

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE:	)	CHAPTER 11
	)	
EQUIPMENT ACQUISITION	)	Case No. 09 B 39937
RESOURCES, INC.	)	
	)	Hon. Timothy A. Barnes
Debtor.	)	
_____	)	
	)	
WILLIAM A. BRANDT, JR., solely in his	)	Adv. No. 11-02203
capacity as Plan Administrator for Equipment	)	
Acquisition Resources, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE CIT GROUP/EQUIPMENT	)	
FINANCING, INC.,	)	
	)	
Defendant.	)	

**RESPONSE TO MOTION TO DISMISS ADVERSARY PROCEEDING**

Plaintiff William A. Brandt, Jr. (“**Plaintiff**” or “**Brandt**”), solely in his capacity as Plan Administrator of Equipment Acquisition Resources, Inc. (“**EAR**” or “**Debtor**”), by his attorneys of record, files this response to Defendant CIT Group/Equipment Financing Inc.’s (“**CIT**” or “**Defendant**”) *Motion to Dismiss Third Amended Complaint* [DE #61] (the “**Motion**”). Brandt hereby asks that this Court deny the Motion.

**SUMMARY OF ARGUMENT**

1. In requesting the dismissal, the Motion misapplies the applicable authority and ignores the factual allegations of the Third Amended Complaint [DE #58] (the “**TAC**”). The Motion has three primary arguments: (a) the TAC inadequately alleges the badges of fraud; (b)

the TAC does not meet the requirements of Rule 9(b); and (c) the transfers should be analyzed as preferences not as fraudulent transfers. As set forth below, CIT's arguments should be rejected, and its Motion denied.

2. First, the TAC alleges seventeen separate badges of fraud which establish the requisite intent for a claim to avoid and recover an actual intent fraudulent transfer.<sup>1</sup> Each of the alleged badges of fraud is supported by Federal and/or Illinois state law. Collectively, the badges demonstrate that all actions taken in furtherance of the Fraud<sup>2</sup>—including the transfers made to CIT—were undertaken with the intent to hinder, delay, or defraud creditors of EAR. Thus, the TAC establishes the requisite intent for § 548(a)(1)(A) and 740 ILCS § 160/5(a)(1).

3. Second, the TAC meets the requirements of Rule 9(b). As stated, the TAC contains seventeen separate badges of fraud. These badges, combined with the other allegations in the TAC plead the facts of the Fraud with great detail and particularity. The Court's June 6, 2013 Memorandum Decision, Adv. No. 11-02236 [DE #59] (the "**June 2013 Decision**") makes clear that the reason for dismissal of the SAC was because it "touch[ed] upon the various badges of fraud in a piecemeal fashion." June 2013 Decision, pg. 11. The TAC pleads the badges of fraud directly and collectively, and thus, cures any deficiencies that the SAC may have had with respect to the requirements of Rule 9(b). Thus, the TAC pleads the Fraud with particularity.

4. Third, the Court has already struck down CIT's argument that the transfers must be analyzed as preferences and not fraudulent transfers. In its September 2012 Memorandum

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<sup>1</sup> Per this Court's instruction, Brandt is excluding any discussion of the Ponzi scheme presumption and is limiting his argument regarding EAR's intent to hinder, delay, or defraud its creditors to the existence of the badges of fraud. Solely for the purposes of preserving these arguments for any potential appeal, Brandt incorporates those arguments relating to the Ponzi scheme presumption and intent to defraud contained in his *Response to Motion of the CIT Group/Equipment Financing Inc. to Dismiss Second Amended Adversary Complaint* [DE #49].

<sup>2</sup> Capitalized terms not otherwise defined in this response have the meaning set forth in the TAC.

Decision in Adversary No. 11-ap-02196 (“US Bank September 2012 Decision”), the Court specifically rejected the argument “that preferential payments to creditors and fraudulent transfers are mutually exclusive.” US Bank September 2012 Decision, pgs. 5-7. Further, the Court held that “while a transfer made in satisfaction of antecedent debt is made for ‘value,’ . . . such a transfer may nonetheless have been made with actual fraudulent intent.” *Id.*, at 6. Thus, CIT’s argument is inappropriate and without merit.

5. Taken as true, the allegations in the TAC sufficiently show that Brandt is entitled to avoid and recover the transfers made to CIT under 11 U.S.C. § 548 and 740 ILCS 160/5. Therefore, this Court should deny the Motion in its entirety.

## **ARGUMENT**

### **I. Standard of Review**

6. To survive a motion to dismiss, a complaint must satisfy two requirements: (a) “the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests”; and (b) “its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level.” September 2012 Memorandum Decision [DE # 40] (the “**September 2012 Decision**”), pg. 6 (quotations omitted) (alteration in original).

7. Where allegations of fraud are involved, Rule 9(b) requires the plaintiff to “state with particularity the circumstances constituting the fraud or mistake.” That means the plaintiff must state the “who, what, when, and where” of the alleged fraud. September 2012 Decision, pg. 6 (quoting *Uni\*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992)). For a fraudulent transfer, this means the complaint must allege “what (or how much) was transferred, when the transfer was made, how it was made, who made it, who received it, and under what

circumstances.” *Marwil v. Oncale (In re Life Fund 5.1 LLC)*, 2010 WL 2650024, at \*3 (Bankr. N.D. Ill. 2010); accord, *Pereira v. Grecogas Ltd. (In re Saba Enters, Inc.)*, 421 B.R. 626, 640 (Bankr. S.D.N.Y. 2009). “However, the heightened specificity requirement for bankruptcy trustees . . . is slightly relaxed given the inevitable lack of knowledge concerning acts of fraud previously committed against [a] debtor, a third party.” *In re Hearthside Baking Co., Inc.*, 402 B.R. 233, 255 (Bankr. N.D. Ill. 2009) (collecting cases) (internal quotations omitted).

**II. The TAC Alleges the Existence of Seventeen Separate Badges of Fraud, Therefore, the TAC Sufficiently Alleges Fraudulent Intent**

8. As requested by the Court’s June 2013 Decision—and demonstrated below—the TAC alleges seventeen separate badges of fraud that arise out of the Fraud (the “Pleaded Badges of Fraud”).<sup>3</sup> The Pleaded Badges of Fraud demonstrate that EAR acted with the intent to hinder, delay, or defraud its creditors when it transacted with CIT and the other lessors. Each of the Pleaded Badges of Fraud is supported by Federal and/or Illinois law and arises out of the Fraud. Further, the TAC specifically connects each of the transfers to the Pleaded Badges of Fraud by establishing that that EAR’s transactions with CIT were a part of the Fraud.

9. It is well settled that “[d]irect proof of actual intent to defraud [on an actual intent fraudulent transfer claim] is not required—indeed, it would be hard to come by—and a trustee can prove actual intent by circumstantial evidence. Courts often look to ‘badges of fraud’ as

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<sup>3</sup> It should be noted that analysis of the badges of fraud is unnecessary to establish fraudulent intent where it is otherwise established. See, e.g., *Liebersohn v. Campus Crusade for Christ, Inc. (In re C.F. Foods, L.P.)*, 280 B.R. 103, 109 (Bankr. E.D. Pa. 2002) (“[E]ven in the absence of any of the enumerated badges, a court can find actual fraud.”); *Hays v. Jimmy Swaggart Ministries*, 263 B.R. 203, 209 (M.D. La. 1999) (holding that consideration of badges of fraud is unnecessary where “actual intent” otherwise established); see also, e.g., *In re Beverly*, 374 B.R. 221, 236 (B.A.P. 9th Cir. 2007) *aff’d in part, dismissed in part*, 551 F.3d 1092 (9th Cir. 2008) (“A trier of fact is entitled to find actual intent based on the evidence in the case, even if no ‘badges of fraud’ are present.”).

circumstantial evidence.” *E.g., In re Pop*, No. 04 B 43773, 2007 WL 1592957 (Bankr. N.D. Ill. May 24, 2007). The presence of all or even a majority of these badges of fraud is unnecessary to establish fraudulent intent. *See, e.g., Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 419 F.3d 594, 599-600 (7th Cir. 2005) (criticizing district court for concluding that five badges of fraud were insufficient to establish intent); *Kaibab Indus., Inc. v. Family Ready Homes, Inc.*, 372 N.E.2d 139, 142 (1978) (finding that four badges of fraud were sufficient to establish intent). And the “concurrence of several badges will always make out a strong case” for existence of fraudulent intent. *E.g., In re Russo*, 1 B.R. 369, 382 (Bankr. E.D.N.Y. 1979). In addition, “[w]hether badges of fraud shown in the evidence are sufficient to establish the fact that the conveyance in question was fraudulent is a matter for the jury to decide.” *E.g., Zwick v. Catavenis*, 162 N.E. 869, 872 (1928).

**1. EAR Was Insolvent Throughout the Relevant Period**

10. EAR was insolvent at the time of the transfers. June 2013 Decision, pg. 10-11 (quoting *Grede v. Bank of New York Mellon, et al.*, 441 B.R. 864, 881 (N.D. ILL. 2010) (citing *Pomona Valley Imps., Inc., et al. (In re Cohen)*, 199 B.R. 709, 717 (B.A.P. 9<sup>th</sup> Cir. 1996))); June 2013 Decision, pg. 11 (quoting 740 ILCS 160/5(b)(1)-(11)). As alleged in the TAC, EAR was rendered insolvent by the Fraud at least as early as 2005 and throughout the period it made the transfers to CIT. TAC ¶¶ 42-43.

**2. EAR Incurred Substantial Debt Throughout the Relevant Period**

11. EAR had incurred, and was continuing to incur, substantial debt while it was making its payments to CIT. June 2013 Decision, pg. 10-11 (quoting *Grede*, 441 B.R. at 881); June 2013 Decision, pg. 11 (quoting 740 ILCS 160/5(b)(1)-(11)). The TAC specifically alleges that the Fraud consisted of EAR borrowing funds from new lessors to pay old lessors, and EAR used funds derived from the Fraud to make the transfers to CIT. *E.g.*, TAC ¶¶ 14-36, 46. As

detailed in the TAC, EAR incurred substantial debt by entering into new fraudulent leasing arrangements while it made the transfers to CIT. In fact, the TAC specifically identifies millions of dollars in obligations that EAR incurred on a monthly basis. TAC ¶ 34. CIT's arguments simply ignore these allegations.

### ***3. EAR Concealed the True Nature of Transactions***

12. The true nature of the transactions with CIT and other Financial Entities was concealed. June 2013 Decision, pg. 10-11 (quoting *Grede*, 441 B.R. at 881); June 2013 Decision, pg. 11 (quoting 740 ILCS 160/5(b)(1)-(11)). The allegations of the TAC establish that EAR made attempts to conceal the nature of the equipment transactions, including those with CIT. Specifically, the TAC describes a fraudulent scheme at EAR designed to defraud creditors. *E.g.*, TAC ¶¶ 14-36, 46. EAR concealed the transactions through: (a) using MTD to disguise the fact that EAR owned the underlying equipment (*E.g.*, TAC ¶¶ 25-30, 32) and (b) falsely claiming that the transactions were based on operational needs (*E.g.*, TAC ¶¶ 14, 26, 29).

### ***4. EAR Was Under Constant Threat of Potential Lawsuits***

13. The transfers to CIT were made while EAR was under threat of potential lawsuits. June 2013 Decision, pg. 10-11 (quoting *Grede*, 441 B.R. at 881); June 2013 Decision, pg. 11 (quoting 740 ILCS 160/5(b)(1)-(11)). EAR was a massive fraud. *E.g.*, TAC ¶¶ 14-20. Had EAR's creditors discovered the Fraud, EAR and its principals would have been subject to numerous lawsuits. TAC ¶¶ 60, 66. In fact, EAR's creditors filed numerous suits alleging fraud and breach of contract once the company filed for bankruptcy. TAC ¶¶ 60, 66. Furthermore, EAR received numerous notices of default beginning in 2009, and would have received those notices of default much earlier had it ceased making payments to any of the lessors, including CIT. TAC ¶¶ 60, 66.

**5. Player, Who Controlled EAR, Absconded**

14. EAR's manager, Sheldon Player, has absconded. June 2013 Decision, pg. 10-11 (quoting *Grede*, 441 B.R. at 881); June 2013 Decision, pg. 11 (quoting 740 ILCS 160/5(b)(1)-(11)). From 2003 to October 8, 2009, Player exercised complete control over EAR. *E.g.*, TAC ¶¶ 19-20, 38, 40. Player fled the state of Illinois after being ousted from the company in October 2009. *E.g.*, TAC ¶¶ 38, 40. In addition, Player was apprehended in 2009 carrying \$700,000 in cash through the airport in Denver, Colorado. TAC ¶¶ 60, 66.

**6. EAR Removed and Concealed Assets**

15. EAR removed and concealed assets. June 2013 Decision, pg. 11 (quoting 740 ILCS 160/5(b)(1)-(11)). Player, Anstett, and Malone caused EAR to transfer millions of dollars to them personally in the form of cash payments, real estate purchases, and other goods. *E.g.*, TAC ¶¶ 27, 36. In 2007 and 2008 alone, shareholder distributions were approximately \$23 million. TAC ¶ 36. Player regularly used EAR's funds to fund gambling trips, making transfers from EAR's bank accounts to certain casinos to cover his gambling losses. TAC ¶¶ 60, 66. Furthermore, Player caused EAR to purchase assets in other peoples' names. TAC ¶¶ 60, 66.

**7. EAR Used MTD as a Straw Man in Its Scheme**

16. EAR used MTD as a straw man or "mere dummy" in its transactions with CIT and the other lessors. *E.g.*, *Olds v. Adams Clark Bldg. Corp.*, 277 Ill. App. 157, 166 (Ill. App. Ct. 1934) (recognizing the use of a straw man as a badge of fraud); *Brach v. Moen*, 35 F.2d 475, 478 (8th Cir. 1929); *In re Russo*, 1 B.R. 369, 382 (Bankr. E.D.N.Y. 1979). As alleged in the TAC, MTD had no legitimate interest in the underlying transaction other than to receive its cut from participating in the Fraud. *E.g.*, TAC ¶¶ 25-30. In fact, MTD had no legitimate operations and filed for bankruptcy in 2011 with no assets. *E.g.*, TAC ¶ 30. Put simply, and as the TAC describes, MTD's sole purpose was to facilitate the Fraud for the benefit of EAR.

**8. *The Overall Existence and Cumulative Effect of the Events at EAR Indicate the Intent to Defraud Creditors***

17. The overall existence and cumulative effect of the pattern, series of transactions, and EAR's course of conduct indicate the transactions with CIT and the other lessors were designed to defraud creditors. *E.g.*, *In re Kaiser*, 722 F.2d 1574, 1583 (2d Cir. 1983); *In re Meyer*, 307 B.R. 87, 91-92 (N.D. Ill. 2004); *In re Cohen*, 142 B.R. 720, 728 (Bankr. E.D. Pa. 1992); *In re Dereve*, 381 B.R. 309, 326 (Bankr. N.D. Fla. 2007). The TAC specifically alleges that the Fraud consisted of a pattern, series of transactions, and course of conduct whereby EAR acquired funds from new creditors to pay existing creditors, including CIT. *E.g.*, TAC ¶¶ 14-36, 46. All of the transactions EAR entered into with CIT were for equipment that EAR did not need (and in fact already owned) and did not use, and involved sham transactions through MTD. *E.g.*, TAC ¶¶ 14-20. As the TAC describes, the sole purpose of the Fraud—*i.e.* EAR entering into rounds of unnecessary equipment transactions—was to defraud its creditors.

**9. *The General Chronology of Events and Transactions at EAR Indicate the Intent to Defraud Creditors***

18. The general chronology of events and the transactions under inquiry indicate the intent to defraud. *E.g.*, *In re Kaiser*, 722 F.2d at 1583; *In re Meyer*, 307 B.R. at 91-; *In re Cohen*, 142 B.R. at 728; *In re Dereve*, 381 B.R. at 326; *In re Eubanks*, 444 B.R. 415, 424 (Bankr. E.D. Ark. 2010). The timeline for EAR's leasing transactions indicates EAR's intent to defraud. EAR entered into equipment leases and financing arrangements on a continuous basis, regardless of the legitimate business need for the transactions. *E.g.*, TAC ¶¶ 14-20, 45. EAR owned the equipment in question prior to the transactions, and therefore, the sole purpose of the transactions was to provide liquidity to fuel the Fraud. *E.g.*, TAC ¶ 18. Moreover, EAR's equipment obligations increased based upon its need to enter into additional transactions to pay for prior obligations. *E.g.*, TAC ¶¶ 33, 60, 66.



***10. EAR's and MTD's Principals Have Refused to Testify***

19. Player and Anstett, who ran EAR, have refused to testify regarding EAR and invoked their Fifth Amendment right against self-incrimination. TAC ¶ 40; *E.g.*, *Heeren v. Kitson*, 28 Ill. App. 259, 261 (Ill. App. Ct. 1888) (recognizing refusal to testify as a badge of fraud); *In re Krantz*, 97 B.R. 514, 523 (Bankr. N.D. Iowa 1989); *In re Youngstown Osteopathic Hosp. Ass'n*, 280 B.R. 400, 412 (Bankr. N.D. Ohio 2002); *Detroit Trust Co. v. Hockett*, 270 N.W. 243, 138 (Mich. 1936). Moreover, Ferguson, who owned and ran MTD, failed to respond to Brandt's allegations that he participated in the Fraud. TAC ¶ 30.

***11. EAR's Exceptional and Peculiar Conduct Indicate the Intent to Defraud Its Creditors***

20. EAR's conduct was both exceptional and peculiar. *Heeren*, 28 Ill. App. at 260 (recognizing exceptional and peculiar conduct as a badge of fraud). As the TAC describes: (a) EAR had no legitimate business need to enter into the lease and financing arrangements, including those with the CIT (*E.g.*, TAC ¶¶ 14-20, 45); (b) EAR took steps to conceal its ownership in the equipment through the use of its straw man, MTD (*E.g.*, TAC ¶¶ 25-30); (c) EAR altered serial numbers for equipment and pledged assets multiple times (TAC ¶ 15); and (d) EAR possessed equipment that was far in excess of its needs (*E.g.*, TAC ¶ 29). Put simply, a legitimately operating business would not have acted in the manner EAR did.

***12. EAR Made Significant Misrepresentations***

21. EAR made false statements, concealed facts, and operated under false pretenses. *In re Draper*, 355 B.R. 607, 610 (Bankr. E.D. Ky. 2006); *In re Kaiser*, 722 F.2d at 1582; *In re Poole*, 15 B.R. 422, 432 (Bankr. N.D. Ohio 1981). As alleged in the TAC, EAR made misrepresentations concerning the following: (a) its financial condition, *E.g.*, TAC ¶¶ 31-32; (b) that its revenues were largely derived from sham sales to MTD for equipment, *E.g.*, TAC ¶¶ 29-

32; (c) that the underlying equipment transactions with CIT were unnecessary, *E.g.*, TAC ¶¶ 14-20; (d) that EAR owned the equipment that was part of the transactions with the CIT, *E.g.*, TAC ¶¶ 25; and (e) the identity of EAR's management (TAC ¶¶ 19-20). Thus, the TAC sufficiently alleges the existence of this badge of fraud.

***13. The Equipment Transactions Have a Lack of Reasonable Justification***

22. There is an overall lack of a reasonable justification for the transfers at issue. *In re Heal*, No. 08-40108-JJR-7, 2009 WL 5214894, at \*6 (Bankr. N.D. Ala. Dec. 31, 2009). As alleged in the TAC, the underlying equipment related to CIT was already owned by EAR. *E.g.*, TAC ¶¶ 14-20, 45. Other than furthering the Fraud, EAR had no reasonable justification for borrowing funds from CIT to purchase the equipment and make subsequent payments based on that obligation.

***14. EAR's Conduct Was Questionable and Outside the Ordinary Course***

23. The transactions with the CIT and the other Financial Entities were questionable and not in ordinary course for a legitimate business. *Ryan Beck & Co. v. Campbell*, 2003 WL 22282380, at \* 7 (N.D. Ill. Oct. 2, 2003); *In re Saba Enters., Inc.*, 421 B.R. 626, 643 (Bankr. S.D.N.Y. 2009); *United States v. Johnston*, 245 F. Supp. 433, 441 (W.D. Ark. 1965). As alleged in the TAC, EAR had no legitimate business need to enter into leasing transactions with the CIT for equipment that EAR already owned. *E.g.*, TAC ¶¶ 14-20, 45. Furthermore, it is both questionable and outside of the ordinary course of any business to alter serial numbers and enter into multiple leases on a single piece of equipment (or purchase the same piece of machinery multiple times through financing) and disguise the ownership of equipment in leasing and purchasing activities. *E.g.*, TAC ¶¶ 15-16.

***15. The Equipment Transactions were Unusual and Undertaken With Secrecy and Haste***

24. EAR entered into the transactions involved in the Fraud under secrecy and haste, and the transactions were unusual. *In re Bernard L. Madoff Inv. Secs. LLC*, 445 B.R. 206, 223 n. 15 (S.D.N.Y. 2011); *In re Saba Enters., Inc.*, 421 B.R. at 643; *In re Russo*, 1 B.R. 369, 382 (Bankr. E.D.N.Y. 1979); *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995). EAR disguised its transactions with MTD. *E.g.*, TAC ¶¶ 25-30. Moreover, as mentioned previously, EAR had no legitimate business need to enter into leasing transactions with the CIT for equipment that EAR already owned, making the transaction highly unusual. *E.g.*, TAC ¶¶ 14-20, 45. Thus, the TAC sufficiently alleges the existence of this badge of fraud.

***16. There is a Lack of Documentation to Support the Basis for the Equipment Transactions***

25. There is an absence of any documentation that indicates the purpose of the underlying transactions with CIT. *E.g.*, TAC ¶¶ 14-20, 60, 66. *Kaibab Indus., Inc. v. Family Ready Homes, Inc.*, 372 N.E.2d 139, 142 (Ill. App. Ct. 1978). There are simply no documents that would indicate why EAR had need for the equipment in question, and perhaps more importantly, why it would need to purchase equipment it already owned through MTD. CIT's reference to the Master Agreements is merely a red herring, as those agreements say nothing of the business purpose for EAR entering into leases for unnecessary equipment. The true purpose for the transactions with CIT was to perpetuate the Fraud, a fact EAR failed to document for obvious reasons. Thus, the TAC sufficiently alleges the existence of this badge of fraud.

***17. EAR Was Aware of Its Inability to Pay Creditors***

26. EAR, through Player and Anstett, was aware that: (a) EAR creditors' had claims against the Company; and (b) that EAR could not pay those claims. *E.g.*, TAC ¶¶ 14-20, 42-43.

*MFS/Sun Life Trust-High Yield Series*, 910 F. Supp. at 935. In fact, the TAC alleges that EAR entered into fraudulent equipment transactions to obtain funds to attempt to pay its obligations. *E.g.*, TAC ¶¶ 14, 28.

### **III. The TAC Meets the Requirements of Rule 9(b)**

27. In making its argument, CIT ignores the factual allegations in the TAC and mischaracterizes the law related to the badges of fraud. Taken as true, both the TAC's general allegations and the specific badges of fraud alleged specifically connect both the CIT leases and the payments to the Fraud and, therefore, meet the requirements of Rule 9(b).

#### **a. The Transactions with CIT, and the Related Transfers, Are Connected to the Fraud**

28. First, the TAC's allegations connect the CIT transactions to the Fraud. Equipment owned by EAR that was part of the Fraud was sold by MTD to the underlying financier. TAC ¶¶ 24-28. MTD took these funds and transferred them to EAR, less its 1-2% cut for participating in the scheme. TAC ¶ 25. The TAC identifies each agreement with CIT, the related pieces of equipment, and EAR's corresponding sham "sale" of that same equipment to MTD. TAC ¶¶ 44-55. In each instance, MTD transfers the funds received from CIT to EAR, less its cut of 1-2%. TAC ¶¶ 44-55. In describing the transactions with CIT, the TAC states that "[b]ecause EAR owned the equipment in question prior to the date of the supplements, the transactions were unnecessary from a business standpoint." TAC ¶ 45. Moreover, "[e]ach of the Master Agreement supplements generated cash for EAR through the 'sale' of the equipment to MTD." TAC ¶¶ 59, 65. The transactions "provided EAR with the funds it required to pay existing obligations on equipment financing and lease obligations that were part of the fraudulent scheme." TAC ¶¶ 59, 65. Thus, the equipment subject to EAR's agreements with CIT "was purchased from MTD and was part of the Fraud." TAC ¶¶ 45, 59, 65.

29. Second, the TAC connects the transfers to the fraudulent CIT leases. Each and every payment EAR made to CIT was based upon an obligation created by a fraudulent CIT transaction. *E.g.*, TAC ¶¶ 14-20, 44-55. Without the underlying obligation, CIT would never have received a dime from EAR. CIT had no “legitimate” dealings with EAR. Therefore, the transfers cannot be separated from the leases, or by logical extension the Fraud.

30. Third, the TAC directly connects the transfers to and describes how they were made in furtherance of the Fraud. During the period of time the transfers were made, “EAR generated almost 96% of its revenue from fraudulent sales to MTD.” TAC ¶ 46. And any potentially legitimate revenues were woefully insufficient to pay both EAR’s operating expenses and leasing/financing obligations on equipment. TAC ¶¶ 31-32, 35. Because potentially legitimate funds were insufficient to pay lease and finance obligations in any given year, “EAR was therefore required to use funds generated from the Fraud to pay its lease and financing obligations, including the transfers to CIT.” TAC ¶ 46; *see also* ¶¶ 59, 65. Moreover, had EAR missed payments to CIT or other lessors, the default and resulting cross-defaults would have crippled EAR’s ability to obtain additional funds through fraudulent leases. TAC ¶¶ 28, 46. Therefore, each of the transfers was connected to and made in furtherance of the Fraud.

**b. CIT Mischaracterizes *B.E.L.T., Inc. v. Wachovia Corp., In re Sharp Int'l Corp., and Boston Trading Group, Inc. v. Burnazos***

31. In addition to ignoring the allegations of the TAC, CIT mischaracterizes *B.E.L.T., Inc. v. Wachovia Corp.*, 403 F.3d 474 (7th Cir. 2005), *In re Sharp Int'l Corp.*, 302 B.R. 760 (E.D.N.Y. 2003) *aff'd*, 403 F.3d 43 (2d Cir. 2005), and *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504 (1st Cir. 1987) in arguing the TAC must be dismissed. The nature of the Fraud and relationship to the transfers at issue render *B.E.L.T., In re Sharp*, and *Boston Trading* inapposite. As alleged in the TAC, the very existence of the transactions with CIT and the other

lessors—*i.e.* leases for equipment EAR already owned and did not need disguised through the use of a straw man—is what constituted the Fraud. This is a starkly different fact pattern from a lender entering into a legitimate loan with a legitimate business purpose with a company committing an unrelated fraud.

32. In the cases cited by CIT, the courts specifically noted that the transfers to the defendants did not relate to the underlying fraud. In *B.E.L.T.*, the debtor “used false financial statements to conceal [its] true financial statements, but this had nothing to do with its motive in paying the [defendant].” *B.E.L.T.*, 403 F.3d at 478. Similarly, the *Sharp* court specifically noted that “[t]he fraud alleged in the complaint relates to the manner in which [the debtor] obtained new funding from the Noteholders, not [the debtor’s] subsequent payment of part of the proceeds to [the defendant].” 403 F.3d 43, 56 (2d. Cir. 2005). Finally, the fraud in *Boston Trading* involved the “churning” of investor accounts (“*i.e.*, making unnecessary trades to obtain commissions”). 835 F.2d 1504, 1506 (1st Cir. 1988). But the transfer at issue in *Boston Trading* did not relate to the churning of accounts. *Id.* at 1506. In direct contrast, the TAC alleges that the equipment obligations and related transfers to CIT were part of the Fraud. TAC, ¶¶ 45-55, 59, 65. The underlying equipment obligations were used to generate cash and “provided EAR with the funds it required to pay existing obligations on equipment financing and lease obligations that were part of the fraudulent scheme.” TAC, ¶¶ 59, 65. Moreover, later sham equipment transactions “provided EAR with the funds used to pay CIT.” TAC, ¶¶ 59, 65. Unlike *B.E.L.T.*, *Sharp*, and *Boston Trading*, the Fraud alleged in the TAC *does* relate to the subsequent payment of proceeds to CIT.

#### **IV. The Court Has Already Rejected CIT’s Preference Argument**

33. The Court has already struck down CIT’s argument that the transfers must be

analyzed as preferences and not fraudulent transfers. First, CIT's argument is inappropriate given the Court's specific instructions that any motions to dismiss the TAC should be predicated upon either the standards or Rule 9(b) or the failure of the TAC to adequately allege the badges of fraud. June 2013 Decision, pg. 13. Second, in its September 2012 Memorandum Decision in Adversary No. 11-ap-02196 ("US Bank September 2012 Decision"), the Court specifically rejected the argument "that preferential payments to creditors and fraudulent transfers are mutually exclusive." US Bank September 2012 Decision, pgs. 5-7. Further, the Court held that "while a transfer made in satisfaction of antecedent debt is made for 'value,'...such a transfer may nonetheless have been made with actual fraudulent intent." *Id.*, at 6. Thus, CIT's argument is inappropriate and without merit.

### **CONCLUSION**

For all the reasons stated above, the Plaintiff respectfully requests that this Court deny the Motion. The Plaintiff also respectfully requests that, should this Court determine that any of the arguments raised in the Motion have merit, the Plaintiff be granted leave to amend the pleadings to meet the Court's concerns, if possible.

Dated: September 27, 2013

Respectfully submitted,

/s/ J. Maxwell Beatty

One of the attorneys for Plaintiff  
William A. Brandt, solely in his capacity as  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served electronically on September 27, 2013 by the Court's CM/ECF system to:

Rosann Ciambone on behalf of Defendant The CIT Group/Equipment Financing, Inc.  
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*/s/ J. Maxwell Beatty*