IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Syntax-Brillian Corporation, *et al.*,	Case No. 08-11407 (BLS)
Debtors.	(Jointly Administered)
SB Liquidation Trust,	Adv. No. 10-51389 (BLS)
Plaintiff,	Related to Adv. Docket Nos. 103, 105, 106, 107, 109 & 113
v.	
Preferred Bank,	
Defendant.	

MEMORANDUM ORDER[1]

Upon consideration of the Motion to Dismiss the First Amended Complaint (the "Motion to Dismiss") [Adv. Docket No. 105] and accompanying brief in support [Adv. Docket No. 106] filed by Preferred Bank (the "Bank"); the Answering Brief (the "Answering Brief") in Opposition to the Motion to Dismiss [Adv. Docket No. 109] filed by SB Liquidation Trust (the "Trust" or "Plaintiff"); the Reply Brief in Support of the Motion to Dismiss [Adv. Docket No. 264] filed by the Defendant; and oral argument heard on April 20, 2015; the record reflects as follows:

[1] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 . . . ." Fed. R. Bankr. P. 7052(a)(3). Accordingly, the Court makes no findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. BACKGROUND

1. The Court assumes familiarity with the history underlying this dispute as it has been subject of three memorandum opinions. The factual and procedural background of this adversary proceeding (the "Proceeding") is set forth in detail in two opinions by this Court, *see SB Liquidation Trust v. Preferred Bank (In re Syntax-Brillian Corp.)*, No. 08-11407 BLS, 2011 WL 3101809 (Bankr. D. Del. July 25, 2011); *SB Liquidation Trust v. Preferred Bank (In re Syntax-Brillian Corp.)*, No. 08-11407 BLS, 2013 WL 153831 (Bankr. D. Del. Jan. 15, 2013), and also in an opinion by the Court of Appeals for the Third Circuit, *see SB Liquidation Trust v. Preferred Bank (In re Syntax-Brillian Corp.)*, 573 F. App'x 154 (3d Cir. 2014). The following background is only a summary of the facts relevant to the instant matter.[2]

2. On July 7, 2010, the Plaintiff initiated the Proceeding by filing a complaint against the Bank to recover, among other things, avoidable fraudulent transfers owed to Syntax-Brillian Corporation and certain of its affiliated debtors (collectively, the "Debtors"). The Bank moved to dismiss the Proceeding, which the Court granted by Order [Adv. Docket No. 31] and Opinion [Adv. Docket No. 30] on July 25, 2011 (the "July 25 Opinion"). *In re Syntax-Brillian Corp.*, No. 08-11407 BLS, 2011 WL 3101809 (Bankr. D. Del. July 25, 2011). With respect to the actual and constructive fraud claims, the Court held that dismissal was appropriate because the Plaintiff did not allege sufficient facts to show that the Bank actually or constructively knew of the purported ongoing fraud. *Id.* at *12. The Court determined that the failure to allege such knowledge was fatal under the circumstances because the Plaintiff's fraudulent transfer claims hinged on the collapsing doctrine—an equitable tool whereby a court can collapse multiple transactions and consider the overall financial consequences of the transactions. *Id.* at *11-12. The Court concluded that the collapsing doctrine required a showing of the transferee's knowledge of the fraudulent scheme, and therefore the Plaintiff could not invoke the collapsing doctrine. *Id.* ("Because Counts III through VII [actual and constructive fraud claims] are predicated upon the Plaintiff's collapsing argument, the Court finds that each of the fraudulent transfer claims necessarily fail.").

3. On July 25, 2012, the Plaintiff filed a motion for relief from judgment under Fed. R. Civ. P. 60(b) and sought reconsideration of the

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[2] Capitalized terms that are not defined herein have the meaning ascribed to them in the Court's two previous memorandum opinions.

July 25 Opinion based on newly discovered evidence. On January 15, 2013, the Court denied the motion by Order [Adv. Docket No. 79] (the "January 15 Order") and Opinion [Adv. Docket No. 78]. *In re Syntax-Brillian Corp.*, 2013 WL 153831, at *8-9 (holding that the Plaintiff failed to show that the new evidence would have changed the Court's disposition).

4. The Plaintiff appealed both of the Court's rulings. The Third Circuit certified and authorized a direct appeal of the rulings pursuant to 28 U.S.C. § 158(d)(2). On August 11, 2014, the Third Circuit affirmed in part and vacated in part the July 25, 2011 Order and affirmed the January 15, 2013 Order. *In re Syntax-Brillian Corp.*, 573 Fed. Appx. at 164.

5. The Third Circuit vacated this Court's dismissal of the counts relating to fraudulent transfers with actual intent under 11 U.S.C. § 548(a)(1)(A) and 6 Del. Code § 1304(a)(1). In its ruling, the Third Circuit focused on whose intent was necessary to satisfy the "actual intent" requirement and held that the relevant statutes only require the Plaintiff to allege the intent of the Debtors. *In re Syntax-Brillian Corp.*, 573 F. App'x at 161-62 ("[W]e conclude that the Trust should not have been required to aver knowledge of the Debtor's fraudulent intent on the part of the defendant/transferee, Preferred Bank.").

6. After the Third Circuit's ruling, the Proceeding was remanded to the District Court, which referred it back to this Court [Adv. Docket No. 96].

7. By stipulation of the parties, the Plaintiff filed the First Amended Complaint [Adv. Docket No. 102] on December 17, 2014. In accordance with the Third Circuit's ruling, the First Amended Complaint now asserts three counts against the Bank: Count I seeks to avoid the Kolin Secured Line Obligations, the Note 204615 Obligations, the December 2006 Line 202359 Obligation, and the September 2007 Line 202359 Obligations (collectively, the "Obligations" or "Count I") on the basis that the Obligations were incurred with the actual intent to delay, hinder, or defraud under 11 U.S.C. § 548(a)(1)(A), 11 U.S.C. § 544(b), and applicable state law; Count II seeks to avoid the Kolin Secured Line Principal Transfer and the Line 202359 Payoff Transfer (collectively, the "Transfers" or "Count II") on the same basis as Count I; and Count III seeks to recover the Transfers under 11 U.S.C. § 550.

8. The Bank timely filed the Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) on ground that the First Amended Complaint fails to state claims upon which relief may be granted. Plaintiff has opposed the Motion to Dismiss, and the Bank filed the Reply. The Court heard oral argument and took the matter under advisement. The matter has been fully briefed and is ripe for decision.

9. For the following reasons, the Court will deny the Bank's Motion to Dismiss.

II. ANALYSIS

10. On remand, the Third Circuit tasked this Court with determining whether the "Trust sufficiently alleged actual fraud under the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure." *In re Syntax-Brillian*, 573 Fed. Appx. at 163 n.11. Before addressing this issue, the Court must briefly consider a couple arguments made by the parties that seek to influence the prism by which the Court analyzes the sufficiency of the facts in the First Amended Complaint.

11. The Plaintiff once again seeks to collapse the Obligations into one integrated transaction so the Court can consider the outgoing transfers to the Kolin Company, Ltd. ("Kolin").[3] The law of the case doctrine bars the Plaintiff from reasserting this argument because the Court previously held that the Obligations could not be collapsed.[4] *In re Syntax-Brillian Corp.*, 2011 WL 3101809, at *12. "The doctrine of the law of the case dictates that when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the litigation." *Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074, 1086 (3d Cir. 1995) (internal citation and quotation marks omitted). After an issue has been decided, parties cannot seek to re-litigate that issue in the same case. *In re Martin's Aquarium, Inc.*, 98 F. App'x 911, 913 (3d Cir. 2004).

12. In the July 25 Opinion, the Court expressly held that the Obligations could not be collapsed into one transaction because the Plaintiff failed to sufficiently allege that the Bank had actual or constructive knowledge of the wrongful purpose of the purported fraudulent transactions. *In re Syntax-Brillian Corp.*, 2011 WL 3101809, at *12. The Third Circuit did not disturb this conclusion. *In re Syntax-Brillian Corp.*, 573 F. App'x at 160. The Third Circuit declined to address whether

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[3] The Plaintiff also argues that the Ponzi scheme presumption applies such that the Debtors' actual intent to hinder, delay, or defraud can be inferred from its active participation in a Ponzi scheme. *See generally In re DBSI, Inc.*, 477 B.R. 504, 510 (Bankr. D. Del. 2012). It is unnecessary to consider whether the presumption applies because, as will be discussed, the Court holds that the Plaintiff has sufficiently pled a claim under section 548(a)(1)(A) and 6 Del. Code § 1304(a)(1).

[4] The Third Circuit recognizes three exceptions to the law of the case doctrine. *In re AmeriServe Food Distribution, Inc.*, 315 B.R. 24, 36 (Bankr. D. Del. 2004). None of these exceptions apply to the matter before the Court.

the Court correctly applied the collapsing doctrine because the Plaintiff prevailed in arguing that its fraudulent transfer claims only require evidence of the Debtors' intent.[5] *Id.* ("Because we find that the Trust prevails on its first argument, we need not reach its alternative argument regarding the requirements for the equitable tool of collapsing."). Therefore, the Plaintiff is bound by the Court's previous decision rejecting the collapsing doctrine in this case.

13. The Bank requests dismissal of the First Amended Complaint on grounds that it gave value in good faith within the meaning of Bankruptcy Code section 548(c). At this juncture, the Court will not consider whether the affirmative defense embodied in section 548(c) applies.[6] A plaintiff asserting a claim under 548(a)(1)(A) does not have to allege that the transferee lacked good faith. *In re Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 317, 331 (Bankr. S.D.N.Y. 2011) ("[A] defendant's good faith need not be negated by the Trustee in the Complaint.") (internal citation omitted); *In re Bayou Grp.*, LLC, 362 B.R. 624, 631 (Bankr. S.D.N.Y. 2007) ("[L]ack of good faith is not an element of a plaintiff's claim under Section 548(a)(1)."). Section 548(c) is an affirmative defense, and therefore the burden is on the defendant-transferee to plead and establish facts to prove the defense. *Silverman v. Actrade Capital, Inc. (In re Actrade Fin. Techs. Ltd.)*, 337 B.R. 791, 805 (Bankr. S.D.N.Y. 2005). But that burden does not shift to the transferee until the plaintiff meets the evidentiary burden of proving a prima facie case. Accordingly, the Court declines to consider the merits of the Bank's good faith defense under section 548(c) at this stage. *E.g., In re Dreier LLP*, 452 B.R. 391, 401 (Bankr. S.D.N.Y. 2011) (refusing to consider an affirmative defense under 548(c) at the motion to dismiss stage); *see also In re Opus E., L.L.C.*, 480 B.R. 561, 572 (Bankr. D. Del. 2012).

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[5] The Third Circuit also explicitly declined to reach the question of whether the Plaintiff must allege that the Bank knew or should have known of the fraudulent nature of the alleged fraudulent conveyances to invoke the collapsing doctrine. *In re Syntax-Brillian Corp.*, 573 F. App'x at 160 n.8.

[6] 11 U.S.C. § 548(c) ("[A] transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.").

A. Standard for Dismissal under Rule 12(b)(6) when Rule 9(b) Applies

14. Federal Rule of Civil Procedure 12(b)(6), made applicable to the Proceeding by Fed. R. Bankr. P. 7012, provides that a court may dismiss a complaint "for failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993).

15. The Third Circuit instructs courts to conduct a two-part analysis when presented with a Rule 12(b)(6) motion to dismiss. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, courts are to separate the factual and legal elements of the claims and accept all well-pleaded facts as true. *Id.* Second, courts are to "determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief." *Id.* at 211 (internal citation omitted).

16. To survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). 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." *Id.* Determining plausibility will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

17. Federal Rule of Civil Procedure 9(b), made applicable to the Proceeding by Fed. R. Bankr. P. 7009, governs the pleading of intentional fraudulent conveyance claims. It provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "In order to satisfy Rule 9(b), plaintiffs must plead with particularity the circumstances of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Lum v. Bank of Am.*, 361 F.3d 217, 223–24 (3d Cir. 2004) (internal citation and quotation marks omitted), *abrogated in part on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

18. In bankruptcy, the heightened pleading standard under Rule 9(b) is "relaxed and interpreted liberally where a trustee, or a trust formed for the benefit of creditors, . . . is asserting the fraudulent transfer claims."

Official Comm. of Unsecured Creditors of Fedders N. Am., Inc. v. Goldman Sachs Credit Partners (In re Fedders N. Am., Inc.), 405 B.R. 527, 544 (Bankr. D. Del. 2009); *In re Saba Enterprises, Inc.*, 421 B.R. 626, 640 (Bankr. S.D.N.Y. 2009).

B. Actual Intent to Hinder, Delay, or Defraud under Section 548(a)(1)(A) and 6 Del. Code § 1304(a)(1)

19. Both Bankruptcy Code section 548(a)(1)(A)[7] and 6 Del. Code § 1304(a)(1)[8] focus on whether a transfer was made, or an obligation was incurred, with the actual intent to "hinder, delay, or defraud" the debtor's creditors. *In re Syntax-Brillian Corp.*, 573 F. App'x at 161-62 ("[S]ection 548(a)(1)(A) and 6 Del. Code § 1304 unambiguously focus solely on the intent of the debtor."). Both statutes are set out in the disjunctive, and "a showing of any one of the three requisite states of mind—the intent to hinder, the intent to delay, or the intent to defraud—is sufficient to establish the intent element." *In re Stanton*, 457 B.R. 80, 93 (Bankr. D. Nev. 2011). Because direct evidence of intent is typically unavailable, plaintiffs may demonstrate intent circumstantially with the well-known "badges of fraud." *In re Fedders N. Am., Inc.*, 405 B.R. 527, 545 (Bankr. D. Del. 2009). Badges of fraud are circumstances so commonly associated "with fraudulent transfers that their presence gives rise to an inference of intent." *In re Sharp Int'l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005).

20. The badges of fraud that courts often consult include, but are not limited to: (1) the relationship between the debtor and the transferee; (2) consideration for the conveyance; (3) insolvency or indebtedness of the debtors; (4) how much of the debtor's estate was transferred; (5) reservation of benefits, control or dominion by the debtor over the property transferred; and (6) secrecy or concealment of the transaction. *In re Hechinger Inv. Co. of Del, Inc.*, 327 B.R. 537, 550 (D. Del. 2005), *aff'd*, *In re Hechinger Inv. Co. of Del., Inc.*, 278 F. App'x 125 (3d Cir. 2008). The

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[7] Section 548(a)(1)(A) provides that a "trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became ... indebted . . . ."

[8] 6 Del. Code § 1304(a)(1) states that "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . ."

presence or absence of any single badge of fraud is not conclusive. *In re Hill*, 342 B.R. 183, 197 (Bankr. D.N.J. 2006). "The proper inquiry is whether the badges of fraud are present, not whether some factors are absent." *Id.* (internal citation omitted); *see In re Lehman Bros. Holdings Inc.*, 469 B.R. 415, 448 (Bankr. S.D.N.Y. 2012).

21. The badges-of-fraud analysis is not a check-the-box inquiry, and a court may consider other factors relevant to the alleged fraudulent transaction. *E.g., Ritchie Capital Mgmt., LLC v. Stoebner (In re Polaroid Corp.)*, 779 F.3d 857, 863 (8th Cir. 2015) ("Courts may consider any factors they deem relevant to the issue of fraudulent intent . . . ."); *In re Tribune Co.*, 464 B.R. 126, 162 (Bankr. D. Del. 2011) ("A court may, of course, consider factors other than the traditional badges of fraud in an analysis of fraudulent intent."). While the badges of fraud provide a basic rubric, courts examine the totality of the circumstances to determine whether fraudulent intent exists. *See Max Sugarman Funeral Home, Inc. v. A.D.B. Inv'rs*, 926 F.2d 1248, 1254 (1st Cir. 1991); *In re Adler, Coleman Clearing Corp.*, 247 B.R. 51, 86 n.52 (Bankr. S.D.N.Y. 1999), *aff'd*, 263 B.R. 406 (S.D.N.Y. 2001).

1. Count I: Avoidance of the Obligations

22. The Bank asserts that the Plaintiff has not sufficiently alleged a claim under section 548(a)(1)(A) and 6 Del. Code § 1304 because the First Amended Complaint lacks direct evidence of fraud, and with the exception of insolvency, the presence of any badges of fraud. With such lack of circumstantial evidence, the Court cannot infer that the Obligations were incurred with the actual intent to hinder, delay, or defraud the Debtors' creditors. The Bank also argues that the Obligations cannot be fraudulent conveyances because those obligations and the funding of the proceeds into the Debtors' bank accounts could not, in and of themselves, cause damage to the Debtors' creditors.

23. In response, the Plaintiff contends that the First Amended Complaint contains sufficient allegations to show that the Debtors knew to a substantial certainty that incurring the Obligations would have the consequence of hindering, delaying, or defrauding its creditors. The Plaintiff emphasizes that an intent to delay, an intent to hinder, *or* an intent to defraud qualifies under section 548(A)(1)(A). The Plaintiff asserts that the Kolin Faction's knowledge of the inevitable harm that would befall the creditor body can be imputed to the Debtors because many of the members of the Kolin Faction served as directors and officers of the Debtors.

24. The gravamen of Count I is that the Obligations were incurred to prolong the Kolin Faction's fraudulent scheme and to continue an unsustainable enterprise that was inevitably doomed to fail. The Plaintiff supports this assertion with the following allegations: the Kolin Faction had the power to cause the Debtors to enter into the Obligations; at all relevant times, the Debtors purposefully sold products at a loss to "prop up" Kolin; the Debtors were insolvent at the time the Obligations were incurred; the Kolin Faction generated fake "credit memos" that purported to represent various credits that Kolin gave the Debtors; the amount of the fake credit memos were substantial—in fiscal year 2006 and 2007 the Debtors recorded in excess of $85 million and $140 respectively; the fake credit memos enabled the Debtors to continue an unsustainable enterprise; Syntax was significantly overpaying Kolin for the televisions that Syntax imported and sold; and the Kolin Faction significantly benefitted from the Debtors under-cost selling. The Plaintiff also stresses that the chief components of the Kolin Faction's prodigious fraud include the Kolin Faction causing the generation of over 100 fake "credit memos" that represented various credits Kolin gave the Debtors, the Debtors to record over $400 million in fake sales to SCHOT, and the creation of fake invoices from Kolin to SBC for Kolin's fictitious purchase of "tooling" for plastic molds. The Court accepts as true all of these allegations. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008).

25. Critical to the Plaintiff's position is the overlap of management between Kolin and the Debtors. Several of the Debtors' officers and directors were officers, directors, and shareholders of Kolin: James Li was on SBC's Board of Directors and was also at relevant times its President, Chief Operating Officer, and Chief Executive Officer; Thomas Chow was a Director of SBC, its Chief Financial Officer, and Chief Procurement Officer; Christopher Liu was Kolin's Chairman of the Board and a Director of SBC; Roger Kao was Kolin's Vice President and served as a Director of Syntax; Alice Phang was SBC's Controller.[9] *In re Syntax-Brillian Corp.*, 2013 WL 153831, at *1 n.6.

26. The Court can reasonably infer based on the relative positions of the Kolin Faction members within the Debtors' organization that they had the power to cause the Debtors to incur the Obligations. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003) ("[We] draw all reasonable inferences from such allegations in favor of the

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[9] As noted in both the Court's memorandum opinions, the members of the "Kolin Faction" are Li, Chow, Liu, Kao, and Phang.

complainant."). The Court will impute the intent of these individuals to incur the Obligations to the Debtors.[10] *E.g., Schnelling v. Crawford (In re James River Coal Co.)*, 360 B.R. 139, 161-62 (Bankr. E.D. Va. 2007) ("[F]or the purpose of recovering impermissibly transferred corporate assets and thereby facilitating creditor recovery, the intent of the officers and directors may be imputed to the corporation."); *In re Nat'l Audit Def. Network*, 367 B.R. 207, 220 (Bankr. D. Nev. 2007) (same).

27. The Debtors' operations depended on receiving money from the Obligations; without this liquidity the Debtors could not sustain their under-cost selling to Kolin. When the Obligations were incurred, the Debtors had negative operating income and negative gross margins. While obtaining liquidity under such circumstances might be a reasonable way to effectuate a turnaround plan or other related business decision, the Obligations were incurred at a time when the Kolin Faction was in the midst of generating fake credit memos and recording fake sales to SCHOT. The Kolin Faction would also be incentivized to cause the Debtors to incur the Obligations because they benefited from the Debtors continued operations as they were directors, officers, and shareholders of Kolin.

28. The Debtors are presumed to intend the natural consequences of their acts. *In re Sentinel Mgmt. Grp., Inc.*, 728 F.3d 660, 667 (7th Cir. 2013). And the natural consequence of incurring the Obligations—which were primarily secured obligations—under the circumstances described above would, at a minimum, delay or hinder distributions to the creditor body. *See In re Tribune Co.*, 464 B.R. at 161 ("If the natural consequence of a debtor's actions is that its creditors were hindered, delayed or defrauded, a court is more likely to find that an intentional fraudulent transfer occurred."). The delay of payment to creditors was substantially certain to occur when the Debtors incurred the Obligations at a time when they were purposefully concealing massive losses. *See In re Tronox Inc.*, 503 B.R. 239, 279-80 (Bankr. S.D.N.Y. 2013) (observing that "actual intent" is satisfied when the consequences of an act

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[10] The Court is cognizant that there may be a dispute as to whether members of the Kolin Faction had sufficient authority within the Debtors' organization such that their intent can be imputed to the Debtors. *See In re Pers. & Bus. Ins. Agency*, 334 F.3d 239, 242 (3d Cir. 2003) (discussing the circumstances upon which the fraud of an officer or director can be imputed to a corporation). The Court construes the First Amended Complaint in a light most favorable to the Plaintiff and draws all reasonable inferences in favor of the Plaintiff; as such, at this stage, the acts of the Kolin Faction will be attributable to the Debtors.

are substantially certain to result from it). Furthermore, the Debtors were insolvent at the time the Obligations were incurred. The presence of this badge of fraud, along with viewing the incurrence of the Obligations under the totality of the circumstances, the Court finds that the factual pleadings allow the Court to draw the reasonable inference that the Debtors incurred the Obligations with the actual intent to delay, hinder, or defraud within the meaning of both section 548(a)(1)(A) and 6 Del. Code § 1304.[11] Thus, the Court holds that the Plaintiff plausibly states a claim upon which relief can be granted in Count I.

2. Count II: Avoidance of the Transfers

29. The Bank requests dismissal of Count II on grounds that the Transfers represent payments towards fully secured obligations. The Transfers resulted in a dollar-for-dollar reduction in the Debtors' liability and therefore did not put assets otherwise available in a bankruptcy distribution outside the reach of creditors. The Bank reasons that the Transfers cannot constitute fraudulent transfers because they represent repayments of fully secured debt that resulted in the Bank releasing its security interest in the Debtors' assets; as such, the Transfers did not deplete or diminish the value of assets available to creditors.

30. The Plaintiff's avoidance of the Transfers is predicated on the successful avoidance of the Obligations. Count I seeks to avoid the Obligation; while Count II seeks to avoid the Transfers, which are the repayment of the Obligations. The Court accepts as true the allegations regarding the Bank obtaining a valid security interests under applicable nonbankruptcy law at the time the Obligations arose.[12]

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[11] The Plaintiff supports Count I with details regarding the date, time, and amount of each individual obligation. *See In re Aphton Corp.*, 423 B.R. 76, 87 (Bankr. D. Del. 2010) ("[T]he Court must decide whether the Complaint meets the heightened pleading standards of Rule 9(b). Allegations of 'date, place or time' fulfill the function of Rule 9(b) by placing the defendants on notice of the precise misconduct with which they are charged.") (internal citation omitted).

[12] The Plaintiff disputes that the Kolin Secured Line Obligations was secured by assets of the Debtors. The Plaintiff argues that without a security interest in any of the Debtors' assets, payments on the Kolin Secured Line Obligations could not reduce a secured obligation as to the Debtors, but rather constituted a payment of funds that could otherwise have been available to the Debtors' creditors. Regardless if the Kolin Secured Line Obligations were secured with assets other than the Debtors, because the Kolin Secured Line Obligation is one of the obligations the Debtors seek to avoid in Count I and could still potentially be avoided given that the Court declines to dismiss Count I, any

31. If the Plaintiff ultimately prevails on Count I and avoids the Obligations, by operation of law the security interests created are retroactively nullified and the Bank's otherwise enforceable security interests are rendered ineffective. 10 *Collier on Bankruptcy* ¶ 548.10[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2015) ("If the trustee avoids an obligation, nullification means that the transferee acquired no rights as a result of the transaction and that the trustee need not consider the obligation valid as against the estate."); *see Roswell Capital Partners LLC v. Alternative Const. Techs.*, No. 08 CIV. 10647 DLC, 2010 WL 3452378, at *6 (S.D.N.Y. Sept. 1, 2010) ("[A] valid security interest depends on the continuing existence of an 'obligation.' Where the underlying debt has been extinguished, a security interest is no longer enforceable."). However, if the Court ultimately concludes that the Obligations were not fraudulently incurred, then their repayment does not harm creditors because the Transfers were made on account of a valid and binding obligation. *E.g., In re First All. Mortgage Co.*, 471 F.3d 977, 1008 (9th Cir. 2006) (noting that payment to a "fully secured creditor does not hinder, delay or defraud creditors because it does not put assets otherwise available in bankruptcy distribution out of their reach"); *In re Propex, Inc.*, 415 B.R. 321, 324 (Bankr. E.D. Tenn. 2009) (holding that payments made on account of an antecedent debt is as a matter of law, a transfer made for reasonably equivalent value). Because the Court declines to dismiss Count I, Count II cannot be dismissed at this stage.

3. Count III: Recovery of the Transfers under 11 U.S.C. § 550

32. The Plaintiff avers that that the Bank received the Transfers and was an initial transferee under 11 U.S.C. § 550(a)(1).[13] The Bank does not dispute that it was the initial transferee. The Court finds that the First Amendment Complaint sufficiently alleges that the Bank was an initial transferee of the Transfers. Because the Court holds that Count II survives, Count III must also survive because it provides the mechanism

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repayment on such obligation could also be avoided in the event the Plaintiff prevails on Count I.

[13] 11 U.S.C. § 550(a)(1) ("[T]o the extent that a transfer is avoided under . . . [section] 548 . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—(1) the initial transferee of such transfer . . . .").

for the Plaintiff to recover the value of property transferred in the event it successfully avoids the Transfers.

Accordingly, it is hereby

ORDERED, that the Motion to Dismiss [Adv. Docket No. 105] is DENIED; and it is further

ORDERED, that counsel shall confer and promptly contact the Court to schedule a status conference to address further proceedings in this Proceeding.

BY THE COURT:

Dated: February 8, 2016
Wilmington, Delaware

Brendan Linehan Shannon
Chief United States Bankruptcy Judge