IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
ANDERSON NEWS, LLC,	:	Case No. 09-10695 (CSS)
	:	
Debtor.	:	
	:	
ANDERSON NEWS, LLC,	:	
	:	
Plaintiff,	:	
	:	Adv. Proc. No. 11-53979(CSS)
v.	:	
	:	
THE NEWS GROUP, INC.,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

Before the Court is a motion to dismiss a preference action for lack of subject matter jurisdiction under Rule 7012(b)(1) and for failure to state a claim under Rule 7012(b)(6). The Court will grant the motion in part and deny it in part.

A. Lack of Subject Matter Jurisdiction

The defendant argues that, under the Supreme Court's opinion in *Stern v. Marshall*,[1] the bankruptcy court lacks subject matter jurisdiction over this preference action because it is not a core proceeding. The defendant's motion is based on a fallacious premise. *Stern* is not about whether the bankruptcy court has subject matter

[1] *Stern v. Marshall*, ___ U.S. ___, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011).

jurisdiction over a claim.[2] Rather, it addresses whether the bankruptcy judge has the judicial authority to enter a final order.[3]

In this case, the plaintiff has brought an action for recovery of preferential transfers. Preference actions are enumerated as core proceedings under 28 U.S.C. § 157(b)(2)(F). Because preference actions are enumerated as core proceedings under the statute, by definition, those actions "arise under" Title 11.[4] As such, the district court and, by reference the bankruptcy court, have subject matter jurisdiction over preference actions. Thus, this Court has subject matter jurisdiction over the claims and the motion to dismiss under Rule 7012(b)(1) is denied.[5]

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[2] *In re USDigital, Inc.*, 461 B.R. 276, 278 (Bkrtcy. D. Del. 2011).

[3] *Id*. at 280.

[4] *Id*. at 283-84.

[5] As stated above, the question under *Stern* is whether the bankruptcy judge has judicial power to enter final orders. The proper procedural mechanism to raise the issue at this point in the proceedings would be to file a motion for determination of core proceeding(s). Nonetheless, had the issue been properly raised, the Court would nonetheless deny the motion without prejudice.

On February 29, 2012, the United States District Court for the District of Delaware entered an *Amended Standing Order of Reference Re: Title 11*. The Amended Order provides that:

> If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, *the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court*. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution. (emphasis added).

Thus, the district court has referred matters such as this preference action to the bankruptcy court, regardless of whether the bankruptcy judge has the judicial power to enter final orders. As the question of whether the bankruptcy judge has the judicial power to enter final orders is not a threshold issue and indeed may never be an issue in the case, in the interest of judicial economy, this Court generally denies without prejudice or holds in abeyance as premature motions for determination of whether a matter is a core proceeding.

B. Failure to State a Claim

The defendant also seeks dismissal of the action under Rule 7012(b)(6) on the grounds that the plaintiff has failed to state a claim for which relief can be granted. More specifically, the defendant argues that the plaintiff has failed to adequately plead three of the elements necessary to state a *prima facie* case to avoid a preference: the transfers sought to be avoided (1) were on account of an antecedent debt, (2) were made while the debtor was insolvent, and (3) enabled the defendant to receive more than it would have received under Chapter 7 of the Bankruptcy Code. The Court will grant the motion to dismiss without prejudice based upon plaintiff's failure to assert a plausible claim that the transfers were on account of an antecedent debt. The Court will deny the balance of the motion to dismiss.

A motion under Rule 7012(b)(6)[6] serves to test the sufficiency of the factual allegations in the plaintiff's complaint.[7] "Standards of pleading have been in the forefront of jurisprudence in recent years."[8] With the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[9] and *Ashcroft v. Iqbal*,[10] "pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading,

[6] Federal Rules of Civil Procedure 8(a) and 12(b)(6) are made applicable to this adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7008 and 7012, respectively.

[7] *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993) ("The pleader is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist." (citations omitted)).

[8] *Fowler v. UPMC Shadyside*, 578 F.3d 203, 209 (3d Cir. 2009).

[9] 550 U.S. 544 (2007).

[10] 129 S. Ct. 1937 (2009).

requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss."[11]

In *Iqbal*, the Supreme Court makes clear that the *Twombly* "facial plausibility" pleading requirement applies to all civil suits in the federal courts.[12] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to survive a motion to dismiss.[13] Rather, "all civil complaints must now set out sufficient factual matter to show that the claim is facially plausible."[14] A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[15] Determining whether a complaint is "facially plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.[16] But where the well-pleaded facts do not permit the court to infer more than the mere

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[11] *Fowler*, 578 F.3d at 210.

[12] *See Fowler*, 578 F.3d at 210.

[13] *Iqbal*, 129 S. Ct. at 1949. *See also Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007) (citations omitted); *Bartow v. Cambridge Springs SCI*, 285 Fed. Appx. 862, 863 (3d Cir. 2008) ("While facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions.); *General Motors Corp. v. New A.C. Chevrolet, Inc.*, 263 F.3d 296, 333 (3d Cir. 2001) ("Liberal construction has its limits, for the pleading must at least set forth sufficient information for the court to determine whether some recognized legal theory exists on which relief could be accorded the pleader. Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. While facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions." (citations omitted)).

[14] *Fowler*, 578 F.3d at 210 (internal quotations omitted). *See also Iqbal*, 129 S. Ct. 1950 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."); *Buckley v. Merrill Lynch & Co. (In re DVI, Inc.)*, 2008 Bankr. LEXIS 2338 (Bankr. D. Del. Sept. 16, 2008) ("Rule 8(a) requires a showing rather than a blanket assertion of an entitlement to relief. We caution that without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only fair notice, but also the grounds on which the claim rests."(citations omitted)).

[15] *Iqbal*, 129 S. Ct. at 1949.

[16] *Iqbol*, 129 S. Ct. at 1950. "It is the conclusory nature of [plaintiff's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id.* at 1951.

possibility of misconduct, the complaint has alleged - but not shown - that the pleader is entitled to relief."[17]

After *Iqbal*, the Third Circuit has instructed this Court to "conduct a two-part analysis. First the factual and legal elements of a claim should be separated. The [court] must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions."[18] The court "must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief."[19] The Third Circuit has further instructed that "[s]ome claims will demand relatively more factual detail to satisfy this standard, while others require less."[20]

Notwithstanding the above, the defendant asserts that a different and allegedly more stringent standard governs preference actions, i.e., that set forth in *In re Valley*

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[17] *Id.* at 1950 (citations and internal quotations omitted).

[18] *Fowler*, 578 F.3d at 210-11. *See also Twombly*, 550 U.S. at 555 (holding that a court *must* take the complaint's allegations as true, no matter how incredulous the court may be); *Iqbal*, 129 S. Ct. at 1949-50 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . When there are well-plead factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *Winer Family Trust v. Queen*, 503 F.3d 319, 327 (3d Cir. 2007); *Carino v. Stefan*, 376 F.3d 156, 159 (3d Cir. 2004). The Court may also consider documents attached as exhibits to the Complaint and any documents incorporated into the Complaint by reference. *In re Fruehauf Trail Corp.*, 250 B.R. 168, 183 (Bankr. D. Del. 2000) (*citing PBGC v. White*, 998 F.2d 1192, 1196 (3d Cir. 1993)). "[I]f the allegations of [the] complaint are contradicted by documents made a part thereof, the document controls and the Court need not accept as true the allegations of the complaint." *Sierra Invs., LLC v. SHC, Inc. (In re SHC, Inc.)*, 329 B.R. 438, 442 (Bankr. D. Del. 2005). *See also Sunquest Info. Sys., Inc. v. Dean Whitter Reynolds, Inc.*, 40 F. Supp. 2d 644, 649 (W.D.Pa. 1999) ("In the event of a factual discrepancy between the pleadings and the attached exhibit, the exhibit controls." (citations omitted)).

[19] *Fowler*, 578 F.3d at 211 (internal quotations omitted) ("[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts." (citations omitted)). "The plaintiff must put some 'meat on the bones' by presenting sufficient factual allegations to explain the basis for its claim." *Buckley v. Merrill Lynch & Co., Inc. (In re DVI, Inc.)*, 2008 Bankr. LEXIS 2338, at *13 (Bankr. D. Del. Sept. 16, 2008).

[20] *In re Ins. Brokerage Antitrust Litig.*, 2010 U.S. App. LEXIS 17107, 46-47 n. 18 (3d Cir. Aug. 16, 2010). *See also Arista Records LLC v. Doe*, 604 F.3d 110, 120-21 (2d Cir. 2010) (stating that *Twombly* and *Igbal* require factual amplification where needed to render a claim plausible, not pleadings of specific evidence or extra facts beyond what is needed to make a claims plausible).

Media, Inc., 288 B.R. 189 (Bkrtcy. D. Del. 2003) and *In re Oakwood Homes Corp.*, 340 B.R. 510 (Bkrtcy. D. Del. 2006). Of course, the United States Supreme Court's standard as interpreted by the Third Circuit governs this motion to dismiss. The question is whether the articulation of the standard governing motions to dismiss preference actions set forth in *Valley Media* and *Oakwood Homes* is consistent with governing law.

In *Valley Media*, which was decided prior to *Twombly/Iqbal* and the Third Circuit's decision in *Fowler*, the court found "that the following information must be included in a complaint to avoid preferential transfers in order to survive a motion to dismiss: (a) an identification of the nature and amount of each antecedent debt and (b) an identification of each alleged preference transfer by (i) date, (ii) name of debtor/transferor, (iii) name of transferee and (iv) the amount of the transfer."[21] In *Oakwood Homes*, which was decided after *Twombly/Iqbal* and *Fowler* and indeed cited to those cases, the court reiterated the standard articulated in *Valley Media* as governing motions to dismiss preference actions. At the same time, however, the *Oakwood Homes* court noted that in *Valley Media* it had "rejected the argument that a 'complaint should also prove: (1) how Defendant is considered a creditor; (2) how an interest in the property was transferred to the Defendant; (3) that Plaintiff owed Defendant an antecedent debt; and (4) how the transfers enable Defendant to receive more than it would have in a Chapter 7 liquidation.'"[22] The court went on to say that "[r]equiring such information 'would require detailing all relevant facts . . . Rule 8(a) does not contemplate such

[21] *In re Valley Media, Inc.*, 288 B.R. at 192 (citing *Posman v. Bankers Trust Company,* Adv. Pro. No. 97–245, Walsh, C.J. (Bkrtcy. D. Del. July 28, 1999)).

[22] *Oakwood Homes*, 340 B.R. at 522 (internal citations omitted).

specificity.'"[23] Finally, the court noted that the rule articulated in *Valley Media* (and adopted in *Oakwood Homes*) "is subject to the facts of the particular case."[24]

This Court finds that the *Valley Media/Oakwood Homes* standard is entirely consistent with *Twombel/Iqbal* and *Fowler*. Nonetheless, the standard should not be strictly applied.

1. For or on Account of Antecedent Debt

Turning first to whether the allegations that the transfers were for or on account of an antecedent debt there are two insufficiencies with the complaint. The complaint lists four transactions (totaling approximately $2.5 million) in which payments were allegedly made by the plaintiff to the defendant in the 90 day preference period. Each of the transfers is identified by invoice date, check date and date on which the check cleared. However, for three of the four transactions, all three dates are identical. The fourth transaction occurred shortly after the alleged invoice date (although the invoice itself is confusing and inconsistent with the other invoice information). Payment of a debt on the date it was incurred is generally not for or on account of an antecedent debt.[25]

[23] *Id.* (internal citations omitted).

[24] *Id*. at 523.

[25] *See In re USDigital*, 443 B.R. at 36-37.

Plaintiff's only description of the nature of the debt is insufficient on its face to overcome the inference that the payment was not for or account of antecedent debt.

> Defendant The News Group transacted business with Plaintiff prior to the Petition Date. Defendant is a magazine and book wholesaler and was a competitor of Plaintiff. The transfer amount represents a settlement payment to Defendant.

Complaint, ¶10.

There is simply insufficient information to support a plausible claim that the transfer was for or on account of an antecedent debt. Indeed, on its face, it appears for at least three of the transactions it was not. Plaintiff is not a trustee left with books and records and no one that is familiar with them. Plaintiff is the debtor in possession. Although the debtor's business ceased operations in 2009, there must be more information available to counsel. Plaintiff can and should do better.

2. While The Debtor Was Insolvent

The Court now turns to the defendant's claim that the plaintiff has not adequately pled that the debtor was insolvent at the time the transfers were made.[26] The plaintiff alleges that the transfers were made in the 90 day period prior to the Petition Date. As such, the plaintiff is entitled to the presumption that the debtor was insolvent at the time the transfers were made.[27]

The defendant argues, however, that the plaintiff is not entitled to the presumption of insolvency because the examiner appointed in the underlying bankruptcy case found that the debtor was generally paying its debts as they became

[26] *See* 11 U.S.C. § 547(b)(3).

[27] 11 U.S.C. § 547(f).

due until immediately prior to the Petition Date and after the alleged preferential transfers. The plaintiff counters that the examiner's report is outside the four corners of the complaint and cannot be considered in a motion to dismiss.

Generally, a court may consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and some matters judicially noticed.[28] In the Third Circuit, a court may consider "concededly authentic document[s] upon which the complaint is based when the defendant attaches such a document to its motion to dismiss."[29] But the court will not take into account additional facts asserted in a memorandum opposing the motion to dismiss because such memoranda do not constitute pleadings under Rule 7(a).

For several reasons, the Court will not consider the examiner's report to determine whether, under Rule 7012(b)(6), the plaintiff has adequately pled the transfers were made at a time when the debtor was insolvent. First and foremost, the report is well beyond the scope of the documents that may be considered at this stage of the pleadings. Second, it is not clear as a matter of law that a finding that a debtor is paying its debts as they become due establishes that it was solvent for purposes of section 547(b)(3) of the Bankruptcy Code. Third, the examiner's report is a lengthy and complex document. To dismiss a preference action based upon a three sentence excerpt would be irresponsible. The examiner's report must be considered in its entirety and in its context before it can serve as a basis to determine whether the debtor is entitled to

[28] *Pension Ben. Guar. Corp.*, 998 F.2d at 1196; *Steinhardt v. Citicorp.*, 126 F.3d 144, 144, 145 n.1 (3d Cir. 1997).

[29] *Pension Ben. Guar. Corp.*, 998 F.2d at 1196.

the presumption of insolvency in this preference action. Finally, even if the examiner's report clearly indicates that the debtor was solvent it is unclear whether that finding - as law of the case, collateral estoppel or any similar theory – would control in the preference action. Thus, the Court will deny the motion to dismiss based upon the plaintiff's alleged failure to plead adequately that the debtor was insolvent at the time of the transfers.

3. Section 547(b)(5)

Section 547(b)(5) of the Bankruptcy Code sets forth one of the five elements that must be met to establish a *prima facie* case that a preferential transfer occurred. It requires the plaintiff to establish that the transfer "enables such creditor to receive more than such creditor would receive if- (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title."[30] The plaintiff alleges in ¶17 of the complaint that "the payment to general unsecured creditors in a chapter 7 liquidation of the debtor would be less than 100 cents on the dollar." The defendant argues that this is insufficient. As noted above, a motion to dismiss a preference action "is subject to the facts of the particular case." Of all the elements required to be pled in support of a preference action to escape a motion to dismiss, this is perhaps the easiest to satisfy. The general statement in this case is sufficient to survive the motion to dismiss.

[30] 11 U.S.C. §

C. Conclusion

The motion to dismiss on the basis of lack of subject matter jurisdiction is denied. In addition, the motion to dismiss for failure to assert a plausible claim that the debtor was insolvent at the time of the alleged preferential transfers and that the transfers provided the defendant with more than it would have received under a Chapter 7 liquidation is denied. The motion to dismiss for failure to assert a plausible claim that the transfers were for or on account of antecedent debt is granted with leave for the plaintiff to file an amended complaint within 28 days of issuance of this order. Failure to file an amended complaint in the time allotted will result in dismissal with prejudice of the adversary proceeding.[31]

Christopher S. Sontchi
United States Bankruptcy Judge

Date: 8/22/2012

[31] As the claims pursuant to sections 550 and 502(d) and (j) are derivative of the preference claims, which are being dismissed without prejudice, these claims are also dismissed with leave for the plaintiff to file an amended complaint within 28 days of issuance of this order.