ORDERED.

Dated: December 06, 2021

Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Purple Shovel, LLC,

Debtor.
_____/

Case No. 8:18-bk-04599-CED
Chapter 11

Purple Shovel, LLC, by and through
Gerard A. McHale, Jr., as Chapter 11 Trustee,

Plaintiff,

vs.

Para Dynamic Enterprises, LLC,

Defendant.
_____/

Adv. Pro. No. 8:20-ap-208-CED

ORDER (1) DENYING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND (2) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS PROCEEDING came before the Court for hearing on September 8, 2021, to consider the *Trustee's Motion for Summary Judgment on Second Amended Complaint*

(the "Trustee's Motion"),[1] and *Defendant Para Dynamic Enterprises, LLC's Motion for Summary Judgment and Memorandum in Support* (the "Defendant's Motion")[2] (together, the "Motions"). The issue is whether the Trustee may avoid a December 22, 2017 transfer of $1.2 million from Purple Shovel, LLC ("Debtor") to Para Dynamic Enterprises, LLC ("Defendant") as a preferential or fraudulent transfer under 11 U.S.C. § 547, Fla. Stat. § 726.106(2), or 11 U.S.C. § 548. After carefully considering the record, the Court finds that the transfer is not avoidable.

I. FACTS

The history of Debtor's relationship with Defendant is not in dispute.

On January 11, 2010, Debtor was formed as a Delaware limited liability company with two initial members: Red Shovel, LLC ("Red Shovel"), with a 70% interest, and Defendant, with a 30% interest.[3] Benjamin Worrell was the manager and sole member of Red Shovel, and Robert A. Para was the manager and sole member of Defendant.[4] Debtor's business operations involved the procurement and transportation of goods and the provision of military logistics support for the United States Government, including under contracts with Special Operations Command ("SOCOM").

[1] Doc. No. 35.
[2] Doc. No. 38.
[3] Doc. No. 38-17, pp. 27-28.
[4] Doc. No. 38-17 p. 50.

When Debtor was formed, Red Shovel and Defendant entered into Debtor's initial operating agreement (the "Operating Agreement").[5] It provided for Mr. Worrell and Mr. Para to serve as Debtor's managers[6] and set out their rights and obligations.[7] In December 2011, Red Shovel and Defendant amended the Operating Agreement to adjust Debtor's membership interests so that Red Shovel owned a 53% interest and Defendant owned a 47% interest.[8] In February 2013, the Operating Agreement was amended again to reflect Red Shovel's transfer of its 53% membership interest to Mr. Worrell individually.[9]

On December 5, 2014, Debtor, Mr. Worrell, Defendant, and Mr. Para entered into a *Resolution for Purple Shovel, LLC to Purchase Para Dynamic Enterprises, LLC's Forty-Seven Percent Interest in Purple Shovel, LLC* (the "Redemption Agreement").[10] Under the Redemption Agreement, Debtor agreed to purchase Defendant's 47% interest in Debtor in exchange for (a) Debtor's payment of the interest then due on Debtor's line of credit from First Community Financial Bank, which Defendant had

[5] Doc. No. 38-17, pp. 24-51.
[6] Doc. No. 38-17, p. 29.
[7] Doc. No. 38-17, p. 34.
[8] Doc. No. 38-17, p. 57
[9] Doc. No. 38-17, p. 5.
[10] Doc. No. 38-16.

guaranteed (the "Bank Line of Credit"), and (b) Debtor's payment to Defendant of $450,000.00 over six years.[11]

After the parties entered into the Redemption Agreement, Defendant no longer participated in Debtor's business and, apparently, learned of Debtor's post-Redemption Agreement activities and contracts only through published reports.[12]

In September 2015, Debtor filed a 2014 partnership income tax return (the "2014 Tax Return") and a 2014 Schedule K-1, reflecting the partners' shares of year-end income, deductions, credits, etc. (the "2014 K-1"), for the tax year beginning on January 1, 2014, and ending on December 5, 2014, the date of the Redemption Agreement.[13] Debtor has not filed a partnership tax return since the 2014 Tax Return.[14] Mr. Worrell filed individual income tax returns for 2015 and 2016 that included a *Schedule C, Profit or Loss from Business (Sole Proprietorship)*, in which Mr. Worrell identified Debtor as his business.[15]

On March 15, 2016, Defendant sued Debtor and Mr. Worrell in the Circuit Court for Orange County, Florida (the "State Court Action"),[16] alleging that Debtor and Mr.

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[11] The $450,000.00 payable to Defendant represented a "split" of the $764,000.00 principal balance due on the Bank Line of Credit (Doc. No. 17-1, p. 2). Defendant asserts that it never received the consideration it was due under the Redemption Agreement and that Defendant paid off the entire $764,000.00 balance of the Bank Line of Credit (Doc. No. 38-15, p. 6).
[12] Doc. No. 38-17, p. 10.
[13] Doc. No. 38-10.
[14] Doc. No. 38-1, p. 4 (Declaration of Scott M. Ratchick, ¶¶ 9-10).
[15] Doc. No. 38-13, p. 9; Doc. No. 38-14, p. 12.
[16] Doc. No. 38-17.

Worrell made false representations during the negotiation of the Redemption Agreement that induced Defendant to sell its membership interest in Debtor for less than its fair value. For example, Defendant alleged that Debtor and Mr. Worrell concealed the fact that Debtor had new business opportunities, such as two pending contracts to provide services to SOCOM, that improved Debtor's future financial condition and increased the value of Defendant's membership interest.[17] In the State Court Action, Defendant stated seven claims against Debtor and Mr. Worrell for actual and consequential damages: fraud in the inducement, civil conspiracy, breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, accounting, and constructive trust.

In May 2016, Debtor, Mr. Worrell, and Defendant agreed to arbitrate the State Court Action.[18] In Defendant's statement of claim for the arbitration, it asserted a claim for damages against Debtor and Mr. Worrell exceeding $7 million.[19]

On October 26, 2016, Debtor was sued in the Circuit Court for Hillsborough County, Florida in an action styled *Ziecha Norwillo, as surviving spouse and as Personal Representative of the Estate of Francis Norwillo, and Michael Dougherty v. Purple Shovel, LLC, et al*. (the "Tort Litigation").[20] The Tort Litigation arose from injuries suffered by

[17] Doc. No. 38-17, pp. 9-12.
[18] Doc. No. 38-19.
[19] Doc. No. 38-20.
[20] Case No. 16-CA-009933; Main Case, Claim Nos. 2-1, 3-1, 4-1.

two contract workers (the "Tort Plaintiffs") while they were providing services for Debtor in June 2015, and sought more than $60 million in damages.

On October 16, 2017, one of Debtor's lenders, PFF, LLC ("PFF"), notified Debtor and Mr. Worrell of their default under a $4 million revolving line of credit and security agreement that Mr. Worrell had guaranteed (the "PFF Line of Credit").[21]

In October 2017, Debtor, Mr. Worrell, and Defendant, all represented by counsel, reached an agreement in the arbitration of the State Court Action, in which Debtor agreed to pay $1.2 million to Defendant to settle Defendant's claims.[22]

On December 21, 2017, PFF sued Debtor and Mr. Worrell in Virginia alleging that Debtor had defaulted on the PFF Line of Credit (the "PFF Lawsuit"). PFF sought damages of more than $4 million against Debtor and Mr. Worrell.[23]

Just one day later, on December 22, 2017, Debtor paid the $1.2 million agreed settlement amount to Defendant,[24] and Defendant released all claims against Debtor and Mr. Worrell.[25] Defendant contends it "had no specific knowledge or understanding on or about December 22, 2017 of the Debtor's financial condition as

[21] Doc. No. 46-3, pp. 26-27.
[22] Doc. No. 38-1, pp. 1-2 (Declaration of Scott M. Ratchick, ¶¶ 2).
[23] Doc. No. 32, p. 6, n. 1.
[24] Doc. No. 32, ¶ 2.
[25] Doc. No. 36, p. 22 (Declaration of Benjamin D. Worrell, ¶ 8).

of that date" and that neither Debtor nor Mr. Worrell had provided it with any of Debtor's financials.[26]

Mr. Worrell, in a declaration filed in support of the Trustee's Motion (the "Worrell Declaration"), stated that (1) he did not want to pay Defendant $1.2 million to settle the State Court Action, "but at that time I still believed that I could save the company and I did not want PFF to take the money," and that (2) he believed Defendant had already been fully compensated for its minority interest in Debtor by the consideration it received under the Redemption Agreement.[27]

As of January 31, 2019, Debtor's internal balance sheet reflected a "total equity" of a negative $1,180,918.01.[28]

II. THE BANKRUPTCY CASE AND ADVERSARY PROCEEDING

On June 1, 2018 (the "Petition Date"), Debtor filed a petition under Chapter 11 of the Bankruptcy Code.[29] In its bankruptcy schedules, Debtor listed assets with a total value of $1,016,098.04, consisting primarily of cash, deposits, receivables, investments, and real property.[30] Debtor also listed secured claims of $4,230,959.68,

[26] Doc. No. 38-15, p. 8.
[27] Doc. No. 36, pp. 20-23.
[28] Doc. No. 50, p. 11.
[29] Main Case, Doc. No. 1.
[30] Main Case, Doc. No. 1, p. 16.

and unsecured claims of more than $8,120,784.44, not including the unliquidated claims asserted in the Tort Litigation.[31]

On July 31, 2018, Gerard A. McHale, Jr. (the "Trustee") was appointed as the Chapter 11 trustee in Debtor's case.[32]

On April 13, 2020, the Trustee initiated this adversary proceeding. In his Second Amended Complaint (the "Complaint"),[33] the Trustee alleges that Defendant was an insider of Debtor, and that Debtor's payment of $1.2 million to Defendant on December 22, 2017 (the "Transfer") is voidable as a preferential transfer under § 547 of the Bankruptcy Code, [34] a fraudulent transfer under § 726.106(2) of the Florida Statutes, and a constructively and actually fraudulent transfer under § 548.

Defendant answered the Complaint,[35] and the parties filed the Motions, responses, and replies.[36]

III. ANALYSIS

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), a party "may move for summary judgment, identifying each claim or defense — or the part of each claim or defense —

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[31] Main Case, Doc. No. 1, pp. 17-22.
[32] Main Case, Doc. No. 143.
[33] Doc. No. 32.
[34] Unless otherwise stated, statutory references are to the United State Bankruptcy Code, 11 U.S.C. § 101, *et seq.*
[35] Doc. No. 34.
[36] Doc. Nos. 35, 38, 46, 48, 50, and 52.

on which summary judgment is sought." Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.[37]

For issues on which the movant bears the burden of proof, the movant must come forward with credible evidence that, if not controverted at trial, would entitle the movant to a directed verdict. But for issues on which the nonmovant bears the burden at trial, the moving party may either show that there is an absence of evidence to support the non-moving party's claim or may come forward with affirmative evidence showing that the non-moving party will be unable to prove its claim or defense at trial. If the moving party carries its initial burden, the responsibility moves to the non-moving party to show the existence of a genuine issue of material fact.[38]

The standard is the same for cross-motions for summary judgment.[39] In such cases, courts must evaluate each motion on its own merits and draw all reasonable inferences against the party whose motion is under consideration. However, in evaluating cross-motions, courts may "assume that there is no evidence which needs to be considered other than that which has been filed by the parties."[40]

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[37] Fed. R. Civ. P. 56(a), made applicable to this proceeding by Fed. R. Bankr. P. 7056.
[38] *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993); *In re Fields*, 2018 WL 1616840, at *2 (Bankr. M.D. Fla. Mar. 30, 2018).
[39] *In re Van Arsdale*, 2017 WL 2267021, at *2 (Bankr. N.D. Cal. May 18, 2017) (citing *Taft Broadcasting Co. v. United States*, 929 F.2d 249, 248 (6th Cir. 1991)).
[40] *In re Van Arsdale*, 2017 WL 2267021, at *2 (quoting *Greer v. United States*, 207 F.3d 322, 326 (6th Cir. 2000)).

Here, the Trustee bears the burden of proof as to each required element of his preference claim[41] and as to each required element of his actually and constructively fraudulent transfer claims.[42]

B. The Trustee's Claims Under § 547(b) and Fla. Stat. § 726.106(2)

To avoid a preferential transfer under § 547(b), a trustee must show that the transfer (1) was to a creditor, (2) was on account of a previous debt, (3) was made while the debtor was insolvent, (4) was made within 90 days before the bankruptcy petition was filed, and (5) enabled the creditor to receive more than it would have received if the debtor's estate were liquidated under Chapter 7.[43] Section 547(b)(4)(B) extends the look-back period from 90 days to one year before the petition date, but only if the transferee was an insider of the debtor at the time of the transfer.[44]

To avoid a fraudulent transfer under Fla. Stat. § 726.106(2), a plaintiff must show that the debtor made the transfer (1) to an insider, (2) for a previous debt, (3) while the debtor was insolvent, and (4) that the insider had reasonable cause to believe that the debtor was insolvent.[45]

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[41] *In re Flooring America, Inc.*, 302 B.R. 394, 398 (Bankr. N.D. Ga. 2003).
[42] *In re Able Body Temporary Services, Inc.*, 626 B.R. 643, 656 (Bankr. M.D. Fla. 2020) (citing *In re American Way Service Corporation*, 229 B.R. 496, 525-26 (Bankr. S.D. Fla. 1999)).
[43] 11 U.S.C. § 547(b); *In re Oconee Regional Health Systems, Inc.*, 621 B.R. 64, 69-70 (Bankr. M.D. Ga. 2020).
[44] *In re NetBank, Inc.*, 424 B.R. 568, 570 (Bankr. M.D. Fla. 2010).
[45] Fla. Stat. § 726.106(2); *National Maritime Services, Inc. v. Straub*, 979 F. Supp. 2d 1322, 1330 (S.D. Fla. 2013).

The Trustee's claims to avoid the Transfer as a preferential transfer under § 547 and as a fraudulent transfer under Fla. Stat. § 726.106(2) both hinge on whether Defendant was an insider of Debtor at the time of the Transfer.

1. Defendant was not an insider at the time of the Transfer.

The undisputed facts are that Defendant became a member of Debtor upon its January 2010 formation and that Defendant's sole member, Mr. Para, was one of Debtor's two managers. But after the December 2014 Redemption Agreement, Defendant sold its membership interest to Debtor and neither Defendant nor Mr. Para were involved in Debtor's business activities or business decisions in any way. After December 2014, neither Debtor nor Defendant considered Defendant to hold any interest in Debtor; Debtor's 2014 Tax Return and 2014 K-1, and Mr. Worrell's personal 2015 tax return all reflect that after December 2014, Defendant did not hold a membership interest in Debtor. And although Defendant alleged in the State Court Action that the purchase price paid by Debtor for Defendant's membership interest was too low, Defendant did not allege that the redemption of its interest had never occurred or that it should be rescinded.

From these undisputed facts, the Court concludes that Defendant was a member and insider of Debtor until the date of the Redemption Agreement—December 5, 2014—and that Defendant's membership interest and insider status terminated on that date.

2. The Transfer is not avoidable under § 547(b).

The Transfer took place on December 22, 2017, after 90 days but within one year of the Petition Date. Under § 547(b), a transfer may be avoided if it meets the other requirements of the section and was made between 90 days and a year before the petition date, but *only* if the transferee was an insider of the debtor "at the time of such transfer."[46]

> Section 547 limits the trustee's avoidance powers for preferential transfers that occur "before ninety days and one year before the date of filing the petition" to creditors who were an insider of the debtor. 11 U.S.C. § 547(b)(4)(B). A creditor's insider status "is to be determined on the exact date of the transfer."[47]

In *In re Beaulieu Group, LLC*,[48] the individual defendant claimed that he was not an insider of the debtor at the time of the "one-year transfers," because his employment with the debtor had terminated before that date. The court ruled that the plaintiff failed to state a claim to avoid a preferential transfer because the plaintiff had not alleged that the individual retained any control over the debtor after his employment ended or at any time during the one-year preference period, and "there is no basis to depart from the plain language of the statute, which requires that insider status exist at the time of the transfer."[49]

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[46] 11 U.S.C. § 547(b)(4)(B).
[47] *In re Oconee Regional Health Systems, Inc.*, 621 B.R. at 77-78 (quoting *In re Toy King Distributors, Inc.*, 256 B.R. 1, 97-98 (Bankr. M.D. Fla. 2000)).
[48] 2021 WL 4469928 (Bankr. N.D. Ga. Sept. 29, 2021).
[49] *In re Beaulieu Group, LLC*, 2021 WL 4469928, at *33.

And in *In re NetBank, Inc.*,[50] the bankruptcy court held that the plaintiff failed to state a cause of action to recover a transfer that occurred more than 90 days before the petition date, where the plaintiff conceded that the defendant received the transfer *the day after* his resignation as the debtor's CEO had become effective. In so holding, the court agreed with the majority position that, for avoidance purposes, the transferee must have been an insider on the exact date of the payment, not the date on which the payment was arranged or negotiated.[51]

Here, the undisputed facts show that Defendant's insider status terminated on December 5, 2014, the date of the Redemption Agreement, and the Trustee has offered no evidence that Defendant retained any interest in Debtor after that date. The Court finds that Defendant has met its burden on summary judgment to show that there is an absence of evidence to support the Trustee's claim to avoid the Transfer under § 547(b), and the Trustee has failed to meet his burden to show the existence of a genuine issue of material fact. Therefore, the Transfer is not avoidable as a preferential transfer under § 547(b).

3. The Transfer is not avoidable under Fla. Stat. § 726.106(2).

The transferee's insider status is a required element of a claim to avoid a fraudulent transfer under Fla. Stat. § 726.106(2).[52]

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[50] 424 B.R. 568 (Bankr. M.D. Fla. 2010).
[51] *In re NetBank, Inc.*, 424 B.R. at 570-72.
[52] *National Maritime Services, Inc. v. Straub*, 979 F. Supp. 2d at 1330.

Section 726.106(2) is a provision of the Florida Uniform Fraudulent Transfer Act ("FUFTA").[53] Under FUFTA, a transferee's insider status is generally determined by the transferee's relationship to the debtor at the time of the transfer, because the transferee's close relationship and opportunity to influence the debtor's decision to make the transfer is what subjects the transfer to heavy scrutiny.[54] For example, in *National Maritime Services, Inc. v. Straub*,[55] the court determined that the transferee (Straub) was an insider under § 726.106(2) because he was the sole person in control of the debtor at the time of the transfer and therefore in control of the relevant transactions.[56] The court concluded that Straub's close relationship to the debtor and his ability to direct payment meant that the transfers were not conducted at arms-length and rendered Straub an insider under FUFTA.

Here, there is no evidence that Defendant and Debtor shared a close relationship on the date of the Transfer. Rather, Defendant's relationship with Debtor had terminated three years earlier, and, as of March 2016, Defendant was Debtor's *adversary* in contested litigation. The Trustee has offered no evidence to show that Defendant had any control over Debtor or Debtor's finances on the date of the

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[53] Fla. Stat. § 726.101, *et seq*.
[54] *See In re Black Iron, LLC*, 609 B.R. 390, 407 (Bankr. D. Utah 2019) (under the Utah Uniform Fraudulent Transfer Act), and *Bank of America, N.A. v. Fulcrum Enterprises, LLC*, 20 F. Supp. 3d 594, 604 (S.D. Tex. 2014) (under the Texas Uniform Fraudulent Transfer Act).
[55] 979 F. Supp. 2d 1322 (S.D. Fla. 2013).
[56] *National Maritime Services, Inc. v. Straub*, 979 F. Supp. 2d at 1330.

Transfer or that the settlement of the State Court Action was not the result of an arms-length negotiation.

The Court finds that Defendant has met its burden on summary judgment to show that there is an absence of evidence to support the Trustee's claim to avoid the Transfer under Fla. Stat. § 726.106(2), and the Trustee has failed to meet his burden to show the existence of a genuine issue of material fact. Therefore, the Transfer is not avoidable as a fraudulent transfer under Fla. Stat. § 726.106(2).

C. The Trustee's Fraudulent Transfer Claims Under § 548

The Trustee alleges that the Transfer was both constructively fraudulent and actually fraudulent under § 548. To avoid a transfer as constructively fraudulent under § 548(a)(1)(B), the trustee must show that the debtor received less than reasonably equivalent value in exchange for the transfer and that the debtor was insolvent or financially impaired at the time of the transfer. And to avoid a transfer as actually fraudulent under § 548(a)(1)(A), a trustee must show that the debtor transferred the property with the actual intent to hinder, delay, or defraud the debtor's creditors.

1. The Transfer was not constructively fraudulent under § 548(a)(1)(B).

Debtor transferred $1.2 million to Defendant in settlement of Defendant's State Court Action against Debtor and Mr. Worrell. In his Motion, the Trustee asserts that Debtor received less than reasonably equivalent value in exchange for the Transfer

because the Transfer essentially represented Debtor's final payment for the redemption of Defendant's "worthless" equity interest in Debtor, and because the Transfer primarily benefitted Mr. Worrell, not Debtor. Although Debtor was released from Defendant's claims in the State Court Action, the Trustee contends that the release had no value to Debtor because Debtor went out of business and filed its bankruptcy petition six months later.[57]

Defendant, on the other hand, asserts: (a) that it had sought damages of more than $7 million against Debtor in the State Court Action; (b) that Debtor was bound by Mr. Worrell's actions as alleged in the State Court Action and was therefore legally responsibility for the damages; (c) that the State Court Action was litigated for eighteen months; and (d) that the settlement was an arms-length agreement reached after a full-day arbitration at which Debtor was represented by counsel. Consequently, Defendant contends that Debtor received reasonably equivalent value from the Transfer because it "resolved the risk of substantial liability far in excess of the settlement amount."[58]

Because the Bankruptcy Code does not define the term "reasonably equivalent value," courts generally consider factors such as the "good faith of the parties, the disparity between the fair value of the property and what the debtor actually

[57] Doc. No. 35, pp. 4-6.
[58] Doc. No. 38, pp. 21-26.

received, and whether the transaction was at arm's length."[59] "[T]he essential examination is a comparison of 'what went out' with 'what was received,'"[60] but the "the concept of reasonably equivalent value does not require a dollar-for-dollar transaction."[61]

It is well-settled that indirect benefits, as well as direct benefits, may constitute "value" under § 548(a)(1)(B) if the benefits are sufficiently concrete and identifiable. And value can include the elimination of claims against the debtor or the resolution of litigation. For example, in *In re Miller*,[62] the debtor transferred $50,000.00 to settle a lawsuit against him and other defendants for breach of contract, breach of fiduciary duty, fraud, and other claims. The settlement was reached after a mediation among all parties. The debtor later filed a Chapter 7 bankruptcy petition, and the Chapter 7 trustee filed a complaint to avoid the $50,000.00 payment as a constructively fraudulent transfer under § 548(a)(1)(B). The court found that the trustee did not meet his burden of proving that the debtor received less than reasonably equivalent value in exchange for the payment, stating,

> The settlement here, like most, was not an outright victory for either side. It was the result of mediated resolution of ongoing litigation. There was

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[59] *In re Universal Health Care Group, Inc.*, 560 B.R. 594, 602 (Bankr. M.D. Fla. 2016) (citations omitted).
[60] *United States v. Winland*, 2017 WL 6498074, at *5 (M.D. Fla. Dec. 1, 2017) (quoting *In re Leneve*, 341 B.R. 53, 57 (Bankr. S.D. Fla, 2006)).
[61] *In re Northlake Foods, Inc.*, 715 F.3d 1251, 1257 (11th Cir. 2013) (citing *In re Advanced Telecomm. Network, Inc.*, 490 F.3d 1325, 1336 (11th Cir. 2007).
[62] 536 B.R. 863 (Bankr. D. Idaho 2015).

> nothing to suggest the settlement was anything other than an arms-length resolution of contested factual and legal issues.[63]

In reaching its decision, the court noted that the claims against the debtor "were not without some foundation" and that the goal of a settlement is to avoid the risk and expense of litigation.[64]

Here, as in *Miller*, Defendant's claims against Debtor in the State Court Action do not appear "totally groundless." Rather, Defendant's claims involved fact-based issues of fraud and breach of fiduciary duty; the damages claimed by Defendant in the State Court Action far exceeded the amount of the Transfer; the State Court Action was on-going at the time the parties reached a settlement agreement; and the settlement was reached in a contested arbitration with all parties represented by counsel. The Trustee has offered no evidence that Debtor and Mr. Worrell *gratuitously* agreed to make a $1.2 million payment to Defendant without receiving a benefit in return.

A $1.2 million payment cannot be characterized as a "nuisance value" settlement; the Court infers that Mr. Worrell believed there was value to Defendant's claims in the litigation, and if PFF "took the money," Debtor would not have the funds available to settle with Defendant at a later time, or that Mr. Worrell was concerned about the possibility of an adverse arbitration award against Debtor and himself, or

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[63] *In re Miller*, 536 B.R. at 871.
[64] *Id.*

that Mr. Worrell thought he could negotiate with PFF more easily than with Defendant. In any event, the Transfer to Defendant ended the State Court Action and allowed Debtor to avoid the risk and expense of further litigation.

The Court finds that Defendant has met its burden on summary judgment to show that there is an absence of evidence to support the Trustee's assertion that the Transfer was for less than reasonably equivalent value, and the Trustee has failed to meet his burden to show the existence of a genuine issue of material fact. Therefore, the Court concludes that Debtor did not receive less than reasonably equivalent value in exchange for the Transfer.

2. The Trustee's Claim that the Transfer Was Actually Fraudulent Under § 548(a)(1)(A)

Under § 548(a)(1)(A), a transfer is actually fraudulent if the debtor made the transfer with "actual intent to hinder, delay, or defraud" a creditor.[65] "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."[66]

The Trustee alleges that the totality of the circumstances, as supported by the Worrell Declaration, establishes Debtor's fraudulent intent in making the Transfer because: (a) the Transfer benefitted Mr. Worrell, not Debtor, but Debtor made the

[65] 11 U.S.C. § 548(a)(1)(A).
[66] *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)).

payment; (b) Debtor historically made payments to benefit Mr. Worrell at Debtor's expense; (c) the Transfer occurred the day after PFF filed the PFF Action against Debtor and Mr. Worrell; (d) Debtor did not want to pay PFF, a creditor, and instead paid the money to Defendant; (e) Debtor received less than reasonably equivalent value in exchange for the Transfer, which the Trustee characterizes as additional compensation for Defendant's worthless equity interest; (f) Debtor was insolvent at the time of the Transfer; and (g) Debtor went out of business and filed its Chapter 11 petition six months after the Transfer.[67]

a. The Statutory Badges of Fraud

Defendant points out that the Trustee has alleged only four of the eleven badges of fraud listed in Fla. Stat. § 726.105(2),[68] which may be applied with equal weight in an action under § 548.[69] The Trustee has alleged that:

> (1) The transfer or obligation was to an insider.
>
> (2) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (3) The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

[67] Doc. No. 35, pp. 6-7.
[68] Doc. No. 38, p. 18.
[69] *Id.* (citing *In re McCarn's Allstate Finance, Inc.*, 326 B.R. 843 (Bankr. M.D. Fla. 2005)).

(4) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.[70]

As set forth above, the Court has determined that Defendant was not an insider of Debtor on the date of the Transfer, and that the Transfer was not for less than reasonably equivalent value. This leaves only two remaining statutory badges of fraud alleged by the Trustee: whether Debtor had been sued at the time of the Transfer and whether Debtor was insolvent or became insolvent shortly after the Transfer was made.

b. Debtor had been sued or threatened with suit.

The record evidence is that Debtor had been sued by the Tort Plaintiffs before the Transfer, had been threatened with suit by PFF before the Transfer, and had been actually sued by PFF the day before the Transfer.

c. Debtor was insolvent on the date of the Transfer.

The Trustee asserts that Debtor's insolvency on the date the Transfer is established by (1) the filing of the Tort Litigation in October 2016, in which the Tort Plaintiffs seek more than $60 million in damages; (2) the PFF Lawsuit filed against Debtor in December 2017, in which PFF seeks more than $4 million in damages; (3)

[70] The Trustee did not allege the other seven badges of fraud listed in Fla. Stat. § 726.105(2): the debtor retained possession or control of the property after the transfer; the transfer or obligation was concealed; the transfer was of substantially all the debtor's assets; the debtor absconded; the debtor removed or concealed assets; the transfer occurred shortly before or shortly after a substantial debt was incurred; and the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Debtor's schedules in the bankruptcy case, filed six months after the Transfer, listing assets valued at a little more $1 million and liabilities exceeding $12 million, and (4) the Trustee's investigation of Debtor's financial condition and his determination that Debtor was insolvent on the date of the Transfer.[71]

In his Declaration in support of the Trustee's Motion, the Trustee states that Debtor "never owned any real hard assets," and that "except for a few miscellaneous assets, it owned only intangible contract rights" with the United States government, which were either "not easily assignable or not assignable at all."[72] In a supplement to his declaration, the Trustee further states that his opinion of Debtor's insolvency is supported by Debtor's internal balance sheet dated January 31, 2018, the month after the Transfer, which he contends "shows that the Debtor was insolvent by more than $1.1 million."[73]

Defendant, however, asserts that the Trustee's insolvency analysis failed to consider two valuable assets belonging to Debtor: a $10 million debt owed to Debtor as a judgment creditor in the case of *Homeland Munitions, LLC, et al. v. Purple Shovel, LLC,* in the United States District Court in Utah, and a "long-standing" $560,000.00

[71] Doc. No. 35, p. 4.
[72] Doc. No. 36, pp. 5-6.
[73] Doc. No. 50, p. 10 (Debtor's internal balance sheet just a month after the Transfer stated "total assets" of $2,811,492.48 (Doc. No. 50, p. 11) and its bankruptcy schedules filed six months later listed assets valued only at $1,016,098.04 (Main Case, Doc. No. 1, p. 8)).

receivable owed to it by Matt Lamb Studios and others for services rendered.[74] But Defendant has provided no evidence that these debts were collectible, could be monetized, or had any significant value to Debtor. Consequently, even without considering the $60 million potential liability claimed in the Tort Litigation, the record evidence is that Debtor's liabilities exceeded its assets on December 22, 2017, the date of the Transfer.

The Court finds that the Trustee has met his burden on summary judgment to show there is no genuine factual dispute that Debtor was insolvent on the date of the Transfer, and Defendant has not met its burden to show a genuine factual dispute on the issue of insolvency. Therefore, the Court concludes that Debtor was insolvent on the date of the Transfer.

d. The Trustee's contentions regarding the "totality of the circumstances" do not evidence actual fraudulent intent.

The Trustee alleges that the "totality of the circumstances" demonstrate that Debtor made the Transfer with actual fraudulent intent. However, of the circumstances alleged by the Trustee, the Court has found only that Debtor had been sued before Transfer was made, and that Debtor was insolvent on the date of the Transfer. The Court has not found that Defendant was an insider of Debtor or that the Transfer was for less than reasonably equivalent value, and the remaining

[74] Doc. No. 38, pp. 9, 20-21; Doc. No. 38-15, p. 8.

circumstances alleged by the Trustee do not warrant a finding of actual fraudulent intent.

For example, the Trustee argues that the Transfer benefited Mr. Worrell, not Debtor, but the Trustee overlooks (1) that Debtor made the Transfer to settle the State Court Action in which claims of fraud and breach of fiduciary duty against Debtor had been litigated for eighteen months, (2) that Debtor may be liable for any fraudulent misrepresentations made by Mr. Worrell in connection with the Redemption Agreement, and (3) that Debtor was a defendant in the State Court Action. In addition, even if Debtor "historically" made payments solely to benefit Mr. Worrell, the historical payments are not evidence that Debtor made the Transfer with actual fraudulent intent.

e. The Transfer was not actually fraudulent under § 548(a)(1)(A).

The Trustee bears the burden of proving that Debtor made the Transfer with actual intent to hinder, delay, or defraud creditors.[75] Here, the Court has found only two of the statutory badges of fraud alleged by the Trustee: that Debtor had been sued before the Transfer was made, and that Debtor was insolvent on the date of the Transfer. But the Transfer was in settlement of the State Court Action, which involved substantial claims by Defendant and was vigorously litigated by Debtor and Defendant. And the Court has found that the Trustee failed to establish that

[75] *In re Able Body Temporary Services, Inc.*, 626 B.R. at 656.

Defendant was an insider of Debtor at the time of the Transfer or that the Transfer was for less than reasonably equivalent value.

Mr. Worrell's statements in the Worrell Declaration do not create a genuine dispute of material fact on the issue of Debtor's fraudulent intent, because they only show that Debtor chose to make the Transfer to Defendant instead of retaining the funds to pay PFF, and that Mr. Worrell may have been motivated by his belief that he could "save the company." Although Debtor owed other creditors at the time of the Transfer, and Debtor may have *preferred* Defendant over its other creditors, including PFF, there is insufficient evidence to support a finding that Debtor made the transfer with actual fraudulent intent.

The Court finds that Defendant has met its burden on summary judgment to show that there is an absence of evidence to support the Trustee's assertion that Debtor made the Transfer with fraudulent intent. The burden on summary judgment shifted to the Trustee, and the Trustee failed to meet his burden to show the existence of a genuine issue of material fact. The Court concludes that Defendant is entitled to summary judgment on the Trustee's claim to avoid the Transfer as actually fraudulent.

III. CONCLUSION

For the foregoing reasons, the Court finds that the Trustee has not met his burden of proof on summary judgment to establish that the Transfer was voidable as

a preferential transfer under § 547, a fraudulent transfer under Fla. Stat. § 726.106(2), or a constructively or actually fraudulent transfer under § 548. Further, the Court finds that Defendant has met its burden of proof on summary judgment to establish an absence of evidence to support each the Trustee's claims.

Accordingly, it is

ORDERED:

1. The Trustee's Motion for Summary Judgment (Doc. No. 35) is **DENIED** and Defendant's Motion for Summary Judgment (Doc. No. 38) is **GRANTED**; and

2. The Court will enter a separate judgment in Defendant's favor.

Clerk's Office to serve on interested parties via CM/ECF.