UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:17-bk-01712-FMD
Chapter 11

ATIF, INC.,

Debtor.
_____/

Daniel J. Stermer, as Creditor Trustee,

Plaintiff,

vs. Adv. Pro. No. 9:20-ap-009-FMD, et al.

T.A. Borowski, Jr., P.A. d/b/a Borowski & Traylor, P.A., et al.

Defendants.
_____/

ORDER GRANTING OMNIBUS MOTION TO DISMISS AMENDED COMPLAINTS WITH PREJUDICE

The Chapter 11 debtor, ATIF, Inc., ("Debtor") previously conducted business as a title insurance company under a license issued by the State of Florida. As part of its business operations, Debtor retained law firms to represent its insureds in connection with title policy claims.

Plaintiff, as Creditor Trustee under Debtor's confirmed Chapter 11 plan, filed complaints against 34 law firms, including the 29 law firms in the above-captioned adversary proceedings (the "Law Firms"). In his initial complaints (the "Original Complaints"), Plaintiff sought to avoid payments made by Debtor to the Law Firms for legal services they provided to Debtor's insureds during the four years prior to Debtor's bankruptcy filing. Plaintiff alleges that the payments were actually fraudulent transfers and constructively fraudulent transfers under 11 U.S.C. § 548[1] and the Florida Uniform Fraudulent Transfer Act ("FUFTA").[2] In the aggregate, the payments total $13.2 million.[3]

The Court granted the Law Firms' motions to dismiss the Original Complaints without prejudice and with leave to amend; Plaintiff filed amended complaints against the Law Firms (the "Amended Complaints").[4] The Amended Complaints are virtually identical to each other.

The defendant Law Firms in the 29 above-captioned adversary proceedings filed an Omnibus Motion to Dismiss (the "Omnibus Motion"),[5] Plaintiff filed an objection,[6] and the Law Firms filed a reply.[7] In addition, some of the defendant Law Firms filed joinders to the Omnibus Motion,[8] to which Plaintiff objected,[9] and the Law Firms replied.[10]

On August 10, 2020, the Court conducted a hearing on the Omnibus Motion. After careful consideration of the Amended Complaints, the Omnibus Motion, the joinders, the objections, the replies, and the arguments of counsel, the Court will dismiss Plaintiff's Amended Complaints with prejudice.

A. ELEMENTS OF A FRAUDULENT TRANSFER CLAIM

Under § 548 of the Bankruptcy Code, the court may avoid fraudulent transfers made within two

[1] Unless otherwise stated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*
[2] Chapter 726 of the Florida Statutes.
[3] Doc. No. 49, ¶ 1.
[4] Doc. No. 46. Unless otherwise stated, all docket citations are to Adv. Pro. No. 9:20-ap-009-FMD.
[5] Twenty-nine of the Law Firms joined in the Omnibus Motion to Dismiss (Doc. No. 49, p. 3, n. 1).
[6] Doc. No. 53.
[7] Doc. No. 55.
[8] Adv. Pro. No. 9:20-ap-050-FMD, Doc. No. 35; Adv. Pro. No. 9:20-ap-055-FMD, Doc. No. 35; Adv. Pro. No. 9:20-ap-066-FMD, Doc. No. 28.
[9] Adv. Pro No. 9:20-ap-050-FMD, Doc. No. 36; Adv. Pro. No. 9:20-ap-055-FMD, Doc. No. 36.
[10] Adv. Pro. No. 9:20-ap-050-FMD, Doc. No. 37; Adv. Pro. No. 9:20-ap-055-FMD, Doc. No. 37.

years of the bankruptcy petition.[11] Under § 544 and FUFTA, the court may avoid fraudulent transfers made within four years of the bankruptcy petition.[12] Section 546(a) permits the filing of an avoidance action within two years after the filing of the bankruptcy petition.[13]

The issue before the Court is whether the Amended Complaints state claims for avoidance of the payments to the Law Firms as actually fraudulent transfers and constructively fraudulent transfers under § 548 and FUFTA.

Elements of an Actually Fraudulent Transfer Claim

Fraudulent transfer claims under § 548(a)(1)(A) and Fla. Stat. § 726.105(1)(a) are analogous "in form and substance" and may be analyzed contemporaneously.[14] Under § 548(a)(1)(A) of the Bankruptcy Code, the court may avoid a transfer if it was made with actual intent to hinder, delay, or defraud any entity to which the debtor was indebted or to which the debtor became indebted on or after the date of the transfer.[15]

Under § 544 and Fla. Stat. § 726.105(1)(a), the court may avoid a transfer that is fraudulent as to a creditor, if the transfer was made with actual intent to hinder, delay, or defraud any creditor of the debtor.[16] To prevail on a claim alleging actual fraud under Fla. Stat. § 726.105(1)(a), a plaintiff must prove that (1) there was a creditor to be defrauded, (2) a debtor intending fraud, and (3) a conveyance or transfer of property which could have been applicable to the payment of the debt due.[17]

The focus of the inquiry into actual intent is the state of mind of the debtor/transferor, and culpability on the part of the transferee is not essential.[18] "Because actual intent to defraud is difficult to prove, courts look to the totality of the circumstances and badges of fraud surrounding the allegedly fraudulent transfers."[19]

Elements of a Constructively Fraudulent Transfer Claim

Under § 548(a)(2)(B) of the Bankruptcy Code, a transfer may be avoided as constructively fraudulent if it was for less than a reasonably equivalent value and the debtor was insolvent or became insolvent as a result of the transfer. Under Fla. Stat. § 726.105(1)(b), a transfer is constructively fraudulent as to present and future creditors if the debtor made the transfer "without receiving a reasonably equivalent value in exchange," and the debtor was engaged in a business for which its remaining assets were unreasonably small or reasonably believed that it would incur debts beyond its ability to pay.[20] Under Fla. Stat. § 726.106(1), a transfer is fraudulent as to present creditors if the debtor made the transfer "without receiving a reasonably equivalent value in exchange" and was insolvent or became insolvent as a result of the transfer.[21]

B. BACKGROUND

Facts

The relevant facts are not in dispute. Debtor, previously known as Attorneys' Title Insurance Fund, Inc., is wholly owned by Attorneys' Title Insurance Fund, a Florida Business Trust (the "ATIF Trust"). Until 2009, Debtor, using the trade

[11] 11 U.S.C. § 548(a)(1).
[12] Fla. Stat. § 726.110.
[13] Courts may extend the two-year deadline for cause. Fed. R. Bankr. P. 9006(b); *In re International Administrative Services, Inc*., 408 F.3d 689, 699 (11th Cir. 2005). The Court has extended the deadline for filing avoidance actions in this case to September 30, 2020 (Main Case, Doc. No. 732).
[14] *In re Rollaguard Security, LLC*, 591 B.R. 895, 907 (Bankr. S.D. Fla. 2018)(quoting *In re Stewart*, 280 B.R. 268, 273 (Bankr. M.D. Fla. 2001)).
[15] 11 U.S.C. § 548(a)(1)(A).
[16] 11 U.S.C. § 544; Fla. Stat. § 726.105(1)(a).
[17] *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1302 (11th Cir. 2020)(citing *Wiand v. Lee*, 753 F.3d 1194, 1199-1200 (11th Cir. 2014)).
[18] *In re Pearlman*, 478 B.R. 448, 453 (Bankr. M.D. Fla. 2012)(quoting *In re Cohen*, 199 B.R. 709, 716-17 (B.A.P. 9th Cir. 1996)).
[19] *In re D.I.T., Inc*., 561 B.R. 793, 802 (Bankr. S.D. Fla. 2016)(citing *In re Model Imperial, Inc*., 250 B.R. 776, 790-91 (Bankr. S.D. Fla. 2000)).
[20] Fla. Stat. § 726.105(1)(b).
[21] Fla. Stat. § 726.106(1).

name "The Fund," sold and underwrote title insurance policies ("Title Policies") under a license from the Florida Office of Insurance Regulation (the "Florida OIR"). The Title Policies were written and issued by attorneys who had agency agreements with Debtor. These attorneys held a membership interest in ATIF Trust and are sometimes referred to as "Member Agents."

Under the terms of the Title Policies, Debtor was obligated to investigate Title Policy claims made by its insureds ("Policy Claims"). Debtor frequently retained attorneys, including Member Agents, to represent its insureds in connection with Policy Claims, including in litigation.

Florida law required Debtor to account for the potential liability of Policy Claims and for the projected amount of attorney's fees and costs necessary to resolve Policy Claims, including litigation expenses. In addition, under Florida law, Debtor was required to maintain statutory premium reserves ("Statutory Premium Reserves") to satisfy Policy Claims and to maintain an "unearned premium reserve" (together, the "Reserves'"). And Florida law required Debtor to purchase reinsurance in the event that it became insolvent, and to maintain assets equal to its liabilities plus 10% (the "Surplus").

Debtor's Agreements with OR Holding and OR Title

In March 2009, Debtor learned that the Florida OIR had observed that Debtor's Statutory Premium Reserves and Surplus were in jeopardy of falling below the minimum statutory requirements and that the Florida OIR was considering putting Debtor into a receivership.[22]

To avoid being placed in receivership, in 2009, Debtor entered into a joint venture agreement (the "JVA") with Old Republic National Title Holding Company ("OR Holding"). Under the JVA, (1) Debtor and OR Holding created a new entity, Attorneys' Title Fund Services ("ATF Services"), which began doing business as "The Fund," (2) Old Republic National Title Insurance Company ("OR Title") underwrote title insurance policies issued by ATF Services, (3) Debtor continued to administer its Policy Claims, and (4) Debtor agreed to use its best efforts to convince its Member Agents to sign agency agreements with ATF Services.

The JVA was contingent upon the Florida OIR's approval. The Florida OIR conditioned its approval on Debtor's entering into a consent order (the "Consent Order"). Under the Consent Order, Debtor surrendered its certificate of authority to sell title insurance. Upon entering into the JVA and the Consent Order, Debtor was no longer a going concern and began the process of winding down its business. Approximately 544 of Debtor's employees, including Debtor's "high level executives," became employees of ATF Services.[23]

Plaintiff alleges that in June 2009, Debtor and OR Holding issued press releases regarding the changes to Debtor's business operations. In addition, the Florida OIR published information regarding the JVA and the changes to Debtor's business operations. News reports recounted Debtor's dire financial condition.[24]

After the 2009 JVA, although Debtor was no longer operating as a title insurance company, it continued to retain and pay attorneys, including the Law Firms, to investigate its insureds' Policy Claims and to represent its insureds in litigation.

In 2011, Debtor and OR Holding entered into an amended Joint Venture Agreement (the "Amended JVA"). Under the Amended JVA, OR Holding provided additional capital to Debtor and Debtor exchanged its membership interest in ATF Services for a subordinated Class B interest in ATF Services.

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[22] Under Fla. Stat. § 631.031, the Florida Department of Financial Services is authorized to commence proceedings to rehabilitate an insurer upon a determination by the Florida OIR that one or more grounds exist. *Florida Department of Financial Services v. Midwest Merger Management, LLC*, 2008 WL 3259045, at *1, n. 1 (N.D. Fla. Aug. 6, 2008). Under Fla. Stat. § 631.051, grounds for rehabilitation include the impairment or insolvency of the insurer.

[23] Adv. Pro. No. 9:18-ap-531-FMD, Doc. No. 162, ¶ 42.

[24] Doc. No. 46, ¶¶ 36-38.

In 2015, Debtor, OR Holding, and OR Title entered into a Master Agreement (the "Master Agreement"). Under the Master Agreement, OR Title reinsured Debtor's Title Policies and Debtor transferred substantially all its assets to OR Title. These assets included Debtor's cash on hand, the Reserves, the assets in Reserves, and Debtor's real property and intellectual property. After the transfer, Debtor retained assets of approximately $2.5 million and liabilities that were not related to Policy Claims.[25]

Debtor's Bankruptcy Case and the Adversary Proceedings

On March 2, 2017, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. In its bankruptcy schedules, Debtor listed assets of approximately $520,000.00 and liabilities in excess of $37 million.[26] The United States Trustee appointed a committee of unsecured creditors (the "Committee"). Ultimately, the Court approved the Chapter 11 plan filed by the Committee. The confirmed plan provided for the formation of a "Creditor Trust" and the appointment of Daniel J. Stermer as the "Creditor Trustee."[27] Plaintiff is the Creditor Trustee.

Plaintiff's Original Complaints and the Motions to Dismiss

In January 2020, Plaintiff filed the Original Complaints against 34 Law Firms seeking to recover a total of more than $13.2 million in attorney's fees and costs paid by Debtor to the Law Firms in the four years prior to Debtor's bankruptcy filing.[28] Plaintiff attached an exhibit to each of the Original Complaints that listed the date and amount of each payment made by Debtor to the individual Law Firm.[29] Plaintiff alleged that the payments to the Law Firms made after the date of the 2009 JVA are avoidable as actually fraudulent transfers under 11 U.S.C. § 548(a)(1)(A) and Fla. Stat. § 726.105(1)(a), because Debtor made them with actual intent to hinder, delay, and defraud Debtor's creditors. With respect to six of the Law Firms, Plaintiff alleged that payments made after Debtor entered into the 2015 Master Agreement are avoidable as constructively fraudulent transfers under 11 U.S.C. § 548(a)(1)(B) and Fla. Stat. § 726.105(1)(b), because they were for less than a reasonably equivalent value and Debtor was insolvent or became insolvent as a result of the transfers.

The Law Firms moved to dismiss the Original Complaints.[30] The Court conducted a hearing on April 30, 2020, and determined that the Original Complaints failed to state claims to avoid fraudulent transfers under 11 U.S.C. § 548 and FUFTA because they did not satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b) (incorporated by Federal Rule of Bankruptcy Procedure 7009) or the pleading standards of *Ashcroft v. Iqbal*[31] and *Bell Atlantic Corporation v. Twombly*.[32]

The Court held, first, that the Original Complaints expressly alleged that the transfers were in payment of legal services performed by the Law Firms, anticipating the good faith defense provided for by § 548(c); and second, Plaintiff's claims that the payments to the Law Firms were actually fraudulent transfers set forth only conclusory allegations that the Law Firms owed fiduciary duties to Debtor, were obligated to protect Debtor's assets for the benefit of its creditors, and were insiders of Debtor, without providing any specificity in those allegations.[33]

The Court granted the Law Firms' motions to dismiss the Original Complaints without prejudice to Plaintiff's filing amended complaints.[34]

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[25] Plaintiff has also sued OR Holding and OR Title to avoid alleged fraudulent transfers arising from the JVA, the Amended JVA, and the Master Agreement (Adv. Pro. No. 9:18-ap-531-FMD).
[26] Main Case, Doc. No. 23.
[27] Main Case, Doc. Nos. 273 and 338.
[28] Doc. No. 49, ¶ 1.
[29] *See, e.g.*, Doc. No. 1, Ex. 1.
[30] Doc. No. 17.
[31] 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).
[32] 550 U.S. 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).
[33] Doc. No. 49, Ex. A, Transcript of April 30, 2020 hearing.
[34] Doc. No. 39.

Plaintiff's Amended Complaints

Plaintiff timely filed the Amended Complaints in the above-captioned 29 adversary proceedings. The Amended Complaints attempt to cure deficiencies in the Original Complaints by including the following allegations:

First, rather than alleging the transfers to the Law Firms with more specificity, Plaintiff now alleges the transfers more vaguely. For example, the Original Complaints alleged that "Debtor did not receive a direct or indirect benefit in exchange *for the legal services it paid to*" the Law Firms;[35] the Amended Complaints allege that Debtor did not receive a benefit "for the *transfers to*" the Law Firms. And the Original Complaints alleged that Debtor transferred funds "in legal fees" to the Law Firms, but the Amended Complaints have deleted the words "in legal fees."[36]

Second, to support Plaintiff's allegation that Debtor received no consideration in exchange for its payments to the Law Firms, the Amended Complaints allege (1) that it was in Debtor's best interest to enter into receivership, but Debtor prolonged the inevitable by employing the Law Firms to litigate Policy Claims and cause more delay, which prejudiced creditors and depleted Debtor's assets; (2) that the transfers did not benefit Debtor, who was obligated to preserve assets for its creditors; (3) that after the 2015 Master Agreement, the transfers to the Law Firms only benefited OR Title because OR Title had reinsured all of Debtor's Title Policies and was responsible for paying Policy Claims; (4) that for every successful defense of a Policy Claim, the required amount of the Statutory Premium Reserve was reduced by an amount less than the claim's full amount, which benefited OR Title because under the Master Agreement, Debtor had transferred the Statutory Premium Reserve to OR Title;[37] and (5) that Debtor, instead of marshalling its assets for the benefit of its creditors, continued to litigate matters as though it were an active insurance company.[38] The Amended Complaints also allege that a representative of the Florida OIR has testified that after the 2015 Master Agreement, Debtor was no longer an insurer, no longer had a certificate of authority, and no longer had any policyholder obligations.[39]

Third, in support of Plaintiff's allegation regarding Debtor's fraudulent intent, the Amended Complaints allege that Debtor's policy to "litigate, litigate, litigate" represented Debtor's choice to transfer funds to the Law Firms at the expense of its creditors, resulting in diminished assets for Debtor's creditors;[40] that the ligation and the depletion of Debtor's assets only benefited OR Holding and OR Title; that the transfers only benefited the Law Firms; and that creditors therefore suffered.[41] The Amended Complaints also allege that "[a]t the same time," Debtor was defending a number of vaguely identified tort claims and closing protection letter claims that were not Policy Claims, and that the potential liability from these non-Title Policy related claims was greater than Debtor's assets, such that defending the non-Title Policy related claims "depleted Debtor's dwindling assets without deriving benefits from them for its creditors."[42]

Fourth, to support its contention that the Law Firms were Debtor's insiders, the Amended Complaints allege that the Law Firms were members of Debtor's attorney network; that "specific" (although unnamed) attorneys with the Law Firms were "Attorney Members;" that Debtor's "Members" were kept apprised of Debtor's financial and operational conditions; [43] and that the Law Firms were "in the ATIF Trust," which owned 100% of Debtor and were, therefore, "Debtor's shareholder[s] through the ATIF Trust."[44] The Amended Complaints also allege that Debtor looked to the Law Firms to set loss reserves and expense reserves on the matters in which they served as counsel; that Debtor requested from the Law Firms a summary of the Policy Claims they were handling, the attorney's fees and costs to

[35] A redline comparison of the Original Complaint and Amended Complaint is attached to the Omnibus Motion as Exhibit B - Doc. No. 49-2, ¶¶ 60, 63.
[36] *See* Doc No. 49-2, ¶¶ 56, 77, 81.
[37] Doc. No. 46, ¶ 60.
[38] Doc. No. 46, ¶ 64.
[39] Doc. No. 46, ¶ 50.
[40] Doc. No. 46, ¶ 64.
[41] Doc. No. 46, ¶ 72.
[42] Doc. No. 46, ¶ 51.
[43] Doc. No. 46, ¶¶ 40-43.
[44] Doc. No. 46, ¶ 59.

resolve the Policy Claims, and updates to possible losses;[45] that in some cases, Debtor did not set reserves or the reserves were set to match expenses already incurred, allowing Debtor, *with the Law Firms' assistance*, to conceal its true liabilities from the Florida OIR;[46] that after Debtor lost most of its sources of income, the Law Firms continued to litigate Policy Claims;[47] and that the Law Firms, as Debtor's attorneys and part of Debtor's attorney network, knew or should have known that Debtor was financially unstable, had surrendered its certificate of authority to conduct its insurance business, and was winding down its business to protect its creditors.[48]

Finally, in support of his allegations that Debtor concealed the payments to the Law Firms, Plaintiff alleges that Debtor requested information regarding liability and litigation expenses from the Law Firms for Debtor to set its reserves, that "in some cases," Debtor set no reserves at all, and that Debtor concealed its true liabilities from the Florida OIR by understating them on its financial reports.[49]

C. ANALYSIS

Under the standards provided by the United States Supreme Court in *Ashcroft v. Iqbal*[50] and *Bell Atlantic Corporation v. Twombly*,[51] a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. A complaint is plausible on its face if it contains the factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged.[52]

In *In re Ernie Haire Ford, Inc*., the bankruptcy court stated:

> With respect to the pleading requirements necessary to survive a motion to dismiss, the pleading landscape for plaintiffs, including trustees in bankruptcy, has changed as a result of the United States Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. *A plaintiff's complaint must contain enough facts to make the claim for relief "plausible on its face." Facial plausibility exists where the factual allegations allow the court to infer that the defendant is liable for the misconduct alleged.* In requiring claims to be plausible, the Court set forth a spectrum of a claim's potential for success, ranging from possible at the lower end, to plausible, to probable at the higher end. *While probability is not required, a plaintiff must do more than raise a sheer possibility of the defendant's liability. A complaint must, therefore, contain sufficient factual allegations to nudge the claim for relief from the realm of conceivable to plausible.* Facts that are merely consistent with a defendant's potential liability are insufficient to accomplish this task.[53]

Additionally, complaints that allege fraud must comply with the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Under Rule 9(b), as incorporated by Federal Rule of Bankruptcy Procedure 7009, a party "must state with particularity the circumstances constituting fraud."[54]

(1) Plaintiff's Actually Fraudulent Transfer Claims

The intent necessary to prove an actually fraudulent transfer claim is the debtor's intent, not the intent of the recipient of the transfer. In other words, if the debtor intended to defraud creditors and transferred property to further that intent, a

[45] Doc. No. 46, ¶¶ 66-69.
[46] Doc. No. 46, ¶¶ 70-71.
[47] Doc. No. 46, ¶ 55.
[48] Doc. No. 46, ¶ 58.
[49] Doc. No. 46, ¶¶ 66-71.
[50] 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).
[51] 550 U.S. 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).
[52] *In re Adetayo*, 2020 WL 2175659, at *1 (Bankr. N.D. Ga. May 5, 2020)(citing *Iqbal* and *Twombly*).
[53] 459 B.R. 824, 835 (Bankr. M.D. Fla. 2011)(citations omitted)(emphasis supplied).
[54] Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009.

claim to avoid an actually fraudulent transfer exists independent of the intent of the transferee.[55]

Because a plaintiff is rarely able to prove fraudulent intent on the part of the transferor with direct evidence, courts look to "badges of fraud" to glean intent by observing the transferor's course of conduct.[56] Plaintiff contends that he has sufficiently alleged the following six badges of fraud:[57]

(1) The Law Firms are insiders;

(2) Debtor transferred property at a time when there was pending or threatened litigation against it;

(3) Debtor did not receive reasonably equivalent value;

(4) Debtor concealed the transfers;

(5) Debtor was insolvent at the time of the transfers; and

(6) Debtor transferred the property to the Law Firms in close proximity to when its other liability was ripening.[58]

The Court's analysis focuses on the three most relevant factors presented: whether the Law Firms were Debtor's insiders, whether Debtor received reasonably equivalent consideration, and whether Debtor concealed the transfers to the Law Firms.

The Court concludes that the Amended Complaints do not plausibly allege that Debtor made transfers to the Law Firms with actual fraudulent intent for three reasons. First, the Amended Complaints do not allege sufficient facts to support Plaintiff's conclusory allegation that the Law Firms were Debtor's insiders. Second, the allegations of the Amended Complaints demonstrate that Debtor received reasonably equivalent value in exchange for its payments to the Law Firms because (a) Debtor was obligated by Title Policies, the JVA, and the Consent Order to administer and resolve Policy Claims, and (b) the Law Firms were employed by Debtor so that Debtor could fulfill those obligations. Third, Plaintiff has not sufficiently alleged facts from which the Court could conclude that Debtor concealed its payments to the Law Firms. And finally, the Amended Complaint does not allege fraud with the particularity required by Rule 9(b).

(a) Plaintiff does not adequately allege that the Law Firms were Debtor's insiders.

In *In re Island One, Inc*.,[59] the bankruptcy court discussed the alleged insider status of a defendant attorney in the context of a preference action:[60]

> Several courts have analyzed the relationship between a debtor and an attorney to determine whether "insider" status should be conferred on an attorney who received a transfer from a debtor in the one year preference period in § 547(b)(4)(B). Courts are in firm agreement that the mere fact that a defendant attorney and a debtor had an attorney-client relationship is not dispositive in finding that a defendant attorney is an insider status. In the Eleventh Circuit, the question should be answered by considering (1) the closeness of the relationship between the transferee and the debtor, and (2) whether the transaction between the parties was conducted at arm's length. *The determination is based on whether there is a high degree of control between the parties*, such that the relationship "transcended normal attorney-

[55] *See, e.g., In re Pearlman*, 478 B.R. at 453 (quoting *In re Cohen*, 199 B.R. at 716-17).
[56] *In re McCarn's Allstate Finance, Inc.*, 326 B.R. 843, 849-50 (Bankr. M.D. Fla. 2005).
[57] Other badges of fraud include whether the debtor retained control of the property after the transfer, whether the transfer was of substantially all of the debtor's assets, and whether the debtor absconded. *In re Levine*, 134 F.3d 1046, 1053 (11th Cir. 1998).
[58] Doc. No. 53, p. 10.
[59] 2013 WL 652562 (Bankr. M.D. Fla. Feb. 22, 2013).
[60] Section 547 permits the court to avoid transfers to insider creditors within one year of the filing of the bankruptcy if the debtor was insolvent and the transfer allowed the creditor to receive more than it would have received in a Chapter 7 liquidation.

> client boundaries." There must be enough influence or control over a debtor to improperly influence the transfers in dispute.[61]

In *Island One*, the complaint alleged that the debtor and the attorney shared office space and had a long-term lease arrangement, that the attorney had an equity interest in the debtor, and that the debtor had identified the attorney as an insider in its sworn statement of financial affairs filed in its bankruptcy case. The bankruptcy court held that these allegations set forth sufficient facts to survive the motion to dismiss.[62]

Here, Plaintiff generally alleges, first, that "specific"—although unnamed—attorneys with the Law Firms were Member Agents and served as agents for Debtor; second, that the Law Firms were stakeholders in the ATIF Trust; third, that Debtor sent the Law Firms information about its financial condition; and fourth, that Debtor requested reports from the Law Firms regarding the status of the Policy Claims that they were handling and the estimated attorney's fees and costs to resolve the Policy Claims.

But unlike the complaint in *Island One*, the Amended Complaints' allegations lack any factual support from which the Court can infer that the Law Firms had any control or influence over their employment or Debtor's payment to them. Plaintiff has not alleged any facts regarding any rights or powers held by Member Agents or any agreements between Debtor and its Member Agents that would support an inference that the Member Agents were somehow Debtor's insiders or that the Law Firms exercised any control over Debtor.

Further, the Court's dismissal of the Original Complaints was, in part, because they contained only conclusory allegations that the Law Firms owed fiduciary duties to Debtor and were obligated to protect Debtor's assets.[63] The Amended Complaints do not cure this deficiency. Instead, Plaintiff alleges in the Amended Complaints only that "Debtor tended to retain its Members to litigate disputes involving the title policies,"[64] and that "[a]s its attorney, and as part of Debtor's attorney network," the Law Firms should have known that Debtor was financially unstable and was winding down its business to protect creditors.[65] Plaintiff does not allege that the Law Firms owed Debtor a fiduciary duty under any contract or statute.

Finally, Debtor employed the Law Firms to represent Debtor's insureds in connection with Policy Claims.[66] The Law Firms represented the insureds, not Debtor, and were in privity only with the insureds.[67] Plaintiff has not alleged any facts to support an inference that the Law Firms had an attorney-client or other fiduciary relationship with Debtor.

The Court concludes that Plaintiff has failed to sufficiently allege facts that would allow the Court to infer that the Law Firms were insiders of Debtor.

(b) Plaintiff does not adequately allege a lack of reasonably equivalent value.

Plaintiff alleges in the Amended Complaints that Debtor, as part of its business until 2009, was obligated to investigate claims made by its insureds under Title Policies and to determine a reserve amount for Policy Claims.[68] Plaintiff also alleges that under the 2009 JVA:

> Debtor remained responsible for administering title insurance claims for its insureds by appointing a General Manager to concentrate primarily on overseeing Debtor's balance sheet, monitoring cash flow needs, converting non-liquid assets into cash, monitoring claims activity, and ensuring that Debtor complied with its financial reporting obligations.[69]

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[61] *In re Island One, Inc*., at *2 (citations omitted) (emphasis added).
[62] *In re Island One, Inc*., at *3.
[63] Doc. No. 49, Ex. A, Transcript of April 30, 2020 hearing, p. 36.
[64] Doc. No. 46, ¶ 40.
[65] Doc. No. 46, ¶ 58.
[66] *See, e.g.*, Doc. No. 46, ¶¶ 60(a), 60(b), 63, 66.
[67] *Arch Insurance Company v. Kubicki Draper, LLP*, 266 So. 3d 1210, 1214 (Fla. 4th DCA 2019).
[68] Doc. No. 46, ¶ 21.
[69] Doc. No. 46, ¶ 29(a).

Plaintiff does not dispute Debtor's continuing obligation to administer Policy Claims after it entered into the 2009 JVA. In fact, Plaintiff concedes that Debtor was required to evaluate and resolve Policy Claims, that Debtor existed to "handle title policy claims as they accrued,"[70] and that Debtor employed and paid the Law Firms to represent its insureds in order to satisfy this obligation.[71]

The Eleventh Circuit has held that "the concept of 'reasonably equivalent value' does not demand a precise dollar-for-dollar exchange."[72] The Court concludes that Plaintiff has failed to sufficiently allege facts that would allow the Court to infer that Debtor did not receive reasonably equivalent consideration for its payments to the Law Firms.

(c) Plaintiff does not adequately allege that Debtor concealed transfers.

Plaintiff alleges that Debtor requested information from the Law Firms regarding liability and litigation expenses in connection with their representation of Debtor's insureds to assist Debtor in setting its reserves, that "in some [unspecified] cases," Debtor set no reserves at all, and that Debtor concealed its true liabilities from the Florida OIR by understating them on its financial reports.[73] But these allegations do not permit the Court to infer that Debtor concealed its payments to the Law Firms.

First, Plaintiff's allegation that Debtor requested information from the Law Firms regarding potential liability and *future* projected legal fees and expenses is consistent with Debtor's obligation to investigate Policy Claims and an attorney's traditional role in providing expense projections to a client. Second, Plaintiff's allegations do not support an inference that Debtor concealed its payments to the Law Firms from the Florida OIR.

The Court concludes that Plaintiff has failed to sufficiently allege facts that would allow the Court to infer that Debtor concealed its payments to the Law Firms.

(2) Plaintiff's Constructively Fraudulent Transfer Claims

Six of the 29 Amended Complaints include constructively fraudulent transfer claims to avoid payments by Debtor to the Law Firms after it had entered into the 2015 Master Agreement. To support these claims, Plaintiff alleges that Debtor received less than reasonably equivalent value in exchange for the payments because Debtor was no longer in the title insurance business at the time of the transfers, and therefore did not receive any benefit from the Law Firms' services. Plaintiff alleges that any benefit from the payments actually accrued to OR Title and OR Holding because under the Master Agreement, Debtor transferred its Reserves to OR Title and the preservation of the Reserves inured to the benefit of OR Title and OR Holding.[74]

But Plaintiff's theory ignores that, notwithstanding the Master Agreement, Debtor's contractual relationships with its insureds remained intact and Debtor was still contractually obligated to investigate and, if necessary, litigate Policy Claims. Noticeably absent from the Amended Complaints is *any* allegation that the Law Firms did not perform the services for which they were retained. In other words, the Law Firms provided legal services to Debtor's insureds, submitted invoices to Debtor, and received payment of their invoices. As the Eleventh Circuit held in *In re Caribbean Fuels America, Inc.*,[75] the issue in evaluating a constructive fraud claim is not whether the debtor subjectively benefited from the property or services, but whether the property or services themselves had objective value. Plaintiff has not alleged that Debtor's legal services did not have objective value.

The Law Firms' invoices to Debtor constitute "antecedent debt." Under 11 U.S.C. § 548(d)(2) and Fla. Stat. § 726.104, value includes the satisfaction

[70] Doc. No. 46, ¶¶ 30, 34.
[71] Doc. No. 53, pp. 8-9, 14-15.
[72] *In re Advanced Telecomm. Network, Inc.*, 490 F.3d 1325, 1336 (11th Cir. 2007).
[73] Doc. No. 46, ¶¶ 70-71.
[74] *See, e.g.*, Adv. Pro. No. 9:20-ap-050-FMD, Doc. No. 33, ¶¶ 83, 92, 97.
[75] 688 F. App'x 890, 894-95 (11th Cir. 2017).

of an antecedent debt.[76] This Court has previously found that dollar for dollar payment of antecedent debt constitutes reasonably equivalent value.[77]

Because Plaintiff has not sufficiently alleged that the payments to the Law Firms were not for reasonably equivalent value, the Court finds that Plaintiff does not state a plausible claim for the avoidance of constructively fraudulent transfers.

D. **CONCLUSION**

In a nutshell, Debtor retained the Law Firms to represent its insureds in connection with Policy Claims so that Debtor could fulfill its contractual obligations to its insureds; the Law Firms provided legal services to Debtor's insureds and invoiced Debtor for their services; Debtor paid the invoices.

As the United States Supreme Court held in *Twombly*, to survive a motion to dismiss, a complaint must contain enough factual allegations to nudge the claim for relief "across the line from conceivable to plausible."[78] Under the *Twombly* and *Iqbal* standards for evaluating motions to dismiss, the Court finds that the Amended Complaints do not contain sufficient factual allegations to state plausible claims against the Law Firms for the avoidance of actually fraudulent or constructively fraudulent transfers under § 548 or FUFTA.

Plaintiff is represented by able counsel and has had ample time to investigate his claims against the Law Firms.[79] In dismissing Plaintiff's Original Complaints, the Court granted Plaintiff leave to file the Amended Complaints and allowed him sufficient time to do so.[80] If facts existed to support Plaintiff's fraudulent transfer claims, Plaintiff would have alleged them in the Amended Complaints. Under these circumstances, the Court finds it appropriate to dismiss the Amended Complaints with prejudice.

Accordingly, it is

ORDERED:

1. The Omnibus Motion to Dismiss is **GRANTED.**

2. Plaintiff's Amended Complaints are **DISMISSED** with prejudice.

DATED: September 14, 2020.

/s/ Caryl E. Delano

Caryl E. Delano
Chief United States Bankruptcy Judge

[76] 11 U.S.C. § 548(d)(2); Fla. Stat. § 726.104.
[77] *In re Mongelluzzi*, 591 B.R. 480, 496 (Bankr. M.D. Fla. 2018).
[78] *Twombly*, 550 U.S. at 570.
[79] Plaintiff was engaged as the Creditor Trustee in January 2018; Plaintiff's general counsel served as counsel to the Creditors' Committee beginning in May 2017; Plaintiff's special litigation counsel in these adversary proceedings was retained in October 2017; the Original Complaints were filed in January 2020.
[80] The Court announced its ruling on the motions to dismiss the Original Complaints on April 30, 2020 (Doc. No. 38); Plaintiff filed the Amended Complaints on June 24, 2020 (Doc. No. 46).