Commonwealth Fed. Sav. & Loan Ass'n, 939 F.2d 20, 23 (3d Cir. 1991); *In Re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990). The *Bundles* standard arose in the context of determining if the proceeds from a sale of assets at foreclosure represented reasonably equivalent value. *Bundles*, 856 F.2d at 823-24. In that case, the Seventh Circuit, held that

> [I]n determining reasonably equivalent value, the court must focus on what the debtor received in return for what he surrendered. Consequently, it is appropriate to consider, as a starting point, the fair market value. However, the fact that the sale was the result of a foreclosure rather than an arm's length transaction between a willing buyer and a willing seller is also of considerable importance. Therefore, the bankruptcy court must focus ultimately on the fair market value as affected by the fact of foreclosure. ... The bankruptcy court therefore must consider such factors as whether there was a fair appraisal of the property, whether the property was advertised widely, and whether competitive bidding was encouraged.

Id. at 824.

13. The *Bundles* decision held that, during a foreclose sale, it may be reasonable to receive less than fair market value for an asset, but to determine the reasonability of the sale requires an examination of all of the specific circumstances. *Id.* at 824. Later, the Supreme Court held that in a foreclosure sale complying with applicable state law, the price that an asset is sold for is, as a matter of law, reasonably equivalent value. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). The Court thus rejected the use of the *Bundles* test in such circumstances. However, the Court stated that, outside the context of such a sale, the "'reasonably equivalent value' criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value) ... ." *Id.*

14. In non-foreclosure situations, courts have thus continued to use the totality of the circumstances to determine if reasonably equivalent value has been received. *See*, *In re R.M.L.*, 92 F.3d at 148-49 (stating that, after a finding that the debtor actually received value, it is appropriate to look at the totality of the circumstances to determine if the value was reasonably equivalent). The factors that are often considered in a "totality of circumstances" analysis are such things as the fair market value of the transferred assets, the relationship of the parties to one another, and the good faith of the parties. *Id.* at 148. The aim is to discover "whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *Id.* at 149 (emphasis omitted).

15. Here, there is ample evidence that the answer to the question is "yes." Information from the most disinterested source imaginable, the securities market, helps to establish the fair market value of the VFI Businesses. This is not a case involving a distress sale, in which an asset's value may be skewed downward. In fact, neither party argues that the transfer of assets at issue here was distressed in any way. Instead, the determination of reasonably equivalent value here is a straightforward comparison of the amount of consideration paid to Campbell and the fair market value of the assets transferred to VFI on the date of the Spin-off.[62] I have already found that the value of the consideration paid to Campbell was $500 million. *See supra*, ¶ F60. Consequently,

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[62]It is important to note that to find reasonably equivalent value it must first be shown that the debtor received something of value. *In re R.M.L.*, 92 F.3d at 149. Here neither side argues that VFI did not receive any value at all in the Spin-off, consequently, this prong of the analysis has been met.

all that is left to be determined is the fair market value of the VFI Businesses at the time of the Spin.

16. To determine the fair market value of businesses, courts have looked to market data about similar assets as the most trusted source of information. *See Peltz v. Hatten*, 279 B.R. 710, 738 (D. Del. 2002) (stating that "in determining whether a value is objectively 'reasonable' the court gives significant deference to marketplace values ... [because] [w]hen sophisticated parties make reasoned judgments about the value of assets ... it is not the place of fraudulent transfer law to reevaluate or question those transactions with the benefit of hindsight").

17. Comparable sales from the time in question are one type of market data that can be used to determine the value of a company. *See In re Morris Communications*, 914 F.2d at 469. One problem with the use of comparable sales is that, because no two companies are identical, error can be introduced when selecting the companies to use in the comparison. *Peltz*, 279 B.R. at 738.

18. Another method used to determine the fair market value of a company is discounted cash flow ("DCF") analysis. DCF analysis is the process of projecting the amount of free cash flow a company will generate over a foreseeable period of time and what the value of the company is at the end of that time period, a number called the "terminal value." (D.I. 352 at 4012-26.) The free cash flow and the terminal value are then discounted to present value and any debt carried by the business is subtracted. (*Id.*) The result is an estimate of the value of the business. (*Id.*) DCF analysis is also problematic, however, because the inputs used in the chosen DCF model can be highly subjective. (*Id.*)

19. The price of a company's publicly traded common stock at the time of the transaction is presumably an ideal data point for the determination of fair market value. Specifically, with respect to stock traded on "the New York Stock Exchange, one of the most efficient capital markets in the world," *PHP Liquidating, LLC v. Robbins (In re PHP Healthcare Corp.)*, 128 Fed. Appx. 839, 848 (3d Cir. 2005) (Not Precedential), the value established on the open market is the fair market value for purposes of determining reasonably equivalent value, "[i]n the absence of any evidence of manipulation or bad faith[.]" *Id.*

20. The stock of VFI was traded on the New York Stock Exchange at the time of the Spin-off. *See supra*, ¶ F57. Because of the open and public nature of the trading, the only real concern in determining the fair market value of the company is whether the investing public had the information necessary to properly evaluate the VFI Businesses. Consequently, I have used the trading price of VFI's stock as the primary factor in determining if the fair market value of the VFI Businesses was greater than $500 million. In addition, I have considered the opinions expressed by market participants both during and after the Spin-off, as well as the market price of comparable companies at the time of the Spin-off, and I have considered the opinions of the parties' experts.

i. Price of VFI's Stock

21. As previously noted, the value that the market placed on the VFI Businesses at the time of the Spin-off, as inferred from VFI's public stock price, was $1.6 billion. *See supra*, ¶ F59. Considering the information that VFB asserts the market did not have at the time of the Spin-off, and the market's reaction when it

indisputably acquired such information, as reflected in the price of VFI common stock during and after the Spin-off, I conclude that the value of the businesses transferred in the Spin-off was greatly in excess of the purchase price of $500 million.

22. VFB lists numerous facts about which it contends Campbell misled the public at the time of the Spin-off. (D.I. 356, ¶ F300.) Further, VFB contends that because the public was unaware of these facts, the price of VFI stock was higher than it otherwise would have been if the public had been properly informed. (*Id.*, ¶ F297.) Specifically, VFB points to such things as product loading and the foreseeability of a deload; trade spending depletion and under-accrual; the sharp decline in projected VFI FY1998 earnings; VFI's $21 (vs. $250) million borrowing capacity;[63] the financial impact of pricing changes and buying requirements in beef and mushroom supply agreements; the cost of duplicative transition services; Campbell's plan to stop utilizing a plant that VFI was to run after the Spin-off; onerous TIA sale restrictions; plans for post-Spin price increases; Campbell's control of the Swanson name; the cost and risk of VFI's building an infrastructure; unrecognized cost variances; and VFI's inability to pursue its plan to grow through acquisitions. (*Id.*, ¶ F300.)

23. I examined each of these factors to determine if they materially affected VFI's stock price. With respect to loading and deloading, I have found that there was some loading of product by the VFI Businesses before the Spin-off. *See supra*, ¶ F53. From the evidence presented, however, I cannot determine exactly how much loading occurred and the extent to which it affected those businesses' financial statements.

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[63]The $250 million figure is the difference between the $750 million originally available under the Credit Facility and the $500 million which Campbell had already drawn on it.

See supra, ¶ F53. I note, though, that Mr. Owsley, VFB's expert, calculated that EBIT for the twelve months prior to the Spin-off was increased by $14.8 million through loading (PTX 1290), while Dr. Luehrman, Campbell's expert, calculated that FY1998 EBIT was increased by $3.2 million through loading. (*Id.*) Because I am interested in the information's affect on VFI's stock price, the exact amount of loading is not as important as the investing public's awareness of the approximate extent of the loading. In a July 22, 1998 JP Morgan public analyst report, less than four months after the Spin-off, the affect of deloading on sales and profit was estimated at $50 million and $17.5 million, respectively. (PTX 394 at 26.) Mr. Owsley argues that this deloading number could encompass loading that "happened in prior periods going back to pre-history," and presumably not cover the loading he accounted for in his adjustments to VFI's financials. (D.I. 353 at 4230:15.)

24. VFB has taken great pains, however, to point out that Campbell forced VFI to load heavily throughout the Spin-off, implying that this was not a normal occurrence. (*See*, *e.g.*, D.I. 356, ¶ L50.) VFB cannot now have it both ways. Either loading was a normal business practice for the VFI Businesses, or it was not a normal business practice. If it were a normal business practice, then the investing public would have been aware of it and the practice would have been properly reflected in VFI's stock price. If loading were not a normal business practice, then the JP Morgan analyst report, which estimates more loading than that alleged by VFB's own expert, would show that only four months after the Spin-off the investing public was aware that significant loading had occurred in the VFI Businesses. At the time of the JP Morgan analyst report, VFI had a market cap of about $900 million, implying a value of $1.4

billion for the VFI Businesses.[64] (DTX 1667.) Although less than the market value at the time of the Spin-off, this value is still far in excess of the $500 million paid for the VFI Businesses.

25. The next issue is "the sharp decline in projected VFI FY1998 earnings." VFB contends that the public was unaware of the decline. However, although not contained in the Form 10, the drop in projected earnings was presented to the investing public in road shows prior to the Spin-off. (D.I. 320 at 2420:8-19, 2492:17-2493:16 (Bernstock).)

26. Next VFB asserts that VFI's vastly reduced borrowing capacity was hidden from the public. Again, while this point was not stated in the Form 10, the investing public could be expected to deduce that VFI borrowing capacity would be materially reduced because of its decreasing earnings. Even absent that, however, in September the investing public was informed that VFI had renegotiated the covenants on its bank loans and had its borrowing capacity vastly reduced. (D.I. 355 at 4743:22-4744:2.) (Luehrman).) In spite of this news, the price of VFI's stock was still such that the implied value of the VFI Businesses was far in excess of the $500 million. *See supra*, ¶ L32.

27. The transition services fee, the TIA, the Swanson trademark license restrictions, the risk of building an independent corporate infrastructure, and the two year limit on the agreement of Campbell to use the Omaha plant, were all disclosed in

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[64]Again, I arrive at the implied market value by adding to the market capitalization the $500 million debt obligation that served as payment.

the Form 10. (PTX 1 at '0892, '0895, '0939-40.) Consequently, the investing public was aware of these factors at the time of the Spin-off.

28. The inability to pursue any immediate acquisition plans should have been apparent, at the latest, four months after the Spin-off, when VFI was at risk of defaulting on its covenants under the Credit Facility. Again, VFI's stock price during this time shows that the investing public did not believe that a change in growth strategies drastically reduced the value of the VFI Businesses. *See supra*, ¶ L32.

29. The lack of success in cutting costs was recognized weeks after the Spin-off and was evident in VFI's financials. (D.I. 315 at 405-408.) Consequently, any negative impact from this news would also have been reflected in the price of VFI stock shortly after the Spin-off. *See supra*, ¶ L32.

30. As for the beef and mushroom supply contracts, neither side has presented persuasive evidence that information about them was or was not withheld from the public. However, it is unlikely that problems with the contracts would have negatively affected the price of VFI stock. Both the mushroom and the beef businesses were sold after the Spin-off for close to the prices they had been estimated to be worth at the time of the Spin, *see supra*, ¶¶ F83-84, which indicates that the contracts did not drive down the value of the companies. Moreover, Mr. Owsley opined that VFI's pre-Spin-off EBIT for the trailing twelve months should be reduced by only $900,000 to account for the supply agreements. (PTX 1290.) Compared to the implied market value of the VFI Businesses, which was over $1 billion, that amount is immaterial. Consequently, I conclude that any contractual problems those two businesses faced did not materially affect the value of VFI at the time of the Spin-off.

31. As for the trade spending, VFI did delay recognizing some of the costs associated with promoting its products in 1997, and it may have done the same in 1998. *See supra,* ¶¶ F40-44. However, the impact of those decisions on VFI's value was not significant enough to make the VFI Businesses less than reasonably equivalent to the $500 million payment. According to Mr. Owsley, unusual marketing expenses associated with the VFI Businesses, which included delayed recognition of trade spending, reduced VFI's unadjusted pre-Spin EBIT of $131.7 million by $8.5 million. (PTX 1290.) Even projecting such earnings into the future, however, is not enough to make a meaningful dent in the $1.1 billion dollar gap between the implied value of the VFI Businesses and VFI's $500 million obligation.

32. The limited effect of the information VFB claims was misrepresented to the public can be seen in the trading of VFI's stock after the Spin-off. Nine months after the Spin, after multiple profit warnings and a restructuring of VFI's Bank debt, VFI's stock price was roughly equivalent to the price at which it had traded at the time of the Spin-off.[65] (DTX 1667; DTX1678.) One year after the Spin-off, VFI still had a market capitalization of about $600 million, implying that the value of the businesses transferred in the Spin-off was about $1.1 billion. (DTX 1678.) Fifteen months after the Spin-off, VFI successfully sold $200 million of unsecured bonds to a group of 29 sophisticated institutional investors. (DTX 511 at '1361.) The bonds continued to trade at or near par throughout calendar year 1999, despite a further decline in VFI's EBITDA/Interest coverage ratio from 2.5 to 2.2. (DTX 632; DTX 681; DTX 1677; D.I.

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[65]VFI's stock price on the date of the Spin was $25.31, nine months later it traded at approximately $23-$25. (DTX 1667; DTX 1678.)

355 at 4746:24-4748:5 (Luehrman); D.I. 321 at 2571:1-7 (Bernstock); D.I. 318 at 1496:4-11 (O'Malley).) Indeed, VFI's stock continued to trade at relatively stable prices despite the fact that the market for similar food companies had dropped considerably.[66] A sound argument can be made that much of the drop in the price of VFI stock in the year after the Spin-off can be attributed to that unfavorable market climate for food companies.

33. VFB does not even attempt to show any market valuation of VFI contemporaneous with the Spin-off that is anywhere close to the figures urged by VFB's experts. There simply is no credible evidence to justify setting aside VFI's stock price and the other contemporaneous market evidence of VFI's worth. Even if, as VFB implies, the market was suffering from some "irrational exuberance" in establishing VFI's stock price, that gives me no basis for second-guessing the value that was fairly established in open and informed trading.

ii. Opinions Regarding the VFI Businesses' Fair Market Value Formed Independently of This Litigation

34. In a July 1998 internal VFI document, VFI estimated its own enterprise value at $1.56 billion, which would put its estimate of the value of the VFI Businesses at a minimum of $1.35 billion. *See supra*, ¶ F71. Prior to the Spin-off, Goldman Sachs 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. 320 at 2747:10-11 (DiSilvestro).) VFI's own independent outside advisors, Braxton and Georgeson, valued VFI's equity

[66]The stock price of similar food companies had dropped 21% in the year after the Spin-off. (DTX 477 at '4976.)

at between $800 million and $1.4 billion shortly before the Spin-off, implying a value for the VFI Businesses of $1.3 billion to $1.9 billion. (DTX 437.)

35. On April 28, 1999, in a letter to major shareholders discussing VFI's FY1999 performance, Mr. Bernstock addressed the value of VFI at the time of the Spin-off, taking into account negative information about VFI that had come to light in the year following the Spin-off. (DTX 477 at '4976.) He said that had the true earnings capacity of VFI been known to the market at the time of the Spin-off, the share price of VFI's common stock would have been $14-15, rather than the $25.31 at which the stock closed at the day of the Spin-off. (*Id.*; DTX 1673.) At $14 to $15 per share, the resulting market capitalization is about $650 million, resulting in a value of the VFI Businesses of $1.15 billion. (*Id.*) Mr. Bernstock also noted that although the stock market as a whole had increased since the time of the Spin-off, the price of similarly situated food companies had decreased 21%. (*Id.*) At about the time of this letter, the market capitalization of VFI was approximately $600 million, rather than the $510 million one would expect if the market had believed that the original market capitalization should have been $650 million (*i.e.*, $650 million x 79%, the percentage drop in the market for similar companies). (DTX 1678.)

36. Despite the fact that food companies had decreased in value, and VFI was on the verge of bankruptcy, 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. (PTX 1032 at '0661, '0687; PTX 1038 at '3759; PTX 1032 at '0653-54.)

37. Thus the contemporaneous views of people involved both before and after the Spin-off support the conclusion that the value of the VFI Businesses was greatly in excess of $500 million at the time of the Spin.

iii. Dr. Luehrman's Comparable Company Analysis

38. The comparable company analysis done by Dr. Luehrman also serves to corroborate the value the market placed on VFI. A comparable company analysis looks at the values of a range of companies that are similar to the company being examined. (D.I. 354 at 4633 (Luehrman).) The value attributable to each of the comparable companies is determined by a recent sales price or the price of common stock. (*Id.*) The value data for the comparable companies is adjusted to account for differences in such things as company size and profit margin, and an estimated value is then determined for the company being analyzed. (*Id.*) A significant benefit of the market comparables approach is that it is based on data from the time in question and, assuming appropriate comparables are selected, is therefore less susceptible than a DCF analysis to the distorting effect of hindsight. (D.I. 354 at 4635 (Luehrman).)

39. Dr. Luehrman selected six "Best Comparables" for VFI: Best Foods, Dean Foods, Goodmark Foods, H.J. Heinz, Hormel, and International Home Foods.[67] (DTX 1441; D.I. 355 at 4668:3-11 (Luehrman).)

40. As a check, Dr. Luehrman compared his Best Comparables to comparables chosen by other market participants or observers at the time. (DTX 1417;

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[67]Dr. Luehrman selected companies that were comparable to VFI by applying a series of "screens" to the pool of potential comparables. (D.I. 355 at 4667-8 (Luehrman).) For example, he first eliminated all companies that were, by a factor of ten, bigger and smaller than VFI. (*Id.*) He also eliminated companies that only sold one type of product. (*Id.*)

DTX 1418; DTX 1439; D.I. 355 at 4669:5-4672:12 (Luehrman).) Comparing his grouping to S&P's Food Industry Index, five out of six companies appeared on both lists. (DTX 1441; DTX 1417; D.I. 355 at 4669:17-4670:1 (Luehrman).) Compared to comparable companies selected by contemporary food industry analysts close in time to the Spin-off, again, five of the Best Comparables appeared on both lists. (DTX 1418; DTX 1441; D.I. 355 at 4670:5-4671:3 (Luehrman).) The one company, Goodmark, that appeared on Dr. Luehrman's list, but not that of the analysts, had the lowest set of multiples among the Best Comparables group, thus demonstrating a lack of bias in Dr. Luehrman's "Best Comparables" group.[68] (DTX 1418; DTX 1441; D.I. 355 at 4670:14-4671:20 (Luehrman).)

41. Dr. Luehrman's market comparables approach yielded a set of nine market indicators of the enterprise value of VFI. (DTX 1424; D.I. 355 at 4694:3-14 (Luehrman).) Eliminating what he regarded as the least reliable indicators, and selecting the median multiples for his Best Comparables group of companies, Dr. Luehrman concluded that VFI's enterprise value, on a minority-interest basis, was in a range between $1.5 billion and $1.8 billion at the time of the Spin-off. (DTX 1420; DTX 1421; DTX 1424; D.I. 355 at 4694:15-4695:17 (Luehrman).) Dr. Luehrman's analysis was persuasive and confirms that the stock price of VFI at the time of the Spin-off was reasonable.

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[68]A company's multiple is, among other things, a representation of how the market views the growth prospects for a particular company. For example, when the market prices a company so that it has a relatively large market value/EBIT multiple, the market can be understood to be indicating that the company's EBIT will continue to grow, or that the company has value aside from its ability to generate cash. Comparing VFI to a company with low multiples has the effect of reducing the estimated value of VFI, an effect contrary to Campbell's interest in this litigation.

iv. Mr. Owsley's Comparable Company Analysis

42. VFB's expert, Mr. Owsley, also completed a market comparables analysis. That analysis, however, was not persuasive. Mr. Owsley made no attempt to check his list of comparable companies against the listing of comparables selected by market analysts at the time of the Spin-off. Only one of Mr. Owsley's comparable companies was included among the companies identified by equity analysts at that time as being comparable to VFI. (D.I. at 4772:7-4773:13 (Luehrman); DTX 1694.) Mr. Owsley screened food companies for those with low growth and low profitability, then excluded dairy and foreign businesses. (D.I. 352 at 4051:3-52:20 (Owsley); PTX 1311; PTX 1314; PTX 1315.) The result was a list of companies that was not comparable to VFI.

43. After completing his comparable analysis, Mr. Owsley calculated the VFI Businesses' enterprise value at $569 million ($634 million minus a transition cost of $65 million). (D.I. 352 at 4056-57 (Owsley); PTX 1316 (chart of Mr. Owsley's comparable analysis).)

44. Mr. Owsley next applied an illiquidity discount of 25% because of the TIA restrictions that prevented VFI from selling the majority of its businesses within two years without complying with certain conditions. (D.I. 352 at 4058:2-9, 4059:10-61:7; PTX 1316.) Mr. Owsley supported his illiquidity discount theory with studies of restricted stock. (D.I. 352 at 4059:10-61:7 (Owsley).)

45. That illiquidity discount was not warranted. (D.I. 355 at 4770:6-4771:23, 4822:3-19 (Luehrman).) Unlike an owner of stock who is restricted from selling his shares, VFI had the flexibility to effect a sale within two years of the Spin-off, if changed circumstances necessitated it. (D.I. 354 at 4586:21-4604:21 (Wessel); D.I. 320 at

2525:1-13 (Bernstock); DTX 407 at '7520.) VFI also had the ability to, and in fact did, gain economic returns by operating its businesses for cash, which is completely unlike a person restricted from realizing a return on illiquid stock. (D.I. 355 at 4771:13-23 (Luehrman).) Mr. Owsley could identify no other analyst who applied such an "illiquidity discount" in valuing VFI. (D.I. 353 at 4225:6-8 (Owsley).)

46. Mr. Owsley next applied a spin-off discount of 10% to reflect VFI's additional risk as a newly formed spin-off, relative to the "comparable" companies. (D.I. 352 at 4058 (Owsley).) Mr. Owsley argued that the discount was justified because the market generally demands higher returns from spin-offs to compensate for their risk as newly formed companies. (D.I. 352 at 4058, 4070-71, 4867 (Owsley).) However, analysts at the time of the Spin-off applied no such discount, (D.I. 353 at 4226:6-16 (Owsley)), which could have and would have been done, had it been appropriate.

47. Because of the foregoing failures in Mr. Owsley's comparables analysis, I reject it as an unreliable measure of VFI's value.

v. Mr. Owsley's DCF Analysis

48. To support its claim of insolvency and lack of reasonably equivalent value, VFB relies on the discounted cash flow analysis advanced by Mr. Owsley, arguing that the value of the businesses transferred in the Spin-off "had an overall value range of $270-360 million." (D.I. 356, ¶¶ F375-90.) The same selective hindsight that undermined its market comparables analysis, however, also infects VFB's DCF approach, which makes it unpersuasive.

49. Mr. Owsley began his DCF analysis by first reducing VFI's reported last twelve months pre-Spin EBIT from $131.7 million to $57.5 million. (D.I. 356, ¶ F377.)

He next projected the free cash flow for all of VFI's segments for the last quarter of FY1998 and the next five fiscal years. (*Id.*; D.I. 352 4013-28; PTX 1292; PTX 1293; PTX 1294; PTX 1295; PTX 1296; PTX 1297; PTX 1298; PTX 1299; PTX 1300.) From those free cash flows, Mr. Owsley subtracted $65 million for a one time restructuring charge related to the Spin-off. (D.I. 356, ¶ F379; D.I. 352 at 4028-32; PTX 1302.) Then, Mr. Owsley calculated what the terminal value of VFI would be after the fifth fiscal year under a constant growth model with a 10.3% discount rate and a negative 2% growth rate into perpetuity. (D.I. 356, ¶ F380; D.I. 352 at 4037-38; PTX 1309.) He then discounted all of the free cash flows, the terminal value, and the transition expense to present value to arrive at what VFB asserts was the value of VFI at the time of the Spin-off. (D.I. 356, ¶ F381; D.I. 352 at 4040; PTX 1309 at 2.)

50. The first flaw in Mr. Owsley's DCF analysis deals with the projected EBIT of Kattus. Mr. Owsley projected that Kattus would loss $6.7 million in FY1999; $6.1 million in FY2000; $5.6 million in FY2001; $5.1 million in FY2002; $4.6 million in FY2003; and be sold for working capital thereafter. (D.I. 352 at 4024-26; PTX 1309.) The present value of those negative cash flows equals a negative $17.85 million, as compared to the business's appraised value of $20 million.[69] Ultimately, in January 1999, VFI sold Kattus for over $20 million. (DTX 104 at 2.) Mr. Owsley's assumptions about Kattus are patently unreasonable.[70]

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[69]Mr. Owsley acknowledged that he was aware that, prior to the Spin-off, Kattus was appraised at $20 million. (D.I. 352 at 4025:17-26:6; PTX 680 at '8282.)

[70]VFB argues that it is not reasonable to use the appraised value of Kattus because VFI was prevented from selling any of its businesses under the TIA. (D.I. 356, ¶ DF139.) This argument misses the point of the appraisal, which speaks to Kattus's ability to produce cash. The analysis is rooted in cash flow. Moreover, Kattus was

51. The second flaw in Mr. Owsley's DCF analysis is his reduction by $15 million of VFI's projected EBIT for each of the five projected fiscal years, supposedly to account for increased costs incurred in operating VFI as a stand-alone company. (D.I. 353 at 4193:5-12; PTX 1290.) The document that Mr. Owsley relied on to make that adjustment plainly does not support it. The document referred to increased costs of $15 million over five years, meaning an increased annual cost of $3 million, rather than $15 million annually. (*Id.* at 4193:18-21.) The difference caused by the unsupported additional reduction is $12 million per year, totals $60 million. Moreover, contemporaneous documents showed that the estimated $15 million cost increase was part of an analysis showing that, overall, there would be a decrease in the costs of operating VFI as a stand-alone business. (DTX 185 at '1505, '1518; DTX 220 at '1877; D.I. 355 at 4759:4-17 (Luehrman); D.I. 353 at 4192:21-4194:7, 4194:23-4195:3 (Owsley).) That conclusion, which undercuts Mr. Owsley's analysis, is bolstered by the fact that Ms. MacDonnell, who was in charge of Vlasic and Swanson prior to the Spin-off, wanted to run those businesses as a stand-alone company because she believed she could cut needless overhead and run them more efficiently. (D.I. 322 at 3059 (Johnson).)

52. The third flaw concerns a deduction taken by Mr. Owsley to account for, among other things, what he believed was reduced spending on marketing prior to the Spin-off. (D.I. 352 at 3998-90; PTX 1290.) Mr. Owsley deducted $8.5 million per year because he believed that profits were artificially increased by advertising cost cuts prior to the Spin-off, which in turn had a negative effect on future growth. (D.I. 352 at 3988-

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exempt from the TIA. (D.I. 318 at 1547:4-10 (McCarthy).)

91.) Dr. Luehrman, on the other hand, persuasively reasoned that a manager would not spend additional millions of dollars on advertising, as Mr. Owsley's corrected EBIT presumes, without there being a corresponding increase in sales or earnings. (D.I. 355 at 4764:12-4765:7.) Moreover, I find it untenable that Mr. Owsley both takes a deduction from EBIT to account for VFI's need for increased marketing, while at the same time projecting stagnating and decreasing earnings for VFI.

53. The fourth flaw applies to the negative 2% growth rate Mr. Owsley used in his constant growth model to estimate the value of the cash generated by VFI after the first five years. In pointing out the flaws in Mr. Owsley's DCF analysis, I have not singled out his pessimistic projections for VFI's EBIT during the first five years of the company's operations.[71] His assertion of a negative perpetual growth rate of VFI after five years, however, is particularly unreasonable. At the time of the Spin-off, the consumer price index showed estimated inflation to be about 2.8% per year. (DTX 1305.) Viewing the negative 2.0% growth rate in light of inflation, Mr. Owsley predicted that VFI would continually shrink at a real rate of 4.8% per year forever (a negative 2.0% growth rate minus 2.8% rate of inflation). If anyone actually making decisions at the time held the utterly bleak view espoused by Mr. Owsley, I have seen no evidence of it. On the contrary, the investing public had high hopes for VFI at the time of the Spin-off. (*See, e.g.*, DTX 428, at '4535.)

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[71]It is important to note that Mr. Owsley's projections fly in the face of what everyone involved in the Spin-off believed at that time. For the sake of simplicity, however, I have chosen to examine the flaws in Mr. Owsley's DCF analysis that are the most readily quantifiable.

54. In short, Mr. Owsley's DCF analysis is fundamentally flawed and unpersuasive.

vi. Actual Cash Flows

55. Interestingly, VFB's other economic experts, Sheridan Titman and Greg Hallman, also performed an analysis using cash flows, in this instance the actual cash flows generated by VFI, rather than projected cash flows. (D.I. 289 at 15.) In their analysis, they calculate that the "cash flows generated by VFI both through operations and through the sale of businesses – including the ultimate sale of VFI to Pinnacle – produced a value at the time of the spin-off of approximately $446 million."[72] (*Id.*) Despite that, they concluded in a separate analysis that $377 million was the value of VFI. (*Id.*) Those experts further noted that although their "$377 calculated value is lower than the $446 realized ex-post, the $446 ex-post value is certainly closer to [their] $377 value than it is to the $1.1-$1.8 billion value calculated by Dr. Luehrman and the approximately $1.6 billion value implied by the market prices at the date of the spin-off." (*Id.*)

56. What VFB's experts seem to miss is that this is not an exercise to see which side's valuation comes closer to estimating what VFI's cash flow ended up being. Rather, the aim is to determine the fair market value of VFI at the time of the Spin-off. By VFB's own account, VFI's tenure as a public company was marred in highly visible ways. (D.I. 356, ¶ L307-21.) Yet, despite the very public problems faced by VFI after

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[72]In making this calculation, Titman and Hallman used a discount rate of 11.8% to discount the cash flows generated by VFI back to the time of the Spin-off. (D.I. 289 at 15.) Although I make no finding as to the propriety of this rate, I do note that it is higher than the rate advocated by Campbell's expert, which was 9.6%. (D.I. 292 at 25.)

the Spin-off, VFB wants me to believe that the investing public would have predicted an even worse fate for VFI if it had really understood the facts at the time of the Spin. A far more reasonable conclusion, however, is that, since VFI was able to generate over $450 million in cash, even with the problems that developed, its fair market value was at least reasonably equivalent to $500 million at the time of the Spin-off.[73]

b. Inadequate Capitalization

57. A debtor is inadequately capitalized if its assets were unreasonably small in relation to its business or the business that it was about to engage in, or the debtor reasonably believed that it would be unable to pay its debts as they came due. N.J. STAT. § 25:2-25. The test for unreasonably small capital and ability to pay debts as they come due is reasonable foreseeability. *See Moody v. Security Pac. Business Credit*, 971 F.2d 1056, 1073 (3d Cir. 1992) (holding that in the context of a fraudulent transfer, the test for determining if a business will fail due to such things as unreasonably small capital is reasonable foreseeability). When considering if a business is inadequately capitalized, it is proper to consider the availability of credit. *Id.*

58. VFB argues that VFI had planned to grow its businesses and that the growth plan required time and capital. (D.I. 356, ¶ L21.) VFB contends that VFI's assets were unreasonably small to complete this plan. (*Id.*) Campbell argues that, at the time of the Spin-off, VFI's future operating plans were reasonable, and that

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[73]Indeed, I conclude it was substantially in excess of $500 million. For that reason, VFB's argument that all of the debt transferred to VFI in the Spin-off, a total of $646 million by their count, should be considered payment for the VFI Businesses, *see supra*, ¶¶ F59-60, is inconsequential. I find the fair market value of the VFI Businesses at the time of the Spin-off was well in excess of $646 million.

unforeseen events caused VFI's problems, not unreasonably small assets. (D.I. 357, ¶¶ L12-13.)

59. VFI was in the business of selling pickles, frozen foods, and other processed foods. It operated for two years after the Spin-off and successfully went to the market to borrow $200 million dollars during that time. *See supra*, ¶¶ L12-13. All of the professionals involved in the Spin-off, as well as independent third parties that purchased VFI's stock and, later, its bonds, believed that VFI's assets were adequate to operate the businesses in which it was engaged. (*Id.*) Because the most persuasive evidence runs directly contrary to its position, VFB has failed to carry its burden of proving by a preponderance of the evidence that VFI's assets were unreasonably small for the businesses in which it was engaged. Likewise, VFB has failed to prove by a preponderance of the evidence that responsible parties should have reasonably believed that VFI would be unable to pay its debts as they came due.

60. Therefore, VFB has not proven by a preponderance of the evidence that VFI was inadequately capitalized at the time of the Spin-off.

c. Insolvency

61. "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." N.J. STAT. § 25:2-23(a). As discussed above, the value of VFI's assets at the time of the Spin was greater than $646 million, the sum that VFB asserts was the total amount of VFI's debts. *See supra*, n.75. Therefore, VFI was not insolvent at the time of the Spin-off.

3. Actual Intent to Defraud

62. "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor ... if the debtor made the transfer or incurred the obligation ... [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor ... ." N.J. STAT. § 25:2-25. Actual intent to defraud, by its nature, is rarely susceptible to direct proof, and, thus, circumstantial evidence must suffice.[74] *Gilchinsky v. National Westminster Bank*, 732

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[74]The burden of proof required to establish a claim involving actual intent is unsettled. The conflicting case law on this point has been summarized as follows:

> Earlier cases have held that the trustee must prove actual intent to defraud creditors by clear and convincing evidence. *Matter of Foxcroft Square Co.*, 184 B.R. 671, 674 (E.D.Pa. 1995); *In re Taubman*, 160 B.R. 964, 984 (Bankr.S.D.Ohio 1993). The foregoing cases, however, analyze the burden of proof standard under each state's enacted version of the Uniform Fraudulent Conveyance Act. ... In *Plotkin v. Pomona Valley Imports, Inc. (In re Cohen)*, 199 B.R. 709 (9th Cir. BAP 1996), the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals decided that determining whether transfers were made with actual intent to hinder, delay or defraud creditors utilized the same inquiry under either 11 U.S.C. § 548(a)(1) or the Uniform Fraudulent Transfer Act, but did not specify which standard applied. *Cohen*, 199 B.R. at 716. Generally, courts do not agree which standard applies to "actual intent" actions under § 548(a)(1)(A). Compare *Provident Life and Accident Ins. Co. v. General Syndicators of America, (In re Laramie Assoc., Ltd)*, 1997 U.S. Dist. LEXIS 14170, 1997 WL 587288, at *6 (E.D.Pa. 1997)(clear and convincing evidence standard) with *Thompson v. Jonovich (In re Food & Fibre Protection, Ltd.)*, 168 B.R. 408, 418((Bankr.D.Ariz. 1994)(preponderance of the evidence standard). See also *Development Specialists, Inc. v. Hamilton Bank, N.A. (In re Model Imperial, Inc.)*, 250 B.R. 776, 790-91 (Bankr.S.D.Fla. 2000) (noting disagreement regarding which standard applies in Florida courts, but deciding that, under the Supreme Court's decision in *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991), a preponderance of the evidence standard applies to fraudulent conveyance actions).

Leibersohn v. Campus Crusade for Christ, Inc. (In re C.F. Foods, L.P.), 280 B.R. 103,

A.2d 482, 490 (N.J. 1999); *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1304 (3d Cir. 1986). Each piece of circumstantial evidence is often referred to as a "badge of fraud." *Id.*

63. In determining actual intent under subsection a. of Section 25:2-25, consideration may be given, among other factors, to whether:

> a. The transfer or obligation was to an insider;
> b. The debtor retained possession or control of the property transferred after the transfer;
> c. The transfer or obligation was disclosed or concealed;
> d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> e. The transfer was of substantially all the debtor's assets;
> f. The debtor absconded;
> g. The debtor removed or concealed assets;
> h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> I. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

N.J. STAT. § 25:2-26.

64. "Although the presence of a single factor, *i.e.* badge of fraud, may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud." *Gilchinsky v. National Westminster Bank N.J.*, 732 A.2d 482, 490 (N.J. 1999). In addition to these

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111 (Bankr. M.D. Pa. 2002). Because I find that VFB has failed to prove actual intent to defraud by even a preponderance of the evidence I need not further discuss the point. *See infra*, ¶ L65.

badges of fraud, any other factors pertinent to the transaction should be considered. *Id.*

65. I have already concluded that the $500 million obligation VFI incurred was reasonably equivalent to the businesses it received and that VFI was solvent at the time of the Spin-off. *See supra*, ¶ F56. In addition, the conduct of VFI and Campbell does not suggest an intent to hinder, delay, or defraud any creditor. Any aggressive accounting or any gloss put on information provided to the investing public was done with the intent to increase VFI and Campbell's stock price, and was not an effort to hinder, delay, or defraud creditors. *See supra*, ¶¶ F45-53. Moreover, at the time of the Spin-off, VFI and Campbell's employees believed that VFI was going to be a viable company. *See supra*, ¶¶ F11-20. Consequently, VFB has failed to show by a preponderance of the evidence that anyone had an intent to hinder, delay, or defraud any creditor in connection with the Spin.

B. Breach of Fiduciary Duty

66. VFB alleges that VFI's pre-Spin directors breached a fiduciary duty to VFI's foreseeable creditors. (D.I. 356 at ¶ L44-48.) This effort to state a claim has numerous short comings; however, one in particular stands out. The pre-Spin directors did not owe any fiduciary duty to future creditors of VFI. *See Francis v. United Jersey Bank*, 432 A.2d 814, 824 (N.J. 1981) ("While directors may owe a fiduciary duty to creditors also, that obligation generally has not been recognized in the absence of insolvency.") As I have ruled that VFI was not insolvent at the time of the Spin, *see supra*, ¶ L61, there was no fiduciary duty to creditors and, accordingly, the claim of a breach must fail.

C. Campbell's Proof of Claims

67. VFB argues that Campbell's claims against VFI's estate should be disallowed because Campbell offered no evidence establishing the validity of their claims. (D.I. 356, ¶¶ F55-56 (citing *In re Fidelity Holding Co.*, 837 F.2d 696, 698 (5th Cir. 1988).) The case cited by VFB, however, states that "[u]nder Bankruptcy Rule 301(b), a party correctly filing a proof of claim is deemed to have established a prima facie case against the debtor's assets. The objecting party must then produce evidence rebutting the claimant or else the claimant will prevail." *In re Fidelity*, 837 F.2d at 698 (internal citations omitted). VFB has not produced evidence to rebut Campbell's claims, so the argument for disallowance must fail on this record.

68. VFB also alleges that I should disallow or subordinate Campbell's claims because of Campbell's actual or constructive fraud in the Spin-off. (D.I. 356, ¶ L55.) Because of my earlier rulings on actual and constructive fraud, this claim also fails. *See infra*, ¶¶ L9, L65.

D. Alter Ego and Illegal Dividend

69. VFB's last two allegations, that VFI was an alter ego of Campbell and that the Spin-off was an illegal dividend, were abandoned by VFB. VFB did not raise these claims in its proposed Findings of Fact and Conclusions of Law, and only mentioned them after Campbell noted that omission. (D.I. 361, ¶ DC24-25, 28.) Additionally, with respect to the claim that VFI declared an illegal dividend, VFB, in its response, relies on the assertion that VFI was insolvent at the time of the Spin-off or that the Spin-off caused it to become insolvent, a proposition I have already rejected. (*Id.*, DC24-25.) As for the alter ego claim, such a finding requires a showing of such factors as "failure

to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders." *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981). VFB has not shown that any of these factors were present at the time of the Spin-off. Consequently, both claims are without merit.

IV. SUMMARY OF CONCLUSIONS

In summary, for the reasons expressed herein, Campbell is not liable to VFB for actual or constructive fraudulent transfer or for the VFI Directors' alleged breach of fiduciary duty. In addition, Campbell's claims against VFI are not disallowed nor are they subordinated to other claimants. Finally, VFB's claims that VFI was an alter ego of Campbell and that VFI declared an illegal dividend during the Spin-off have been abandoned and, in any event, are rejected. The parties should confer and submit a form of judgment giving effect to the rulings herein.