

Specialty Foods division financial results, was lowered, first to \$115 million, and then to \$99 million. (DTX 381 at '2004.)

F. The Spin-off

54. The motivation for Campbell to engage in the Spin-off had at least three aspects. First, it was a matter of business strategy. Whether one takes the view expressed by Campbell, that it was simply refocusing on core businesses (see, D.I. 357, ¶¶ F5-14) or one takes the view expressed by VFB, that Campbell was sending its "dog" businesses to the pound (see, D.I. 356, ¶¶ F4-29, F374), the Spin-off was a strategic divestiture. Second, the Spin-off promised, and ultimately delivered an enormous tax benefit to Campbell. Specifically, the payment it received from VFI was tax free. See *infra*, ¶¶ F6, F62, F81, n.51. Third, and for valuation purposes most significantly, the Spin-off presented an opportunity for Campbell to take a healthy piece of cash out of the VFI Businesses.

55. The means Campbell employed to take cash was provided by the Banks. Campbell had arranged with the Banks to establish a \$750 million line of credit for VFI (the "Credit Facility"). Campbell decided that it would take \$500 million in cash from the Credit Facility and that VFI would take on the burden of that debt as part of the VFI capital structure. See *infra*, ¶ F63. The \$500 million thus became payment to Campbell in exchange for the transferred business assets.

56. The Spin-off occurred on March 30, 1998. (DTX 501 at '1552; D.I. 285, Ex. A, ¶ 21.) During the Spin-off, Campbell transferred all of the businesses within the "Specialty Foods" division, i.e., the VFI Businesses, along with the business specific

debt, to VFI. (*Id.*) In addition, as noted, Campbell transferred the \$500 million Credit Facility debt to VFI. (*Id.*)

57. By the close of trading on the day of the Spin-off, VFI's stock price stood at \$25.31 per share on the New York Stock Exchange. (DTX 1673; D.I. 319 at 1949:14-19 (Bernstock).) At that time, VFI had approximately 45 million shares outstanding, yielding an equity market capitalization of approximately \$1.1 billion. (*Id.*) That figure represented the value the market placed on all of the businesses transferred to VFI at the time of the Spin-off, taking account of the attendant debt.

58. At the time of the Spin-off, the market priced VFI's stock knowing that VFI had taken on \$500 million in debt as part of the Spin. I am called upon in this case to make a determination about the comparative value of VFI's payment to Campbell and the assets transferred from Campbell to VFI. See *infra*, ¶ Conclusions of Law ["L"] 15. The first order of business is determining what constituted the payment. The answer is the acceptance of the \$500 million debt obligation.

59. The effect of viewing the \$500 million Credit Facility debt as payment is, analytically, to remove that negative number as an encumbrance on or reduction of the value of the VFI Businesses. In other words, the market capitalization number of \$1.1 billion must be increased by \$500 million to gain a true view of the value of the businesses, leading to an implied value of \$1.6 billion.³⁵ Both parties apparently agree that VFI's acceptance of the \$500 million obligation Campbell incurred under the Credit

³⁵This approach approximates but is not identical to estimating the enterprise value of the company. Enterprise value is the value of a company excluding the negative effect of all of its debt (*i.e.*, its market capitalization plus its debt). (D.I. 354 at 4638:2-16 (Luehrman (see *infra*, n.43)).)

Facility was payment for the VFI Businesses. (D.I. 356, ¶¶ L5-7; D.I. 362, ¶¶ L5-7.) VFB argues, however, that all of the other obligations (the “Secondary Obligations”) owed by the VFI Businesses and transferred as part of the Spin-off, should also be considered payment from VFI to Campbell.³⁶ (D.I. 356, ¶¶ L5-7.) These Secondary Obligations include such things as loans made from Campbell to VFI prior to the Spin-off to pay for operating costs, debts due to suppliers, and numerous other expenses incurred by VFI in its day-to-day operations, as well as things such as pension obligations. (*Id.*) These Secondary Obligations amounted to approximately \$146.2 million. (*Id.*)

60. Undercutting VFB’s position, however, is the behavior of the parties at the time of the Spin-off. While both sides appear to have seen the acceptance of the \$500 million Credit Facility obligation as payment (D.I. 356, ¶¶ L5-6; D.I. 357, ¶ L8.), the Secondary Obligations were treated as ordinary business obligations. The loans from Campbell to VFI prior to the Spin-off were treated as just that, loans. VFI received cash for taking on the corresponding obligations. (D.I. 285, Ex. A, ¶ 17.) The other Secondary Obligations, such as pension obligations, were taken on as an ordinary part of doing business. I thus conclude that the Secondary Obligations, while they had an

³⁶Ultimately, however, the decision on whether these Secondary Obligations constitute payment does not alter the outcome of the reasonably equivalent value analysis. I have relied heavily on VFI’s stock price to determine the fair market value of the VFI Businesses. As creditors’ claims stand in front of common stockholders’ claims, the price that common stock trades at reflects the value of the businesses, less the amount of debt held by the company. If the Secondary Obligations were treated as payment, they would simply be removed from consideration with respect to the value of the VFI Businesses, thereby increasing the value of the VFI Businesses for the purposes of a reasonably equivalent value analysis.

impact on the value of the VFI Businesses, were not viewed as, and should not be treated as, part of the payment made from VFI to Campbell.

61. The value the market placed on the VFI Businesses is of the utmost importance, but the legitimacy of that value necessarily depends on what information the market had when the shares in question were being traded. The Form 10 disclosed many key facts about VFI, specifically: (1) the lack of operating history as an independent company (PTX 1 at '0892; D.I. 318 at 1679:14-19 (Adler)); (2) the non-compete restrictions preventing VFI from manufacturing, distributing, marketing, or selling many products in competition with Campbell (PTX 1 at '0937); (3) the lack of ownership of the Swanson trademark and the limitations on the use of that mark (PTX 1 at '0895); (4) the terms of and risks under the Tax Indemnity Agreement ("TIA") (PTX 1 at '0875, 92-93, '0938-39; PTX 3); (5) one-time gains on asset sales and insurance proceeds, ten-year-high cattle costs, and higher effective tax rates at Swift (PTX 1 at '0917-18, '0956, '0971; D.I. 318 at 1682:7-22, 1683:22-25 (Adler)); (6) the short-term nature of the mushroom and beef supply agreements, co-packing agreements, and transition services agreement (PTX 1 at '0940; D.I. 321 at 2862:8-24 (Lipscomb)); (7) the declines in spending for marketing in FY1998 (PTX 1 at '0918; D.I. 318 at 1682:23-1683:18 (Adler)); (8) the 1998 sales volume declines of Vlasic pickles (PTX 1 at '0917, '0920); and (9) the expected \$25 to \$30 million pre-tax restructuring charges (PTX 1 at '0921).

62. VFB points to the TIA as one of the major causes of VFI's future troubles. (D.I. 356, ¶¶ F321-28.) In particular, VFB alleges that the TIA restricted VFI's "ability to sell its businesses for at least two years" and "restricted VFB's ability to issue common

stock to raise capital to reduce debt." (*Id.*, ¶ F321.) There can be no question, however, that the public was aware of the TIA at the time of the Spin-off. In addition to being singled out for mention twice in the Form 10, the TIA was attached to the Form 10 as exhibit 10.5. (PTX 1 at '0875, 92-93, '0938-39; PTX 3.) Moreover, such indemnity agreements are frequently a feature of spin-offs, to protect the transaction's tax-free nature. (D.I. 354 at 4585:5-4586:20 (Wessel); D.I. 320 at 2273:20-2276:21 (Hays).) Therefore, it is plain that the investing public knew of the TIA and how it affected the Spin-off.

G. VFI's Credit Facility

63. As earlier noted, Campbell executives had negotiated with the Banks prior to the Spin to create a \$750 million Credit Facility. (PTX 615 at '1032; D.I. 315 at 605:3-15 (Lord).) Campbell borrowed \$500 million and, by the terms of the Credit Facility, VFI was to assume all obligations under the agreement and Campbell would be released from such obligations. (PTX 615 at '1032) The remaining \$250 million borrowing capacity belonged to VFI. (*Id.*)

64. It appears that the Banks did not conduct an independent investigation of the performance of the VFI Businesses. (PTX 533 at '636-38; DTX 189 at '310; D.I. 319 at 2029-32 (Emmet); D.I. 314 at 96-97 (Lewis); PTX 400 at '244; D.I. 320 at 2431 (Bernstock).) Rather, they relied heavily on "pro forma" financial statements and projections supplied by Campbell. (*Id.*)

65. In the third quarter of FY1998, VFI informed the Banks that the original EBIT projection that had been given to them, \$143 million, was being adjusted downward to \$99 million. (PTX 720 at '589-91; D.I. 314 at 98, 101-02, 104-06 (Lewis);

D.I. 318 at 1393 (O'Malley³⁷); D.I. 320 at 2492-93, 2565 (Bernstock).) In a June board meeting, VFI further lowered its EBIT estimate for the year to \$70 million.³⁸ (PTX 760 at '004.) At the time, VFI attributed 60-70% of the drop in FY1998's estimated EBIT to de-loading of product (*i.e.*, shipping less product than usual, with the aim of bringing down customer inventories to normal levels), 20-25% of the drop "from softness in Argentina and Germany," and 10-15% of the drop to "weaker consumption trends than had been expected for Vlasic and Swanson." (PTX 760 at '005.)

66. At the \$99 million target, VFI did not believe it was in breach of any of the covenants in its loan agreement with the Banks.³⁹ (D.I. 314 at 113-14 (Lewis).) However, at the \$70 million EBIT target, the managers believed that VFI would be in breach of the covenants by the end of FY1998. (D.I. 314 at 114-115 (Lewis).) Knowing it would soon be in default, VFI set out to amend the Credit Facility. (D.I. 314 at 118

³⁷Shaun Flynn O'Malley, the Chairman Emeritus of PriceWaterhouse LLP, was one of the original directors of VFI. (D.I. 318 at 1389:19-21, 1390:8-9 (O'Malley).)

³⁸Although documentation from that board meeting states, and testimony confirms, that the FY1998 EBIT estimate at the prior board meeting was \$99 million, documentation from the prior board meeting states that the EBIT estimate for the year was \$99 million minus a \$26 million dollar restructuring charge. (PTX 720 at '586, 89; D.I. 314 at 114-15 (Lewis).) It is unclear if the later EBIT estimate is merely a reaffirmation of that earlier estimate, including the restructuring charge, or if VFI's estimated EBIT had dropped to \$70 million not including the restructuring charge. In any event, the financial condition of VFI was worsening.

³⁹The pertinent covenants included a minimum Debt/EBITDA Ratio and a Fixed Charge Coverage Ratio. (PTX 615 at '1080.) EBITDA means earnings before interest, taxes, depreciation, and amortization. Debt/EBITDA Ratio is defined as "the ratio of (I) Consolidated Debt at the end of such Fiscal Quarter to (ii) Consolidated EBITDA for the period of four consecutive Fiscal Quarters then ended." (*Id.* at '1038.) Fixed Charge Coverage Ratio is defined as the "ratio of Consolidated EBITDA for the period of four consecutive Fiscal Quarters then ended to Consolidated Interest Expense for such period of four consecutive Fiscal Quarters." (*Id.* at '1040.)

(Lewis).) To that end, VFI invited the Banks in June and July of 1998 to perform a due diligence review of its financial performance. (D.I. 314 at 118-19 (Lewis).) This turned out to be a contentious process in which the Banks exhaustively examined VFI's finances. (D.I. 314 at 118-121 (Lewis).)

67. At the end of July, JP Morgan, which was the lead bank on the Credit Facility, made a presentation to the other Banks. (PTX 1227 at '9975; D.I. 314 at 120-121 (Lewis).) Included in that presentation was the conclusion that VFI warranted a BB credit rating.⁴⁰ (PTX 1227; D.I. 314 at 120-121 (Lewis).) Because it found VFI to be a BB credit, as opposed to a higher BBB credit, which had been the underlying assumption when the Banks originally made credit available, JP Morgan recommended a number of changes to the loan agreement. (PTX 1227; D.I. 314 at 120-121 (Lewis).) Among other things, JP Morgan recommended that the Banks secure collateral from VFI, require VFI to complete a bond offering, require VFI to hedge against interest rate fluctuations, and require modification of a variety of covenants in the Credit Facility. (PTX 1227 at '976; D.I. 314 at 120-21 (Lewis).)

68. On September 30, 1998, VFI and the Banks entered into an amended agreement, which contained the changes proposed by JP Morgan. (PTX 1164; D.I. 316

⁴⁰Although a BB credit rating was a step down for VFI, this rating was still equal to or greater than that of 60% of the consumer packaged goods companies in the United States. (PTX 1227 at '9975; D.I. 314 at 120:24-121:7 (Lewis); D.I. 321 at 2768:4-8 (DiSilvestro); D.I. 355 at 4732:4-13 (Luehrman).)

at 685-86 (Lord); D.I. 314 at 119-122, 180 (Lewis); D.I. 353 at 4123-25, 4249-50 (Owsley⁴¹); PTX 825.)

69. Mr. Lewis, VFI's CFO, did most of the negotiating with the Banks. In October 1998, shortly after the Credit Facility was successfully amended, Mr. Bernstock terminated Mr. Lewis and placed another member of VFI's management team, Mr. Goldstein, in the position of CFO, although Mr. Goldstein had no prior experience in the management of a financially leveraged business. (D.I. 314 at 181:24-182:17 (Lewis); 2529:25-2530:14 (Bernstock).)

H. VFI's Stock Price

70. After the Spin-off, VFI's stock price generally outperformed its peers in the S&P mid-cap food index⁴² over the period from the date of the Spin-off through January 1999. (DTX 1667; DTX 1226; D.I. 355 at 4740:19-4744:2, 4745:16-4746:23 (Luehrman⁴³).) That performance was achieved notwithstanding full disclosure to the

⁴¹Henry Owsley is the CEO of Gordian Group, which is a "financial advisory firm that deals primarily in financially-troubled situations, restructurings and other complex situations." (D.I. 352 at 3969:15-20 (Owsley).) Owsley was hired by VFB "as a rebuttal expert with respect to Dr. Luehrman's report." (*Id.* at 3972:11-13.)

⁴²The S&P mid-cap food index reflects the stock performance for mid-size food companies. D.I. 355 at 4746 (Luehrman).) Because many of these companies had market values similar to VFI, around \$1 billion, it is useful to compare VFI's stock performance to this index to see how it performed with respect to similarly situated companies. (*Id.*)

⁴³Timothy Luehrman is the Managing Director of Standard and Poors' Corporate Value Consulting. He testified as an expert for Campbell, and was "hired by the defendants to respond to allegations that, in connection with the spinoff of VFI, that VFI did not receive reasonably equivalent value as of the spinoff date, that VFI was insolvent as of the spinoff date, and VFI was inadequately capitalized at the spinoff date and lacked an ability to pay its debts as of that date." (D.I. 354 at 4626:13-15, 4630:6-14 (Luehrman).)

market of information with potentially negative consequences, including: (i) SEC Form 10 disclosures; (ii) VFI's results in the third and fourth quarters of FY1998, after the Spin-off; (iii) market reports of the anticipated cost to realign shipments with consumption, or to "de-load"; and (iv) VFI's inability to satisfy its bank loan covenants and its consequent covenant renegotiation with the Banks. In the face of these and other disclosures, the value of the VFI Businesses, as measured by its equity capitalization plus the \$500 million Credit Facility obligation, never fell below \$1.1 billion between the date of the Spin-off and January 1999. (*Id.*)⁴⁴

71. The stock market's valuation of VFI's equity is corroborated by other contemporaneous market evidence in the record. Most significantly, in a July 1998 internal VFI document, VFI estimated its own enterprise value at \$1.56 billion, which would put the value of the VFI Businesses at about \$1.35 billion.⁴⁵ (DTX 391 at '8549.) In the months preceding the Spin-off, Goldman valued the equity of VFI in the range of \$1 billion to \$1.2 billion, implying a value for the VFI Businesses of \$1.5 to \$1.7 billion. (DTX 437; D.I. 321 at 2747:10-11 (DiSilvestro).) Shortly before the Spin-off, VFI's independent outside advisor, Georgeson and Company, looked at a number of

⁴⁴By the end of 1998, VFI's stock price had recovered nearly to its full Spin-off price. (*Id.*) Analysts reports in 1998 show that the mix of information in the market about the impact of loading on FY1998 included the view that it was \$16 to \$17.5 million, *i.e.*, higher than the figure used by Drs. Hallman and Titman. (DTX 394 at 5, 26; DTX 428 at '4540, '4549; D.I. 355 at 4744:3-4745:7 (Luehrman).)

⁴⁵VFB argues that VFI's enterprise value excluded about \$146 million in debt that is included in the value of the VFI Businesses transferred in the Spin-off. See *infra*, F59. Consequently, assuming that is true, the value of those businesses, as transferred, is about \$146 million less than their enterprise value due to the increased debt level.

valuations, such as those done by Goldman and by another VFI advisor, Braxton Associates ("Braxton"), and an investor survey, and estimated a range of between \$800 million and \$1.4 billion for VFI's equity, implying a value for the VFI Businesses of \$1.3 billion to \$1.9 billion. (DTX 437.) Such contemporaneous evidence of fair market value has the advantage of being untainted by hindsight or post-hoc litigation interests.

I. VFI's 1999 Operating Plans

72. In March and April 1998, VFI's business unit managers prepared their operating plans for FY1999, their first full year as an independent, SEC-reporting company. (DTX 363; PTX 712; D.I. 315 at 320:19-21, 343:19-24 (Dorsch); D.I. 316 at 769:20-770:18 (Kessler).)

73. Mr. Bernstock explicitly directed the VFI managers who prepared the 1999 operating plans to develop specific programs to address "genuinely complex challenges" based on a solid understanding of their businesses. (DTX 334 at '0071; D.I. 320 at 2477:18-2478:11 (Bernstock).) The operating plans were required to contain "a level of tactical content that we would each put our own money into." (*Id.*)

74. The VFI managers had personal financial incentives to be conservative and realistic in preparing the 1999 operating plans, since 70% of their compensation depended on their achieving at least 90% of the operating plan results. (DTX 708 at '8866; DTX 390 at '7375-81; D.I. 318 at '1471:2-21 (O'Malley).)

75. The 1999 operating plans were prepared with the benefit of two management consultants, Braxton and Swander Pace. (D.I. 315 at 317:14-21, 320:1-3; 350:11-19 (Dorsch).) Consistent with Mr. Bernstock's instruction, the 1999 operating plans specifically addressed the challenges facing VFI, including declining sales trends

(DTX 363 at '1052, '1077, '1079; PTX 712 at '0850, '0867), lack of advertising support during FY1998 (DTX 363 at '1082), increased price premiums (DTX 363 at '1107), problems with plant and equipment (DTX 363 at '1138-39), aging pickle pasteurizers (DTX 363 at '1155-56), inventory realignment (PTX 712 at '0864), distribution losses, reduced shelf space, and margin creep (PTX 712 at '0880, '0885). (D.I. 320 at 2488:2-2489:17 (Bernstock); D.I. 355 at 4706:16-4707:5 (Luehrman).) The plans contemplated relatively modest improvement over VFI's FY1997 performance, based on specific new business initiatives. (DTX 363 at '1062, '1065, '1071; D.I. 315 at 347:8-11 (Dorsch); D.I. 355 at 4703:13-4704:22 (Luehrman).)

76. The operating plans projected EBIT of \$126 million and projected EBITDA of \$172 million.⁴⁶ (DTX 390 at '7330, '7335, '7337.) VFI did not need to achieve this level of profitability in order to satisfy its interest obligations. There was a substantial interest coverage "cushion" in the event that VFI fell short of its projections. At the operating plan level of \$172 million of EBITDA and projected interest payments of \$45 million (DTX 390 at '7330), VFI had a coverage ratio (*i.e.*, EBITDA divided by interest obligation) of 3.8. If, however, VFI fell approximately \$30 million short in EBITDA, it would still have a coverage ratio of 3.2. (D.I. 353 at 4173:20-4174:15 (Owsley); D.I. 320 at 2424:15- 2425:8 (Bernstock).) In its June 1999 bond offering, with a significantly lower coverage ratio (2.5), VFI had access to \$200 million of new, unsecured,

⁴⁶Depreciation and amortization are non-cash expenses and thus ought not affect the ability of a company to pay back its obligations in the short term. Further, capital expenditures, which are not accounted for by EBITDA, may be postponed if a company has trouble repaying lenders. Therefore, EBITDA is considered a useful financial measure for judging a company's ability to make interest or debt payments.

subordinated debt. (DTX 29 at '1348; DTX 501 at '1559; D.I. 320 at 2514:1-7 (Bernstock).)

J. The 1999 Bond Offering

77. In that bond offering, which occurred approximately 15 months after the Spin-off, VFI successfully sold \$200 million of unsecured bonds to a group of 29 institutional investors. (DTX 511 at '1361.) The bonds were contractually subordinated to VFI's Credit Facility debt, meaning that the Banks had to be paid in full before the bondholders could recover, in the event of a bankruptcy or liquidation of VFI. (DTX 501 at '1563.) The purchasers of the bonds had available to them the financial figures for the last twelve months, through May 2, 1999, which showed approximately \$66 million of EBIT (\$110.9 EBITDA less \$45.2 million depreciation and amortization), substantially below the 1999 operating plan EBIT projection of \$126 million.⁴⁷ (DTX 501 at '1559; DTX 390 at '7330, '7332.) The record reflects that, in conjunction with the bond offering, the rating agencies assigned to VFI a corporate credit rating of BB, the same as the rating that the Banks had given VFI in August 1998. (D.I. 355 at 4732:14-21 (Luehrman).)

78. In the 165-page offering circular for the bonds (DTX 501), there was full disclosure of all facts and circumstances of the Spin-off, VFI's performance thereafter, the status of the bank financing to which the bonds were subordinated, and the numerous risk factors attendant to the bondholders' unsecured position. (DTX 501 at

⁴⁷VFB argues that the EBIT figures in the circular for the 1999 bond offering were misleading because, *inter alia*, they did not include losses from "Kattus (which had been sold) and Swift (which was being sold)." (D.I. 361, at 10, fn. 6.) If the EBIT figures did not include results from those companies, that information was still described in the offering circular. (DTX 501 at '1560 (listing the financial results for Kattus and Swift).)

'1561-68.) The bond disclosure came on the heels of many prior public disclosures about VFI, including the Form 10 and the periodic SEC filings that VFI had made during its time as an independent public company. Ms. Carter, the general counsel for VFI, was "very comfortable" signing the SEC Form S-4 for the bond offering, with full understanding that investors would rely on the disclosure in this document in making investment decisions. (D.I. 323 at 3516:6-3518:22 (Carter).) The disclosure was "as accurate as [she] knew," based on her due diligence. The accuracy and completeness of the disclosures made in connection with the bond offering have never been challenged. (D.I. 323 at 3516:6-3518:22 (Carter); D.I. 318 at 1485:16-19 (O'Malley).)

79. The bond offering circular offered potential investors a candid assessment of VFI's business, including a statement of the risks and challenges facing VFI. For example, the offering circular disclosed (1) that there had been limited advertising of VFI's brands and little innovation in its products in the recent past (DTX 501 at '1553-54); (2) that the financial results for the first nine months of FY1999 had been poor, including a 3.8% decrease in net sales (DTX 501 at '1580-83, '1587-88, '1590); (3) that the company faced significant transition costs and administrative expenses, restructuring costs, unusual charges, increased marketing and advertising costs, increased IT costs, and, in the mushroom businesses, yield problems (DTX 501 at '1582, '1678-79); (4) that the divestitures of Kattus and Swift generated impairment losses, resulting in negative shareholder equity on a "book" accounting basis (DTX 501 at '1559, '1579); (5) that the mushroom supply and certain co-packing agreements would be terminated in 2000 (DTX 501 at '1599, '1565); (6) that, because of obligations to Campbell, the Company was prohibited from entering into markets for frozen soup

and broth, vegetable juice, and salsa (DTX 501 at '1601, '1617); (7) that there were significant restrictions on the company's rights to use the Swanson trademark (DTX 501 at '1567, '1600-01, '1618); (8) that there were tax risks under the TIA and consequent limitations on the ability to sell assets, issue common stock, merge, dissolve or liquidate (DTX 501 at '1565, '1617-18); (9) that the company faced agricultural commodity and foreign currency risks (DTX 501 at '1566-68) and limitations on additional borrowing (DTX 501 at '1561); and (10) that, under the amended Credit Facility, the company faced restrictions affecting debt repayment, new debt, and capital spending. (DTX 501 at '1589, '1621, '1687-88.)

80. VFI had a deservedly weaker credit rating as of the bond offering than it had at the Spin-off. (D.I. 320 at 2513:2-5 (Bernstock); D.I. 355 at 4733:25-4734:9 (Luehrman).) In addition, the credit markets in which it operated had tightened. (*Id.*) By the time of the bond offering, VFI's EBITDA to interest coverage ratio had decreased to 2.5. (' 29 at 1348; DTX 501 at '1559; D.I. 320 at 2514:1-7 (Bernstock); D.I. 318 at 1481:17-1482:10 (O'Malley).) Yet the bonds continued to trade at or near par value throughout calendar year 1999, despite a further decline in VFI's interest coverage ratio from 2.5 to 2.2. (DTX 632; DTX 681; DTX 1677; D.I. 355 at 4746:24-48:5 (Luehrman); D.I. 320 at 2571:1-7 (Bernstock); D.I. 318 at 1496:4-11 (O'Malley).)

K. Sale of VFI Businesses

81. As part of the Spin-off, Campbell and VFI had, as previously noted, entered into a TIA that restricted VFI's ability to sell its businesses for at least two years, to avoid a ruling from the IRS that could cause the Spin-off to be taxable to

Campbell and its shareholders.⁴⁸ (PTX 3 at §6.2(a)(I); D.I. 318 at 1545-47 (McCarthy).)

The TIA did, however, allow for VFI to sell its business before the expiration of two years if VFI received an Opinion of Counsel or a ruling from the IRS that stated that the proposed sale of the business would not affect the tax-free nature of the Spin-off and Campbell was “reasonably satisfied” with the opinion or ruling. (PTX 3, § 6.2(c) at 1606; D.I. 320 at 2274:22-2276:21 (Hays⁴⁹); D.I. 354 at 4586:21-4587:13 (Wessel⁵⁰)).

82. VFI began exploring a possible sale of Swift in September 1998. (DTX 423 at '2802; DTX 697 at '3419-20; D.I. 320 at 2277:2-14 (Hays); D.I. 318 at 1545:1-24 (McCarthy).) At that time, Campbell decided that it was not reasonable to allow the sale of any of VFI’s businesses, because of the large potential tax liability for Campbell and VFI that could result.⁵¹ (D.I. 318 at 1551:6-15, 1552:6-9 (McCarthy).) VFI’s employee in charge of managing the tax ramifications of the sale of VFI Businesses, Kathy McCarthy, agreed with Campbell’s assessment. (*Id.*) Despite that initial assessment, however, Ms. McCarthy continued to look for a way to sell Swift, while avoiding any tax liability. (*Id.*) She soon discovered information previously unknown to her concerning

⁴⁸VFI was, however, able to sell Kattus. (D.I. 318 at 1547:4-10 (McCarthy).) VFI sold Kattus for over \$20 million in January 1999. (DTX 104 at 2.) This sale price was better than the \$15 million value that VFI had estimated for Kattus shortly after the Spin. (DTX 391 at '550.)

⁴⁹Daniel P. Hays was Vice President of Tax at the Campbell Soup Company at the time of the spinoff. (D.I. 320 at 2197:10-11 (Hays).)

⁵⁰Thomas F. Wessel works in the Corporate Tax Group at KPMG and testified for Campbell as an expert in spin-offs. (D.I. 354 at 4582:22-25, 4583:1-20 (Wessel).)

⁵¹As part of the Spin-off VFI agreed to indemnify Campbell for any tax liability that resulted from actions taken on the part of VFI that caused the IRS to revoke the tax free treatment afforded to the Spin-off. (PTX 3 at §§6.1(a), 7.1; D.I. 319 at 1943-44, 1967-70 (Carter).)

the tax basis of Swift. (*Id.*) Armed with this new information, Ms. McCarthy met with VFI's tax counsel, Dechert, Price & Rhoads ("Dechert"), to discuss the possibility of a sale. (*Id.* at 1553:17-24.) Dechert in turn met with Campbell's tax director to discuss a possible sale. (D.I. 320 at 2277:15-19 (Hays).) Dechert had concluded that it likely would be able to provide a tax opinion supporting such a sale. (*Id.*; D.I. 318 at 1555:2-21 (McCarthy).) By January 1999, Dechert provided an opinion which stated that a sale of Swift would not jeopardize the IRS's earlier tax ruling. (' 697 at 3409, '3441-42.) VFI pressed forward with the planned sale and received Campbell's consent in time to conclude the sale on VFI's Board-approved schedule. (D.I. 318 at 1598:12-21 (McCarthy).)

83. VFI sold Swift in July 1999 for \$85 million. (D.I. 317 at 1309 (Parker); PTX 924 at '764-66; D.I. 316 at 929 (Pelone⁵²).) Shortly after the Spin-off, VFI had estimated Swift's value at about \$80 million. (DTX 391 at '550.) Moreover, VFB admits that this "sales price was reasonable . . ." (D.I. 356 ¶ F195.) The book value for Swift, however, was approximately \$225 million. (PTX 924 at '764-66) Consequently, the

⁵²Francis J. Pelone had been Director of Corporate Audit at VFI and, subsequently joined the Trustee's Office for VFI's estate. (D.I. 316 at 865:14-16, 25, 866:1-8, 894:11-16 (Pelone).)

sale of Swift resulted in VFI taking a \$140 million write-off.⁵³ (D.I. 317 at 1309 (Parker); PTX 924 at '764-66; D.I. 316 at 929 (Pelone).)

84. In April 2000, VFI sold its mushroom business for an amount between \$40 and \$50 million.⁵⁴ (PTX 975; PTX 994 at '965-66; PTX 10 at '2108; PTX 993 at '176; PTX 1330). In July 1998, VFI estimated the value of that business at \$70 million. (DTX 391 at '550.) As there were approximately two years between the 1998 estimate and the sale, there is nothing persuasive to suggest that the July 1998 estimate was unreasonable.

⁵³VFB argues that Swift should have been written-down before the Spin-off. (D.I. 356, ¶¶ F288-96.) However, under the accounting rules as understood at the time of the Spin-off, and as confirmed by PriceWaterhouse's opinion on the Form 10 financial statements, Campbell was not required to recognize any impairments in connection with the Spin-off. (PTX 1 at '0946.) Campbell followed PriceWaterhouse's advice in performing pre-spin impairment testing, which confirmed that the undiscounted cash flows for the useful life of the VFI assets equaled or exceeded their net book value. Because the undiscounted cash flows test was met, no impairment recognition was required. (D.I. 322 at 3146:23-3149:4 (Lord); D.I. 317 at 1054:21-1055:5 (O'Malley).) VFI's independent impairment testing of the same VFI Businesses after the Spin-off – which was likewise approved on audit by PriceWaterhouse – confirms that the undiscounted cash flows tests were satisfied. (DTX 405 (handwritten notes from September 1998 discussing impairment under FAS121); D.I. 317 at 1070:3-1075:23 (Pelone); D.I. 354 at 4359:8-4361:21 (McEachern (Stephen McEachern is an expert and the Managing Partner of Vince Roberts and Company)); D.I. 353 at 4282:15-18, 4283:11-17 (McEachern).)

⁵⁴Less than a year later, the purchaser went bankrupt, claimed the sale was a fraudulent conveyance, and settled the case for \$2 million in cash and \$9 million in claims against VFI's estate. (D.I. 318 at 1579-80 (McCarthy); D.I. 319 at 1823 (Reitnauer (Jack Reitnauer was part of the mushroom business and the Director of Packing, Scheduling, Distribution and Marketing for Campbell at the time of the spin. (D.I. 314 at 243:2-11 (Reitnauer)))); D.I. 319 at 1897 (Carter); PTX 1078; PTX 1118.) As far as I can tell, neither side has provided, and I do not know, the aggregate value of the claims against VFI's estate.

L. Post Bond Issuance

85. By VFI's own admission, "[a]fter the bond offering, 'sort of like every day...or every week something new went bad, somewhere in the company.'" (D.I. 356 at ¶ F348 (citing Goldstein 2178-80).) Consequently, to protect cash flow VFI had to pull back planned investments in turnaround initiatives. (D.I. 319 at 2180 (Goldstein).) The businesses still continued to deteriorate, and, by the end of 1999, the outlook was grim. (D.I. 319 at 2169, 2180 (Goldstein); D.I. 319 at 2090 (Mann).)

86. In January 2000, VFI took a \$15 million charge for under-accrued trade spending in FY1999. (D.I. 318 at 1407, 1491 (O'Malley); D.I. 320 at 2531 (Bernstock); D.I. 316 at 945, 949 (Pelone); D.I. 318 at 1661 (Adler).) Specifically, VFI had underestimated the trade deductions granted in FY1999. (D.I. 318 at 1660-61 (Adler); D.I. 317 at 1165-66, 1175-76 (Lummis); D.I. 316 at 947-48, 1091-94 (Pelone); PTX 523 at '640.) Trade discounts in the food business are typically negotiated between a producer's salespeople and the retailers and wholesalers for the products. (D.I. 318 at 1660-61 (Adler); D.I. 317 at 1165-66, 1175-76 (Lummis).) VFI did not keep actual account of all such discounts, but rather estimated their total value. Those estimates were recorded as accrued trade expenses. (*Id.*) As it turned out, the amount of trade deductions and trade spending estimated in September 1999 was not an accurate reflection of the trade spending actually accrued in FY1999. (D.I. 318 at 1660-61 (Adler); D.I. 317 at 1165-66, 1175-76 (Lummis); D.I. 316 at 947-48, 1091-94 (Pelone); PTX 523 at '640.) However, under the Generally Accepted Accounting Principles ("GAAP"), which govern the filing of financial disclosures with the SEC, these estimates, at the time they were made, were consistent with the information VFI then had in its

possession. (D.I. 317 at 1038:16-1041:6, 1034:19-1035:3, 1036:6-1038:15 (Pelone); D.I. 318 at 1496:17-1498:23 (O'Malley).) The charge for the revision to the trade spending accruals was made to the FY2000 results, the year in which the discrepancies were discovered, in keeping with GAAP requirements. (*Id.*)

87. The charge for the revision led to a violation of a covenant with the Banks. (D.I. 317 at 1087, 1095-96 (Pelone); D.I. 318 at 1497-98 (O'Malley).) Because of the breach of the loan covenant, PriceWaterhouse required VFI to file an amended Form 10-K/A for FY1999 with a "going-concern" audit qualification, expressing substantial doubt as to VFI's ability to survive for a year and a day. (D.I. 316 at 950-51 (Pelone); DTX 1113 at 65; D.I. 318 at 1496-98 (O'Malley).) The amended Form 10-K/A for FY1999 was effective September 15, 1999, except for the going-concern qualification, which was effective as of March 13, 2000. (*Id.*)

M. Bankruptcy

88. In FY2000, VFI hired Lazard, an investment banking firm, to explore "strategic alternatives." (D.I. 318 at 1409-11 (O'Malley); D.I. 320 at 2346-47 (Pauker⁵⁵)). Lazard and VFI concluded that VFI was "not viable" due to its "excess leverage" and that the only feasible alternative was to sell the businesses that comprised VFI at that

⁵⁵David Pauker is a Managing Director of Gold & Associates, hired as a consultant by VFI in December of 2000. (D.I. 320 at 2343:23-25, 2344:7 (Pauker).) He and his firm deal with companies faced with a potential bankruptcy filing. (*Id.* at 2344:9-15.)

time.⁵⁶ (D.I. 318 at 1411-12 (O'Malley); 1032 at '664, '666, '678; PTX 1038 at '751, '762.)

89. Due to VFI's worsening financial condition, it needed a \$35 million loan from the Dorrance family, Campbell's largest shareholders, and the Banks in order to delay bankruptcy. (D.I. 318 at 1662-64 (Adler); PTX 1049; PTX 1058; PTX 1059.) Despite that infusion of cash, on January 29, 2001, VFI filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. (D.I. 45, at ¶¶ 1, 3.) VFB was created pursuant to VFI's Chapter 11 plan. (*Id.*)

90. During the administration of the bankruptcy case, VFI sold SonA for about \$17 million and sold Freshbake for about \$3 million. (D.I. 320 at 2362-63 (Pauker); PTX 1094 at '165; PTX 1096 at '808-09, '814, '818; PTX 1103 at 2-4; PTX 1104 at 2-4.)

91. The remaining VFI assets (Vlasic, Swanson, Swanson Canada, and Open Pit) were finally sold in May of 2001 to Pinnacle Foods Corporation for \$335 million. (PTX '1190; D.I. 320 at '2356-62, 2364 (Pauker); PTX 1101 at '846; PTX 1100; D.I. 318 at 1666 (Adler); D.I. 318 at 1422-23 (O'Malley); PTX 1109 at 4-9.) VFB agrees that the \$335 million was "fair consideration" for those assets. (D.I. 356 ¶ F364.)

⁵⁶Between the Spin-off and Spring of 2000, the value of food stocks declined appreciably. (PTX 1032 at '0653-54 (chart of the Standards & Poors Largecap, Midcap, and Smallcap Food Indices, which between 01/01/99 and 04/20/00 dropped 31.8%, 35.5%, and 39.4%, respectively.) Despite the drop in value of food companies, contemporaneous documents show that, in April of 2000, Lazard believed that VFI's "break-up value" was in the range of \$615 to \$845 million, which significantly exceeded its \$485 million of debt. (PTX 1032 at '0661, '0687; PTX 1038 at '3759.)

III. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1334(b); jurisdiction over the parties and venue for this action are uncontested. Provisions of New Jersey law and of Title 11 of the United States Code govern this action.

A. Fraudulent Transfer

2. VFB alleges that VFI fraudulently transferred \$500 million to Campbell by assuming the \$500 million debt obligation during the Spin-off. (D.I. 356, ¶¶ L4-71.) VFB argues that the transfer was illegal because it was constructively fraudulent and, alternatively, that it was made with actual intent to “hinder, delay or defraud” VFI’s creditors. (*Id.*) The two sections of the New Jersey Uniform Fraudulent Transfer Act

("N.J. UFTA") that VFB relies upon for these allegations are Section 25:2-25⁵⁷ and Section 25:2-27⁵⁸. (*Id.*)

1. Standing

3. VFB is the successor in interest to VFI, under VFI's bankruptcy plan of reorganization (D.I. 46, ¶ 3), and has the right to prosecute any causes of action which VFI was entitled to bring. (See D.I. 356, ¶ L1; D.I. 357, ¶ L1.) VFI, which apparently was a debtor in possession (see *id.*), had a duty to act "on behalf of the bankruptcy estate, that is, for the benefit of the creditors." *Official Comm. of Unsecured Creditors*

⁵⁷Section 25:2-25 states:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

N.J. STAT. § 25:2-25.

⁵⁸Section 25:2-27 states in pertinent part:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

N.J. STAT. § 25:2-27.

of *Cybergenics Corp. v. Chinery* (*In re Cybergenics Corp.*), 226 F.3d 237, 243 (3d Cir. 2000). In order to fulfill that duty, it was given the right to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b). This ability to avoid transfers requires that there be at least one unsecured creditor that has standing to bring the cause of action. *In re Cybergenics Corp.*, 226 F.3d at 243. "Yet, once avoidable pursuant to this provision, the transfer is avoided in its entirety for the benefit of all creditors, not just to the extent necessary to satisfy the individual creditor actually holding the avoidance claim." *Id.* (internal citation omitted).

4. In this case, the applicable state avoidance law is the N.J. UFTA. See N.J. STAT. §§ 25:2-20 *et seq.*⁵⁹ As earlier noted, there are two applicable sections. The first of those only requires that there be a creditor with a claim against the estate, regardless of whether it "arose before or after the transfer was made or the obligation was incurred . . ." N.J. STAT. § 25:2-25. In contrast, § 25:2-27 requires that there be a creditor with a claim that "arose before the transfer was made or the obligation was incurred." N.J. STAT. § 25:2-27.

5. Campbell has not challenged VFB's standing to assert § 25:2-25, as that section only requires that there be a creditor with a claim, regardless of when the claim arose. N.J. STAT. § 25:2-25. Campbell does, however, contend that VFB cannot bring a claim under Section 25:2-27 because it has not identified a single creditor with a claim

⁵⁹New Jersey's codification of the UFTA applies in this case because (1) VFI and Campbell were New Jersey corporations and (2) the Spin-off occurred in New Jersey. N.J. STAT. §25:2-20 *et seq.* The applicability of New Jersey law is not contested.

that arose before the challenged \$500 million transfer, in other words, with a pre-Spin claim. (D.I. 357, ¶ L11.) However, Campbell is mistaken.

6. Under the N.J. UFTA, a creditor is defined as "a person who has a claim." N.J. Stat. § 25:2-21. A "claim" is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* Under this broad definition of "claim," obligations such as those under a lease, which are not fixed but "open" and fluctuating, create liability under the broad definition of "claim" in the UFTA. *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27, 31 (Bankr. Fed. App. 1998).

7. It appears that VFB has identified at least one creditor with a pre-Spin claim, specifically the landlord for VFI's corporate headquarters. (D.I. 318 at 1586:3-8 (McCarthy); D.I. 319 at 1911:18-12:3 (Carter); D.I. 317 at 1208:25-10:2 (Lummis); PTX 15; PTX 632 at '3426.) Although VFI did not become the tenant of record under the lease for that property until after the Spin-off, the lease was created in such a manner that VFI agreed to liability under the lease prior to the Spin-off. Specifically, the lease stated that, after the Spin-off was complete, VFI would become the tenant of record and Campbell would be released from all liability under the agreement. (PTX 632 at §15(g).) Consequently, prior to the Spin-off, VFI had agreed to be liable for paying rent on that property.

2. Constructive Fraudulent Transfer

8. Under both Section 25:2-25 and 25:2-27, a finding of constructive fraudulent transfer requires that a debtor make a transfer or incur an obligation and not receive "reasonably equivalent value."⁶⁰ N.J. STAT. §§ 25:2-25, 27. Section 25:2-25 also requires that, at the time of the transfer, the debtor "[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or ... [the debtor] [i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due," *i.e.*, it was inadequately capitalized. N.J. STAT. § 25:2-25. Section 25:2-27 requires that the "debtor was insolvent at [the time of the transfer] or the debtor became insolvent as a result of the transfer or obligation." N.J. STAT. § 25:2-27. Bad faith is not an element of a constructive fraudulent transfer claim under either section.⁶¹ *Id.* §§ 25:2-25, 27; COLLIER ON BANKRUPTCY, ¶ 548.05[1][b] (2005) (stating that the bad faith of a transferee is only considered with respect to an intentional fraudulent transfer).

9. As discussed below, VFB has failed to prove by a preponderance of the evidence that VFI did not receive "reasonably equivalent value" during the Spin-off, or that VFI was inadequately capitalized or insolvent at the time of the Spin-off. See *infra*, ¶¶ L10-56, L59. Therefore, VFB's constructive fraudulent transfer claim fails.

⁶⁰To succeed on a claim of constructive fraudulent transfer, a plaintiff must support the claim by a preponderance of the evidence. *Karkus v. Siefert*, 169 F. Supp. 662, 666 (D.N.J. 1958)

⁶¹Good faith may, however, be considered in a determination of "reasonably equivalent value." See *infra*, ¶ L14.

a. Reasonably Equivalent Value

10. New Jersey's version of the UFTA does not describe how to determine if an asset received by a debtor is reasonably equivalent in value to an obligation incurred by the debtor. The Bankruptcy Code also lacks a definition of "reasonably equivalent value." *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L. (In re R.M.L.)*, 92 F.3d 139, 148 (3d Cir. 1996). Consequently, I must look to case law for guidance on this subject. *Id.*

11. Citing *In re R.M.L.*, 92 F.3d at 148-149, VFB argues that the "totality of the circumstances" is the appropriate test to determine if an asset represents reasonably equivalent value in an exchange. (D.I. 356, ¶ L15, n.43.) Under that test, VFB argues, I should look to factors such as whether the transaction was done at arms-length and completed in good faith. (*Id.*) Campbell argues that a simple comparison between the value of the assets received and the value of the obligation incurred is the proper way to determine if "reasonably equivalent value" was received by the debtor. (D.I. 362, ¶ L15.)

12. Some cases have held that if the fair market value of the consideration received by the debtor is less than 70% of the fair market value of the consideration given by the debtor, then there is a lack of reasonable equivalence. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203-04 (5th Cir. 1980); *Madrid v. Lawyers Title Ins. Co.*, 21 Bankr. 424 (9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir.). Later cases, however, used a different approach, known as the "Bundles" standard, after the Seventh Circuit decision in *Bundles v. Baker*, 856 F.2d 815, 823-24 (7th Cir. 1988). See *Matter of Grissom*, 955 F.2d 1440 (11th Cir. 1992); *Barrett v.*