around the same transaction.

And the defendants there, represented by the same lawyers, different local counsel, because it's Delaware State Court and the Court of Chancellery, they answered. They didn't move to dismiss.

THE COURT: Okay.

MR. NOVOD: And so, we've been taking discovery.

THE COURT: Can we take just -- I don't want to interrupt you.

MR. NOVOD: Yeah.

THE COURT: I think we're having -- I'm getting notes that we're having a little bit of a tech issue.

MR. NOVOD: Sure.

THE COURT: Let's just take five minutes, and then --

MR. NOVOD: Okay.

THE COURT: -- I'll come back on, and we'll continue.

MR. NOVOD: Yes.

THE COURT: Okay. Thank you.

MR. NOVOD: Thank you, Your Honor.

MR. KAMINETZKY: I apologize, Your Honor. I think your tech issue was contagious.

(Recess)

CLERK: All rise.

THE COURT: Thank you. We're back on the record. Okay. Back on the record in Bread v. Pirinate. So, we've got money flowing lenders for the benefit.

MR. NOVOD: Right. And to the point of even taking the agreements for the words that they say, is there an ambiguity in the agreements, and how is it going to be argued? And I think just to take --

THE COURT: I agree.

MR. NOVOD: -- to take it back for a moment, Your Honor, part of the fundamental fairness question here is how do we go about preparing for a motion that we haven't seen? Ordinarily, summary judgment comes at the end of the case.

THE COURT: Mm hmm.

MR. NOVOD: And after that point, we've had a complaint. We've had an answer. We've had interrogatories. We've had requests for admissions. We've had all these procedural safeguards, which are built into the Federal Rules of Procedure to allow the parties to have a full understanding of not just what the claims are, but what the defenses are.

THE COURT: I don't -- I think if I convert the whole thing, that's what I'm saying.

MR. NOVOD: Right. And I think if you convert the whole thing --

THE COURT: Which I'm telling you I've done --

MR. NOVOD: Right.

THE COURT: -- essentially, then I think you get discovery. I just -- there were fights about kind of how much discovery would be needed on the 546(e) question, and I just -- I don't see it that much. I think it's primarily a legal issue. And I think a lot of that implies kind of how I construe what they argue.

But I think what makes the most sense is that I give them an opportunity to file a motion for summary judgment on the issue, and then we take -- you know, there's some discovery that goes on about the whole thing.

The question is, how do we stage it? Do we take up 546(e) at one shot, see what happens; take up actual fraud on the other shot? But I agree with you. You're going to have to see a piece of paper to see what people are arguing. And you -- but I think if I've converted the whole thing, then there's just discovery --

MR. NOVOD: Right.

THE COURT: -- on the whole thing.

MR. NOVOD: And that's why I think the best approach, and this is -- if you just hear me out for a moment --

THE COURT: Mm hmm.

MR. NOVOD: -- because I want to tie back Delaware to this, to actual fraudulent transfer on one hand and constructive fraudulent transfer on the other.

I think it all ties back to doing discovery once, a single time. Because otherwise, we're going to have multiple depositions, we're going to have multiple document requests for production, and -- I mean, like I said, at some point there has to be an answer where I know what the affirmative defenses are, just generally speaking.

THE COURT: Mm hmm.

MR. NOVOD: And we have other non-546(e) topics of discovery. For example, imputation. What evidence is there of actual intent? Not the badges of fraud, but actual intent?

Then we have the badges of fraud, and whether it's constructive fraud or actual fraud, we're -- actual -- I hate to say that as a bankruptcy lawyer -- I should never say actual fraud versus --

THE COURT: I know what you mean.

MR. NOVOD: -- actual fraudulent transfers versus a constructive fraudulent transfer, you're always going to have the question of insolvency and reasonably equivalent value. And that's going to be there no matter what happens on 546(e).

We're going to have questions about whether ADS, Bread, and its directors and officers, controlled Loyalty Ventures. That's one of our badges of fraud, but that's going to be there in any respect. We're going to have questions about whether there was any incurrence of substantial debt. I think that can probably be admitted.

But the Defendants in their papers had said on motion to dismiss that there were zero badges of fraud, so I don't think that's actually something that they're willing to admit. But I happen to think that Loyalty Ventures

incurring $675 million at the Term A and Term B, plus the revolver, satisfies that badge.

But be it as it may, then it gets into the shift in focus, where if I can establish three or more badges of fraud, then it's going to be up to the Defendants to come back and say there was a legitimate, supervening purpose.

THE COURT: Mm hmm.

MR. NOVOD: And that's a four-pronged test, according to -- you know, according to the courts in this circuit. And we happen to think that that's going to be the Defendants' burden. So that's, again, something which, through discovery, we'll be able to elicit and be able to properly prepare for summary judgment on that.

And, of course, balance sheet insolvency. Balance sheet insolvency is everything, whether it's an actual fraudulent transfer claim or a constructive fraudulent transfer claim. So, we get that there.

And then, of course, there's the ratification defense, which is, again, the Defendants' defense. But they assert that every single Loyalty Ventures lender was aware of all material information concerning Loyalty Ventures. Now, they take a narrower view. We -- I remember talking about this six or eight months ago about the ASARCO case being the applicable case there.

So, there are going to be a handful, and I counted

five different really general categories of non-546(e) --

THE COURT: So, what you're asking for is just general discovery when I boil everything down to what you're saying?

MR. NOVOD: I think it has to be. Because, again, so we're moving forward in Delaware, breach of fiduciary duty claims and aiding and abetting breach of fiduciary duty claims. And there are some non-parties involved in that case. And the Defendants answered. We're in the midst of fact discovery there. Candidly, we're still negotiating some search terms with the Defendants, and that's all I'll say on that. But that process is going to move forward one way or the other.

And then lastly, I just -- I think it -- I want it to be said because, Your Honor, I'm not sure if you were aware of it or not. We did do some Rule 2004 discovery before we filed our complaint. We largely slotted into the shoes of the debtor who had started that process. But candidly, when we were negotiating those topics, I didn't think 546(e) was going to be an issue because I didn't -- having read all the cases and thinking about these questions --

THE COURT: It's --

MR. NOVOD: -- I didn't think they were going to warrant this.

THE COURT: It's always an issue.

MR. NOVOD: I know -- well, that's true, but at certain times it's not an issue because if you focus on merit management, then you have one view of the world. But in addition to that, we didn't -- and I'll suffice to say, I didn't focus on the ADS credit agreement lenders and taking discovery there in the 2004 --

THE COURT: Yeah.

MR. NOVOD: -- in thinking about these questions. And Your Honor, I know that you have your own views, and I don't want to spin 546(e) law, so I'm not going to.

THE COURT: No, no, no. What I'm saying is I don't want anyone to know what I think about this because I think it's best.

MR. NOVOD: Of course.

THE COURT: Right? I --

MR. NOVOD: But there's one point that's been lost amongst everything. Our claims also include avoidance of an indemnification obligation.

THE COURT: It's not lost.

MR. NOVOD: Okay, great. Because that's not a 546(e) question. It involves the same fact pattern and all the same information, as well as equitable subordination and claim disallowance. Those are things which can't be disposed of on a 546(e) claim.

THE COURT: Right. But that's -- that, I will try after --

MR. NOVOD: Well, I mean...

THE COURT: -- for sure.

MR. NOVOD: We would still do the same. I would submit, Your Honor --

THE COURT: No, no. I got it. But what I'm saying is, whether a claim should be equitably disallowed, that -- I will tell you that will be staged out on the back end. That's like... That's...

MR. NOVOD: But we're going to want to do discovery once.

THE COURT: Oh, I agree, but --

MR. NOVOD: I've never met a defendant's law firm --

THE COURT: I've never heard of a -- I think claim -- I don't know what you would ask for, for equitable subordination that -- just tell me how much, how well you win the claim, and I'll tell you if your claim is going to be equitably subordinated or not. Right?

MR. NOVOD: Well, sure --

THE COURT: I mean, how bad is the badge --

MR. NOVOD: How bad is the conduct.

THE COURT: Yeah.

MR. NOVOD: Because again --

THE COURT: How bad is the fraud?

MR. NOVOD: -- we're talking about individuals --

THE COURT: Hmm?

MR. NOVOD: -- on that -- we're talking about individuals and individual conduct. My point to that, Your Honor, is that discovery should happen once.

THE COURT: Oh, I understand.

MR. NOVOD: I've never -- from my experience, I've never dealt with a defendant's counsel who said, yes, you can depose my witnesses as many times as you need.

THE COURT: No, I agree.

MR. NOVOD: And so -- and naturally, in all of our engagements and the way that we think about these things, we really need to take the fulsome discovery that we need to be able to be adequately prepared. And I think the rule -- and this gets to Your Honor's point, where we started today -- 12(d) requires, in our view, the conversion of the motion, not a portion of the motion. I'd be -- I don't want to necessarily get into the cases, and I think the --

THE COURT: I don't --

MR. NOVOD: -- supplemental papers --

THE COURT: I just want to deal with kind of where we are.

MR. NOVOD: Yep.

THE COURT: I think I got what I need.

MR. NOVOD: Yeah, so -- and my point to that is, you know, the rules do contemplate us having a reasonable opportunity to gather all the material facts. And just for efficiency, if that alone, we think it should happen once.

THE COURT: Thank you.

MR. NOVOD: Thank you, Your Honor.

THE COURT: Counsel?

MR. KAMINETZKY: Good afternoon, Your Honor. Benjamin Kaminetzky, of Davis Polk, for the Defendants. Thank you for seeing us.

I get that -- like, what's going on here. It's quite simple. They want to -- the Trustee wants to avoid a ruling on 546(e) on their constructive fraud claim as much as possible, and they're going to say or do anything to try to take Your Honor's eye off the ball.

The only issue is, were these payments for the benefit of a financial institution? That's the only question. We were contractually obligated to pass every single dollar on to the financial institutions.

And I want to warn the Trustee, he needs to be careful here, because these financial institutions who receive those payments are most of his clients, are the beneficiaries of these lawsuits. So, they know exactly what they received, how they received it, when they received it, et cetera.

So, you can play rope-a-dope and pretend, well, we don't know if the money was paid. Of course, you know if the money -- I mean, this is so simple. We have a contract that says, ADS, every dollar you receive you have to pass on to the credit agreement lenders, who are financial institutions. He said, well, we don't know who they are. Yes, you do. They're your clients.

So, if you want to have discovery about who were the actual recipients, sure, we can give you the names of the recipients. If you want to -- this is just so beyond the, like, over the rainbow, that he's saying, oh, we need discovery into the drafting, and we need -- again, for the benefit of the financial institutions.

THE COURT: What do you think we need discovery on if I were just to tee up the 546 issue?

MR. KAMINETZKY: All we need is the final agreements. Is there a contractual -- you don't need a contractual application, but here it's the easiest 546(e) in the history of 546(e). Again, the standard is, "did the financial institutions" -- I'm reading from the Greektown case -- "receive a direct" -- I'm quoting -- "ascertainable and quantifiable benefit corresponding in value to the payments to the Defendants?"

Here, we were contractually obligated and did take every dollar, the 650 and the 100 million, as required by

the SDA, and gave it to financial institutions. It doesn't have to be these financial -- any financial institutions. And then we (indiscernible) satisfied 546(e). I have literally no idea, all the other stuff. I mean, that's it. That's the only inquiry.

I understand he doesn't want Your Honor to rule on it, and he wants to have a 540 -- I'm sorry -- a constructive fraudulent transfer over our head until the end of the case. But the whole point of 546(e) is it's a threshold question.

And what the Supreme Court says is that you're supposed to -- and (indiscernible) this is something easy. The words are the words. Is it -- sometimes you fight about whether it was a securities contract. Here, there's no question it was. He doesn't dispute that. So, was it for the benefit? Somehow, he's arguing -- I think he said, well, when you receive money, it might not be for your benefit.

THE COURT: Wait a minute --

MR. KAMINETZKY: I mean, if you can tell yourself --

THE COURT: In other words, it's your summary judgment motion that you'd be teeing up, right? So, in other words -- but I do think they'd be entitled to know who -- for example, who the lenders are --

MR. KAMINETZKY: Sure.

THE COURT: -- and who received the money. And you'd have to prove up this is the money moved from here to here, and I turned -- if you're saying, I turned over every dollar that I was contracted, and I did -- you know what I mean? That kind of --

MR. KAMINETZKY: Sure. But that -- I mean, they have that, but sure, I'm happy to give them -- final docs are already in the record of where -- you know, where the contractual obligations are that we hand the money over. The flow of funds, we're happy to provide. And, you know, in terms of like, okay, the money went from the banks to ADS and then to the financial institutions. That's really easy. And that we, in fact, abided by the contract.

Here, Your Honor, I'm just taking a step back. The only way this deal could happen is that, again, this was a spinoff, right? So, these financial institutions had liens on what we're about to spinoff. So, they weren't going to let us -- they're not going to lose their collateral without getting the money that we received for that collateral. So, of course, we were contractually obligated to pass the money on, or else they wouldn't have let LVI out the door in the spinoff.

But that's fine. We could -- I mean, there's a contractual obligation. Why you would need discovery as to

-- I mean, I'm trying to --

THE COURT: No --

MR. KAMINETZKY: I'm looking, he says we need to know --

THE COURT: Well, he's going to want discovery on all of his claims and I --

MR. KAMINETZKY: I understand that. I'm fine -- we deserve -- I deserve -- we don’t deserve anything --

THE COURT: No, I mean, I --

MR. KAMINETZKY: I'm asking. We would like a ruling on the constructive fraud --

THE COURT: I'm --

MR. KAMINETZKY: -- because actual fraud is hard to prove, Your Honor.

THE COURT: Let me just tell you, I'm convinced more -- and I came in here thinking it... The constructive fraud -- excuse me -- the 546 issue is going to determine a lot as to whether this case and what should go to trial and how much is left to go to trial. That's a threshold issue to me. And I'm going to -- I think that's the issue I want to tee up first. It's what I've always wanted to tee up first.

I think -- but I do think you've got to file something. And I do think they're entitled to some discovery, based upon what you filed, to kind of prove up

your summary judgment on the 546 defense.

MR. KAMINETZKY: We're happy to re-file it as a summary judgment, but again, I'm not sure. Again --

THE COURT: I know, but I'm saying -- but in other words, you get to prove your docs. But they're entitled to some -- depending on what you put in the doc, they get to read the doc and then say, hey, I think I'm entitled to a little bit of evidence to then prove up. I don't know what you put in there. Maybe it's just all in the docs. It's your burden, right, to establish the 546 event? So, I think you get a chance to file something, say, within 30 days. You know, you can get what you want.

MR. KAMINETZKY: Yeah. I do think, though, that Your Honor, that this is a -- you know, constructive fraudulent transfer is a very -- it's one of their claims, and I think Your Honor is exactly right, that we need to get through that. Just in terms of, like, the burden and cost of this whole discovery exercise, I think changes dramatically if it's in or if it's out.

THE COURT: Oh, I agree. And that may require -- and I get it. I get his point that that may be proved at the end, but knowing that you're going to go to trial on the whole thing or you're going to go to trial just potentially on just fraudulent transfer or, you know --

MR. KAMINETZKY: Actual fraud --

THE COURT: -- 541(a)(1) on an actual fraud, I think changes the dynamic completely in terms of what the cost, time... And I can get a discovery schedule.

I want to deal with the 546(e) issue, but I think you've got to tee it up, I don't know, 30 days, and let them get a response on 30 days. But there may be some discovery that may need to take place, depending on what you agree that you all can agree on.

MR. KAMINETZKY: I --

THE COURT: They get a chance to see what you put out there, that's what I mean.

MR. KAMINETZKY: No. And I'm happy to do that within 30 days, file a new summary judgment on the 546 constructive fraudulent transfer issue. Done.

I hope we can work out the discovery, but listening to what Mr. Novod, who I'm so fond of -- so don't take anything I say --

THE COURT: No, I --

MR. KAMINETZKY: -- I mean, I think he's a wonderful lawyer. But I fear that, you know, what he's talking about, I need to know. Scrivener's error? And again --

THE COURT: No --

MR. KAMINETZKY: -- for the benefit of the financial institutions.

THE COURT: Those issues have been dealt -- and people know how I dealt with it in Robertshaw. I mean, I'm going to enforce documents literally as written. So, I mean, just --

MR. KAMINETZKY: Hmm. Okay.

THE COURT: The point I'm trying to make is, I think you get something on file in 30 days, I think they then file something within -- well, they get to see what you want, and then maybe they can ask for some discovery before they respond. But theoretically, they could respond within 30 days. The docs have docked. Maybe the parties are working throughout this.

And if we need to tee it up, then we'll do it the way I've traditionally done it, whereas someone shows up with a list of document requests, someone says, here's what I think we should do, and he will leave it up to His Honor, and His Honor will just make the call, and people will live with the decision that I make on docs after they do it. And sometimes people like my decisions, and sometimes they don't. But I'm going to deal with the 546(e) threshold issue first, and I think it will --

MR. KAMINETZKY: And Your Honor, to make it easier --

THE COURT: -- clarify this. But I think we ought to dual track that with -- I know that you all are thinking

about going to mediation. That doesn't stop what we do here. It might actually -- I think everyone putting their positions on paper sometimes is helpful as well.

MR. KAMINETZKY: No, I --

THE COURT: We'll see.

MR. KAMINETZKY: I (indiscernible) same. So, I am fine -- I'll do you one better, Your Honor. We'll file in 30 days our 546 -- we'll call it the 546(e) motion, and we'll provide, along with that motion, anything we think you need, which is basically the docs and the -- I don't know, the flow of funds? Because, again, the issue is, did it go for the benefit of the financial institutions, the flow of funds into whom the financial institutions are important. I guess he's -- what are the financial institutions? And that's fine. I mean, we'll do that straight on.

THE COURT: The parties can start to talk about what it is, if it's limited to just the 546(e), I think. But a lot of what he's asking for you're going to provide anyway and you're going to have to prove anyway where the money -- how the money moved, if you were entitled to turn it over, that you turned it over, some flow of funds, who the lenders are, relevant docs that are there.

I don't want to take judicial notice of anything. I want -- if something's in the docs, prove it up and get me in, and then we'll see where we are. That's what I think.

MR. KAMINETZKY: Okay, Your Honor. So, okay. And I do think, though, I mean, just to be clear so there's no ambiguity. So, we'll file the 546(e) summary judgment motion, just that. And do I take it from Your Honor -- did you rule against us on the actual fraud? Like, where are we on --

THE COURT: Yeah. No, I think they've -- essentially, I think they've established -- I think they've established prima facie on the actual fraud claim on their motion to dismiss. That's why I thought it made sense to just convert the whole thing and go there and maybe you can prove something there.

But in terms of the pleading on its face, I'm more than welcome -- I'm more than happy to give you a doc that denies the motion to dismiss with respect to the actual fraud and all the other claims. I think they've pled that out. But the 546, I want to convert, because I think that's a threshold issue. And maybe without prejudice, you filing a summary judgment motion on the other stuff as well.

MR. KAMINETZKY: Okay. So, without prejudice, as -- at the -- if we go forward with discovery on the other stuff, then to file --

THE COURT: Yeah.

MR. KAMINETZKY: -- a summary judgment then because --

THE COURT: Or maybe -- yeah, everyone's rights.

MR. KAMINETZKY: Yeah, I mean, everyone. Right. And they could file, I guess, whatever they want.

THE COURT: That's what I think.

MR. KAMINETZKY: What else would be helpful for you to hear from me? I mean, I'm happy to respond and to talk about how you have to -- I mean, there's --

THE COURT: That's --

MR. KAMINETZKY: -- a lot of stuff he threw at Your Honor, but --

THE COURT: No, no, no. I'm kind of trying to -- there's a lot of strong arguments on either side, and I don't want to --

MR. KAMINETZKY: Well --

THE COURT: I want to just get to the point where I can just rule on the issues and get to the legal issues. So, I do think I'll get you something in writing shortly, really shortly, on the other claims, the other parts of your motion to dismiss, cleanly tee up the 546 issue and then give -- and then give you 30 days. And I'll probably get it out tomorrow because I've got a hearing (indiscernible).

MR. KAMINETZKY: Understood.

THE COURT: But give you 30 days from a period of time to get something on file and then give them an opportunity to respond. And then the question is, when it

comes to discovery, I don't -- if you all decide to mediate or not, that's up to you. Just let me know. And if something changes from within that or changes -- but I think my summary judgment timeline doesn't change what's going on, regardless of what you all do. But I'd be open to discovery, if you guys decide to mediate.

MR. KAMINETZKY: Okay. And when you say discovery, so we'll stage the discovery, we'll do any remaining 540s. Again, I don't think there possibly could be any, but you're not going to decide -- I understand Your Honor's not going to decide that now -- that we'll do that first in connection with the summary judgment motion that we'll file in 30 days, and then we'll see --

THE COURT: That's exactly right. And you get a chance to look at it and say, no --

MR. KAMINETZKY: You need --

THE COURT: -- you know, they've given me X, but I still need Y. And you'll have a hearing within 24 hours on that. We'll just have a status conference. As a matter of fact, it may even make sense that I may even schedule a status conference a couple of days after it gets filed so that we already have something on the books, and then you can look and see what it is.

MR. KAMINETZKY: And can we do it by Zoom, so we don't have --

THE COURT: Yeah, 100 percent. I think appearing by video is completely fine.

MR. KAMINETZKY: Okay, good. Because we're both coming from New York, and it's --

THE COURT: No, no, no. That makes sense.

MR. NOVOD: I did want to address one or two points, but I didn't want to interrupt you, Ben.

MR. KAMINETZKY: Okay. I mean, unless Your Honor wants -- I mean, I have a lot to say, but it seems like --

THE COURT: No.

MR. KAMINETZKY: -- we have a path forward.

THE COURT: Your two points?

MR. NOVOD: I just -- I had a clarification concerning what we're expecting to see from the Defendants,

THE COURT: Mm hmm.

MR. NOVOD: And then I just wanted to address who my client is, and I'll get to that last.

THE COURT: Sure.

MR. NOVOD: One, when one moves for summary judgment, typically you would file all of your material information that one needs to judge --

THE COURT: In connection with the motion.

MR. NOVOD: Exactly.

THE COURT: Yeah.

MR. NOVOD: And it's done with declarations that

are sworn under penalty of perjury --

THE COURT: It's summary judgment motion, yeah.

MR. NOVOD: Right. Well, but they've just asked for the ability to file the motion, but not the supporting papers. I just want to be clear, ordinarily, you'd have a statement of the --

THE COURT: Yeah.

MR. NOVOD: -- non-disputed facts --

THE COURT: Yeah.

MR. NOVOD: -- because then we have an opportunity to --

THE COURT: Fair point. I think -- it's a -- I'm giving you 30 days to go file one up, so that we can really tee the issue up.

MR. NOVOD: A real summary judgment motion, though. So, with declarations --

THE COURT: Correct.

MR. NOVOD: -- with documents that are exhibited that are authenticated, with a statement of facts --

THE COURT: Whatever proves their case up, yeah. That's exactly right.

MR. NOVOD: Okay. I just wanted to make sure that wasn't lost, and that we're not --

THE COURT: No.

MR. NOVOD: -- just going to get a regurgitated

version of the motion to dismiss.

THE COURT: Well --

MR. NOVOD: The point that I wanted to make, Your Honor, just because -- I stand here for the Trustee.

THE COURT: Right.

MR. NOVOD: I don't stand here for any lender.

THE COURT: Right.

MR. NOVOD: And he said --

THE COURT: Oh, no, no. Yeah, I know who you represent.

MR. NOVOD: Yeah. And I don't know if the Term Loan B -- there was $500 million in Term Loan B --

THE COURT: Mm hmm.

MR. NOVOD: -- that aren't the same bulge bracket banks that were the credit agreement lenders that were taken out. And so, there are questions that we have as to who are the actual people? So, you can't say that the credit agreement lenders that were paid at the ADS credit agreement lenders are my clients --

THE COURT: Mm hmm.

MR. NOVOD: -- because A, they're not my client. My client's the Trustee. But secondly, we don't even know if they're the beneficiaries of the trust, because there's a whole different world of lenders that came in to buy the Term Loan B --

THE COURT: Mm hmm.

MR. NOVOD: -- which was $500 million, and not the $175 million in Term Loan A. So, I just wanted to be clear on that.

And then on 546(e), we're not afraid of Your Honor ruling. We happen to think --

THE COURT: No, no --

MR. NOVOD: Yeah, I mean, I just want that to be clear. And we're not seeking to delay. All we're doing is saying, listen --

THE COURT: Yeah.

MR. NOVOD: -- we need the information and discovery in order to be able to do that.

THE COURT: And I think what I'll do is I'll get an order out tomorrow, but it'll be out by tomorrow. I just -- I don't want to rush it. It'll lay everything out, get some dates there.

I will not set a hearing on summary judgment motion yet, but I will -- once you kind of see the order, somewhere within that time we'll set the timeframe and we'll pick a date, and we'll all come in and argue it.

MR. NOVOD: And Your Honor, I appreciate the way that you're sequencing this part of it, which we're going to now see what the motion is with the evidence, and then we're going to have an ability to say what discovery we need.

We're going to talk, of course, to the Defendants, because we've been talking to them for the last year and a half anyway. And we're going to see if we can get it done --

THE COURT: Yeah.

MR. NOVOD: -- without coming back to Your Honor.

THE COURT: Okay. That sounds great.

MR. NOVOD: Thank you.

THE COURT: All right, folks. Thank you very much.

MR. KAMINETZKY: Thank you for seeing us.

THE COURT: Alrighty.

CLERK: All rise.

(Proceedings adjourned at 1:50 a.m.)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

Date: June 16, 2025

SCHEDULE "F"

Bread's Answer to Complaint In Texas Litigation

(Excerpts)

ANSWER: Defendants lack sufficient knowledge to admit or deny the allegations in the first sentence of Paragraph 12, and therefore deny them. Defendants deny the allegations in the second, fourth, and fifth sentences of Paragraph 12. The document referenced in the third sentence of Paragraph 12 is the best evidence of its contents, and Defendants deny any allegations in the third sentence of Paragraph 12 inconsistent with or purporting to contextualize, characterize, or otherwise provide commentary to what is written in that document. Defendants lack sufficient knowledge to admit or deny the allegations in footnote 9, and therefore deny them.

13. In the final Spinoff Transaction, ADS mandated and caused LVI, the entity that would 'acquire' the AIR MILES business, as well as ADS's separate BrandLoyalty business, (i) to borrow $675 million[10] from third-party lenders and use $650 million of it (nearly all of the net proceeds of those loans) to pay ADS for the stock of the subsidiaries who conducted the AIR MILES and BrandLoyalty businesses (the "$650M Transfer"), (ii) to cause Debtor Rhombus Investments L.P. ("Rhombus") to pay $100 million purportedly due under a promissory note to an ADS wholly owned subsidiary (the "$100M Transfer"), with $50 million to repay principal and $50 million to pay interest due under that note, (iii) on behalf of L1 Canada, to purport to transfer to ADS/Bread the right to receive the proceeds of an ongoing litigation between L1 Canada and Canada Revenue Agency, which, if successful could result in proceeds of up to CAD[11] 75-80 million to which L1 Canada may become entitled (the "Tax Litigation Proceeds Transfer Obligation"), and (iv) to assume liability for certain class action lawsuits consisting of claims that were based on and arose from actions that the ADS Board had directed prior to the Spinoff Transaction (the "Liability Assumption").

ANSWER: The allegations in Paragraph 13 are based on the documents effectuating the Spinoff Transaction, which are the best evidence of their contents, and Defendants deny any allegations in Paragraph 13 inconsistent with or purporting to contextualize, characterize, or otherwise provide commentary to what is written in those documents. Footnotes 10 and 11 require no response.

14. Yet, the Spinoff Transaction was not in the best interests of LVI or its creditors. The Spinoff Transaction was made when, and/or resulted in LVI being balance sheet insolvent and

[10] *All* dollar figures in this Complaint are in U.S. dollars, unless otherwise noted.

[11] "CAD" references the Canadian Dollar Currency.

ANSWER: Defendants deny the allegations in the first and second sentences of Paragraph 281, except admit that the Schedules to the SDA were not filed with the copy of the SDA that was filed with the U.S. Securities and Exchange Commission. The document referenced in the third sentence of Paragraph 281 is the best evidence of its contents, and Defendants deny any allegations in the third sentence of Paragraph 281 inconsistent with or purporting to contextualize, characterize, or otherwise provide commentary to what is written in that document. Defendants deny the allegations in the fourth sentence of Paragraph 281.

282. As part of the Spinoff Transaction, LVI and ADS also entered into the "Tax Matters Agreement", dated as of November 5, 2021 (the "TMA"). The TMA addresses the rights and obligations of ADS/Bread, LVI and, purportedly, their respective subsidiaries with respect to various tax obligations, tax litigation proceeds, and tax refunds. Under the TMA, ADS/Bread caused LVI to agree to pay over to ADS/Bread any tax litigation proceeds which could be as much as CAD 75-80 million to which L1 Canada may become entitled within thirty (30) days of receipt thereof.

ANSWER: The document referenced in Paragraph 282 is the best evidence of its contents, and Defendants deny any allegations in Paragraph 282 inconsistent with or purporting to contextualize, characterize, or otherwise provide commentary to what is written in that document.

283. Section 8(a) of the TMA provides that "ADS shall be entitled to all Tax Refunds received by any member of the ADS Group or any member of the Loyalty Ventures Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C."[263] TMA Schedule C specifically lists "[L1 Canada] income tax payments made in order to appeal and litigate the 2013 tax assessments (and additional assessments in 2014-2016) issued by both Canadian federal and provincial tax authorities."[264]

[263] TMA, §8(a).

[264] TMA, Schedule C.

ANSWER: The document referenced in Paragraph 283 is the best evidence of its contents, and Defendants deny any allegations in Paragraph 283 inconsistent with or purporting to contextualize, characterize, or otherwise provide commentary to what is written in that document.

284. The TMA was executed by Jeff Fair, as Senior Vice President of "Loyalty Ventures on its own behalf and on behalf of the members of the Loyalty Ventures Group." Fair also co-signed the TMA, as Senior Vice President of "ADS on its own behalf and on behalf of the members of the ADS Group."

ANSWER: The document referenced in Paragraph 284 is the best evidence of its contents, and Defendants deny any allegations in Paragraph 284 inconsistent with or purporting to contextualize, characterize, or otherwise provide commentary to what is written in that document.

285. As a result of LVI's transfer of $650 million to ADILC (which it then distributed upstream to ADS) on November 3, 2021, LVI became legally insolvent. Upon the completion of that transfer, (a) LVI's debts totaled no less than the $675 million of Term Loan A and Term Loan B indebtedness, but (b) its only assets and property were the Contributed Shares of the entities comprising the LoyaltyOne Business, and at a fair valuation, the LoyaltyOne Business was worth less than $450 million at the time of the transfer. Thus, the sum of LVI's debt was greater than all of its property and assets, at a fair valuation, upon the completion of the transfers to ADS on November 3, 2021.

ANSWER: To the extent that Paragraph 285 contains legal conclusions, no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 285.

286. Upon the completion of the $650M Transfer, LVI now owed that amount and more under the Credit Agreement, as stated above:

a. LVI became obligated to make the amortization and interest payments described above on the Term Loan A and Term Loan B indebtedness on a quarterly basis until their stated maturities (November 3, 2026 and November 3, 2027, respectively). Those amortization payments were to be made in equal quarterly installments in an aggregate amount of 7.5% per annum of the initial aggregate principal balance of the Term Loan A and Term Loan B indebtedness. Pursuant to those terms, LVI was require to make annual amortization payments of over $48 million in 2022 alone, and over $45 million of such payments in 2023.

b. LVI became obligated to make interest payments on the Term Loan A and Term Loan B indebtedness at certain floating rates (which would increase if certain

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

Court File No. CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

AIDE MEMOIRE OF THE AD HOC GROUP OF TERM LOAN B LENDERS

Bennett Jones LLP
One First Canadian Place
100 King Street West, Suite 3400
Toronto ON M5X 1A4

Preet K. Gill (#55526E)
Tel.: 416.777.6513
Email: gillp@bennettjones.com

Jesse Mighton (#62291J)
Tel.: 416.777.6255
Email: mightonj@bennettjones.com

Shawn Kirkman (#92214U)
Tel.: 416.777.7499
Email: kirkmans@bennettjones.com

Lawyers for the Ad Hoc Group of Term Loan B Lenders