**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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|---|---|---|
| In re: | ) | Chapter 11 |
| | ) | |
| DAILY BREAD WINDDOWN, LLC, | ) | Case No. 20-11266 (JTD) |
| | ) | Jointly Administered |
| Reorganized Debtor. | ) | |
| | ) | |
| Gavin Solmonese, LLC, in its capacity as Liquidating Trustee of PQ Liquidating Trust, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Adv. No. 22-50334 (JTD) |
| | ) | |
| Corporation Services Company, | ) | |
| | ) | |
| Defendant. | ) | **Re: D.I. 1, 7, 8, 9, 10** |

## MEMORANDUM OPINION AND ORDER

Plaintiff Gavin Solmonese, LLC, in its capacity as Liquidating Trustee of PQ Liquidating Trust (the "**Trustee**") brought this action seeking to avoid certain transfers pursuant to Sections 547 and 548 of the Code, and for disallowance of claims filed by Defendant Corporation Service Company ("**CSC**") pursuant to Section 502 of the Code "until such time as the Defendant pays an amount equal to the aggregate amount of the Avoidable Transfers." CSC moved to dismiss (the "Motion to Dismiss") the preference and fraudulent transfer claims in Counts I, II, and III for failure to state a claim and seeks to dismiss the entire complaint because the plan purportedly exculpated CSC as an agent of the Debtors.[1] The Trustee opposed the Motion to Dismiss.[2]

[1] Motion to Dismiss, D.I. 7, Opening Brief in Support of the Motion of Corporation Service Company to Dismiss Complaint, D.I. 8, Reply Brief in Support of the Motion of Corporation Service Company to Dismiss Complaint, D.I. 10.

[2] Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548, 550 and to Disallow Claims Pursuant to 11 U.S.C. § 502, D.I. 1, Plaintiff's Answering Brief in Opposition to Corporation Service Company's Motion to Dismiss, D.I. 9. Trustee relies only on federal bankruptcy law for the basis of its claims.

After considering the parties' submissions, and for the reasons discussed below, the Motion to Dismiss is denied in part and granted 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).

## BACKGROUND

On May 27, 2020 ("**Petition Date**"), PQ New York, Inc. and 104 of its affiliates (the "**Debtors**") commenced a voluntary chapter 11.[3] Debtors' Plan was confirmed on September 25, 2020, creating the PQ Liquidating Trust, vesting it with the right to commence avoidance actions, and appointing the Trustee.[4]

The Trustee alleges that CSC provided legal compliance services to Debtors pursuant to certain agreements.[5] Prior to the Petition Date, CSC served as Debtors' registered agent in Delaware, California, Virginia, New York, and Illinois to accept service of process.[6]

From January 3, 2020, through January 23, 2020, CSC issued 88 invoices to the Debtors totaling $26,245.[7] On March 12, 2020, Debtors paid CSC $26,245 in satisfaction of the outstanding invoices.[8]

In Count I the Trustee asserts that Debtors paid CSC for or on account of antecedent debt or a debt owed before the transfer based on certain agreements with the Debtors.[9] At the time of

[3] D.I. 1 at ¶8.
[4] *Id.* at ¶11–13.
[5] *Id.*at ¶16.
[6] D.I. 8 at 6–7.
[7] D.I. 1, Ex. A.
[8] *Id.*
[9] *Id.* at ¶40.

the payment, the Trustee presumed Debtors' insolvency because the transfer occurred within ninety days of the Petition Date pursuant to Section 547(f) of the Code.[10] The Trustee further alleges that CSC received more than it would have if Debtors liquidated in a chapter 7 based on its review of Debtors schedules as well as proofs of claim showing that unsecured creditors will not be paid in full.[11]

In Count II, the Trustee alleges that to the extent the transfer was not based on an antecedent debt, there was no reasonable equivalent value, and the Debtors were insolvent at the time of the transfers or made insolvent by the transfers.[12]

Count III asserts a claim for recovery of any transfers deemed avoidable pursuant to Section 550 of the Code.[13]

Count IV seeks disallowance of CSC's claims until CSC pays any amounts owed to the Debtors on account of the avoidance actions pursuant to Section 502(j) of the Code.[14]

## ANALYSIS

### I. LEGAL STANDARD

A Federal Rule of Civil Procedure ("**Rule**") 12(b)(6) motion 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 pleadings must have enough facts to plausibly state a claim on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility allows a court to reasonably infer defendant's liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Determining plausibility depends on a context specific analysis. *Id.* at 664. The Court must

[10] *Id.* at ¶42.
[11] *Id.* at ¶41, 43.
[12] *Id.* at ¶46(A).
[13] *Id.* at ¶49.
[14] *Id.* at ¶56.

accept the allegations as true. *Id.* at 663. The Court draws all reasonable inferences in favor of the plaintiff. *See, e.g., Alpizar-Fallas v. Favero*, 908 F.3d 910, 914 (3d Cir. 2018). The defendant bears the burden to show that plaintiff fails to state a claim. *Davis v. Wells Fargo*, 824 F.3d 333, 349 (3d Cir. 2016).

In weighing a motion to dismiss, courts use a three-part analysis. "First, the court must take note of the elements needed for a plaintiff to state a claim." *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010) (citing *Iqbal*, 556 U.S. at 675). Second, the Court must separate the factual and legal elements of the claim, accepting all the complaint's well-pled facts as true and disregarding any legal conclusions. *Id.*; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citing *Iqbal*, 556 U.S. at 679). Third, the Court must determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *Santiago*, 629 F.3d at 130.

## II. DISCUSSION

### A. Preferential Transfer (Count I)

To assert a claim for preferential transfer, the complaint must include "(a) an identification of the nature and amount of each antecedent debt and (b) an identification of each alleged preference transfer by (i) date [of the transfer], (ii) name of debtor/transferor, (iii) name of transferee and (iv) the amount of the transfer." *In re Tweeter Opco.*, 452 B.R. 150, 153 (Bankr. D. Del. 2011) (alterations in original) (citations omitted).

Providing dates and amounts and check numbers is insufficient to establish the nature of the antecedent debt. *Id.* To describe the nature of the antecedent debt, there should be some detail of the pre-existing debtor/creditor relationship. *Id.* Merely alleging that transferee is a vendor or creditor and that the transfer was based on purchase of goods or services is insufficient

to identify antecedent debt. *In re DA Liquidating Corp.*, 622 B.R. 172, 176–77 (Bankr. D. Del. 2020). Plaintiff must allege facts that give context to the alleged transfer. *In re MCG Limited Partnership*, 545 B.R. 74, 82–83 (Bankr. D. Del. 2020). Identifying the antecedent debt might require alleging the identity of contracts or description of goods or services exchanged. *Tweeter Opco*, 452 B.R. at 155. The existence of an agreement does not by itself establish that debtor incurred antecedent debt. *BMT-NW Acquisition,* 582 B.R. at 861.

CSC argues that the complaint fails to plead the nature of the antecedent debt because there is no allegation what Debtors paid CSC for and what Debtors received in return. Particularly, CSC argues that Trustee should identify whether CSC is a vendor or creditor. CSC does not believe that the description of the invoices and other documents is specific enough to evidence the nature of the antecedent debt or how such debt arose.

The exact nature of services rendered, and the value of those services for the debt incurred are factual questions. Trustee describes that the services CSC provided were for legal compliance. This description, accepted as true, provides more than a bare allegation that merely referred to services offered by a vendor or creditor. *See DA Liquidating*, 622 B.R. at 176–77 (holding that merely alleging vendor or creditor and the transfer was based on goods or services is insufficient). Trustee's description of legal compliance services gives context to the transfer. *See MCG Limited Partnership*, 545 B.R. at 82–83. Trustee provides invoice numbers which if true, should notify CSC of the factual disputes that underlie the transfers and the services connecting to these invoices. For these reasons, the Motion to Dismiss is denied as to Count I.

**B. Fraudulent Transfer[15] (Count II)**

Rule 9(b) pleading does not apply if there is no actual fraud alleged. *In re Pillowtex Corp.*, 427 B.R. 301, 310 (Bankr. D. Del. 2010). A constructive fraud claim must satisfy the pleading requirements under Rule 8(a)(2). *BMT-NW Acquisition*, 582 B.R at 856. To survive a motion to dismiss a constructive fraudulent transfer, the plaintiff must allege (i) a transfer within the applicable time, (ii) debtor's insolvency, and (iii) a lack of reasonably equivalent value. *In re Charys Holding Co. Inc.*, 443 B.R. 628, 636 (Bankr. D. Del. 2010). To satisfy Rule 8(a)(2), the trustee must identify the dates, amounts, source, and transferee for the transfers. *BMT-NW*, 582 B.R. at 856. Determinations about reasonable equivalent value and insolvency require factual determinations. *Id.* at 857.

CSC argues that the complaint fails to plead lack of reasonably equivalent value. The Trustee argues that he has, pointing to a single paragraph of the complaint that states "[p]laintiff pleads in the alternative that the Debtor(s) making such transfer(s) did not receive reasonably equivalent value in exchange for such transfer(s)." D.I. 9 at 8. But this is not enough.

The Complaint contains no factual information from which one could conclude that the Debtors did not "get what they gave." *See VFB, LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3d Cir. 2007). In fact, the Complaint barely describes the nature of what the Debtors received at all beyond stating that "upon information and belief, [CSC] was, at all relevant times, a vendor or creditor that provided legal compliance services to or for the debtors." There are no factual allegations at all regarding the services received by Debtors, nor anything that could support a finding that the Debtors overpaid for such services. Instead, the Complaint just repeats the statutory requirements for a constructive fraud claim. This is wholly insufficient. *See In re SRC*

[15] The Trustee specifically includes the constructive fraudulent transfer, not actual fraud.

*Liquidation, LLC*, 581 B.R. 78, 97–98 (D. Del. 2017) (holding that the bankruptcy court was correct to find no plausible allegations that alleged fraudulent transfers were not earned by the creditor). Courts look to whether there are plausible allegations relating to the value of services. *See In re F-Squared Investment Mgmt., LLC*, 600 B.R. 294, 305 (Bankr. D. Del. 2019) (holding that the trustee did not allege any facts or circumstances to show that bonuses were not based on value employee provided or that bonuses were gratuitous); *Charys Holding*, 443 B.R. at 636–37 (holding those allegations relating to lack of equivalent value were sufficient when there were allegations discussing excessive rates). The Motion to Dismiss with respect to Count II is granted.

**C. Exculpation (Counts I, II, III, and IV)**

CSC also argues that claims against it were released under the Plan.[16] Specifically, it argues that the following provision releases all the Debtors' agents, including CSC:

> The Exculpated Parties will neither have nor incur any liability to any entity for any claims or causes of action arising on or after the Petition Date and prior to closing of the Chapter 11 Cases (and in the event that the Chapter 11 Cases are closed and subsequently reopened, during such time as the Chapter 11 Cases are reopened), for any act taken or omitted to be taken in connection with, or related to (i) the Chapter 11 Cases, (ii) formulating, negotiating, preparing, disseminating, implementing, administering, confirming or effecting the consummation of the Plan, the Disclosure Statement, or any other contract, instrument, release or other agreement or document created or entered into in connection with the Plan, (iii) any other postpetition act taken or omitted to be taken in connection with or in contemplation of the restructuring of the Debtors, or (iv) the approval of the Disclosure Statement or confirmation or consummation of the Plan; provided, however, that the foregoing provisions will have no effect on the liability of any entity that results from any such act or omission that is determined in a Final Order of the Bankruptcy Court or other court of competent jurisdiction to have constituted gross negligence or willful misconduct; provided, further, that the Exculpated Parties will each be entitled to rely upon the advice of counsel concerning their duties pursuant to, or in connection with, the above referenced documents, actions or inactions.

[16] *See* Docket No. 20-11266, D.I. 563, at §§ 9.03, 1.48, 1.94.

The plan defined "Exculpated Parties" as follows:

> (i) the Debtors, (ii) the Debtors' directors and officers, (iii) the Creditors' Committee, (iv) the Liquidating Trustee, and (v) in the case of (i) – (iv), each of their respective Representatives, and in the case of the Creditors' Committee, each of its members (each solely in such capacity); provided, however, that with respect to any Person identified herein, such Person shall be considered an Exculpated Party solely to the extent that such Person participated in actions to which section 1125(e) of the Bankruptcy Code applies.

The plan included agents when defining "Representatives."

Even if it could be established at this stage of the case that CSC was Debtors' agent as a matter of law (which it cannot), there is nothing before me that would establish that CSC provided "good and valuable consideration" for the releases granted under the Plan. *See In re Exide Techs.*, 303 B.R. 48, 75 (Bankr. D. Del. 2003) (holding that an exculpation provision failed because there was no consideration). Further, in most cases, the question of whether consideration given is good and valuable is one of fact that cannot be resolved at the motion to dismiss phase. Because there is an unresolved question of fact, the Motion to Dismiss based on the exculpation clause in the Plan is denied.

**D. Section 550 (Count III)**

To survive a motion to dismiss, a claim for recovery under Section 550 needs only to state a plausible claim to avoid under Sections 547 or 548. *In re Ctr. City Healthcare, LLC*, 641 B.R. 793, 805 (Bankr. D. Del. 2022).

CSC argues that Count III should be dismissed because it is not a separate basis for liability. CSC is correct that Section 550 is not a separate basis. The survival of the claim hinges on whether the preferential transfer and fraudulent transfer claims survive the Motion to Dismiss. Because Count I survives, CSC's Motion to Dismiss Count III is denied.

**E. Disallowance (Count IV)**

Disallowance of a claim depends on the Trustee's success in avoiding transfers. *See* 11 U.S.C. § 502(d). Until the Trustee has litigated it claims for the avoidable transfers alleged in Count I, disallowance is nascent. *In re Try the World, Inc.*, No. 20-01013, 2021 WL 3502607, at *11, 2021 Bankr. LEXIS 2140, at *34–35 (Bankr. S.D.N.Y. Aug. 9, 2021). The Trustee has adequately pled Counts I and III to avoid transfers. Therefore, the Motion to Dismiss Count IV is denied. CSC moved to dismiss Count IV because the plan exculpated CSC.[17] Because there is an unresolved question of fact as to exculpation, the Motion to Dismiss Count IV is denied.

**F. Leave to Amend**

The Trustee included in its Memorandum of Law a request for leave to amend if some or all of the Motion to Dismiss was granted. Rule 15(a), made applicable here by Bankruptcy Rule 7015, provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Granting such leave is within the court's discretion and courts liberally allow amendments. *See, e.g., Valley Media, Inc. v. Borders, Inc.* (*In re Valley Media, Inc*), 288 B.R. 189, 192–93 (Bankr. D. Del. 2003); *In re Crucible Materials Corp.*, 2011 Bankr. LEXIS 2513, 2011 WL 2669113, at *4–5 (Bankr. D. Del. Jul. 6, 2011). However, "denial of leave is justified if there is undue delay, bad faith, a dilatory motive, prejudice or futility." *Valley Media*, 288 B.R. at 193 (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997)).

"Where 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

[17] D.I. 8 at 15.

B.R. 155, 172 (Bankr. D. Del. 2022) (citations omitted); *In re W.J. Bradley Mortgage Capital, LLC*, 598 B.R. 150, 178 (Bankr. D. Del. 2019) (citations omitted). Moreover, a plaintiff's request for leave to amend a complaint is improper without indicating the particular grounds on which amendment is sought. *U.S. ex rel Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 243 (3d Cir. 2013).

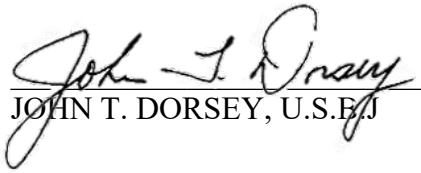
The Trustee had the opportunity to amend his complaint within 21 days when he received service of CSC's Rule 12(b) Motion to Dismiss. Fed. R. Civ. P. 15(a)(1)(B). The Trustee was on notice of the possibly deficient complaint but opted to oppose the Motion to Dismiss instead of amending. The Trustee's request for leave to amend is denied based on procedural infirmities. I am not making a finding of undue delay, bad faith, dilatory motive, prejudice, or futility. Rather, I find that a request for leave to amend a complaint that is merely embedded in an opposition memorandum to a motion to dismiss is improper.

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

For the foregoing reasons, Motion to Dismiss is DENIED in part and GRANTED in part.

1. CSC's Motion to Dismiss Count I is DENIED.
2. CSC's Motion to Dismiss Count II is GRANTED.
3. CSC's Motion to Dismiss Count III is DENIED.
4. CSC's Motion to Dismiss Count IV is DENIED.
5. The request for leave to amend is DENIED.

Dated: November 1, 2022



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