IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 7
UNITED TAX GROUP, LLC,	Case No. 14-10486 (LSS)
Debtor.	
GEORGE L. MILLER, Chapter 7 Trustee,	
Plaintiff,	Adv. Pro. No. 16-50088 (LSS)
v.	
EDWARD WELKE AND JOHN DOES 1–100,	Re: Adv. Docket Nos. 41, 42, 43, 44, 45, 46, 47, 48
Defendants.	

MEMORANDUM ORDER GRANTING CROSS-MOTION TO AMEND
AND
DENYING MOTION TO DISMISS

This matter comes before the Court on consideration of George L. Miller, Chapter 7 Trustee's amended complaint ("Amended Complaint").[1] Defendant Edward Welke filed a motion to dismiss the Amended Complaint ("Motion to Dismiss"),[2] and the Trustee filed a cross-motion for leave to file a second amended complaint ("Cross-Motion to Amend").[3]

[1] Amended Complaint of George L. Miller, Chapter 7 Trustee, Against Edward Welke and John Does 1–100 Pursuant to 11 U.S.C. §§ 547 and 550, Federal Rule of Bankruptcy Procedure 7001, and Applicable Law ("Amended Complaint"), Apr. 17, 2017, ECF No. 41.
[2] Defendant Edward Welke's Motion to Dismiss Amended Complaint ("Motion to Dismiss"), May 8, 2017, ECF No. 42.
[3] Trustee's Cross-Motion for Leave to File Second Amended Complaint ("Cross-Motion to Amend"), May 22, 2017, ECF No. 43.

Jurisdiction

The Court has subject matter jurisdiction over this adversary proceeding.[4] Venue in this District is proper.[5] Notwithstanding Federal Rules of Bankruptcy Procedure 7008 and 7012, neither party makes a statement in their respective pleadings that the proceeding is core or not core. As a preference action is an enumerated core proceeding,[6] and neither party has asserted this proceeding is not core, the Court will treat it as such. Further, this is not a final order so constitutional concerns are not implicated.

Background

1. On March 5, 2014, United Tax Group, LLC ("Debtor") filed a voluntary petition under chapter 7 of the United States Bankruptcy Code. George L. Miller was appointed as the trustee ("Trustee").

2. On March 3, 2016, the Trustee filed a complaint ("Complaint") commencing the above captioned adversary proceeding against Welke and John Does 1–100.[7] The Trustee sought to recover a series of transfers made by the Debtor under preference and constructive fraudulent transfer theories. Welke answered the Complaint on April 14, 2016, generally denying all claims and raising multiple defenses.[8]

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[4] 28 U.S.C. §§ 157 and 1334.
[5] *Id.* §§ 1408 and 1409.
[6] *Id.* § 157(b)(2)(F).
[7] Complaint of George L. Miller, Chapter 7 Trustee, Against Edward Welke and John Does 1–100 Pursuant to 11 U.S.C. §§ 547 and 550, Federal Rule of Bankruptcy Procedure 7001, and Applicable Law, Mar. 3, 2016, ECF No. 1.
[8] Defendant Edward Welke's Answer and Affirmative Defenses, Apr. 14, 2016, ECF No. 5.

3. On May 5, 2016, Welke moved for judgment on the pleadings.[9] By Order dated December 13, 2016, the Complaint was dismissed without prejudice, but with leave to amend.[10]

4. On April 14, 2017, the Trustee filed the Amended Complaint, alleging that between March 11 and October 1, 2013, the Debtor paid $255,328.91 to American Express Bank, FSB in satisfaction of repayment obligations Welke owed on a credit card account with American Express.

5. The Amended Complaint sounds in two counts, a preference claim under 11 U.S.C. § 547(b) seeking to avoid the transfers from the Debtor to American Express, and a § 550 recovery claim. The fraudulent conveyance claims have been eliminated.

6. On May 8, 2017, Welke filed the Motion to Dismiss. Welke asserts that the Amended Complaint should be dismissed because the Trustee fails to plead the elements of a voidable transfer in that he (i) did not adequately plead an antecedent debt; (ii) did not properly allege that Welke is an insider (statutory or non-statutory); and (iii) failed to adequately plead insolvency.

7. In response, on May 22, 2017, the Trustee filed his Cross-Motion to Amend. The Trustee's accompanying brief[11] has attached to it a proposed second amended

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[9] Defendant Edward Welke's Motion for Judgment on the Pleadings, May 5, 2016, ECF No. 6.
[10] *Miller v. Welke (In re United Tax Grp., LLC)*, Case No. 14-10486 (LSS), Adv No. 16-50099, 2016 WL 7235622 (Bankr. D. Del. Dec. 13, 2016); Order, Dec. 13, 2016, ECF No. 23. Welke appealed the Order, asserting that the Court erred in granting leave to replead in an amended complaint. Welke's appeal was dismissed on January 11, 2018. *See* Memorandum, Jan. 11, 2018, ECF No. 49; Order, Jan. 11, 2018, ECF No. 50.
[11] Brief of George L. Miller, Chapter 7 Trustee, in Response to Motion to Dismiss Amended Complaint and in Support of Cross-Motion for Leave to File Second Amended Complaint ("Response and Opening Brief") 9, May 22, 2017, ECF No. 44.

complaint ("Proposed Second Amended Complaint")[12] adding additional factual allegations regarding solvency, insider status, and the nature of the antecedent debt.

8. The Court will first address the Cross-Motion to Amend. The Court will then address the Motion to Dismiss as if directed at the Proposed Second Amended Complaint.[13]

I. Cross-Motion to Amend

9. Courts have discretion to grant or deny motions for leave to amend.[14] Federal Rule of Civil Procedure 15(a)(2)[15] provides, "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." Notwithstanding the liberal view toward amendments, grounds that can justify denial of leave to amend include undue delay, bad faith, a dilatory motive, undue prejudice, futility, and repeated failure to cure deficiencies by previously allowed amendments.[16]

10. Welke objects to the Cross-Motion to Amend, arguing that the proposed second amendment is futile. Welke also asserts that the Cross-Motion to Amend was brought in bad faith.

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[12] Cross-Motion to Amend Ex. B ("Proposed Second Amended Complaint").

[13] *See Sunset Fin. Res., Inc. v. Redevelopment Grp. V, LLC*, 417 F. Supp. 2d 632, 642 n.15 (D.N.J. 2006): "Once an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading." 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2005). However, a defendant "should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending." *Id.* Rather, "[i]f some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading." *Id. citing* [*Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 641 n.1 (E.D. Pa. 1999)]; *Sun Co. v. Badger Design & Constructors, Inc.*, 939 F.Supp. 365, 367 n. 3 (E.D.Pa.1996).

[14] *Foman v. Davis,* 371 U.S. 178, 182 (1962).

[15] Incorporated by reference in FED. R. BANKR. P. 7015.

[16] *Forman*, 371 U.S. at 182.

11. To permit an amended complaint to be filed is futile if it would fail to state a claim upon which relief can be granted.[17] In addressing futility, courts apply the same legal sufficiency standard as applies under Federal Rule of Civil Procedure 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim [for] relief that is plausible on its face.'"[18] It is insufficient to provide "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ."[19] Here, the Trustee must plead sufficient facts to place Welke on notice of the grounds on which the Trustee's claims rest to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a).[20]

12. To state a preference claim, the Trustee must allege facts that, if true, would establish: (1) a transfer of an interest of the debtor in property; (2) that was made to or for the benefit of a creditor of the debtor; (3) that was made on account of an antecedent debt; (4) that was made while the debtor was insolvent; (5) that was made either within 90 days of the petition date or if the creditor was an insider within one year of the petition date; and (6) that the transfer enabled the creditor to receive more than the creditor would have received in a chapter 7 liquidation.[21]

13. Welke contends that permitting the Proposed Second Amended Complaint to be filed would be futile because the additional factual allegations still fail to adequately

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[17] *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996)).
[18] *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly,* 550 U.S. 544, 570 (2007)).
[19] *Iqbal,* 556 U.S. at 678 (citing *Twombly,* 550 U.S. at 555)).
[20] Incorporated by reference in FED. R. BANKR. P. 7008; *Twombly*, 550 U.S. at 545 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957).
[21] 11 U.S.C. § 547(b).

plead both insolvency[22] and Welke's insider status.[23] As such, it, too, would not survive a motion to dismiss.

The Debtor's Insolvency

14. Regarding insolvency, in the Proposed Second Amended Complaint the Trustee avers:

> The Debtor's records, including the Debtor's tax returns, suggest that the Debtor was insolvent on a "balance sheet" basis at the beginning and end of calendar year(s) 2012.
>
> Various financial statements produced by SWZ for periods in 2012/early 2013 show negative members' equity, with the amount of liabilities exceeding the amount of assets (i) at the time the SWZ loan was made and (ii) more than six (6) months after the SWZ loan was made.
>
> Based upon information and belief, including the facts that (i) the Debtor allegedly defaulted under its loan agreement with SWZ and (ii) that SWZ ultimately foreclosed upon the Debtor's assets and took possession of same, the Debtor's balance sheet showed negative members' equity, and the Debtor was insolvent, at all times during the year prior to the Petition Date.[24]

15. The transfers the Trustee seeks to avoid were between March 11 and October 1, 2013.[25] Welke argues that the Trustee's allegations regarding insolvency either predate the first transfer, or alternatively postdate the last transfer, and thus do not sufficiently plead insolvency on the date of any of the transfers.[26] Welke additionally argues that, taken individually, none of the Trustee's allegations sufficiently plead insolvency.[27]

16. The Trustee replies that the allegations, read together, are sufficient:

> [A]s part of a timeline—the Debtor's representations in its 2012 tax returns; the Debtor's financial statements during late 2012/early 2013; and the Debtor's ultimate

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[22] Defendant Edward Welke's Objection to Trustee's Cross-Motion for Leave to File Second Amended Complaint ("Objection to Amendment") 3, June 6, 2017, ECF No. 46.
[23] *Id.* at 6.
[24] Proposed Second Amended Complaint ¶¶ 24–26.
[25] *Id.* ¶ 13.
[26] Objection to Amendment 4–5.
[27] *Id.* at 3–6.

> demise by way of foreclosure at the hands of SWZ and, subsequently, bankruptcy—the averments provide a sufficient basis for this Court to permit the Trustee to introduce evidence of the Debtor's insolvency.[28]

The Trustee also contends that his allegations are in line with those deemed sufficient in other cases, and likens his pleadings to those found in *Official Committee of Unsecured Creditors v. DVI Business Credit, Inc. (In re DVI Business Credit, Inc.).*[29] The *DVI* Court found that the plaintiff had sufficiently pled insolvency by alleging "that REC III did not have sufficient assets to provide equity to DVI BC, that REC III did not have sufficient capital to contribute to the Cash Collateral Accounts as required, and that payments to the Noteholders were made while REC III was insolvent."[30]

17. Welke cites no case law for the proposition that each allegation must be read individually, and, this notion appears counter to the admonition that on a motion to dismiss, the Court must take *all allegations* in a complaint as true. While the Trustee did not cite any authority for the proposition that the allegations must be read together, in *DVI*, the court considered the *collective weight* of the allegations to find the complaint would survive a motion to dismiss.[31]

18. Further, the notion of establishing a timeline to support insolvency is not entirely foreign. In *In re Winstar Communications, Inc.*, Judge Walrath acknowledged a method—commonly referred to as retrojection—by which a trustee may meet his burden of

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[28] Reply Brief of George L. Miller, Chapter 7 Trustee, in Support of Cross-Motion for Leave to File Second Amended Complaint ("Reply to Amendment") 2, June 13, 2017, ECF No. 47.
[29] *Official Committee of Unsecured Creditors v. DVI Business Credit, Inc. (In re DVI Business Credit, Inc.),* 326 B.R. 301 (Bankr. D. Del. 2005).
[30] *Id.* at 307.
[31] *Id.*

proof on insolvency using a timeline theory.[32] Retrojection requires a showing that the debtor was insolvent as of the dates of the first and last alleged transfer, "accompanied by proof that the debtor's financial situation did not change materially during the intervening period."[33] Recognizing that there will not always be financial records available on a specific date, the court can look to a "reasonable time" prior to or subsequent to the alleged transfer to establish insolvency.[34]

19. Taken together, accepting allegations in the Amended Complaint as true, the allegations in the Proposed Second Amended Complaint sufficiently plead insolvency. The Trustee alleges: (i) balance sheet insolvency as of December 31, 2012, which is three months before the first transfer; (ii) negative members' equity in early 2013, which timeframe could include, at least, transfers made in March, 2013;[35] and (iii) allegations that the Debtor was in default on the SWZ note and the ultimate foreclosure on all of the Debtor's assets, which suggests that the Debtor may have been unable to satisfy creditors' claims in this period of time, which spans from August to November 2013.[36] The Court is unwilling at this time to say these data points are sufficiently close to the transfers such that retrojection is an

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[32] *Shubert v. Lucent Tech. Inc. (In re Winstar Commc'ns, Inc.)*, 348 B.R. 234, 276 (Bankr. D. Del. 2005), *aff'd*, No. 01 01063 KJC, 2007 WL 1232185 (D. Del. Apr. 26, 2007), *aff'd in part, modified in part*, 554 F.3d 382 (3d Cir. 2009).

[33] *Id.* (quoting *In re Indus. Commercial Elec., Inc. v. Babineau (In re Indus. Commercial Elec., Inc.),* No. 02-45451-JBR, 2004 WL 1354530, *7 (Bankr. D. Mass. Apr. 27, 2004).

[34] *Id.* (quoting *Indus. Commercial Elec., Inc.*, 2004 WL 1354530 at *7).

[35] Information derived from a debtor's financial statements can provide a basis for a legally sufficient factual averment of insolvency for purposes of a motion to dismiss. *See Charys Liquidating Tr. v. McMahan Sec. Co., L.P. (In re Charys Holding Co., Inc.)*, 443 B.R. 628, 636 (Bankr. D. Del. 2010) (finding sufficient allegations of insolvency from information contained in the debtor's balance sheets, as explained by accompanying going-concern opinions).

[36] Although the Proposed Second Amended Complaint does not aver the specific dates of the default and foreclosure, Welke did not argue the lack of dates as a basis for moving to dismiss the Amended Complaint. Further, in his objection, Welke acknowledges a default at November 4, 2013, only thirty-four days after the last transfer, and states that the Debtor started making partial payments on the loan in August 2013. Objection to Amendment 4.

appropriate method in this case or will be successful with respect to all transfers. But, drawing all reasonable inferences in favor of the Trustee, they could be. Further, it is possible that, through discovery, additional data points along this timeline will be found to support insolvency on some or all of the relevant dates. The Court, therefore, cannot conclude that the Trustee can prove no set of facts in support of his contention of insolvency.[37]

20. A court's inquiry into futility, and therefore whether a complaint would survive a Rule 12(b)(6) motion to dismiss, is not determining "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[38] Here, on the facts as alleged in the Proposed Second Amended Complaint, the Trustee sufficiently alleges insolvency for purposes of surviving a motion to dismiss. The Cross-Motion to Amend, therefore, is not futile on this ground.

Welke's Status as an Insider

21. Because the transfers all took place more than 90 days prepetition, the Trustee may only seek avoidance of the transfers if Welke was an insider of the Debtor at the time of the transfers.[39]

22. The Proposed Second Amended Complaint contains numerous allegations regarding Welke's involvement with the Debtor. Initially, in his Amended Complaint, the Trustee alleged:

> The Statement of Corporate Ownership attached to the petition which initiated the Debtor's case indicates that, as of the Petition Date, Allerand owned 100% of the Debtor's capital interest and 90.01% of the Debtor's profit interest. The Statement of Corporate Ownership also indicates that an entity

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[37] *DVI*, 326 B.R. at 307.
[38] *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), abrogated on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800, 814–15, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).
[39] 11 U.S.C. § 547(b)(4)(B).

titled "ECW Investco, LLC" held the balance (9.99%) of the Debtor's profit interest as of the Petition Date.

Based upon information and belief, during the two-year period prior to the Petition Date, Welke was a direct or indirect investor in, and creditor of, the Debtor.

Per testimony of Richard J. Sabella ("Sabella"), the manager of Allerand, at the Meeting of Creditors (defined below), SWZ Financial II, LLC ("SWZ") is an entity that is 50% owned by Allerand (the Debtor's managing member)) and 50% owned by another entity owned and/or controlled by Sabella.[40]

Based upon information and belief, at the time each of the Transfers was made, Welke was an "insider" as that term is defined in section 101(31) of the Bankruptcy Code.[41]

23. The Trustee now supplements his allegations in the Proposed Second Amended Complaint as follows:

> Based upon information and belief, at the time each of the Transfers was made, Welke was an "insider" as that term is defined in section 101(31) of the Bankruptcy Code. Specifically, the Trustee notes the following connections in alleging Welke's insider status:
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> - Welke testified at his deposition in this case (held on May 26, 2016) that he reported to Allerand, LLC and that the company employees knew "that he [Welke] was part of the ownership structure." All communications from the Debtor's management to "the ownership structure" were made to either Welke or Richard Sabella.
> - Welke signed the Debtor's Certificate of Formation that was lodged with the Delaware Secretary of State.
> - Through ECW Investco, LLC ("ECW"), Welke holds a 9.99% profits interest in the Debtor;
> - Allerand, LLC, the Debtor's managing member, is owned by Richard Sabella (Allerand's managing member and Welke's business partner) and his spouse;
> - ECW, Allerand, LLC, Welke and Sabella (among other entities) are together referred to as the "Allerand Persons" in the Debtor's Second Amended and Restated Limited Liability Company Operating Agreement

[40] Amended Complaint ¶ 7–9.
[41] *Id.* at ¶ 21.

for purposes of regulating distributions to the "Allerand Persons" from the Debtor (and, by extension, protecting certain of the Debtor's members who were not "Allerand Persons");

- Through an entity he controls, Welke holds a profits interest in SWZ Financial II, LLC, the Debtor's pre-petition secured lender which is the focus of pending litigation in the above-captioned case.

- Welke and Sabella personally executed a "Recourse Carveout Guaranty" in connection with the SWZ Loan debt.

- Welke and Sabella are the only two (2) persons authorized to act for the Debtor in transactions with SWZ under the "Certificate of Incumbency and Borrowing Resolution" incident to the SWZ Loan.

- Welke was authorized to sign, and in fact signed, various corporate/transactional documents on the Debtor's behalf, including (i) agreements related to insurance coverage and (ii) documents ancillary to the SWZ Loan.

- Allerand Capital, LLC, the Delaware-domiciled entity in which Welke is a principal in (and a co-founder of), was party to a management agreement with the Debtor. The other two co-founders of Allerand Capital are Gary Zentner (who signed the SWZ Loan documents on SWZ's behalf) and Sabella.[42]

24. Welke argues that he is neither a statutory insider of the Debtor (as defined by 11 U.S.C. § 101(31)), nor a non-statutory insider of the Debtor.[43] Welke contends that because the Trustee fails to allege a necessary element of § 547, the Trustee fails to state a claim upon which relief can be granted, rendering the proposed amendment futile.

25. The Trustee contends that Welke is an insider of an affiliate and therefore, under § 101(31)(E), an insider of the Debtor. His logic is that Allerand Capital, LLC is an affiliate of the Debtor because it operates the Debtor's business under an operating

[42] Proposed Second Amended Complaint ¶ 23.
[43] Objection to Amendment 6.

agreement (§ 101(2)(d)) and Welke is an insider of the Allerand Capital, LLC because it is a founder and principal of that entity.[44] Welke does not respond to this contention.

26. Further, the Trustee contends that Welke is a non-statutory insider. Welke spends significant time in his objection arguing—on the merits—that he is not. Relying on *In re Opus East, LLC*,[45] he argues that there is no proof that the transfers were not at arms-length, and thus, Welke cannot be an insider.

27. Whether a person is a non-statutory insider is a mixed question of law and fact.[46] In *Opus East*, the Court stated that "Courts focus on three factors to determine if an entity is a non-statutory insider of the debtor: (1) the closeness of the relationship between the transferor and transferee, (2) the degree of influence the transferee exerts over the transferor, and (3) whether the transactions were arms-length."[47] After a trial, the *Opus East* Court concluded that the evidence did not support a finding that one of the defendants was a non-statutory insider because no evidence had been presented of an inordinately close relationship or undue influence over the debtor.

28. The trustee has alleged significant contacts between the Debtor and Welke. Welke is not merely a creditor of the Debtor's. Welke holds a 9.99% profits interest in the Debtor, Welke is authorized to act for the Debtor in certain transactions, he is the co-founder and principal of Allerand Capital, LLC, he is in business relationships with Richard Sabella and the Debtor's employees communicate with management through him. The averments are more than sufficient, at the pleading stage, to allege an insider relationship.

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[44] Although "founder" and "principal" are not words used in the definition of insider, the definition does include "person in control". 11 U.S.C. § 101(31)(E).
[45] *In re Opus East, LLC*, 528 B.R. 30 (Bankr. D. Del. 2015).
[46] *In re Winstar Communications, Inc.*, 554 F.3d 382, 394 (3d Cir. 2009).
[47] *Opus East*, 528 B.R. at 93.

29. Based on the averments in the Proposed Second Amended Complaint, the Court cannot conclude that the Trustee can prove no set of facts in support of his allegations that Welke in an insider.[48] Because the Trustee sufficiently alleges Welke's insider status for purposes of surviving a motion to dismiss, the Cross-Motion to Amend is not futile on this ground.

The Trustee's Bad Faith

30. Inquiries into bad faith require courts to consider the plaintiff's motives for not having amended the complaint sooner.[49] In evaluating whether a motion to amend is brought in bad faith, the scope of the court's inquiry is limited to, "whether the motion to amend *itself* is being made in bad faith, not whether the original complaint was filed in bad faith or whether conduct outside the motion to amend amounts to bad faith."[50]

31. Welke identifies four main reasons for bad faith:[51] (i) the Trustee relies on the Debtor's tax returns in alleging insolvency in bad faith;[52] (ii) the Trustee's new assertions do not support his allegation that Welke is a statutory insider and are asserted in bad faith;[53] (iii) the Trustee cannot allege in good faith that the transactions between the Debtor and Allerand Capital, LLC or SWZ Financial II, LLC were not at arms-length;[54] and (iv) the

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[48] *DVI*, 326 B.R. at 307.

[49] *See Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir. 1984); *J.E. Mamiye & Sons, Inc. v. Fidelity Bank,* 813 F.2d 610, 614 (3d Cir.1987) ("[T]he question ... of bad faith, requires that we focus on the plaintiff's motives for not amending their complaint earlier").

[50] *Trueposition, Inc. v. Allen Telecom, Inc.*, No. CIV.A.01-823 GMS, 2002 WL 1558531, at 2 (D. Del. July 16, 2002).

[51] In addition to articulating four main reasons for bad faith, Welke devotes significant argument impugning the Trustee's conduct in this entire bankruptcy case. The motion to amend is not a time in which the court evaluates the merits of the original complaint or the plaintiff's behavior, generally, in the case. *Miller v. SWZ Financial II, LLC (In re United Tax Group, LLC)*, Case No. 14-10486, Adv. No. 15-50880, 2018 WL 1135496, *7 (Bankr. D. Del. Feb. 28, 2018).

[52] Objection to Amendment 3–4.

[53] *Id.* at 6.

[54] *Id.* at 7–8.

SWZ adversary proceeding[55] lacks merit and both that proceeding and this proceeding were filed in bad faith in hopes of coercing settlements from the respective defendants.[56]

32. The first three reasons advanced by Welke cannot constitute bad faith in light of the Court's rulings that the Proposed Second Amended Complaint sufficiently alleges insolvency and Welke's insider status. The final contention does not address the amendment, but rather the Trustee's conduct in filing the original complaint. This does not support a finding that the Motion to Amend was brought in bad faith.

33. Accordingly, the Court does not find that the Cross-Motion to Amend was filed in bad faith.

34. As the Cross-Motion to Amend is not futile and was not brought in bad faith, and as Rule 15(a)(2) provides that "[t]he court should freely give leave when justice so requires," the Trustee will be allowed to amend the Amended Complaint.

II. Motion to Dismiss Amended Complaint

35. Having already addressed the sufficiency of the Trustee's pleading with regard to insolvency and Welke's status as an insider, thereby resolving certain grounds for dismissal raised in the Motion to Dismiss, Welke's sole remaining ground for dismissal is that the Trustee fails to allege an antecedent debt as required by 11 U.S.C. § 547(b)(2).

36. Neither party has referred the Court to a case addressing sufficiency of pleading for an antecedent debt. Both the Trustee and Welke have referred the Court to

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[55] Complaint of George L. Miller, Chapter 7 Trustee, Against SWZ Financial II, LLC, Tax Help MD Inc., Allerand, LLC, and Richard J. Sabella Pursuant to 11 U.S.C. § 544 and 548, Florida Statutes Title XLI, § 726.105 *et seq.*, Federal Rule o Bankruptcy Procedure 7001, and Applicable Law, June 25, 2015, Case No. 14-1-486, Adv. No. 16-50088, ECF No. 1.

[56] Objection to Amendment 11.

cases discussing resolution on the merits of whether and which debt is antecedent.[57] But, the ultimate merits of the Trustee's allegations are not addressed in the context of a motion to dismiss. The Trustee need only plead sufficient facts to place Welke on notice of the grounds on which the Trustee's claims rest to satisfy the requirements of Rule 8(a).

37. Here, the Trustee has provided Welke with sufficient notice in the Proposed Second Amended Complaint. The Proposed Second Amended Complaint now includes a list of each American Express statement that the Trustee asserts give rise to the antecedent debt.[58] Even if Welke is correct (on the merits) that the underlying charges in each American Express statement, and not the statements themselves, constitute the antecedent debt, Rule 8(a) is satisfied. By identifying the relevant American Express statements, the universe of underlying charges can be determined, so Welke is on notice of the alleged antecedent debts he must defend against.

38. As the Trustee has satisfied the pleading standard of Rule 8(a) by sufficiently putting Welke on notice of the alleged antecedent debts, the balance of Welke's Motion to Dismiss is denied.

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[57] Welke refers to *In re Hechinger Inv. Co. of Delaware, Inc.*, 489 F.3d 568 (3d Cir. 2007), and the Trustee refers to *In re Hersman*, 20 B.R. 569 (Bankr. N.D. Ohio 1982).

[58] Proposed Second Amended Complaint ¶ 14.

WHEREFORE, IT IS HEREBY ORDERED that:

1. The Cross-Motion to Amend Complaint is **GRANTED**. Within ten (10) days of the entry of this Order, the Trustee shall file and serve the Proposed Second Amended Complaint.
2. The Motion to Dismiss Amended Complaint is **DENIED**.

Dated: April 26, 2018

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE