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	:	UNITED STATES BANKRUPTCY COURT
	:	FOR THE DISTRICT OF NEW JERSEY
In re:	:	
	:	Chapter 11
ONCOLOGY ASSOCIATES OF DELL	:	
COUNTY, LLC, MOBERN RADIATION	:	Case Nos.: 12-11680 (MBK)
AND ONCOLOGY OF DELL COUNTY,	:	13-11674 (MBK)
LLC, AND DENNY REAL ESTATE	:	13-17145 (MBK)
HOLDINGS, LLC,	:	
	:	
Debtors.	:	
	:	
MORRIS S. BRILL,	:	Adv. Pro. No.: 14-01071(MBK)
Chapter 11 Trustee,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Hearing Date:**
	:	
DAVID JAY COUNSELOR,	:	
	:	
Defendant.	:	

BRIEF IN SUPPORT OF MOTION FOR AN ORDER DISMISSING THE FIRST AMENDED COMPLAINT IN LIEU OF FILING ANSWER PURSUANT TO FED.R.BANKR.P. 7012(b) AND FED.R.CIV.P. 12(b)(6)

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PRELIMINARY STATEMENT

Just prior to the last day to file avoidance actions, and without any prior communication with Defendant, Chapter 11 Trustee Morris S. Brill (the "Trustee") filed his Complaint to Allow and Recover Transfers of Property Pursuant to 11 U.S.C. §§ 327, 547, 549 and 550 and to Disallow Claims Pursuant to 11 U.S.C. § 502(d) (the "Complaint") listing David Jay Counselor as a Defendant. ("Counselor" or the "Defendant"). The Complaint was one of a number of boilerplate avoidance actions that the Trustee filed in January 2014.

After Counselor filed his Motion for an Order Dismissing the Complaint, the Trustee filed a Cross-Motion for Leave to Amend Adversary Complaint. The court subsequently granted the Trustee leave, and the Trustee filed his First Amended Complaint to Avoid and Recover Transfers of Property Pursuant to 11 U.S.C. §§ 327, 547, 548, 549 and 550, to Disallow Claims Pursuant to 11 U.S.C. 502(d) and for an Accounting (the "Amended Complaint"). In the Amended Complaint, the Trustee added a cause of action for Fraudulent Transfers under § 548 and requested an Accounting of all payments made to Counselor "within two years of the dates that they became a debtor in a chapter 11 proceeding." Amended Complaint ¶ 61.

Unfortunately, prior to filing the original Complaint and the Amended Complaint against Counselor, the Trustee did not do his homework. The Complaint lacked the basic factual allegations necessary to survive a motion to dismiss and the Amended Complaint fails to correct those deficiencies. Even more, the facts that the Trustee does allege cannot support these avoidance actions.

As an initial matter, the Amended Complaint fails to meet the pleading standards for either the preferential transfer action or the fraudulent transfer action. Most notably, the preferential transfer count fails to identify the antecedent, fails to specify how Counselor is a creditor of the debtors, fails to identify the antecedent debt and fails to provide any facts regarding how Counselor could have received more than he would have received in a Chapter 7 case.

The fraudulent transfer claim is also deficient. The Trustee provides no factual support for his allegations that the Debtors were insolvent, and he makes no mention of how Counselor's services failed to provide the Debtors with reasonably equivalent value.

The Amended Complaint should be dismissed on this basis alone.

Even more egregiously, the Complaint confusedly conflates one debtor with another, presumably in order to obscure the fact that the transfers at issue were made outside the preference period, in contravention of the Bankruptcy Code, the case law, and basic notions of notice and due process. As stated in the Amended Complaint, on January 25, 2012, Oncology Associates of Dell County, LLC ("OADC") filed its bankruptcy petition. More than thirteen months later, on January 30, 2013, Mobern Radiation and Oncology of Dell County, LLC ("Mobern") filed its bankruptcy petition. The Amended Complaint seeks to use the subsequent order consolidating the cases to Mobern's later filing on the back of OADC to extend Mobern's preference look-back period to sixteen (16) months prior to Mobern's petition date. All except one of the transfers the Trustee seeks to avoid were made far outside the applicable preference period, and none was made post-petition. The most recent such transfer was made on July 8, 2012, more than 200 days prior to Mobern's petition date – and

the earliest such transfer was made on November 22, 2011, 431 days prior to Mobern's petition date.

In sum, the Trustee has failed to plead any of his counts with the specificity required by Federal Rule of Civil Procedure 8 and Bankruptcy Rule 7008 and relevant case law. Because the Amended Complaint is fundamentally deficient and those deficiencies cannot be cured, amendment would be futile, and the Court should dismiss the Amended Complaint with prejudice.

NATURE AND STATE OF THE PROCEEDINGS

This is an adversary proceeding to avoid and recover alleged preferential transfers pursuant to 11 U.S.C. § 105(a), 327, 547, 549 and 550, alleged fraudulent transfers under § 548, to disallow claims pursuant to 11 U.S. C. § 502(d) and for an accounting. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F).

On April 29, 2014, Morris S. Brill, Chapter 11 Trustee, (the "Trustee" or the "Plaintiff") filed his First Amended Complaint to Avoid and Recover Transfers of Property Pursuant to 11 U.S.C. §§ 327, 547, 548, 549 and 550, to Disallow Claims pursuant to 11 U.S.C. § 502(d) and for an Accounting.

Counselor has not previously answered, or otherwise plead in response to the Amended Complaint. Contemporaneously herewith, Counselor has filed a Motion, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012 to dismiss the amended complaint (the "Motion to Dismiss"). For the reasons set forth herein, Counselor respectfully requests that this Court dismiss the Amended Complaint in its entirety.

STATEMENT OF FACTS

The Plaintiff in this adversary proceeding is Morris S. Brill, Chapter 11 Trustee for OADC.

The Defendant named in this suit was the attorney for Dr. Barbara Slepian (a non-debtor entity), OADC, Mobern and Denny Real Estate Holdings, LLC ("Denny").

In or about April of 2010, Counselor was retained to represent Dr. Slepian and her business entities. Counselor was paid on a regular monthly basis for the contemporaneous legal services he rendered.

At this time, Dr. Slepian was, as principal of each of the three entities, embroiled in numerous quasi-criminal and civil legal proceedings including an investigation into an outbreak of hepatitis B at a laboratory operated by OADC, a malpractice action against Dr. Slepian and her business partner, Dr. Dane, and a lawsuit brought by TD Bank for nonpayment of a mortgage and foreclosure action in New Jersey state courts. Dr. Slepian was also named personally in all litigation involving these entities. Counselor was retained as legal counsel on the basis that he would represent Dr. Slepian and each of the entities for which she was a principal in all of their criminal and civil litigation for a flat-fee of $25,000 per month plus certain expenses. Based on the terms of their agreement, Counselor would effectively serve as "in-house counsel" for the doctor and her corporations.

Shortly after the commencement of representation, Counselor, in consultation with Dr. Slepian, initiated a counterclaim against both TD Bank and her former business partner for misappropriation of funds, and GECC launched a federal replevin action against Dr.

Slepian and her operating entities. This action was eventually appealed to the Third Circuit Court of Appeals.

For a period of approximately eighteen months, Counselor continued to represent and serve these entities in a variety of business and personal matters. During the applicable time period relating to this Amended Complaint, Counselor was compensated on a monthly basis by check issued from the account of Mobern. Eventually, nearly two years after Counselor initially commended legal representation of Dr. Slepian and her business interests, OADC filed for Chapter 11 bankruptcy protection on January 25, 2012. With the exception of one check issued by Slepian from OADC's checking account in the amount of $2,107.64 representing filing fees and costs in connection with non-debtor litigation, Counselor did not receive any checks from OADC issued by Slepian within the 90-day look back period.

Upon OADC's filing for Chapter 11 protection, Counselor ceased representation of OADC. OADC sought and retained Fox Rothschild LLP as its bankruptcy counsel. Subsequent to filing, all state court and related matters involving OADC were stayed as to OADC. However, they were not stayed as to Dr. Slepian, Mobern or Denny, and Counselor continued to represent Dr. Slepian and her non-debtor entities in their pending litigation.

Following OADC's bankruptcy filing, Counselor, in coordination with Dr. Slepian and Fox Rothschild, chose not to seek appointment as a professional in OADC's bankruptcy case and to continue to represent only the non-debtor entities. Bankruptcy Court docket entries reflect pleadings referencing in detail the nature of the ongoing litigation against the non-debtor entities: Slepian, Denny and Mobern, including references to Counselor's ongoing representation of those non-debtor entities.

On October 2, 2012, by way of letter directed to The Honorable Michael Kaplan of the United States Bankruptcy Court for the District of New Jersey, Counselor advised the court of the status of the state court litigation being handled by Counselor on behalf of the non-debtor entities.

Counselor and Dr. Slepian's relationship concluded later in October 2012 when the state court granted Counselor's request to withdraw as counsel.

On January 22, 2013, upon motion of the Trustee (without notice to Counselor), the Order Extending Proceedings was issued, extending OADC's bankruptcy proceedings over Mobern. On January 30, 2013, Mobern filed its chapter 11 petition. On February 6, 2013, an Order was entered substantively consolidating Mobern's bankruptcy case with that of OADC (the "Consolidation Order"}.

STANDARD OF REVIEW

Under Rule 12(b)(6), which is made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 7012(b), the Court may dismiss a complaint if it fails to "state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6).

A motion filed under the rule allows the court to test the sufficiency of a complaint's factual allegations. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3rd Cir. 1983). "The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premise and destined to fail, and thus spare the litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys*., 988 F.2d 1157, 1160 (Fed. Cir. 1983), *reh'g en banc denied, Hess v. Advanced Cardiovascular Sys., Inc*., 530 U.S. 1277 (1997).

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court laid to rest the "no set of facts" standard that had been applied to motions to dismiss under Rule 12(b)(6). In *Twombly*, the Court held that the often "questioned, criticized, and explained away" language from its prior decision in *Conley v. Gibson*, 255 U.S. 41 (1957), "has earned its retirement" after puzzling the profession for 50 years. *Twombly*, 550 U.S. at 561-63. Instead, the Court made clear that Fed. R. Civ. P. 8 requires that a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570. Without requiring at least facial plausibility, "claim[s] would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id*. at 561 (emphasis added). Such a minimal pleading standard would render meaningless a court's "power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id*. at 558 (quoting *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n. 17 (1983).

Shortly after its groundbreaking decision in *Twombly*, the Supreme Court clarified that the *Twombly* plausibility pleadings standard applies to "all civil actions." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions[s] devoid of further factual

enhancement.'" *Id*. (quoting *Twombly*). In short, Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id*. at 1950.

The Supreme Court in *Iqbal* acknowledged that many complaints attempt to substitute conclusory statements for fact. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "Although for the purposes of a motion to dismiss . . . [courts] must take all of the factual allegations in the complaint as true. . . . [courts] are not bound to accept as true a legal conclusion couched as a factual allegation." *Id*.

As explained below, courts applying *Iqbal* and *Twombly* to complaints for fraudulent transfers and preferential transfers in the bankruptcy context have held that complaints, such as the Trustee's Amended Complaint, which merely state conclusory allegations without setting out the factual basis for such claims, should be dismissed pursuant to Rule 12(b)(6).

In applying *Twombly* and *Iqbal* to determine sufficiency of pleading, the Third Circuit instructs that courts are to conduct a two-part analysis. *Fowler v UPMC Shadyside*, 578 F.3d 203, 210 (3rd Cir. 2009). "First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id*. at 210-11.

Next, the *Fowler* court cautions that the trial court must "determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief." *Id*. at 2011. Says the court, "a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Id*. It will

not be necessary for this court to reach the second prong of the *Fowler* analysis for the simple reason that the Trustee has failed to provide any factual support for several elements of his causes of action under §§ 547 and 548.

Federal Rule of Civil Procedure 8(a)(2), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7008(a), is the governing pleading standard for fraudulent conveyance actions in the Third Circuit. *See In re Charys Holding Co*., 443 B.R. 628, 632 n. 2 (Bankr. D.Del. 2010). When considering the sufficiency of pleading under Rule 12(b)(6), the Third Circuit acknowledged that Rule 8(a)(2) "still requires a 'showing' rather than a blanket assertion, of entitlement to relief. Thus 'it is clear that conclusory or 'bare-bones' allegations will no longer survive a motion to dismiss." *In re Jevic Holding Corporation*, 2011 W.L. 4345204 at *3 (Bankr. D. Del. 2011)(quoting *Twombly* and *Fowler*).

SUMMARY OF THE ARGUMENT

In his Amended Complaint, the Trustee included counts seeking to avoid preferential transfers under 11 U.S.C. § 547(b) (Count One), avoid post-petition transfers under 11 U.S.C. § 549 (Count Two), avoid fraudulent transfers under 11 U.S.C. § 548 (Count Three) and to recover transfers under 11 U.S.C. § 550 (Count Four). Each of the Trustee's causes of action fails to meet the standard set by *Twombly* and *Iqbal* that the complaint set forth sufficient facts to support a plausible claim for relief. The Amended Complaint must be dismissed because the Trustee, despite having obtained leave of court to amend his original complaint, has neglected to supply even the bare minimum facts necessary to support several

elements of the causes of action. For this reason alone, the Trustee's Amended Complaint must be dismissed.

If, however, the Trustee had set forth a plausible cause of action under § 547(b) for preferential transfers, that cause of action fails to assert a claim for which relief can be granted because all but one of the payments in question was made outside the applicable preference look-back period.

The Trustee's cause of action under § 548 for fraudulent transfers should also be dismissed because it is time barred by 11 U.S.C. § 546(a).

The Trustee's cause of action under § 549 for post-petition transfers must also be dismissed because all of the payments alleged by the Trustee were made before Mobern, the issuing entity, filed its bankruptcy petition.

Count Five seeking to disallow claims pursuant to 11 U.S. § 502(d) must be dismissed because it cannot be maintained absent a finding of avoidable transfers.

ARGUMENT

A. Count One of the Trustee's Amended Complaint should be dismissed because it fails to state a claim for preferential transfers under 11 U.S.C. § 547(b).

The Trustee's complaint fails to state a claim for preferential transfers under the Supreme Court's threshold requirements because his allegations are so bereft of factual content that the Court cannot draw any inferences, let alone a reasonable one, that the payments made to Counselor by either OADC or Mobern constitute preferential transfers pursuant to 11 U.S.C. § 547(b).

To state a claim for preferential transfers, the Trustee must allege facts that, if true, would satisfy each element of § 547(b). *See In re Universal Marketing, Inc*., 481 B.R. 318, 324 (Bankr E.D. Pa. 2012). The Trustee's original complaint did little more than track the wording of the statute.

The Trustee's Amended Complaint was filed after Counselor brought these deficiencies to the attention of the Court in his original Motion to Dismiss. Despite having ample opportunity to correct them, he neglected the deficiencies and these pleading holes remain. Counselor submits that the deficiencies remain because the Trustee cannot allege facts that do not exist. Any further opportunity to adjust his pleading would be futile and the cause of action for preferential transfers should be dismissed with prejudice.

For the court's convenience, we review each element of § 547(b) in turn in light of the Supreme Court's pleading standards as set forth in *Twombly* and *Iqbal* and the Third Circuit's two-part analysis in *Fowler*, if appropriate.

(1) The transfer must be of the Debtors' interest in property.

There are, of course, two debtors referenced in the Trustee's Amended Complaint, OADC and Mobern. The Trustee alleges that Mobern paid all of OADC's bills with funds it received as a result of its billing activities on behalf of OADC. Consequently, the Trustee asserts, OADC had an "interest" in all property transferred by Mobern. See Amended Complaint at ¶¶ 21 and 22. In support of this cause of action, the Trustee attaches an exhibit to his Amended Complaint purporting to list payments made to Counselor by OADC or Mobern on the dates indicated on the list.

This cause of action fails because the Trustee has not provided any facts, other than a bald assertion, that either of the Debtors was the source of funds for each payment. *See In re Caremerica, Inc.,* 409 B.R. 737, 756 (Bankr. E.D. N.C. 2009). The *Caremerica* case concerned a set of debtors who used a separate corporation as a conduit through which they funneled payments to the defendants. In his preference complaint, the *Caremerica* trustee included a detailed list with information on each payment as to the payor, payee, amount, date, check number, payee reference number, account number and account name. The trustee also included bank statements showing the payments. *Id.* at 744. The *Caremerica* court found even this level of detail was not enough to satisfy the pleading standard.

> The assertion that "the debtors transferred its (sic) funds into bank accounts operated by the debtors' principals" is merely a conclusory statement that lacks factual support. Similarly, the trustee provides little factual basis for his assertion that "one or more of the debtors, or, in the alternative, the consolidated debtor ... made certain transfers to such defendant in at least the amount listed beside such defendant's name...."

Id at 750.

The *Caremerica* court dismissed the complaint because the trustee did not or could not allege sufficient facts to support his contention that the funds flowing through the corporation had originated with the debtors. Merely making an assertion that "one or more of the debtors, or in the alternative, the consolidated debtor . . . made certain transfers to such defendant in at least the amount listed beside such defendant's name" was insufficient. *Id*. at 750. While the bank statements and the table listing the transfers lent sufficient factual support to the allegation that transfers were made, they did not indicate the source of the funds or which entity initiated each transfer. *Id*. at 750-51. Without more factual support, the court reasoned, there was nothing in the trustee's complaint to rebut the alternative and

reasonable possibility that the funds had originated from sources other than the debtors. *Id*. at 751.

The Trustee in the case at bar asserts that OADC had an interest in the payments because Mobern was its billing entity. Like the trustee in *Caremerica*, he asserts that Mobern was nothing but a conduit for OADC. For this conclusory statement, the Trustee offers no factual support. He supplies only the "fact" that the Debtors issued checks to Counselor, three (out of four) of which he alleges were made by Mobern.[1] The Trustee did not offer the level of factual support the *Caremerica* court considered and found lacking. Clearly, a list of payments and an unsupported conclusion about the relationship between OADC and Mobern are insufficient to meet the plausibility standard required by *Fowler*, *Twombly* and *Iqbal*.

(2) The transfer was made to or for the benefit of a creditor.

The Trustee alleges that Counselor was a creditor of the Debtors at the time of the Transfers. This bare assertion tracks the language of the statute and offers no facts from which the court could make any inference that Glass was ever a creditor of OADC or Mobern.

A "creditor," a defined term in the Bankruptcy Code, is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor," an "entity that has a claim against the estate of a kind specified" in certain

[1] Even here, the Trustee's statements are contradictory. In his ¶ 24, he states, "all of the payments received by the Defendant for services related to the Litigation were paid by the Debtors (initially from checks issued by OAOC, and, with one exception, from checks issued by Modern from and after November, 2011)". His Exhibit A says something else entirely. It lists Modern as the payor on not one, but three, of the checks.

enumerated sections of the Bankruptcy Code, or an "entity that has a community claim." *See* 11 U.S.C. § 101(10).

"Claim" is also a defined term. A "claim" is a "right to payment" or a "right to an equitable remedy for breach of performance." *See* 11 U.S.C. § 101(5). When the Trustee states that Counselor is a creditor, he is offering a legal conclusion, not a statement of fact. The Amended Complaint makes no mention of Counselor's claim against the estate of any of the Debtors or any other fact that would support a legal conclusion that Counselor is a creditor of the Debtors.

The *Iqbal* Court and the Third Circuit in *Fowler* made clear that legal conclusions do not constitute factual support for elements asserted in a complaint. Under *Twombly* and *Iqbal*, the Amended Complaint fails because the Trustee offers no facts -- must less plausible ones – from which this court could infer that Counselor was a creditor or has a claim against the Debtors. Therefore, the Trustee cannot sustain a cause of action for preferential transfers and Count One should be dismissed.

(3) The transfer was made for or on account of an antecedent debt.

The Trustee asserts that "[t]he Transfers were made on account of an antecedent debt or debts owed by the Debtors to, or for the benefit of, Defendant before the Transfers were made." Amended Complaint ¶ 30. In pleading this element, the Trustee again provides no support for his naked recitation of the wording that appears in the statute. The Trustee offers no clue as to the nature or the amount of the antecedent debt. *See In re Net Pay Solutions,* Inc., 2013 WL 5550207 (Bankr. M.D. Pa. 2013); *In re Tweeter Opco,* 452 B.R. 150, 155

(Bankr.D.Del.2011). He merely alleges that the payments were made on account of an antecedent debt.

Even before the Supreme Court fashioned it's the heightened pleading standard in *Twombly* and *Iqbal*, the Delaware Bankruptcy Court had determined that "the nature and amount of the antecedent debt" was necessary to show entitlement to relief when bringing a preferential transfer action. *In re Valley Media, Inc*., 288 B.R. 189 (Bankr. D. Del. 2003); *See In re Anderson News, LLC*, 2012 WL 3638785 *3 (Bankr. D.Del. 2012)(dismissing preference complaint that fails to adequately assert existence of antecedent debt). *See also In re Caremerica, Inc*., 409 B.R. 737, 751 (Bankr. E.D.N.C. 2009).

The Amended Complaint provides no factual basis for the conclusory statement that the transfers were made on account of an antecedent debt. Therefore, Count One should be dismissed.

(4) The transfer was made while the debtor was insolvent.

The Trustee alleges that the Debtors were insolvent at the time of the alleged transfers. Amended Petition ¶ 31. The Bankruptcy Code presumes that the Debtor is insolvent during the 90 days preceding the filing of the Debtor's petition. 11 U.S.C. § 547(f). The trustee lists four payments on his Schedule A, attached to the Amended Complaint. One payment was made by OADC and three were made by Mobern. OADC filed its bankruptcy petition on January 25, 2012. The one payment listed for OADC was made during the 90-day insolvency period, and the presumption of insolvency would probably satisfy this element of § 547(b) as to that payment. But, the other payments came from Mobern, which filed its bankruptcy petition on January 30, 2013. The payments from Mobern were made more than

a year before its petition date. The presumption of insolvency does not apply to those payments. Just like the prior elements, the trustee offers no factual support for his statement that Mobern was insolvent during the 90 days prior to its bankruptcy petition.

In support of Counselor's argument that the Trustee has failed to support his cause of action with facts of insolvency, see the discussion, *infra* at (5), respecting the appropriate date for determining the preference look back period.

(5) The transfer was made on or within 90 days before the date of the filing of the petition.

Count One of the Trustee's Amended Complaint is facially deficient and should be dismissed because none of the payments listed by the Trustee on Exhibits A and B were made on or within 90 days before the date of Mobern's petition.

The Trustee lists twelve transfers that he claims are subject to avoidance under §§ 547 and 549. *See* Exhibits A and B to the Amended Complaint. These checks were dated between November 22, 2011 and July 8, 2012. All of these checks, except for the one dated December 13, 2011, in the amount of $2,107.64, are purported to be issued by Mobern. Mobern filed its bankruptcy petition on January 30, 2013. The ninety day preference period for Mobern began on November 1, 2012, almost four months after the date of the last check.

The single check from OADC's bank account is for $2,107.64, which cannot support a preference action. *See* 11 U.S.C. § 547(c)(9)(a trustee may not avoid a transfer "in a case filed by a debtor whose debts are not primarily consumer debts [if] the aggregate value of all property that constitutes or is affected by such transfer is less than $6,225").

The Trustee suggests that the applicable petition date is January 25, 2012, the date of OADC's bankruptcy petition. The Trustee reasons that the appropriate date from which to apply the 90-day look back period should be OADC's petition date. He reasons that the estates of OAOD and Mobern were substantively consolidated and that the OADC petition date should apply retroactively to expand the preference look-back period for Mobern. This conclusion has no merit.

The issue of whether the substantive consolidation has retroactive effect is a legal issue, not a factual dispute, and thus is properly decided on a motion to dismiss. *In re Sunset Aviation, Inc*., 2011 WL 4002420, at *3 (Bankr. D.Del. 2011) ("I view the Trustee's statement that 'for purposes of calculating the preference period, the substantively consolidated Debtors share the earliest bankruptcy petition filing date of February 25, 2009' as a legal conclusion, not a factual statement . . .. Thus, I find that it is appropriate to address this issue in a motion to dismiss.")

The court in *Sunset Aviation* was also confronted with a complaint alleging a 90-day look back period based on a substantive consolidation. The court concluded that the consolidation order was prospective, not retroactive, and dismissed the preference count with prejudice. The court based its decision on the language of the consolidation order, which "was meant to be applied prospectively, rather than retrospectively," where it was "devoid of retroactive language" and "contain[ed] language which is contrary to a nunc pro tunc order." *Id*. at 5-7, 9.

The order consolidating OADC and Mobern's estates has no language indicating that it was to have any retroactive effect. To arbitrarily imbue the order with nunc pro tunc effect

as to Mobern, which filed its bankruptcy petition more than a year after OADC, would crush all notions of due process and fair play with respect to parties like Counselor, who continued to provide services to Mobern, Denny and Dr. Slepian, with the full knowledge of the Trustee and the Bankruptcy Court, even while OADC operated under the protection of the Bankruptcy Court. As the court observed in *Sunset Aviation*, even if a consolidation order were to be applied nunc pro tunc, "I do not think it appropriate to use a nunc pro tunc order to rewrite § 547, which is what the Trustee is seeking to do here by extending the preference period beyond 90 days." *Id*. at 648.

The Trustee has identified no actionable payments made during the 90-day preference period. Because the order consolidating the cases was not given nunc pro tunc effect, any attempt by the Trustee to recharacterize these payments as preference payments would be futile, therefore, Count One of the Amended Complaint should be dismissed with prejudice.

(6) The transfer enables the creditor to receive more than it would receive if the case were a case under chapter 7.

Avoidance of a preferential transfer is also contingent on the trustee establishing that the preferential transfer enabled the transferee to receive more than it would have received in a Chapter 7 case. "Section 547(b)(5) is a central element of the preference section because it requires a comparison between what the creditor actually received and what it would have received under [chapter 7]." 5 Collier on Bankruptcy, ¶ 547.03([7](15th Ed. rev.] "Thus, in a situation where the alleged preferential transferee is an unsecured nonpriority creditor, the trustee must show that the distribution to all such creditors in a chapter 7 liquidation would be less than 100%." *In re Caremerica, Inc*., 409 B.R. 759, 765-66 (Bankr. E.D.N.C. 2009).

Again, the Trustee merely tracks the language of the statute and offers no facts to support the element. *See* Amended Complaint ¶ 27. He offers no insight as to how much Counselor might receive in a Chapter 7, which would of course necessitate the Trustee offering facts to support an antecedent debt owed to Counselor.

By failing to identify the antecedent debt owed to Counselor, how Counselor was a creditor to either of the Debtors, or what Counselor might expect to receive in a Chapter 7 case, the Trustee has failed to plead Count One with the specificity required under *Twombly* and *Iqbal*. Therefore, Count One should be dismissed.

A. Count Two of the Trustee's Amended Complaint should be dismissed because it fails to state a claim for recovery of post-petition payments under 11 U.S.C. § 549.

The Trustee's Amended Complaint fails to state a claim for recovery of post-petition payments under 11 U.S.C. § 549 because none of the payments were made post-petition.

Section 549 of the Bankruptcy Code permits a trustee to avoid transfers of property that occur after the commencement of the case. Section 549(a) states, in pertinent part: "the trustee may avoid a transfer of property of the estate – (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or (B) that is not authorized under this title or by the court. 11 U.S.C. § 549.

As demonstrated *infra* at Section A(5) , none of the transfers at issue were made post-petition. The latest check listed in the Amended Complaint is dated July 8, 2012. Mobern filed its bankruptcy petition on January 30, 2013. Thus, none of the transfers from Mobern were made post-petition. As to the single check issued by OADC, it is dated December 13,

2011. OADC filed its petition on January 25, 2012. Thus, this transfer was not made post-petition either.

Again, this count should be dismissed with prejudice, as amendment would be futile.

B. Count Three of the Trustee's Amended Complaint should be dismissed because it fails to state a claim for fraudulent transfer under 11 U.S.C. § 548.

Section 548(a)(1) of the Bankruptcy Code grants a trustee the power to avoid any transfer made by a debtor of an interest in property, made no more than two years before the debtor files its bankruptcy petition, if the transfer is deemed to be actually or constructively fraudulent. In the Trustee's Count Three, he appears to be asserting a cause of action for constructive fraud under § 548(a)(1).

The heightened pleading requirement mandated by *Twombly* and *Iqbal* also applies to causes of action for fraudulent transfers. The Bankruptcy Court for the District of Delaware has held that a fraudulent transfer claim is insufficient where it "simply alleges the statutory elements of a constructive fraud action under section 548(a)(1)(B)." *In re Global Link Telecom Corp*., 327 B.R. 711, 718 (Bankr. D.Del. 2005). *See also In re Sunset Aviation, Inc.* 468 B.R. 641, 650 (Bankr. D.Del. 2011).

Where a party asserts a claim for fraud under § 548, the complaint must set forth facts with sufficient particularity to apprise the defendant of the charges against him so that he may prepare an adequate answer. *In re Global Link Telecom Corp.,* 327 B.R. 711, 718 (Bankr.D.Del.2005). To provide fair notice, the trustee must go beyond merely parroting statutory language. *Id. See also In re Circle Y of Yoakum, Texas,* 354 B.R. 349, 356 (Bankr.D.Del.2006); *In re CRC Parent Corp.,* 2013 WL 781603 at *5 (Bankr. D.Del.

2013)("[T]he Trustee must do more than simply allege the statutory elements of a constructive fraud action.")

To survive a motion to dismiss under Rule 12(b)(6), the Trustee must put forth enough allegations in his complaint to make a plausible showing that the Debtors had an interest in property that was transferred to Counselor, that the Debtors received less than reasonably equivalent value in exchange for the transfer, and that the Debtors (1) were insolvent when the transfer was made or became insolvent as a result of the transfer, (2) retained unreasonably small capital to operate their businesses when the transfer was made, or (3) made the transfers while they intended to incur or believed that they had incurred debts that they would not be able to pay as they became due. 11 U.S.C. § 548(a)(1).

The Trustee's Amended Complaint fails under *Twombly* and *Iqbal* because it does little more than repeat the language of § 548 and offers no facts to support a contention that the Debtors failed to receive reasonably equivalent value or that the Debtors were insolvent at the time of the transfers.

(1) A transfer of an interest of the debtor in property

The Trustee alleges that Mobern made payments to Counselor on account of personal obligations of Dr. Slepian and Dr. Dane. This is the sole fact offered in support of his contention that the payments listed in the Exhibits were fraudulent transfers. That statement does not allege what interest, if any, either of the Debtors had in the payments.

In his Factual Allegations, the Trustee asserts that OADC had an interest in property transferred by Mobern because Mobern received payments for OADC's services and paid OADC's bills. As argued *supra* at A(1), although the Trustee alleges that OADC had an

interest in the payments, he never asserts that Mobern had any interest in the funds that were transferred and actually argues that Mobern was nothing but a conduit for OADC. To the extent that the Trustee is asserting that each payment on all three exhibits is a fraudulent transfer (and this is not clear from the Amended Complaint), the Trustee has listed Mobern as the payor on at least eleven (11) of the payments. He has not, however, provided any facts that would show from which Debtor the funds originated or any facts that would show how OADC had an interest in the funds that were paid by Mobern to Counselor and why that is germane to a discussion of payments made by Mobern.

(2) Payors did not receive reasonably equivalent value in exchange for the payments

To determine if the Debtors received reasonably equivalent value for its payment, the Trustee must identify (1) the exchange that failed to provide sufficient value to the Debtors, and (2) the consideration given by the transferee. *See In re Hydrogen, LLC*, 431 B.R. 337 (Bankr. S.D.N.Y. 2010). His summary statement, "the payors did not receive reasonably equivalent value in exchange for the Fraudulent Conveyances," is devoid of information that would shed light on the value of the services Counselor rendered the Debtors, or how those services were not reasonably equivalent to the payments he received. Amended Complaint ¶ 48.

The court in *Caremerica* dismissed a complaint that suffered these same deficiencies: "Missing from the Amended Complaint is an identification of the consideration received by each transferor [and] information as to why the value of such consideration was less than the amount transferred." *In re Caremerica*, 409 B.R. at 756. *See also In re Agriprocessors, Inc*.,

2011 WL 4621741, *6 (Bankr. N.D. Iowa 2011) ("A complaint, however, must do more than just summarily state there was 'less than a reasonably equivalent value in exchange.' The trustee must describe the consideration and why the value of such consideration was less than the amount transferred.")(*citing In re Charys Holding Co.*, 443 B.R. 628, 638 (Bankr. D.Del. 2010).

The Trustee is also seeking to have his cake and eat it, too. Some of these payments, apparently the ones he lists on Exhibits A and B, he argues should be avoided as preferential transfers. For there to be preference, we know that there must also be an antecedent debt for the preferential payment to satisfy. Although the Trustee failed to provide any support for his assertion that an antecedent debt existed at the time of the transfers, he did, nevertheless, state unequivocally that the payments were made "for or on account of an antecedent debt owed by the debtor before such transfer was made." *See* Amended Complaint ¶ 27.

If indeed these payments satisfied an antecedent debt, they cannot also be actionable as fraudulent transfers. Section 548 contains three critical terms: "reasonably," "equivalent" and "value". Of these only "value" is defined by the Bankruptcy Code. According to § 548(d)(2)(A), "'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor. . .." The Third Circuit recognizes that "a party receives reasonably equivalent value for what it gives up if it gets 'roughly the value it gave.'" *VFB LLC v. Campbell Soup Co*., 482 F.3d 624, 631 (3rd Cir. 2007)(internal citations omitted). An antecedent debt that is satisfied dollar for dollar is by definition "reasonably equivalent value." *See. e.g., In re APF Co*., 308 B.R. 183 (Bankr. D.Del. 2004)(Trustee could not state a § 548 constructive fraud claim because "the payments made on the promissory note were

made for value, satisfaction of an antecedent debt"); *See also In re Aphton Corp.,* 423 B.R. 76, 89, fn 50 (Bankr. D.Del. 2010), and cases cited therein.

(3) Debtor was insolvent on the date of such transfer was made

The Bankruptcy Code provides a party with three different paths to proving insolvency when bringing a cause of action for fraudulent transfers. 11 U.S.C. § 548(a)(1)(B). In the Amended Complaint, the Trustee alleges all three of these in the alternative. He contends that the payments

> (a) were made while the payor was insolvent or the payor became insolvent as a result of the Fraudulent Conveyances; (b) left the payor with unreasonably small capital; and/or (c) were made while the payor intended to incur or believed that it had incurred debts that it would not be able to pay as they became due.

Amended Complaint ¶ 48.

Once again, the Trustee does nothing more than reiterate the statute. "A mere recitation of the three legal elements [of § 548(a)(1)(B)] is inadequate to establish a plausible factual basis [under *Iqbal* and *Twombly*]." *In re Agriprocessors, Inc*., 2011 WL 4621741, *5 (Bankr. N.D. Iowa 2011). *See also Caremerica*, 409 B.R. at 745.

C. Count Three of the Trustee's Amended Complaint should be dismissed because it is time barred under 11 U.S. C. § 546(a).

The Trustee's Amended Complaint should be dismissed because it was filed after the expiration of the two year period allowed for the filing of such actions under 11 U.S. C. § 546(a).

Section 546(a) of the Bankruptcy Code allows an action to be brought under § 548 within the later of (1) two years after the entry of the order for relief or (2) one year after the appointment of the Trustee.

OADC filed its bankruptcy petition on January 25, 2012. The Trustee was appointed on November 8, 2012. The last date on which the Trustee could bring a fraudulent transfer action for OADC was January 25, 2014 (which is the later of the two conditions in set forth in § 546 (a)(1)).

The Trustee did not include a cause of action for fraudulent transfer in his original complaint, which was filed just days before the two year limitations period expired. It is only in his Amended Complaint, filed on April 29, 2014 -- more than 90 days after the end of the limitations period – that the Trustee adds Count Three alleging fraudulent transfers and Exhibit C, a list of those alleged fraudulent transfers from OADC to Counselor.

In addition, *for the first time,* he apparently asserts in the Amended Complaint that the transfers he listed on Exhibits A and B were also fraudulent transfers under 11 U.S.C. Sec. 548.[2]

The Trustee cannot use Fed. R. Civ. P. 15(c) to save his defective and late-filed cause of action. Rule 15(c), made applicable to bankruptcy adversary proceedings by Fed. R. Bankr. P. 7015, only allows relation back where "the amendment asserts a claim or defense

[2] It is not entirely clear from the Trustee's imprecise language in Para. ¶ 45 that he intends to include Exhibits A and B, as well as Exhibit C in this cause of action. Part of the confusion stems from the Trustee's blanket statement at the beginning of ¶ 45 that "Modern made payments to Defendant . . . totaling not less than $496,067.43 including the Preferential Transfers." Yet, Exhibits A, B and now C, purport to list payments from Modern and OAOC.

that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading."

The payments listed on Exhibit C were not mentioned in any context in the original complaint and therefore cannot relate back to any "conduct, transaction, or occurrence set out" in the original complaint. The original complaint concerned itself solely with the payments listed on Exhibits A and B and whether they were preferential transfers or post-petition transfers. Nowhere in the Original Complaint does the Trustee even suggest that he is contemplating a cause of action under 11 U.S.C. § 548 with regard to any payment to Counselor, whether on Exhibit A, B or C.

Moreover, the Trustee cannot now, at this late date more than 90 days after the expiration of the limitations period, tack on an entirely new cause of action with respect to the payments listed on Exhibits A and B. Just because the Trustee chooses to re-style the payments on Exhibits A and B does not give him the right to bring a new cause of action well after the limitations period when that cause of action requires a showing of an entirely different set of facts than his original theory of the case. *See Smith v. Porter*, 416 B.R. 264, 268-60 (E.D. Va. 2009; *In re TML, Inc.*, 291 B.R. 400, 431-32 (Bankr. W.D. Mich. 2003). *In re Gantos, Inc*., 283 B.R. 649, 651 (Bankr. D. Conn. 2002). As one court explains, "even if the new theory will lead to the same result, e.g. avoidance of the transfer, an amendment cannot relate back if different facts are essential to reach that conclusion". A fraudulent transfer claim requires consideration of the value of the transfer and other facts materially different from those considered in connection with a preference claim. *In re TML, Inc*. 291 B.R. at 431-32. *See also In re Gantos, Inc*., 283 B.R. at 651 (Bankr. D. Conn. 2002), in

which the court dismissed a trustee's amended complaint on a set of facts virtually identical to the one presented here. The *Gantos* court held that a trustee's amended complaint to avoid a transfer as a constructive fraudulent conveyance could not relate back to the filing of the original complaint, which sought to avoid the same transaction as a preferential transfer.

As the Second Circuit has observed in an analogous case, "[t]he proposed fraud claims allege an entirely new set of operative facts of which it cannot be said that the original complaint provided fair notice." *Ansam Associates, Inc. v. Cola Petroleum, Ltd*., 760 F.2d 442, 446 (2nd Cir. 1995). Like the proposed amendment in *Ansam Associates*, the Trustee's new cause of action for fraudulent transfers involves an "entirely new set of operative facts" from a "different period of time and [] derived from a different statute." *Id*.

Count Three of the Trustee's Amended Complaint is barred by the statute of limitations of 11 U.S.C. Sec. 546(a) and should be should be dismissed with prejudice.

D. Count Four of the Trustee's Amended Complaint should be dismissed because it fails to state a claim for recovery of payments under 11 U.S.C. § 550.

Section 550(a) of the Bankruptcy Code authorizes the recovery of property, or the value thereof, from a transferee only "to the extent that a transfer is avoided under Section 544, 545, 547, 548, 549, 553(b), or 724(a) of [the Bankruptcy Code]." 11 U.S.C. § 550(a

Because the Amended Complaint fails to state a claim under §§ 547, 548 or 549 of the Bankruptcy Code, the Trustee is not entitled to relief under § 550 of the Bankruptcy Code.); *see In re Sufolla, Inc*., 2 F.3d 977, 980 (9th Cir. 1993)(stating that Section 550 is available only "to the extent that a transfer is avoided"); *In re Erin Food Svcs*., Inc., 980 F2d

792, 799 (1st Cir. 1992)(avoidable preference must first be established before § 550 can be used to recover from initial transferee). Accordingly, the Trustee's claims for recovery under § 550 must be dismissed.

E. Count Five of the Trustee's Amended Complaint should be dismissed because the Trustee has no basis to disallow Counselor's claims under 11 U.S.C. § 502(d).

The Trustee's fifth claim for relief, which seeks disallowance of Counselor's claims, should also be dismissed because § 502(d) requires an avoidable transfer for the requested relief. Because the Trustee has not shown (and cannot show) that there have been any preferential or fraudulent transfers, his cause of action for disallowance of claims similarly must fail. *See In re Lexington Healthcare Grp*., 339 B.R. 570, 577-78 (Bankr. D.Del. 2006)(dismissing cause of action for disallowance of claim where fraudulent transfer insufficiently pleaded); *see also In re Davis*, 889 F.2d 658, 662 (6th Cir. 1989)(holding that § 502(d) "is designed to be triggered after a creditor has been afforded reasonable time in which to turn over amounts adjudicated to belong to the bankruptcy estate"); *In re Lids Corp.*, 260 B.R. 680, 684 (Bankr. D. Del. 2001)(finding that a debtor or trustee "wishing to avail itself of the benefits of section 502(d) must first obtain a judicial determination on the preference complaint"); *In re Mountaineer Coal Co., Inc*., 247 B.R. 633, 647 (Bankr. W.D. Va. 2000)(holding that § 502(d) "would not appear applicable unless and until a finding under one of the cited sections had been made and then the claimant had failed to comply with such ruling").

CONCLUSION

Since *Twombly* and *Iqbal*, numerous bankruptcy courts have considered complaints, like the Trustee's original complaint and this Amended Complaint, that provide the court with a list of payments and a recitation of the elements of §§ 547 and 548. Uniformly, those courts have dismissed the complaints as inadequately plead. *See*, *e.g., In re Sunset Aviation,* 468 B.R. at 650-51 ("The Trustee simply provides a near verbatim recitation of the elements of § 548 without stating any underlying facts to support these conclusions. The Trustee does not present any evidence on JetDirect's financial position at the time of the transfer or about any value Shorenstein did or did not give JetDirect in exchange for the transfer. Thus, the pleading is insufficient, and I will dismiss." *See also In re Global Link Telecom Corp*., 327 B.R. 711, 718 (Bankr. D.Del. 2005)(only facts presented were lists of transfers, but no evidence of debtor's financial situation at the time of the transfers or what value was received in exchange for the transfers).

Where, as here, the plaintiff's case hinges on solely on a list of payments and unsupported conclusory statements, the causes of action must be dismissed.

WHEREFORE, for the foregoing reasons, the Defendant respectfully requests that the Court dismiss the Amended Complaint with prejudice and grant such other and further relief that the Court may deem just and proper.

Dated: May 13, 2020

Respectfully submitted,

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