IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
CL H WINDDOWN LLC, *et al.*,	)	Case No. 21-10527 (JTD)
	)	(Jointly Administered)
Debtors.	)	
AMANDA SWIFT, as Liquidation Trustee of the CarbonLite Liquidation Trust,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Pro No. 23-50136 (JTD)
	)	
SYSTEM PACKAGING CO., INC.,	)	
	)	
Defendant.	)	**Re: D.I. Nos. 13 & 14**

MEMORANDUM OPINION AND ORDER

The liquidation trustee of the CarbonLite Liquidation Trust (the "**Trustee**") commenced this adversary proceeding seeking the return of transfers made by debtors CarbonLite Holdings, LLC ("**CLH**") and its affiliates, including CarbonLite P Holdings LLC ("**CLP**") and Pinnpack Packaging LLC ("**Pinnpack**") (collectively the "**Debtors**") to defendant System Packaging Co., Inc. ("**System**" or "**Defendant**"). Defendant has moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "**Motion**").[1] For the reasons set forth below, the Motion is granted in part and denied in part.

JURISDICTION AND VENUE

The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. § 1409(a).

[1] D.I. 13 (Motion to Dismiss); D.I. 14 (Opening Brief in Support of Motion to Dismiss); D.I. 15 (Opposition Brief); D.I. 17 (Reply Brief).

BACKGROUND

Defendant, which was founded in 1983, sold plastic bags to Debtors and is a pre-petition creditor of debtor Pinnpack.[2]

Defendant is owned by Emil Halimi ("**Halimi**"), who is also Defendant's CEO and President.[3] Halimi is a longstanding business associate and friend of the Debtors' CEO, Leon Farahnik ("**Farahnik**"). Both Farahnik and Halimi have been involved in the plastics industry in the Los Angeles area since the late 1970s or early 1980s.[4]

Beginning in the 1990s, Halimi was a director and/or shareholder of a string of businesses founded and/or controlled by Farahnik, including Debtors, and was otherwise part of a trusted group of individuals that were involved in each of these businesses.[5] Halimi and/or Halimi Capital LLC, an entity owned by Halimi, was a shareholder of one or more of the Debtors.[6] Between August 2019, and June 2020, Halimi made a series of loans to Debtors, totaling $7 million.[7]

Defendant provided pre-petition goods and/or services to Pinnpack and between March 11, 2020, and March 5, 2021, Pinnpack transferred $223,248.56 (the "**Transfers**") to Defendant in satisfaction of obligations owed to Defendant.[8]

On March 8, 2021, Debtors filed voluntary chapter 11 petitions. On September 7, 2021, the first amended plan was confirmed and on September 20, 2021, the plan went into effect,

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[2] Amended Complaint ¶¶ 8, 17.
[3] *Id.* ¶ 13.
[4] *Id.* ¶¶ 15-16.
[5] *Id.* ¶ 17.
[6] *Id.* ¶ 28.
[7] *Id.* ¶¶ 35-37. The Trustee has filed a separate adversary proceeding in which she seeks to recover $2.7 million in payments made to Halimi pursuant to promissory notes on those loans on the basis that Halimi was an insider at the time of the transfers. See *Swift v. Halimi*, C.A. 23-50126-JTD (Bankr. D. Del.).
[8] Amended Complaint ¶¶ 38-39 and Ex. A.

establishing the CarbonLite Liquidation Trust (the "**Trust**"). On March 6, 2023, the Trustee commenced these adversary proceedings.

LEGAL STANDARD

A motion made pursuant to Rule 12(b)(6) challenges the sufficiency of the factual allegations in the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

In *Ashcroft v. Iqbal*, the Supreme court identified two "working principles" underlying its earlier decision in *Twombly*. "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." *Id.* at 678 (citation omitted). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679 (citation omitted). "In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

ANALYSIS AND DISCUSSION

I. Preference Claim

To state a preference claim, the Trustee must allege facts that, among other things, would establish that the transfer at issue was made either within 90 days of the petition date or, if the creditor was an insider, was made within one year of the petition date. 11 U.S.C. 547(b). Of the

$223,248.56 in Transfers that the Trustee seeks to recover here, $158,952.90 in Transfers were made in the period between 90 days and one year before the Petition Date (the "**One-Year Transfers**"). Accordingly, with respect to the One-Year Transfers, the Trustee can only succeed if Defendant was an insider.

Under the Bankruptcy Code, "[t]he term 'insider' includes . . . (B) if the debtor is a corporation--(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor." *In re Winstar Communs., Inc.*, 554 F.3d 382, 395 (3d Cir. 2009) (quoting 11 U.S.C. § 101(31)(B)). "Additionally, in light of Congress's use of the term 'includes' in § 101(31), courts have identified a category of creditors, sometimes called 'non-statutory insiders,' who fall within the definition but outside of any of the enumerated categories." *Id.* While actual control, or its equivalent, is necessary for a person to constitute a statutory insider, "a finding of such control is not necessary for an entity to be a non-statutory insider." *Id.* at 396. Rather, "[f]or a person to be a non-statutory insider, 'there must be a close relationship with the debtor and some evidence, other than the relationship, that the transaction was not conducted at arm's length.'" *Miller v. ANConnect, LLC (In re Our Alchemy, LLC)*, Nos. 16-11596 (KG), 18-50633 (KG), 2019 Bankr. LEXIS 2903, at *18 (Bankr. D. Del. Sep. 16, 2019) (quoting *Burtch v. Opus, LLC (In re Opus East, LLC)*, 528 B.R. 30, 93 (Bankr. D. Del. 2015).

The Trustee asserts that the Defendant is a non-statutory insider. Accordingly, to survive a motion to dismiss, the Amended Complaint must include allegations sufficient to support inferences of: (1) a close relationship; and (2) transactions that were not at arm's length. I find that the allegations pled fail to support either inference.

Though the Trustee makes the conclusory allegation that "Defendant was an insider of Pinnpack,"[9] she has included no facts that would support such an inference. Instead, the Trustee appears to rely entirely on allegations regarding the relationship between Defendant's principal, Halimi, and Debtors' CEO, Farahnik, to support the conclusion that Defendant should be considered an insider of the Debtors. Even assuming, *arguendo*, that allegations regarding an entity's principal would be sufficient to confer insider status on the entity, the Trustee has not pled sufficient facts to establish that Halimi is an insider of the Debtors. The allegations simply do not support the conclusion that Halimi and Farahnik have a close relationship or that the transactions at issue were not at arm's length.[10]

For this reason, Count I is dismissed as to the One-Year Transfers.[11]

II. Fraudulent Transfer

Count II of the Amended Complaint asserts a claim for avoidance of a fraudulent transfer pursuant to Section 548 of the Bankruptcy Code. A claim for constructive fraudulent transfer requires a plaintiff to establish that:

(i) The transfers were made within two years of the petition date;
(ii) The debtor received less than reasonably equivalent value in exchange of the transfers; and
(iii) The debtor either (a) was insolvent on the date the transfers were made or became insolvent as a result of the transfers; or (b) was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital; (c) intended to incur or believed that it would incur debts beyond the debtor's ability to pay; or (d) the debtor made the transfer or incurred the obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

[9] Amended Complaint ¶ 50.
[10] A more detailed analysis of the allegations with respect to Halimi's insider status can be found in the opinion on Halimi's Motion to Dismiss at D.I. 20 in *Swift v. Halimi*, C.A. 23-50126-JTD (Bankr. D. Del.).
[11] This dismissal does not affect the remaining transfers at issue in Count I, *i.e.*, those that took place within 90 days of the Petition Date.

11 U.S.C. § 548(a)(1)(B). At the motion to dismiss stage, a claim for constructive fraudulent transfer needs only to plead that there was a transfer for less than reasonably equivalent when the debtors were insolvent. *Beskrone v. Opengate Capital Grp., LLC (In re Pennysaver USA Publ'g, LLC*), 602 B.R. 256, 266 (Bankr. D. Del. 2019).

Defendant argues that the Trustee has not pled allegations sufficient to establish that the Transfers were made for less than reasonably equivalent value. I agree. The Trustee makes the conclusory assertion that "Pinnpack did not receive reasonably equivalent value" but has not alleged any facts that support this conclusion. On the contrary, she has alleged that the Transfers were made "in satisfaction of certain Obligations owed to Defendant."[12] Because the Trustee has failed to allege that the Transfers were made for inadequate consideration, her fraudulent transfer claim must fail. *See Emerald Capital Advisors Corp. v. Bayerische Moteren Werke Aktiengesellschaft (In re Fah Liquidating Corp.)*, 572 B.R. 117, 127 (Bankr. D. Del. 2017) ("[D]isputes as to the actual value of the transfer or value given in exchange for the transfer do not need to be decided on a motion to dismiss *so long as the Trustee has identified the transfer by date and face amount and has alleged that it was for no consideration.*") (internal quotations omitted) (emphasis added). The Motion is therefore granted with respect to Count II.

III. Remaining Claims

Counts III and IV of the Amended Complaint are both dependent on the success of the preference and fraudulent transfer claims. See 11 U.S.C. § 502(d); 11 U.S.C. § 550. *See also Our Alchemy*, 2019 WL 4447202, at *8 (Bankr. D. Del. 2019). Defendant seeks to dismiss these Counts to the extent the claims in Counts I and II are dismissed. Because, as noted above, the

[12] Amended Complaint ¶ 39.

preference claim in Count I of the Amended Complaint survives in part, the Motion is denied with respect to Counts III and IV.

IV. Requested Leave to Amend

Finally, the Trustee argues in her opposition brief that "should the Court determine that Plaintiff failed to adequately allege a non-statutory insider claim, it should grant Plaintiff leave to amend her first Amended Complaint to address any inadequacy that the Court identifies."[13] I disagree.

The Trustee was entitled to amend her complaint as a matter of course within the 21 days following Defendant's service of its motion to dismiss. Fed. R. Civ. Proc. 15(a)(1). Indeed, she did so here in response to the Defendant's motion to dismiss the original complaint.[14] Following the Trustee's filing of the Amended Complaint, Defendant again moved to dismiss, but this time the Trustee chose to respond to the Motion instead of further revising the Amended Complaint. Accordingly, leave of court or the consent of the opposing party is now required for further amendment. Fed. R. Civ. Proc. 15(a)(2).

As the Trustee points out, Rule 15(a) provides that "the Court should freely give leave when justice so requires." However, leave must be properly requested. As I have previously held, "[w]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly." *In re Our Alchemy, LLC*, 642 B.R. 155, 172 (Bankr. D. Del. 2022) (citations omitted). As the Third Circuit has explained, "a 'bare request in an opposition to a motion to dismiss — without any indication of the particular grounds on which amendment is sought . . . — does not constitute a motion within the contemplation of Rule 15(a).'" *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d

[13] D.I. 15 (Opposition Brief) at 13.
[14] D.I. 9 (Amended Complaint).

228, 243 (3d Cir. 2013) (quoting *Kowal v. MCI Communications Corp.*., 16 F.3d 1271, 1280, 305 U.S. App. D.C. 60 (D.C. Cir. 1994)). Additionally, the Trustee did not attach a draft amended complaint to her request for leave, "a failure that is fatal to a request for leave to amend." *Id.* (internal quotations omitted). Leave to further amend the Amended Complaint is therefore denied.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

For the foregoing reasons, the Motion is GRANTED in part and DENIED in part, as follows:

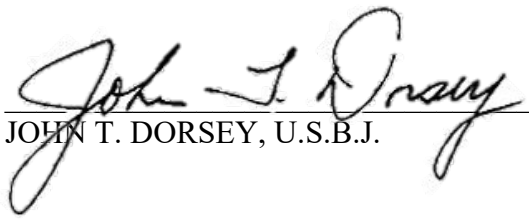
GRANTED as to the One-Year Transfers in Count I;[15]

GRANTED as to Count II;

DENIED as to Count III; and

DENIED as to Count IV.

Dated: September 5, 2023



JOHN T. DORSEY, U.S.B.J.

[15] Defendant's Motion only sought dismissal of the portion of Count I based on the One-Year Transfers and did not seek dismissal of the remainder of Count I.