IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
LIBERTY BRANDS, LLC,	)	Case No. 07-10645 (MFW)
	)	
Debtor.	)	
	)	
MICHAEL JOSEPH, as Liquidating Trustee for Liberty Brands, LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. 09-50965 (MFW)
	)	
SCOTT FEIT, SJF ASSOCIATES, INC., NATIONAL DISTRIBUTION NETWORK, BARRY GARNER, DISCOUNT TOBACCO WAREHOUSE, INC., A&A OF TUPELO, INC., d/b/a GLOBE DISTRIBUTING, SUNFLOWER SUPPLY COMPANY, INC. GARY L. HALL, BENTLEY INVESTMENTS OF NEVADA, LLC, HALL RETAINED ANNUITY TRUST I, and THE HALL FAMILY TRUST	)	
	)	
Defendants.	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Before the Court is the Complaint of Michael Joseph (the "Liquidating Trustee") for Liberty Brands, LLC (the "Debtor") seeking to avoid and recover certain transfers under theories of conversion, preferential transfer, improper post-petition transfer, fraudulent conveyance, disallowance of claims, unjust

[1] The following constitutes the proposed findings of fact and conclusions of law of the Bankruptcy Court under 28 U.S.C. § 157(c).

enrichment, breach of fiduciary duty, fraud, faithless servant, civil conspiracy, and recharacterization of debt to equity.

I. JURISDICTION AND AUTHORITY TO ENTER FINAL ORDER

1. While the parties have stipulated that the Bankruptcy Court has jurisdiction over the adversary proceeding, the Remaining Defendants have not expressly consented to the Bankruptcy Court entering a final judgment on any of the counts raised by this adversary. (Adv. D.I. 209, 138, 33.) See, e.g., Waldman v. Stone, 698 F.3d 910, 922 (6th Cir. 2012) (holding that even if defendant waived the right to object to bankruptcy court's consideration of claim, that did not give bankruptcy court authority to enter final judgment); In re Soporex, Inc., 463 B.R. 344, 362 (Bankr. N.D. Tex. 2011) ("although no party has raised an issue with respect to this Court's ability to hear and finally determine the claims asserted by the Trustee in the Complaint, and in fact the Trustee alleges that all her claims against the Defendants are 'core' claims, in light of the Supreme Court's recent decision in Stern v. Marshall . . ., this Court must . . . determine the Trustee's claims as an Article I tribunal.").

2. While the Bankruptcy Court has core jurisdiction over some of the counts and related jurisdiction over others, the Bankruptcy Court lacks authority to enter a final order on many

of them. 28 U.S.C. §§ 1334, 157(b)(2)(A), (B), (E), (F) & (H) & 157(c). Stern v. Marshall, 131 S. Ct. 2594 (2011) (holding that although the bankruptcy court may have core jurisdiction over some matters, it may be constitutionally unable to enter a final order).

3. Specifically, the Bankruptcy Court does not have constitutional authority to enter a final order on the conversion, fraudulent conveyance, unjust enrichment, accounting, breach of fiduciary duty, fraud, and civil conspiracy counts. See, e.g., Waldman, 698 F.3d at 922 (holding that bankruptcy court lacked authority to enter final judgment on fraud claim); In re Lehman Bros. Holdings Inc., 480 B.R. 179 (S.D.N.Y. 2012) (holding that bankruptcy court lacked authority to enter final judgment on fraud, fraudulent transfer, unjust enrichment, and conversion claims); Soporex, 463 B.R. at 366 (holding that bankruptcy court could not enter final order on breach of fiduciary duty claims); In re Yazoo Pipeline Co., L.P., 459 B.R. 636, 642 (Bankr. S.D. Tex. 2011) (concluding that bankruptcy court could not enter final order on breach of fiduciary duty, conversion, unjust enrichment, civil conspiracy, and fraud claims).

4. The Bankruptcy Court also lacks the constitutional authority to enter a final order on the faithless servant count. Similar to a breach of fiduciary duty claim, it is grounded in

state law, not in the Bankruptcy Code. See, e.g., 24 A.L.R. 6th 399 (2007) (the faithless servant doctrine provides that an agent or employee who violates his or her duty of loyalty or fidelity in the performance of his or her employment duties forfeits the right to compensation therefor).

5. Nor does the Bankruptcy Court have the constitutional authority to enter a final order on the preferential transfer count against DTW because DTW never filed a claim in this bankruptcy case. See, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2617 (2011) ("a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* 'the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship.' If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does *not* 'become[] part of the claims-allowance process' subject to resolution by the bankruptcy court.") (citations omitted); In re Arbco Capital Mgmt., LLP, 479 B.R. 254, 264-65 (S.D.N.Y. 2012) ("The Court similarly concludes that claims for avoidance of preferential transfers, where the creditor has filed no proof of claim, are not subject to the public right exception.").

6. While the Court does have authority to enter a final judgment on the disallowance of claims count, the only basis for that count is that the Trustee is entitled to a judgment against

the Remaining Defendants on the other counts and therefore their claims should be disallowed under section 502(d). (Adv. D.I. 220 at 55.) 11 U.S.C. § 502(d) ("the court shall disallow any claim of any entity . . . that is a transferee of a transfer avoidable under section . . . 547, 548, 549 . . . .").

7. Because the Court determines or recommends that judgment be entered in favor of the Remaining Defendants on all those counts, the Court recommends that judgment be entered in favor of the Remaining Defendants on the disallowance of claims count as well.

8. While the Court does have authority to enter a final judgment on the counts for turnover (section 542) and recovery of transfers (section 550), the only basis for those counts is that the Trustee is entitled to a judgment against the Remaining Defendants on certain of the other counts. (Adv. D.I. 220 at 54, 59.)

9. Because the Court recommends that judgment be entered in favor of the Remaining Defendants on all those counts, the Court recommends that judgment be entered in favor of the Remaining Defendants on the turnover and recovery of transfers counts as well.

10. The Court does, however, have full constitutional authority to enter a final judgment on the Trustee's recharacterization claim, because it goes to the essence of claim

allowance, over which the Court has both jurisdiction and authority to decide. See Katchen v. Landy, 382 U.S. 323, 329-330 (1966) (stating that the power to allow or to disallow claims includes "full power to inquire into the validity of any alleged debt or obligation of the bankrupt upon which a demand or a claim against the estate is based."); In re 431 W. Ponce De Leon, LLC, Bankr. No 13-53479, 2014 WL 3925509, *20 (Bankr. N.D. Ga., Aug. 11, 2014) (holding that bankruptcy court had authority to enter final order on recharacterization of claims because "whether the insider claims are debt or equity is integral to determining the treatment to be accorded the insider claims and is a necessary first step to determine if allowance or disallowance is required.").

11. The Court also has authority to enter an order on the count seeking avoidance of a post-petition transfer. See, e.g., In re Felice, 480 B.R. 401 (Bankr. D. Mass. 2012).

12. In an accompanying Opinion and Order issued this same date, the Court addresses and renders final judgment on the recharacterization and post-petition transfer counts of the Amended Complaint.

13. The Court, however, submits the following proposed findings of fact and conclusions of law with respect to all other counts to the District Court for consideration. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014) (holding that in

matters where the bankruptcy court has core jurisdiction but is unable constitutionally to enter a final order, the bankruptcy court may submit proposed findings of fact and conclusions of law to the District Court pursuant to the procedures set forth in 28 U.S.C. § 157(c)).

14. Pursuant to Rule 9033, any party who objects to the Proposed Findings of Fact and Conclusions of Law shall have 14 days to file a written objection thereto. Fed. R. Bankr. P. 9033(b).

15. At the expiration of the 14-day period, the Clerk of Court shall transmit the Proposed Findings of Fact and Conclusions of Law and any objections thereto to the District Court for consideration.

16. Although any appeal of the accompanying Opinion shall be governed by the bankruptcy appellate rules, the Court recommends that any such appeal be consolidated with and considered by the District Court in connection with its review of these Proposed Findings of Fact and Conclusions of Law.

II. PROPOSED PROCEDURAL FINDINGS OF FACT

17. A Plan of Liquidation was confirmed by the Court on March 12, 2009. (D.I. 430.)[2]

[2] References to the record are as follows: "D.I. #" for pleadings from the main case; "Adv. D.I. #" for pleadings from the adversary; "Tr. [date] at [page]" for the trial transcripts;

18. Pursuant to the Plan, Michael Joseph was appointed as the Liquidating Trustee to administer the estate and pursue certain litigation. (D.I. 403 at 14.)

19. On May 8, 2009, the Liquidating Trustee filed the Complaint, which was amended on January 24, 2011, to add more counts and defendants. (D.I. 478; Adv. D.I. 1, 122.)

20. All claims brought by the Trustee against Scott Feit, SJF Associates, Inc., and National Distribution Network have been resolved. (D.I. 209 at Part III.)

21. The claims against A&A of Tupelo, Inc., were not prosecuted at trial, because A&A itself has filed a bankruptcy petition. (Adv. D.I. 136.)

22. The Remaining Defendants are Barry Garner, Discount Tobacco Warehouse, Inc., Sunflower Supply Company, Inc., Gary Hall, Bentley Investments of Nevada, LLC, Hall Retained Annuity Trust I, and the Hall Family Trust. (Adv. D.I. 209 at Part III.)

23. A trial against the Remaining Defendants was held before the bankruptcy court on November 4, 5, and 6, 2013. (D.I. 565, 566 & 567.)

24. Post-trial briefing was completed on March 7, 2014. (Adv. D.I. 220, 221, 222 & 223.)

25. The transfers from the Debtor to the Remaining

"[name] Dep. at [page]" for deposition transcripts; "JTEx. #" for Joint Trial Exhibits; "Ex. P-#" for Plaintiff's exhibits; "Ex. D-#" for Defendant's exhibits.

Defendants at issue in this case, are the following:

DATE	AMOUNT	INITIAL RECIPIENT
2003-2004	$300,000	Sunflower Supply Co.
8/31/2004	$200,000	Barry Garner
8/17/2005	$350,000	DTW
10/17/2005	$350,000	DTW
3/13/2006	$1,900,000	DTW
5/22/2006	$1,000,000	DTW
7/13/2006	$500,000	DTW
1/26/2007	$434,649.60	DTW
2/16/2007	$434,649.60	DTW
3/1/2007	$434,649.60	DTW
3/2/2007	$579,532.80	DTW
3/13/2007	$232,320	DTW
11/13/2007	$1,100,000	Bentley

III. PROPOSED BACKGROUND FINDINGS OF FACT

26. Prior to 2002, Gary Hall was a co-owner of Medallion Company, Inc. ("Medallion") with the Gary L. Hall Retained Annuity Trust I and the Hall Family Trust; Hall's children and grandchildren were beneficiaries of the trusts. (Tr. 11/6/13 at 5.)

27. Medallion was a cigarette manufacturer with operations in Virginia. (Hall Dep. at 47.)

28. On February 15, 2002, Hall sold Medallion to VGR Acquisitions, Inc. (Tr. 11/6/13 at 7; JTJTEx. 1.)

29. Pursuant to the Medallion sale agreement, Hall was prohibited from being an investor, owner, employee, or otherwise lending assistance to anyone in the development and/or manufacture of cigarettes. (JTEx. 1.)

30. At that time, Hall also owned Sunflower Supply Company Inc. ("Sunflower"), a tobacco supply company; the Medallion sale agreement permitted Hall to continue his involvement in Sunflower. (Tr. 11/6/13 at 9; JTEx. 2.)

31. In late spring 2002 the Debtor was formed to manufacture discount cigarettes; its operations were in New York and Virginia. (Tr. 11/4/13 at 12.)

32. Scott Feit was a founder and managing member of the Debtor. (Id.)

33. Barry Garner was originally a part owner of the Debtor, but he relinquished his ownership interest in 2005. (Tr. 11/5/13 at 48.)

34. Garner remained an employee of the Debtor and was responsible for its operations. (Tr. 11/4/13 at 13.)

35. Prior to joining the Debtor, Garner was an employee of Medallion. (Tr. 11/5/13 at 47.)

36. In 2002, the Debtor received a $1.2 million loan from Sunflower and used it to purchase equipment, indirectly, from

Sunflower. (Tr. 11/4/13 at 14.)

37. As a cigarette manufacturer, the Debtor was party to a Master Settlement Agreement, which required it to make annual payments to certain states (the "MSA" Payments"). (Tr. 11/4/13 at 18.)

38. In 2005, the Debtor was unable to make its MSA Payment. (Feit Dep. at 41.)

39. To help the Debtor make its MSA Payment, Discount Tobacco Warehouse ("DTW") executed a Purchase Order whereby it paid $7,980,000 in advance for the purchase of 14,000 cases of cigarettes from the Debtor. (Tr. 11/4/13 at 21-22; JTEx. 4.)

40. DTW was a cigarette distribution company owned by Justin Boyes. (Boyes Dep. at 10.)

41. Hall had helped Boyes get into the cigarette distribution business by providing start-up capital and advice. (Id. at 19.)

42. The Purchase Order was accompanied by a Security Agreement, which granted DTW a lien on substantially all of the Debtor's assets. (JTEx. 5.)

43. The Debtor used the funds received from DTW to make its 2005 MSA Payment. (Feit Dep. at 48.)

44. The DTW transaction was arranged by Hall, who indirectly funded the transaction by providing an $8 million loan to DTW through Bentley Investments of Nevada, LLC ("Bentley").

(Tr. 11/6/13 at 22.)

45. Bentley was owned and operated by Hall. (Id.)

46. In 2006, the Debtor was again unable to make its MSA Payment. (Tr. 11/4/13 at 28-29.)

47. To help the Debtor make that payment, T. Davis Miller loaned the Debtor $5,100,000 on April 14, 2006. (JTEx. 8.)

48. Hall was the ultimate source of this loan, lending money to Miller so that Miller could in turn lend the money to the Debtor. (Hall Dep. at 85-86.)

49. The Debtor only discussed the Miller loan with Hall. (Tr. 11/4/13 at 29.)

50. In October 2006, Hall prepared a promissory note evidencing the Miller loan (the "Promissory Note") and tried to persuade Feit to sign a security agreement collateralizing the loan. (JTEx. 8; Tr. 11/4/13 at 31-32.)

51. Feit refused to grant the requested security interest. (JTEx. 8; Tr. 11/4/13 at 31-32.)

52. The Promissory Note was later assigned by Miller to DTW at Hall's instructions. (JTEx. 9; Tr. 11/5/13 at 154.)

53. On October 3, 2006, DTW assigned its Purchase Order and accompanying Security Interest and the Promissory Note to A&A of Tupelo, Inc. ("A&A"), a cigarette distribution company owned by Randy Benham. (JTExs. 10 & 11; Tr. 11/5/13 at 185.)

54. On March, 30, 2007, the Debtor received a notice from

A&A stating that the Debtor was in default of the requirements of the Purchase Order. (JTEx. 13.)

55. At that time, the Debtor was also unable to make its 2007 MSA Payment. (Tr. 11/4/13 at 78.)

56. The Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code on May 10, 2007. (D.I. 1.)

57. The law firms of Zuckerman Spaeder LLP ("Zuckerman") and Stinson Morrison Hecker, LLP ("Stinson") filed a notice of appearance and a proof of claim on A&A's behalf in the Debtor's bankruptcy case. (D.I. 13; JTEx. 101 at 3.)

58. The Commonwealth of Virginia objected to A&A's claim. (D.I. 156.)

59. On October 31, 2007, the Court approved a settlement of the objection to A&A's claim. (D.I. 182.)

60. Pursuant to that settlement, on November 17, 2007, the Debtor's counsel wired the settlement funds to an account held by Bentley, as instructed by Zuckerman and Stinson. (JTEx. 57 at 459; JTEx. 64.)

61. The funds were ultimately transferred to Hall and his trusts. (Tr. 11/6/13 at 56-57.)

IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SUBSTANTIVE COUNTS OF THE AMENDED COMPLAINT

A. Conversion

62. In Count I of the Amended Complaint, the Trustee

asserts that each of the identified transfers constitutes conversion of the Debtor's property, for which the Remaining Defendants should be held jointly and severally liable. (Adv. D.I. 122 at 16.)

63. Conversion is the "unauthorized exercise of dominion or control over property by one who is not the owner which interferes with and is in defiance of a superior possessory right of another in the property." Schwartz v. Capital Liquidators, 984 F.2d 53, 53 (2d Cir. 1993). See also In re Musicland Holding Co., 386 B.R. 428, 440 (S.D.N.Y. 2008) (holding that conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.") (citations omitted).

64. To establish a cause of action for conversion, a plaintiff must demonstrate that he has "legal ownership or an immediate superior right of possession" to the property in question. Musicland, 386 B.R. at 440.

65. Where the transfer is of money, it cannot be the subject of an action in conversion unless it is segregated or specifically identifiable. See, e.g., G.D. Searle & Co. v. Medicore Commc'ns, Inc., 843 F. Supp. 895, 912 (S.D.N.Y. 1994) ("[M]oney can be the subject of conversion and a conversion action only when it can be described, identified, or segregated in the manner that a specific chattel can be."); Republic of

Haiti v. Duvalier, 211 A.D. 2d 379, 384 (N.Y. 1995) ("Where the property is money, it must be specifically identifiable and subject to an obligation to be returned or to be otherwise treated in a particular manner.").

66. The Trustee argues that the 11/13/2007 transfer pursuant to the A&A settlement was specifically identifiable property of the estate. See, e.g., Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro, 187 A.D.2d 384, 385, 590 N.Y.S.2d 201, 202 (1992) (holding that "settlement proceeds were a proper subject of a misappropriation and conversion claim").

67. When the Debtor entered into the settlement agreement and transferred those funds, however, it relinquished its interest in them. See, e.g., Crabtree v. Tristar Auto. Grp., Inc., 776 F. Supp. 155, 167 (S.D.N.Y. 1991) (holding that claim for conversion did not lie once funds were paid by the plaintiff, because it had no superior right to them but only a contractual right to insist the defendant perform the promise given in exchange for the funds).

68. Further, the other transfers (including the payment of cash and delivery of product to DTW) were all in repayment of obligations owed by the Debtor to the transferee and, therefore, the Debtor did not have any superior possessory or ownership right to those funds or product.

69. The Trustee contends, however, that the transfers were

not in payment of loans made to the Debtor because those loans (and the DTW advance for product) should be recharacterized as equity contributions.

70. In its Opinion on the recharacterization count, issued contemporaneously herewith, the Court concludes that the transaction with DTW and the loans made by Sunflower and A&A were not equity contributions.

71. Therefore, the Court concludes that the Trustee cannot recover the transfers made in repayment of those obligations under a theory of conversion.

72. Judgment should, therefore, be entered in favor of the Remaining Defendants on the conversion count of the Amended Complaint.

B. Preferences

73. In Count II of the Amended Complaint, the Trustee asserts that the 5/22/2006 and 7/13/2006 transfers to DTW are recoverable as preferences to insiders under section 547(b) of the Bankruptcy Code. (Adv. D.I. 122 at 16-17.)

74. Section 547(b) allows a trustee to recover a pre-petition transfer that was made:

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made --
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the

> date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if–
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

75. DTW does not dispute that these transfers were made to or for the benefit of a creditor on account of antecedent debt. (Adv. D.I. 220 at 33.)

76. The timing of the transfers (between 90 days and one year before the petition was filed) is also not in dispute. (Id. at 22-25.)

1. The Debtor's Insolvency

77. DTW argues that the Trustee has not established that the Debtor was insolvent at the time of the transfers. (Adv. D.I. 221 at 24.)

78. The Trustee is entitled to a presumption of insolvency only if the transfer occurred within the 90 days prior to the filing of the petition. See 11 U.S.C. § 547(f).

79. Under the Bankruptcy Code "a corporation is 'insolvent' when 'the sum of such entity's debts is greater than all of such entity's property, at fair valuation.'" In re Am. Classic Voyages Co., 367 B.R. 500, 508 (Bankr. D. Del. 2007) (quoting 11

U.S.C. § 101(32)).

80. The Trustee introduced evidence at trial showing that the amount of the Debtor's liabilities exceeded a fair valuation of its assets at all times in its existence. (JTEx. 114.)

81. The Remaining Defendants submitted no evidence or testimony to contradict this evidence.

82. Therefore, the Court concludes that the Trustee has satisfied the insolvency requirement.

2. Creditors' Insider Status

83. The Trustee contends that the transfers, although made to DTW, were made for the benefit of both Hall and DTW, and that both Hall and DTW were either statutory or non-statutory insiders of the Debtor. (Adv. D.I. 220 at 33-34.)

a. Statutory Insiders

84. The Trustee argues that Hall and DTW were statutory insiders because they exercised actual control over the Debtor. (Id.) See also 11 U.S.C. § 101(31)(B) (defining insider of a corporation to include a "person in control of the debtor.").

85. To establish control, "there must be day-to-day control, rather than some monitoring or exertion of influence regarding financial transactions in which the creditor has a direct stake." In re Winstar Communications Inc., 554 F.3d 382, 396 n. 5 (3d Cir. 2009).

86. The Trustee provided no evidence that DTW exercised any

control over the Debtor.

87. The Trustee did offer into evidence various email exchanges between Feit and Hall, in which Feit notes that Garner follows instructions from Hall rather than Feit, in support of his assertion that Hall controlled the Debtor. (JTExs. 35, 40.)

88. At trial, Feit testified that "[Garner] would be in contact with [Hall] on a regular basis and . . . would take instructions from [Hall] on how much inventory to build" on DTW's Purchase Order. (Tr. 11/4/13 at 36.)

89. Feit also testified that Hall periodically asked him to provide updates of the Debtor's financial condition and requested that payments be made to DTW on the Purchase Order. (Tr. 11/4/13 at 37.)

90. However, Feit also testified that he made all final decisions on behalf of the Debtor other than manufacturing decisions, which he delegated to Garner. (Tr. 11/4/13 at 63.)

91. Garner testified at trial that he never ignored instructions from Feit and never took instructions from Hall. (Tr. 11/5/13 at 63.)

92. The Court concludes that the Trustee has presented insufficient evidence that Hall controlled the Debtor.

93. At most the evidence establishes that Hall was "monitoring" the Debtor to protect DTW's secured claim and to assure that DTW received the product for which it had pre-paid.

94. The Court concludes that this does not rise to the level of actual control by Hall over the Debtor. Winstar, 554 F.3d at 396.

95. Therefore, the Court concludes that the Trustee has not established that DTW or Hall were statutory insiders of the Debtor.

b. Non-Statutory Insiders

96. The Third Circuit has also identified a category of "non-statutory" insiders, who are not within any of the enumerated categories of section 101(32), but who qualify as insiders for purposes of the preference statute. Winstar, 554 F.3d at 395.

97. For a creditor to qualify as a non-statutory insider, there must be a "close relationship between the debtor and creditor" as well as something "other than closeness to suggest that any transactions [between the parties] were not conducted at arm's length." Id. at 396-97 (quoting Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.), 531 F.3d 1272, 1277 (10th Cir. 2008)).

98. The factors that courts consider in determining whether a transferee is an insider include:

> 1. Whether the loan made to the debtor was documented (e.g., promissory note, mortgage, and specified payment terms);
> 2. Whether the loans were made on an unsecured basis and without inquiring into the debtor's ability to repay the loans;

> 3. Whether the transferee knew that the debtor was insolvent at the time the debtor made the loans or recorded the security agreements;
> 4. Whether there were numerous loans between the parties; . . .
> 7. Whether the transferee had an ability to control or influence the debtor; . . .
> 9. Whether the transferee had authority to make business decisions for the debtor . . . .

In re Emerson, 235 B.R. 702, 707 (Bankr. D.N.H. 1999) (citations omitted).

99. The Trustee argues that Hall and DTW were non-statutory insiders based on the many dealings the Debtor had with them and with other Hall-related entities.

100. The evidence shows that Hall repeatedly orchestrated loans to the Debtor through various entities: the $1.2 million loan through Sunflower in 2002, the $7,980,000 DTW Purchase Agreement in 2005, and the $5.1 million loan from Miller in 2006.

101. The Sunflower loan was apparently not documented, nor was there any maturity date or fixed rate of interest. (Tr. 11/4/13 at 14-15; Tr. 11/6/13 at 12, 14-15.)

102. The DTW Purchase Order was documented and secured by a lien on all of the Debtor's assets. (JTExs. 4 & 5.)

103. The Miller loan was originally undocumented, but a Promissory Note was prepared and executed several months later. (Tr. 11/4/13 at 29-30.)

104. Both the DTW Purchase Order and the Miller loan were arranged by Hall. (Tr. 11/4/13 at 22, 29.)

105. In addition to arranging financing for the Debtor, Hall was also an owner of the Debtor's main supplier, Tobacco Rag Supply Co. (Tr. 11/5/13 at 170.)

106. Hall communicated with Feit regularly, and Feit provided the Debtor's financial information to Hall when requested. (Tr. 11/4/13 at 37.)

107. The Court concludes that the facts establish that there was a "close relationship" between Hall and the Debtor.

108. The Court concludes, however, that the Trustee has not presented sufficient evidence to meet the second prong of the Winstar test, which requires something "other than closeness" to establish that the dealings between the parties were not at arm's length. Winstar, 554 F.3d at 396-97.

109. In Winstar, the Third Circuit upheld the bankruptcy court's conclusion that a major creditor was a non-statutory insider where it "had the ability to coerce [the debtor] into a series of transactions that were not in [the debtor's] best interests," remarking that "[s]uch one-sided transactions refute any suggestion of arm's-length dealing." Id. at 396-99.

110. The Court concludes that the evidence in this case establishes that the transactions between the Debtor and Hall, Sunflower, Miller, and DTW were not so one-sided as to suggest a lack of arm's length dealing.

111. The interest rates on the loans were reasonable (0% on

the Sunflower loan and 12% on the Miller loan), and neither of those loans was secured. (Tr. 11/4/13 at 14-15; JTEx. 8.)

112. The Court concludes that the DTW Purchase Order similarly had reasonable terms; the price per carton of cigarettes was originally favorable to DTW, but 18 months later, the market price of discount cigarettes was lower than the Purchase Order price. (Tr. 11/5/13 at 151.)

113. Under the Purchase Order, to recoup the funds it had pre-paid (almost $8 million) DTW had to buy a significant quantity of cigarettes (14,000 cases), which was advantageous to the Debtor given the volatility of the market price of its product. (JTEx. 4.)

114. In finding that the creditor was a non-statutory insider, Winstar drew an "instructive contrast" with a situation in which a creditor was only able to "compel payment of its debt" and "exercise financial control . . . incident to the creditor-debtor relationship" with the situation in that case where the creditor was able to coerce the debtor into a series of transactions which were against its own interests. Id. at 399.

115. In the instant case, the Court concludes that Hall's influence over the Debtor was consistent with what would be expected between a creditor and debtor; Hall sought financial information about the Debtor and assurances that product would be delivered pursuant to the Purchase Order.

116. Hall did not coerce the Debtor to enter into any transactions that were unfavorable to the Debtor as the creditor did in Winstar. Id. at 399.

117. Consequently, the Court concludes that the Trustee has not established that Hall or DTW were non-statutory insiders by a preponderance of the evidence.

118. Because the transfers in question are beyond the ninety day preference period for non-insiders, they cannot be recovered as preferential transfers.

C. Fraudulent Conveyances

119. In Count VI of the Amended Complaint, the Trustee asserts that several of the transfers at issue are avoidable as fraudulent conveyances under section 544(b)(1) of the Bankruptcy Code, as well as under New York Law. (Adv. D.I. 122 at 18, 94-95.)

120. A transfer is avoidable if it is made with the actual intent to defraud creditors who have legitimate claims. 11 U.S.C. § 548(a)(1)(A). See, e.g., In re Adelphia Commc'ns Corp., 365 B.R. 24, 33-35 (Bankr. S.D.N.Y. 2007).

121. The Trustee presented no direct evidence, and the circumstantial evidence presented was insufficient, to establish that any of the Remaining Defendants acted with actual intent to defraud creditors.

122. A transfer of property of the Debtor can be avoided as

constructively fraudulent if (1) it occurred within two years of the petition date, (2) the Debtor was insolvent at the time of the transfer or became insolvent as result of it, and (3) the Debtor received less than a reasonably equivalent value in exchange. 11 U.S.C. § 548(a)(1)(B).

123. Similarly, New York law provides that "[e]very conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent . . . if the conveyance is made or the obligation is incurred without a fair consideration." N.Y. Debt. & Cred. Law § 273.

124. Several of the transfers at issue were characterized as payments under the Purchase Order, namely the 3/13/2006, 5/22/2006, and 7/13/2006 transfers to DTW totaling $3.4 million. (Tr. 11/4/13 at 26-27; JTExs. 97, 99, 100.)

125. DTW was not entitled to receive cash (rather than product) under the Purchase Order, absent a default or termination of the agreement. (JTEx. 4.)

126. The Trustee argues that these transfers can be avoided because they are constructively fraudulent under both the Bankruptcy Code and New York law. (Adv. D.I. 220 at 52.)

127. It is undisputed that the Purchase Order Payments were transfers of the Debtor's property.

128. There is also no dispute that they were made within two years of the Debtor's bankruptcy filing.

129. Additionally, the Court has already found that the Debtor was insolvent at all times.

130. The Remaining Defendants contend, however, that the Debtor received reasonably equivalent value for these payments. (Adv. D.I. 221 at 29-31.)

131. In return for the payments, the Debtor received a reduction in the balance of product it was obligated to deliver under the Purchase Order. (Feit Dep. at 74-75, 78-79.)

132. Thus, the Debtor was discharged of its obligation to provide DTW with $3.4 million worth of cigarettes under the Purchase Order.

133. The Court concludes that the release from the obligation to provide $3.4 million in product is reasonably equivalent to a cash payment of $3.4 million. See, e.g., Mellon Bank, N.A. v. Metro Commc'ns, Inc., 945 F.2d 635, 646-47 (3d Cir. 1991) ("in evaluating whether reasonably equivalent value has been given the debtor under section 548. . . . [t]he touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred.")

134. Because the Debtor received reasonably equivalent value for its cash payments to DTW, the Court concludes that those payments should not be avoided as constructively fraudulent.

135. The Trustee bases his fraudulent conveyance claim as to the other transfers on his assertion that the loans repaid by the transfers were actually contributions of capital, and thus the transfers were not made to repay antecedent debts. (Adv. D.I. 220 at 54.)

136. Because the Court concludes, in the Opinion issued contemporaneously herewith, that the loans should not be recharacterized as capital contributions, the payments on account of the loans were in repayment of antecedent debt and cannot be avoided as fraudulent transfers. See, e.g., Pashaian v. Eccelston Props., 88 F.3d 77, 85-86 (2d Cir.1996) ("[T]he satisfaction of a preexisting debt qualifies as fair consideration for a transfer of property."); Walker v. Sonafi Pasteur (In re Aphton Corp.), 423 B.R. 76, 93 (Bankr. D. Del. 2010) ("[W]hen a transfer is made to pay an antecedent debt, the transfer may not be set aside as constructively fraudulent.").

D. Disallowance of Claims

137. In Count V of the Amended Complaint, the Trustee asserts that the claims of the Remaining Defendants should be disallowed. (Adv. D.I. 122 at 18.)

138. The only basis for the Trustee's assertion is section 502(d) which requires that the "claim of any entity . . . that is a transferee of a transfer avoidable under section . . . 547, 548, 549" shall be disallowed. (Adv. D.I. 220 at 55.)

139. Because the Court has determined that none of the Remaining Defendants are the recipients of an avoidable transfer, the Court concludes that their claims, if any, cannot be disallowed under section 502(d) of the Bankruptcy Code.

E. Recovery of Avoided Transfers

140. In Count IV of the Amended Complaint, the Trustee seeks the recovery of transfers avoided under sections 547, 548 and 549 as provided in section 550 of the Bankruptcy Code. (Adv. D.I. 122 at 18.) See 11 U.S.C. § 550 ("to the extent that a transfer is avoided under section . . . 547, 548, 549 . . ., the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property. . . .").

141. Because the Court has determined that none of the Remaining Defendants are the recipients of an avoidable transfer, the Court concludes that the Trustee is not entitled to recover any property from them.

F. Turnover

142. In Count VIII of the Amended Complaint, the Trustee seeks a turnover of all property improperly transferred to the Remaining Defendants under section 542 of the Bankruptcy Code. (Adv. D.I. 122 at 20-21.) See 11 U.S.C. § 542 ("an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease . . . shall deliver to

the trustee, and account for, such property or the value of such property. . . .").

143. Because the Court has determined that none of the Remaining Defendants are the recipients of an avoidable transfer, the Court concludes that the Trustee is not entitled to a turnover of any of the funds or property that were transferred by the Debtor to them.

G. Breach of Fiduciary Duties

144. In Counts IX-XII of the Amended Complaint, The Trustee claims that Garner, Hall, and DTW each owed fiduciary duties of care and loyalty to the Debtor, which they breached by committing corporate waste and using their positions of trust to further their private interests. (Adv. D.I. 122 at 21-25.)

1. Garner's Fiduciary Duties

145. The Defendants concede that Garner was a corporate officer of the Debtor. (Adv. D.I. 221 at 34.)

146. As a corporate officer of the Debtor, Garner owed fiduciary duties to the corporation. See, e.g., In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 749-51 (Del. Ch. 2005) (corporate officer owes duty of due care and loyalty to corporation and cannot permit a waste of the corporation's assets).

147. The Trustee asserts that Garner breached his fiduciary duty of loyalty by receiving and accepting $200,000 from the

Debtor. (Adv. D.I. 220 at 60-61.)

148. Hall, Garner, and Feit all testified at trial that the $200,000 payment to Garner by the Debtor satisfied an obligation Hall had to Garner resulting from Garner's termination as an employee of Medallion, which the Debtor had assumed as part of the $1.2 million Sunflower loan. (Tr. 11/4/13 at 16, Tr. 11/5/13 at 97-98, 174.)

149. The Debtor's payment to Garner was credited dollar for dollar against the amount due by the Debtor under the Sunflower loan. (JTEx. 28 at L00487.)

150. The Court concludes that because Garner was entitled to receive the $200,000 from the Debtor as a result of the Debtor's assumption of the obligation from Hall, Garner did not breach his fiduciary duties by accepting this payment.

151. The Trustee further argues that Garner breached his fiduciary duty to the Debtor by allowing the other transfers at issue in this case to be made by the Debtor resulting in a waste of the corporate assets which caused the Debtor's bankruptcy. (Adv. D.I. 220 at 60-61.)

152. As the Court concludes elsewhere herein and in the accompanying Opinion, none of the transfers at issue were improper or avoidable.

153. Further, Garner was not the corporate officer responsible for directing those transfers; as the managing member

of the Debtor Feit was the one responsible for financial transactions. (Feit Dep. at 18-19.)

154. Therefore, the Court concludes that Garner did not breach any fiduciary duty he had to the Debtor.

2. DTW and Hall's Fiduciary Duties

155. Neither Hall nor DTW was an employee, officer or director of the Debtor. (Tr. 11/4/13 at 63, 74.)

156. A party acting as a creditor owes "no fiduciary obligation to its debtor or to other creditors of the debtor in the collection of its claim." In re W.T. Grant Co., 699 F.2d 599, 609 (2d Cir. 1983).

157. A creditor becomes a fiduciary of its debtor only when it "exercises such control over the decision-making processes of the debtor as amounts to a domination of its will." In re Teltronics Servs., Inc., 29 B.R. 139, 170 (Bankr. E.D.N.Y. 1983).

158. "Control . . . is established by facts demonstrating that 'through personal or other relationships the [individuals] are beholden to the controlling person.'" Odyssey Partners, L.P. v. Fleming Cos., Inc., 735 A.2d 386, 407 (Del. Ch. 1999) (quoting Aronson v. Lewis, 473 A.2d 805, 815 (Del. 1984)).

159. Because the Court has already determined that Hall and DTW did not exert actual control over the Debtor, the Court concludes that they did not owe fiduciary duties to the Debtor. (See Part IV.B.2 supra.)

H. Faithless Servant

160. In Count XIV of the Amended Complaint, the Trustee asserts faithless servant claims against DTW, Hall, and Garner. (Adv. D.I. 122 at 26.)

161. To succeed on a faithless servant claim under New York law, which is grounded in agency law, the Trustee must first establish that the defendants breached fiduciary duties of loyalty they had to the Debtor. See, e.g., Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184, 208-11 (2d Cir. 2003) (holding that an agent who breaches his duties of loyalty and good faith is not entitled to receive compensation).

162. The Trustee's claim is based on the assertion that DTW, Hall and Garner all owed fiduciary duties, including duties of loyalty, to the Debtor which they breached by engaging in self-dealing. (Adv. D.I. 220 at 66.)

163. The Court has previously found that DTW and Hall did not owe any fiduciary duties to the Debtor and that Garner did not breach any fiduciary duties to the Debtor. (See Part IV.G supra.) See also, Indep. Asset Mgmt. LLC v. Zanger, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008) (to establish a breach of fiduciary duty claim a plaintiff must establish that a fiduciary duty existed between the plaintiff and the defendant).

164. Consequently, the Court concludes that judgment should be entered in favor of the Remaining Defendants on the faithless

servant claim.

I. Accounting

165. In Count XV of the Amended Complaint, the Trustee seeks an accounting from the Defendants. (Adv. D.I. 122 at 26-27.)

166. The Trustee bases this request on his assertion that the Remaining Defendants owed, and breached, fiduciary duties to the Debtor and, therefore, must account to the estate for each of the transfers at issue. (Adv. D.I. 220 at 66-67, citing Hendry v. Hendry, 2006 WL 1565254, at * 26 (Del. Ch. May 26, 2006).)

167. The Court has previously found that DTW and Hall did not owe any fiduciary duties to the Debtor and that Garner did not breach any fiduciary duties to the Debtor. (See Part IV.G supra.)

168. Consequently, the Court concludes that judgment should be entered in favor of the Remaining Defendants on the claim for an accounting.

J. Fraud

169. In Count XIII of the Amended Complaint, the Trustee alleges common law fraud against the Debtor and fraud on the Court as a result of the $1.1 million post-petition transfer to Bentley as part of the settlement of the A&A claim. (Adv. D.I. 122 at 25-26.)

1. Common Law Fraud

170. To sustain a claim of common law fraud, the Trustee must prove: (1) a material misrepresentation or omission of fact; (2) knowledge by the defendant of its falsity; (3) intent to defraud; (4) reasonable reliance by the plaintiff on the representation; and (5) damages. Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 98 (2d Cir. 1997).

171. The Trustee alleges that the Remaining Defendants made material misrepresentations to the Debtor when they asserted that A&A was owed a debt and that their counsel also represented A&A. (Adv. D.I. 220 at 26.)

172. In the accompanying Opinion issued this date, the Court has determined that A&A was, in fact, owed a debt by the Debtor as a result of the assignments of the Purchase Order and Promissory Note to A&A.

173. The Court has also determined that counsel for the Remaining Defendants was authorized to represent A&A in the context of A&A's claims against the Debtor.

174. Therefore, the Court finds that the Remaining Defendants made no material misrepresentation of fact.

175. For these reasons, the Court concludes that judgment should be granted for the Remaining Defendants on the fraud claim.

2. Fraud on the Court

176. "To prove fraud upon the court, the Trustee must

establish (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court." Miller v. Greenwich Capital Fin. Products, Inc. (In re Am. Bus. Fin. Servs., Inc.), 384 B.R. 80, 85 (Bankr. D. Del. 2008).

177. "Fraud on the court must constitute egregious misconduct such as bribery of a judge or jury or fabrication of evidence by counsel." Herring v. United States, 424 F.3d 384, 390 (3d Cir. 2005).

178. In the accompanying Opinion issued this date, the Court has determined that the Remaining Defendants did not commit any fraud in connection with the A&A claim or settlement.

179. Therefore, the Court concludes that judgment in favor of the Remaining Defendants should be entered on the Trustee's claim for fraud on the court.

K. Unjust Enrichment

180. In Count VII of the Amended Complaint, the Trustee asserts that the Remaining Defendants were unjustly enriched by the transfers at issue. (Adv. D.I. 122 at 15.)

181. A claim for unjust enrichment requires that the defendant be enriched at the expense of the plaintiff, and that "equity and good conscience militate against permitting Defendant to retain what Plaintiff is seeking to recover." Carroll v. LeBouf ,Lamb, Greene & MacRae, LLP, 623 F. Supp. 2d 504, 513-14

(S.D.N.Y. 2009).

182. The Trustee argues that the Remaining Defendants were not entitled to receive the transfers because they were capital contributions that were not to be repaid. (Adv. D.I. 220 at 57.)

183. As the Court concludes in the accompanying Opinion issued this date, the Trustee did not prove his claim for recharacterization.

184. The Trustee further argues that the Remaining Defendants were unjustly enriched by the transfer of cash to DTW which was only contractually entitled to product. (Adv. D.I. 220 at 57.)

185. The Court has, however, concluded that the cash payments to DTW were not fraudulent because the Debtor received reasonably equivalent value for them (a dollar for dollar reduction in the Debtor's obligation to manufacture product for DTW).

186. The Court therefore concludes that judgment should be entered in favor of the Remaining Defendants on the claim of unjust enrichment.

L. Civil Conspiracy

187. In Count XVII of the Amended Complaint, the Trustee asserts that the Remaining Defendants are liable for their part in a civil conspiracy. (Adv. D.I. 122 at 27-28.)

188. To prove civil conspiracy the Trustee must present

"(i) facts constituting a common agreement or understanding, (ii) a common design or purpose to injure the plaintiff, (iii) the tortious or criminal act or acts committed in furtherance of the common agreement and purpose, (iv) the intent and knowledge of the defendants regarding the acts, and (v) damage or injury to the plaintiff as a result of the acts of the defendants." In re Food Mgmt. Group, LLC, 380 B.R. 677, 704 (Bankr. S.D.N.Y. 2008).

189. Under New York law, civil conspiracy requires proof of actual intent to both participate in the conspiracy and injure the plaintiff. Id. (citing Wegman v. Dairylea Coop., Inc., 50 A.D.2d 108 (N.Y. App. Div. 1975)).

190. The Trustee bases its civil conspiracy claim on the underlying torts of conversion, unjust enrichment, and fraud. (Adv. D.I. 220 at 67.)

191. The Court has already determined, however, that no such underlying torts were committed by the Remaining Defendants.

192. Therefore, the Court concludes that judgment should be entered in favor of the Remaining Defendants on the civil conspiracy claim.

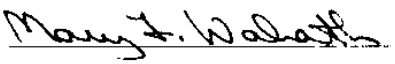
V. CONCLUSION

The Court recommends that the District Court adopt the foregoing Findings of Fact and Conclusions of Law and enter judgment on behalf of the Remaining Defendants on the following

counts: Count I Conversion, Count II Preferences, Count IV Recovery of Transfers, Count VI Fraudulent Transfers, Count VII Unjust Enrichment, Count VIII Turnover, Counts IX-XII Breach of Fiduciary Duties, Count XIII Fraud, Count XIV Faithless Servant, Count XV Accounting, and Count XVII Civil Conspiracy.

Dated: September 25, 2014

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: Jason C. Powell, Esquire[3]

[3] Counsel shall serve a copy of the accompanying Proposed Findings of Fact and Conclusions of Lawon all interested parties and file a Certificate of Service with the Court.

SERVICE LIST

Jason C. Powell, Esquire
Thomas R. Riggs, Esquire
Ferry, Joseph & Pearce, P.A.
824 N. Market Street, Suite 1000
P.O. Box 1351
Wilmington, DE 19899
Counsel for the Liquidating Trustee

William F. Taylor, Jr., Esquire
McCarter & English, LLP
405 N. King Street, 8th Floor
Wilmington, DE 19801
Counsel for the Remaining Defendants

William M. Modrcin, Esquire
Johnston, Ballweg & Modrcin, L.C.
9393 West 110th Street, Suite 450
Overland Park, Kansas 66210
Counsel for the Remaining Defendants