

DISTRICT COURT, CITY AND COUNTY OF DENVER  
STATE OF COLORADO  
1437 Bannock Street  
Denver, CO 80202

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**Plaintiffs:** Ross Berman, an individual; Jason H. Karp, an individual; IMJ I LLC, a Delaware limited liability company; Rachel Farber as trustee for the Rachel Farber Revocable Trust; Stephen Farber as trustee for the Stephen Farber Revocable Trust; and Red Cloud Capital, LLC, a Connecticut limited liability company;

**and Plaintiff-Intervenors:** Trevor Gallup, an individual; and Lynn Honderd, an individual.

v.

**Defendants:** Bellrock Brands Inc., a British Columbia corporation; BRB DB Holdings, Inc., a Delaware corporation; BRB Mary's Holdings Corp., a Delaware corporation; Dixie Brands (USA) Inc., a Delaware corporation; Mary's Operations, LLC, a Colorado limited liability company; Mary's Pets, LLC, a Colorado limited liability company; Mary's Nutritionals, LLC, a Colorado limited liability company; DB Finance, Nevada, LLC, a Nevada limited liability company; and DB Oklahoma, LLC, a Colorado limited liability company.

v.

**Third-Party Defendants:** Andrew Schweibold, an individual; James Harvey, an individual; Rise Investments International II Series 7, LLC, a Georgia limited liability company; High Street Capital Partners, LLC, a New York limited liability company; and Acreage Holdings America, Inc., a Nevada Corporation.

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**INTERVENORS' JOINT RESPONSE TO PLAINTIFFS' MOTION TO STRIKE AND  
DEFENDANTS' JOINDER TO MOTION TO STRIKE**

Intervenors Trevor Gallup and Intervenor Lynn Honderd, (collectively, "Intervenors") by and through their respective undersigned counsel, respond to Plaintiffs' Motion to Strike the Joint Amended Complaint in Intervention, Third-Party Complaint in Intervention and Jury Demand, and to Defendants' Joinder to Plaintiffs' Motion to Strike, and state as follows:

**INTRODUCTION**

Plaintiffs<sup>1</sup> and Defendants<sup>2</sup> have again pursued a common litigation strategy and moved to "strike" Intervenors' Joint Amended Complaint. This motion must be denied for multiple

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<sup>1</sup> "Plaintiffs" are, collectively, Ross Berman, Jason H. Karp, IMJ I LLC, Rachel Farber Revocable Trust, Stephen Farber Revocable Trust and Red Cloud Capital, LLC, and comprise only six of the 11 creditors of the Defendant Companies who have filed UCC-1 statements asserting security interests in the Defendant Companies.

<sup>2</sup> "Defendants" or "Defendant Companies" are, collectively, Bellrock Brands, Inc., BRB DB Holdings, Inc., BRB Mary's Holdings Corp., Dixie Brands (USA) Inc., Mary's Operations, LLC, Mary's Pets, LLC, Mary's Nutritionals, LLC, DB Finance Nevada, LLC and DB Oklahoma, LLC.

reasons. First, the motion does not meet the requirements of C.R.C.P. 12(f), nor is there anything to “strike” that relates to these parties. Nothing has changed in the Amended Complaint as it pertains to Plaintiffs and Defendants. The motion should be denied for this reason alone.

Second, the Amended Complaint fully complies with this Court’s Order and the rules of civil procedure. Intervenors were made parties to this case and properly followed the Court’s orders and the rules of procedure to amend their complaint and assert their fraudulent transfer claim against the other secured creditors of the Defendant Companies (“Third Party Defendants”)<sup>3</sup>, just as they had already asserted them against the Plaintiffs. This amendment was specifically contemplated in their original Complaint and does not contradict anything in the Court’s Order. Indeed, the logic here is precisely the same – claims for fraudulent transfer must be fully adjudicated before final determinations can be made in the claims administration process.

Third, Plaintiffs and Defendants repeatedly argue that this case is like a Chapter 11 bankruptcy and the Intervenors should be happy to litigate their rescission<sup>4</sup> and fraudulent transfer issues inside the claims administration process. Of course, this is not a Chapter 11 case under the

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<sup>3</sup> “Third-Party Defendants,” collectively, are the other five creditors of the Defendant Companies who have filed UCC-1 statements asserting security interests in the Defendant Companies, and are: Andrew Schweibold, an individual; James Harvey, an individual; Rise Investments International II Series 7, LLC, a Georgia limited liability company; High Street Capital Partners, LLC, a New York limited liability company; and Acreage Holdings America, Inc., a Nevada Corporation. Each of the Third-Party Defendants have been properly served with the Amended Complaint.

<sup>4</sup> Intervenors’ claims for rescission are based on their First Claim for Relief – Duress, and their Second Claim for Relief – Void Contract, neither of which are altered from their original Complaint in the Amended Complaint. The focus of the briefing here is therefore solely regarding the Intervenors’ Eighth Claim for Relief for fraudulent transfer, which was asserted against all Defendants and all Plaintiffs in their Complaint, and is asserted against all Defendants, all Plaintiffs, and all Third-Party Defendants in the Amended Complaint.

Bankruptcy Code. In a Chapter 11, Intervenor would be able to file as of right an adversary proceeding against all of the other secured creditors with the full panoply of the civil rules of procedure. In a Chapter 11, there would be an independent trustee overseeing the claims process. In a Chapter 11, no plan for reorganization would enter prior to a determination of which assets properly belong to the bankruptcy estate. Here, the Receiver is the hand-picked management company of Plaintiffs, is a creditor of the Defendants, has a direct financial interest in the outcome of this case, has the same lawyer as the Defendants, and has now cut a deal with the Plaintiffs for equity in some new company that plans to acquire the assets of Defendants cleared of prior debts through this receivership. None of that is what would be expected in a Chapter 11, nor in a regular receivership proceeding.

Intervenor simply have a right to have this Court adjudicate their claims for rescission and fraudulent transfer, which is exactly what the prior Order of this Court allows. Intervenor have an absolute right to litigate their bona fide claim for fraudulent transfer against the Third-Party Defendants prior to any determination of those Third-Party Defendants' security interests under the Claims Administration Procedure, and any attempt to limit that right would be highly prejudicial.

### **BACKGROUND**

1. Intervenor Gallup and Intervenor Honderd moved to intervene and attached as a exhibit to their motion a proposed Joint Complaint in Intervention and Jury Demand on April 19, 2024 ("Complaint").

2. This Complaint expressly contemplated that naming additional secured lenders of the Defendant Companies as third-parties may be necessary in order to properly pursue

Intervenors' fraudulent transfer claim. The fraudulent transfer claim against Defendants and against Plaintiffs was set forth in Intervenors' original Joint Complaint in Intervention as their Eighth Claim for Relief. *See* Complaint in Intervention, ¶¶103-109 (identifying potential other secured creditors who were not part of the Plaintiffs' group of creditors) and ¶¶164-176 (fraudulent transfer claim asserted against Plaintiffs and Defendants). The Complaint also contemplated that it may need to be amended because the deadline for certain payments to each of the Intervenors under their respective Notes and Agreements had not yet passed, but that it was expected that the Defendants would not make those payments when due.

3. After Plaintiffs and Defendants initially opposed the intervention, the Parties eventually negotiated and proposed a stipulation to the Court to allow the intervention, subject to certain limitations in the scope of discovery, the timing of the trial on the Intervenors' claims, and withdrawal of the Intervenors' jury demand. Although these are not bankruptcy proceedings, the Parties envisioned something similar to an adversary proceeding in bankruptcy that would take place prior to the receiver determining the Claims Administration Process for all creditors, including Intervenors.

4. This Court granted intervention to Intervenor Gallup and Intervenor Honderd on June 14, 2024, subject to the limitations set forth in the Stipulated Discovery and Scheduling Order issued on the same date.

5. The Stipulated Discovery and Scheduling Order ("Order") stated that the scope of the intervention included Intervenors' ability to pursue their fraudulent transfer claims against Defendants and Plaintiffs. The Order stated:

The Court entered a Claims Administration Procedure (May 13, 2024 Order). Intervenors agree to submit a claim pursuant to that Order.

Intervenors, however, challenge the priority of the Plaintiffs' claims based on an alleged violation of Colorado's Fraudulent Transfer act as well as seek rescission from the Defendants based on claims of duress or voiding the agreements with Defendants based on illusory and unconscionable theories. Because the composition of the assets of the estate of the Defendants in receivership may be affected by an adjudication of these three issues and claims raised Intervenors, and certain discovery is needed to resolve those three issues, it is agreed that the Intervenors are granted intervention to pursue discovery and claims based on those three issues and claims. Those three claims are set forth in Intervenor's joint complaint as claims 1, 2, and 8 ("Intervention Claims").

...

The Parties anticipate that the Claims Administration Procedure as ordered by the Court on May 13, 2024 will proceed concurrently with these proceedings on the Intervention Claims. However, a final determination by the Court as to the priority or amount of or payment schedule under the Claims Administration Procedure should not complete until after the Court issues its ruling on the Intervention's Claims

6. Thus, the claims that would affect the assets of the Defendant Companies within the receivership and the priority of debts – rescission based on Intervenors' claims of duress or illusory/void contract and fraudulent transfer – would be adjudicated by the Court, prior to a determination of a final claims priority by the Receiver.

7. The Order is silent as to whether Intervenors would be allowed to amend their complaint or to bring in any third-party defendants. The Order is also silent as to contract-based claims, which are not included in the planned hearing, but were not dismissed. Intervenors were of the understanding that the claims related to the breaches of their respective Notes and Agreements would be addressed during the claims process, as those claims do not affect the priority of the claims or the assets in the receivership estate.

8. After the intervention was granted, but before Plaintiffs or Defendants had filed any answer or response, Intervenors filed their Joint Amended Complaint in Intervention, Third-Party

Complaint, and Jury Demand on June 27, 2024 (“Amended Complaint”). They filed this Amended Complaint pursuant to C.R.C.P. 15(a), which allows any party to amend their claims once as a matter of right prior to a responsive pleading being filed. No motion for leave to amend was thus required. Procedurally, Intervenors could not have amended their Complaint until after their intervention was granted and the Complaint had thus been accepted by the Court.

9. The Amended Complaint is virtually the same as the original Complaint. It takes into account that the additional defaults for non-payment upon maturity of the Honderd and Gallup Notes had now occurred, affecting the breach of contract-based claims (Claims 3-7) asserted against Defendants. More importantly, Intervenors amended their fraudulent transfer claim (Claim 8) to assert third-party claims against the other known secured creditors of the Defendant Companies who had filed UCC-1 Financing Statements. These are the same secured creditors who were identified in the original Complaint as necessary for a full adjudication of the fraudulent transfer claim. The allegations supporting the claim for fraudulent transfer asserted against the Plaintiffs and the Defendants remained the same.

10. Because the Amended Complaint is substantially similar to the original Complaint, Intervenors inadvertently kept the jury request language in their Amended Complaint, but did not pay the jury fee and immediately filed notice of withdrawal of their jury demand when the error was pointed out to them by opposing counsel. Intervenors never intended to reinstate a jury demand.

11. Instead of answering the Amended Complaint, Plaintiffs filed a Motion to Strike the Joint Amended Complaint in Intervention, Third-Party Complaint in Intervention and Jury

Demand on July 18, 2024 (“Motion to Strike”). Similarly, Defendants joined Plaintiffs’ Motion to Strike on July 22, 2024.<sup>5</sup>

### **STANDARD OF REVIEW**

Plaintiffs and Defendants moved to strike the Amended Complaint in its entirety pursuant to C.R.C.P. 12(f), which is inapplicable, and should be denied on that procedural basis alone. Rule 12(f) states that, upon timely motion by a party, “the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper.” Plaintiffs have asserted none of these grounds, and indeed, the Amended Complaint is none of these things. Instead, Plaintiffs argue that the Amended Complaint is impermissible under the Court’s prior orders and that the Claims Administration Process is their preferred method for dealing with the Intervenors’ fraudulent transfer claim.

### **ARGUMENT**

The thrust of the arguments in the Motion to Strike are that the Third-Party Defendants are not necessary parties to the adjudication of the Intervenors’ fraudulent transfer claims, that Intervenors actions inconvenience the Plaintiffs, and that the Third-Party Defendants might want to just participate in the claims administration process without participating in the adjudication of the fraudulent transfer claim. However, the Third-Party Defendants and the Plaintiffs are necessary parties to the full adjudication of the fraudulent transfer claim, as purportedly secured creditors of the Defendant Companies. Intervenors are acting within the Court’s Order and the

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<sup>5</sup> One of the Third-Party Defendants, James Harvey, joined in the Motion to Strike shortly before the filing of Intervenors’ Response today. To the extent necessary, Intervenors will file a separate Response to the Mr. Harvey’s “Proposed Third-Party Defendant James Harvey’s Motion To Quash And/Or Strike Third-Party Complaint And Joinder In Plaintiffs’ Motion To Strike.”

Rules of Civil Procedure, and the Plaintiffs have already stipulated to this Court adjudicating the Intervenor's fraudulent transfer claim prior to the Claims Administration Process. To the extent they are attempting to assert defenses or move on behalf of the Third-Party Defendants, Plaintiffs and Defendants have no standing.

**A. Fraudulent Transfer Claims Must Be Asserted Against the Transferee, Not Just the Transferor**

The fraudulent transfer claim cannot be asserted only against the Defendants, and must be asserted against all secured creditors of the Defendants, which includes the Plaintiffs and also the Third-Party Defendants. The remedies a creditor, such as the Intervenor, may seek with respect to fraudulent transfers include seeking a judgment against other creditors. *See* C.R.S. § 38-8-108(1)(a)-(c) (A creditor may obtain avoidance of the fraudulent transfer from the transferee, or a judgment for one and one-half the value of the amount necessary to satisfy the creditor's claim when the transferee has acted with wrongful intent). Importantly, "No judgment may be entered ... unless a court of competent jurisdiction enters or has entered a judgment or order establishing the validity of the creditor's claim against the debtor." *Id.*

This Court, not the Receiver through its Claims Administration Process, must adjudicate the Intervenor's fraudulent transfer claim. This Court has already entered its order granting intervention to adjudicate that claim. The Amended Complaint simply adds the other secured creditors. The Intervenor will be asking this Court to enter a judgment in their favor and against all the secured creditors, which includes the Plaintiffs and the Third-Party Defendants. The Third-Party Defendants (and Plaintiffs) are facing avoidance of their security interests, which will affect their priority in the eventual claims procedure.

Plaintiffs' assertion that the Third-Party Defendants would just be happy with participating in the claims procedure glosses over that the validity of their security interest is in question. Of course the Third-Party Defendants do not want to have this Court adjudicate the validity of their security interests. Of course they do not want a fraudulent transfer claim asserted against them. Whatever the Third-Party Defendants and the Plaintiffs want, the Intervenors have a right to litigate their fraudulent transfer claims as to them. This Court cannot fully adjudicate the rights of these secured creditors without their participation as **parties** to their own defense of the Intervenors' fraudulent transfer claim.

#### **B. Third-Party Defendants are Necessary Parties**

The joinder rule provides that “(a) Persons to be Joined if Feasible. A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties” C.R.C.P. 19(a). Here, the Intervenors are parties to the litigation, and complete relief cannot be accorded to them without inclusion of the Third-Party Defendants. The Court's adjudication would be incomplete if Intervenors were allowed to pursue their fraudulent transfer claim against one group of secured creditors (Plaintiffs), but not the other group of secured creditors (Third-Party Defendants).

The alternative would be for Intervenors to file a separate case against the Third-Party Defendants. Intervenors would likely request a stay of these receivership proceedings while their separate fraudulent transfer litigation played out, for exactly the same reasons that the Court has already recognized – if the validity of the security interests are in doubt, no priority of claims can realistically be determined by a receiver. This alternative approach of suing all the Third-Party Defendants separately could easily lead to inconsistent results, but if the Court does not allow the

adjudication of the fraudulent transfer claim in this case, the Intervenor will have no choice but to pursue such a course. It is likely that the Plaintiffs would then move to consolidate to try to preserve their planned timeframe in this case, which would have the parties wind up right where they could be now.

Another alternative would be for the Intervenor to contest each of the secured parties' claim within the Claims Administration Process, which would put the Receiver improperly in the role of the Court to collect evidence and hold hearings as to each individual secured creditor to determine whether their security interest was a fraudulent transfer and should be avoided. This is unworkable as a procedure to determine the priority of claims and does not allow these secured creditors adequate ability to present their defenses, nor Intervenor the adequate ability to fully prosecute their fraudulent transfer claim.

**C. Intervenor's Amendment of their Complaint is within the Scope of the Order and the Rules of Procedure**

The Order does not limit the Intervenor in the manner Plaintiffs and Defendants suggest, nor have the Intervenor violated any order of this Court. The Order expressly allows adjudication of the Intervenor's fraudulent transfer claim prior to the Claims Administration Process final determination. The fraudulent transfer claim is the only claim asserted against the Third- Party Defendants, and so it is within the scope of the claim the parties already stipulated that this Court should (and must) adjudicate. Further, this Court granted the Motion to Intervene, which makes Ms. Honderd and Mr. Gallup parties to the litigation. The full scope of the rules of civil procedure thus apply to them, except where expressly limited by the Order. The Order is silent as to whether they could amend their Complaint, and silent as to whether they could assert the same fraudulent

transfer claim against the other secured creditors of the Defendant Companies. Intervenors have not violated the Order in any respect.

### **CONCLUSION**

The Intervenors have properly asserted their fraudulent transfer claim against the Third-Party Defendants, and the Plaintiffs and Defendants are simply trying to prevent Intervenors from obtaining a full adjudication of their claim for fraudulent transfer by objecting to their Amended Complaint.

WHEREFORE, Intervenor Gallup and Intervenor Honderd request that the Court deny Plaintiffs' Motion to Strike, deny Defendants' Joinder to Plaintiffs' Motion to Strike, deny any Third-Party Defendants' joinder in the Motion to Strike, and for such additional relief as the Court deems just and proper.

Dated this 13th day of August, 2024.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 13, 2024, a true and correct copy of the foregoing **INTERVENORS' JOINT RESPONSE TO PLAINTIFFS' MOTION TO STRIKE AND DEFENDANTS' JOINDER TO MOTION TO STRIKE** was filed and served via the *Colorado Courts E-filing System* upon all parties/counsel of record.

*/s/ Tiffany Noel* \_\_\_\_\_  
Tiffany Noel