

DEC 10 2015

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-15-1081-KiTaKu
)		
6	ALETHEIA RESEARCH AND)	Adv. No.	14-01735
	MANAGEMENT, INC.,)		
7)	Bk. No.	2:12-47718-BR
	Debtor.)		
8)		
9	_____)		
	JEFFREY IAN GOLDEN, Chapter 7)		
10	Trustee,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM¹	
)		
13	CLAY LACY AVIATION, INC.,)		
)		
14	Appellee.)		
	_____)		

Argued and Submitted on November 19, 2015,
at Pasadena, California

Filed - December 10, 2015

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Aaron H. Stulman of Ashby & Geddes, P.A. argued for
appellant Jeffrey Ian Golden, Chapter 7 Trustee;
Amy L. Goldman of Lewis Brisbois Bisgaard & Smith
LLP argued for appellee Clay Lacy Aviation, Inc.

Before: KIRSCHER, TAYLOR and KURTZ, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8024-1.

1 Chapter 7² trustee Jeffrey I. Golden appeals an order
2 dismissing his complaint against Clay Lacy Aviation, Inc., which
3 sought to avoid and recover from Clay Lacy certain constructive
4 fraudulent transfers under § 544(b), 548(a)(1)(B) and Cal. Civ.
5 Code § 3439. For several years prior to the petition date, Clay
6 Lacy provided private flight-related services to the debtor,
7 Aletheia Research and Management, Inc. and its management and/or
8 employees. Trustee had alleged that insolvent Aletheia did not
9 receive reasonably equivalent value, or any value, in exchange for
10 flights that he alleged were of a personal nature, benefitting
11 only Aletheia's corporate officers, non-employees and family
12 members of Aletheia's principals. The bankruptcy court
13 determined, however, that Aletheia got exactly what it bargained
14 for – a chartered plane to fly persons from point A to point B,
15 regardless of who received the benefit of the flight. Further,
16 Trustee had not alleged that the fees charged by Clay Lacy were
17 something other than fair market value. As such, the court
18 concluded Aletheia had not received less than reasonably
19 equivalent value from Clay Lacy and that Trustee's complaint
20 failed. We VACATE and REMAND.

21 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

22 Aletheia, a California corporation, was founded in 1997.
23 One of its founders, Peter J. Eichler, Jr., served as Aletheia's
24 chief executive officer. Aletheia filed a chapter 11 bankruptcy
25 case on November 11, 2012. Thereafter, Trustee served as the

26
27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 chapter 11 trustee, closed the business, and the case was
2 converted to chapter 7.

3 **A. Trustee's complaint**

4 Trustee later filed an avoidance action against Clay Lacy and
5 Christy Eichler a/k/a Mavis Christine Lessley, the wife of
6 Mr. Eichler.³ He alleged that Clay Lacy had provided flight
7 services to management, "ostensibly for purposes related to
8 Aletheia and/or in furtherance of Aletheia's business operations."
9 During the four years prior to the petition date, Aletheia paid to
10 Clay Lacy no less than \$5,262,355.50 for flight-related services
11 (the "Transfers"). However, alleged Trustee, the Transfers paid
12 for flights for personal use by employees or members of management
13 and their family and friends and served no business purpose of
14 Aletheia. Many of these flights paid for by Aletheia did not have
15 a single Aletheia employee on board. For example, Clay Lacy
16 received \$267,198 to charter a flight to Europe for two weeks in
17 connection with the Eichlers' son's graduation. The flight
18 included the Eichlers and their five children. Trustee alleged
19 this flight neither served a business purpose nor conferred any
20 benefit to Aletheia.

21 Within Trustee's complaint were detailed examples of other
22 flights he contended were for personal use and not for the benefit
23 of Aletheia, including multiple trips to the Eichlers' Lake Tahoe

24
25 ³ Mrs. Eichler, who apparently was never an Aletheia
26 employee, was served with Trustee's complaint on January 12, 2015.
27 Mrs. Eichler failed to file any timely response. On Trustee's
28 request, the clerk entered Mrs. Eichler's default on March 19,
2015, after this appeal had been filed. One day prior, on
March 18, 2015, Mrs. Eichler filed a voluntary chapter 7
bankruptcy case. As a result, Trustee's avoidance action against
her has been stayed.

1 vacation home, ski trips to Salt Lake City, and Eichler family
2 vacations to Hawaii. Obtaining the information from flight
3 manifests, Trustee's complaint included the date of each flight in
4 question, the name of each person on the flight, the flight
5 destination and the fee paid to Clay Lacy. A detailed list of
6 each flight and the amount paid to Clay Lacy was also attached to
7 the complaint, including one flight that alone cost over \$500,000.

8 Trustee further alleged that Aletheia was insolvent at the
9 time the Transfers were made to Clay Lacy. He argued that no
10 reasonable person would conclude any of the listed flights were
11 for a legitimate business purpose of Aletheia and, thus, the
12 Transfers made on account of these flights were not received by
13 Clay Lacy in good faith. In closing, Trustee reserved the right
14 to amend his complaint.

15 **B. Clay Lacy's motion to dismiss, Trustee's opposition and Clay**
16 **Lacy's reply**

17 **1. Clay Lacy's motion to dismiss**

18 Clay Lacy moved to dismiss Trustee's complaint under Civil
19 Rule 12(b)(6) ("Motion to Dismiss"). In short, Clay Lacy argued
20 that Trustee's complaint asserted conclusory statements and failed
21 to provide any specificity or ultimate fact.

22 Clay Lacy argued that Trustee's claims for avoidance of
23 constructive fraudulent transfers should be dismissed for two
24 reasons. First, the complaint failed to show a lack of reasonably
25 equivalent value received by Aletheia. Trustee had not presented
26 any comparison of the value of the Transfers in relation to the
27 value Aletheia received. For example, Trustee failed to allege
28 any other carrier or provider like Clay Lacy could have provided

1 similar services for less cost. Instead, argued Clay Lacy,
2 Trustee erroneously focused on the identity of each flight
3 passenger and his or her purported relationship to Aletheia to
4 summarily conclude that no business purpose or benefit was
5 provided to Aletheia as a result of these flights. Clay Lacy
6 argued that even if it was aware of the names of each passenger to
7 whom it provided services, it did not have any legal duty to
8 inquire as to why a particular passenger was on a given flight or
9 to ascertain or question the purpose of each passenger's flight
10 plan. Clay Lacy argued that it provided the appropriate services
11 if and when requested by Aletheia – i.e., a fueled plane to fly to
12 a specific location at a specific time and date with flight
13 attendants and requested food and beverage items – in exchange for
14 reasonably equivalent value – i.e., payment for such services.

15 Second, Clay Lacy argued that Trustee's complaint failed to
16 provide any facts to support his unsubstantiated conclusion that
17 Aletheia was insolvent at the time of the Transfers. The
18 complaint merely stated "at the time that Aletheia made each of
19 the alleged transfers to Clay Lacy, Aletheia was insolvent." This
20 conclusory allegation of insolvency, argued Clay Lacy, failed to
21 meet the pleading standard in Twombly.⁴

22 **2. Trustee's opposition**

23 Trustee contended that his complaint met the Twombly standard
24 and sufficiently alleged that while Aletheia was insolvent, it
25 made at least 126 transfers totaling no less than \$5,262,355.50 to
26 Clay Lacy for which Aletheia did not receive reasonably equivalent

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28 ⁴ Bell Atlantic Corp. v. Twombly, 550 U.S. 554 (2007).

1 value, or any value, in return. Trustee reiterated that during
2 the fraudulent transfer period, Aletheia chartered at least
3 21 flights purportedly for the benefit of Aletheia amounting to no
4 less than \$355,949.35 for which no Aletheia employee was even
5 present. Trustee argued that no value was received for these
6 flights. An additional 41 flights all purportedly undertaken for
7 Aletheia's benefit that cost Aletheia no less than \$1,512.150.53
8 were personal in nature for the Eichler family and their friends,
9 such as vacation trips to Lake Tahoe, Hawaii and Europe. Trustee
10 argued that Aletheia received little to no value on account of
11 those flights.

12 As for Clay Lacy's contention that the complaint failed to
13 plead facts alleging lack of reasonably equivalent value, Trustee
14 argued that "reasonably equivalent value" focuses on what the
15 debtor surrendered and what the debtor received, not what the
16 creditor gave. Trustee contended that his complaint had met this
17 standard by alleging that Aletheia paid Clay Lacy certain sums of
18 money for which it received little or no value in return. Trustee
19 further disputed Clay Lacy's contention that his complaint failed
20 to present any comparison of the value of the alleged Transfers in
21 relation to the value Aletheia received. In fact, he had alleged
22 that Aletheia received no value in return for the amount paid to
23 Clay Lacy where no employee was on board and no business purpose
24 existed. Thus, the comparison of value was self-evident.
25 Moreover, argued Trustee, his complaint focused on the identity of
26 each flight passenger because if no employees were on board (e.g.,
27 Mrs. Eichler and her four friends flying to Salt Lake City at an
28 expense to Aletheia of \$16,798.01), then no Aletheia business

1 could have been conducted and Aletheia received no value in return
2 for the payments it made to Clay Lacy.

3 Finally, Trustee argued that he did not need to plead
4 insolvency with particularity. Rather, insolvency could be
5 pleaded generally and still be sufficient to survive a motion to
6 dismiss. Trustee contended that his allegation of Aletheia's
7 insolvency had to be considered in a light most favorable to him
8 and assumed to be true for purposes of Clay Lacy's motion. Any
9 question regarding Aletheia's insolvency would be further
10 developed in discovery, on summary disposition or at a trial on
11 the merits. Alternatively, Trustee requested leave to amend his
12 complaint to address any possible deficiencies.

13 **3. Clay Lacy's reply**

14 In reply, Clay Lacy argued that while Trustee's complaint
15 alleged facts about flights he contended were personal in nature
16 and of no benefit to Aletheia and it recited the statutory
17 elements of a constructive fraudulent transfer under the Code and
18 California law, nothing sufficiently connected the description of
19 the flights and passengers to the allegations of constructive
20 fraudulent transfer against Clay Lacy. Clay Lacy argued that
21 Trustee's complaint either missed or was trying to avoid the
22 simple facts that: (1) Aletheia requested flights and other
23 related services; (2) Clay Lacy provided the services Aletheia
24 requested; and (3) Aletheia paid Clay Lacy for the services
25 provided. Whether or not the passengers were Aletheia employees
26 and whether or not the paid flights were to serve a specific
27 business purpose, argued Clay Lacy, was inapposite to the analysis
28 of a constructive fraudulent transfer claim. Clay Lacy contended

1 that if "reasonably equivalent value" was defined by the ultimate
2 purpose of the service, such a standard would hinder service
3 providers from engaging in business with debtors such as Aletheia.

4 As for insolvency, Clay Lacy reiterated that Trustee's
5 complaint merely parroted the statutory elements of § 548(a)(1)(B)
6 and failed to allege any facts regarding Aletheia's financial
7 condition at the time of the Transfers, such as a reference to a
8 balance sheet or a description of the obligations Aletheia owed as
9 compared to the working capital Aletheia had at that time.

10 **C. The bankruptcy court's ruling to dismiss Trustee's complaint**

11 At the start of the hearing on Clay Lacy's Motion to Dismiss,
12 the bankruptcy court noted it was not clear from Trustee's
13 complaint whether Aletheia or some individual not representing
14 Aletheia hired Clay Lacy for each of the flights in question.
15 Counsel for Trustee responded that it appeared Aletheia had hired
16 Clay Lacy each time, but they were still investigating whether
17 certain executive employees may have made the call on behalf of
18 Aletheia. Counsel conceded that such employees would have had the
19 authority to arrange the flights.

20 The bankruptcy court then made its ruling from the bench,
21 granting Clay Lacy's Motion to Dismiss:

22 Okay. Well, let me tell you this. This is going to be
23 a very short hearing; I think you can see where I'm
24 going. When I read this I said this can't possibly be
the law. Maybe, sometimes it is. But this case, it's
quite clear that the debtor got what it bargained for.

25

26 There's not going to be a debate. It is so clear to me
27 that you got it wrong; just the whole theory of this is
28 wrong. . . . There are two things going on here. The
debtor got what it bargained for. As they pointed out,
there is no - your theory is that it's . . . a fraudulent
transfer because . . . there was no good purpose for it

1 and so forth. I really do understand it but I just don't
2 buy it for a second.

3 What actually happened here is in any commercial
4 activity, like, for example, with renting a car or
5 renting a house The debtor got what it bargained
6 for. It got a plane. Period. And as they point out,
7 there's no evidence that this was a higher price for the
8 normal planes. . . .

9 What you're saying is well, because the use of the plane
10 didn't benefit the debtor, therefore, it's a fraudulent
11 transfer. I just don't buy that for a second.

12 If indeed, for instance - and I'm not ruling on it . . .
13 because it's not before me, but as [Mrs. Eichler] is
14 concerned, if the debtor then gave away, in this case,
15 free transportation to her at a certain value then that
16 might very well be. I'm not saying it is but that, at
17 least, as far as . . . any of these other people that got
18 a free ride . . . yes, that could very easily be a
19 fraudulent transfer. But the transfer there would be
20 from the debtor giving the actual seats on the plane[.]
21 That could easily be a fraudulent transfer because the
22 debtor got no benefit on that. But here, the debtor got
23 what it bargained for. It got a plane, a chartered
24 plane. Period.

25 So . . . there is no fraudulent transfer here. . . .

26 Hr'g Tr. (Feb. 11, 2015) 8:19-23, 9:7-21, 10:1-20. The court did
27 not discuss whether Trustee would be given leave to amend.

28 The order granting Clay Lacy's Motion to Dismiss and
dismissing Trustee's complaint was entered on February 24, 2015.
The order, drafted by counsel for Clay Lacy, failed to articulate
or incorporate any of the bankruptcy court's findings. It was
also silent as to whether the complaint was dismissed with or
without prejudice. Trustee timely appealed.

29 **II. JURISDICTION**

30 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
31 and 157(b) (2) (H). We initially determined the order on appeal was
32 interlocutory. After briefing by the parties, the Panel agreed to
33 consider Trustee's notice of appeal as a motion for leave to

1 appeal and granted leave to appeal. See Rule 8004(d).
2 Accordingly, we have jurisdiction under 28 U.S.C. § 158.

3 **III. ISSUES**

- 4 1. Did the bankruptcy court err when it granted Clay Lacy's
5 Motion to Dismiss?
6 2. Did the bankruptcy court abuse its discretion when it
7 dismissed Trustee's complaint without leave to amend?

8 **IV. STANDARDS OF REVIEW**

9 We review de novo the bankruptcy court's order dismissing a
10 complaint under Civil Rule 12(b)(6). Hernandez v. Cty. of Tulare,
11 666 F.3d 631, 636 (9th Cir. 2012); Tracht Gut, LLC v. Cty. of L.A.
12 (In re Tracht Gut, LLC), 503 B.R. 804, 810 (9th Cir. BAP 2014). A
13 dismissal without leave to amend and with prejudice is reviewed
14 for an abuse of discretion. Id. A bankruptcy court abuses its
15 discretion by denying leave to amend unless amendment would be
16 futile or the plaintiff has failed to cure the complaint's
17 deficiencies despite repeated opportunities. Hernandez, 666 F.3d
18 at 636. A bankruptcy court also abuses its discretion when it
19 commits an error of law. Id.

20 **V. DISCUSSION**

21 **A. Standard for dismissal under Civil Rule 12(b)(6)**

22 Under Rule 7012, incorporating Civil Rule 12(b)(6), a
23 defendant may move to dismiss a complaint if it fails to "state a
24 claim upon which relief can be granted." Under Rule 7008,
25 incorporating Civil Rule 8(a), a complaint must contain "a short
26 and plain statement of the claim showing that the pleader is
27
28

1 entitled to relief."⁵ Civil Rule 8(a)(2). "[T]he pleading
2 standard Rule 8 announces does not require 'detailed factual
3 allegations,' but it demands more than an unadorned, the-defendant
4 -unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S.
5 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). "A pleading
6 that offers 'labels and conclusions' or 'a formulaic recitation of
7 the elements of a cause of action will not do.'" Id. (quoting
8 Twombly, 550 U.S. at 555). "Nor does a complaint suffice if it
9 tenders 'naked assertions' devoid of "further factual
10 enhancement.'" Id. (quoting Twombly, 550 U.S. at 557).

11 To survive a motion to dismiss, "a complaint must contain
12 sufficient factual matter, accepted as true, to 'state a claim to
13 relief that is plausible on its face.'" Id. (quoting Twombly,
14 550 U.S. at 570). "A claim has facial plausibility when the
15 plaintiff pleads factual content that allows the court to draw the
16 reasonable inference that the defendant is liable for the
17 misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556).
18 "[A] complaint [that] pleads facts that are 'merely consistent
19 with' a defendant's liability . . . 'stops short of the line
20 between possibility and plausibility of entitlement to relief.'"

21
22 ⁵ Neither party has contended that the heightened pleading
23 standard of Civil Rule 9(b) applies to constructive fraud claims.
24 We agree it does not apply. See Cendant Corp. v. Shelton, 474 F.
25 Supp.2d 377, 380 (D. Conn. 2007) (Civil Rule 9(b) applies only to
26 actual, not constructive, fraud claims); Charys Liquidating Trust
27 v. McMahan Sec. Co. (In re Charys Holding Co.), 443 B.R. 628, 632
28 n.2 (Bankr. D. Del. 2010) (constructive fraudulent transfer claims
are governed by Civil Rule 8, not the heightened Civil Rule 9(b)
pleading standard); Angell v. Ber Care, Inc. (In re Caremerica,
Inc.), 409 B.R. 737, 755-56 (Bankr. E.D.N.C. 2009) (Civil Rule 9(b)
is inapplicable to constructive fraud claims because such claims
are not based on actual fraud but instead rely on the debtor's
financial condition and the sufficiency of consideration paid by
the transferee) (citing cases).

1 Id. (quoting Twombly, 550 U.S. at 557). Although a court must
2 accept as true all factual allegations contained in a complaint, a
3 court need not accept plaintiff's legal conclusions as true. Id.
4 "Threadbare recitals of the elements of a cause of action,
5 supported by mere conclusory statements, do not suffice." Id.
6 (quoting Twombly, 550 U.S. at 555). A dismissal under Civil
7 Rule 12(b)(6) may be based on either the lack of cognizable legal
8 theory or on the absence of sufficient facts alleged under a
9 cognizable legal theory. Johnson v. Riverside Healthcare Sys.,
10 534 F.3d 1116, 1121 (9th Cir. 2008).

11 **B. Governing law: §§ 544, 548 and CAL. CIV. CODE § 3439**

12 A bankruptcy trustee can avoid constructive fraudulent
13 transfers under state law and the Code. Section 544(b) allows the
14 trustee to avoid any transfers of a debtor's property which would
15 be avoidable by an unsecured creditor under state law. Section
16 548 provides a federal statutory basis for avoiding fraudulent
17 transfers. Wyle v. C.H. Rider & Family (In re United Energy
18 Corp.), 944 F.2d 589, 593 (9th Cir. 1991). Trustee sought to
19 avoid the Transfers to Clay Lacy under both §§ 544(b) and
20 548(a)(1)(B).

21 Under § 548(a)(1)(B), a trustee may avoid any transfer of an
22 interest of the debtor in property that was made within 2 years
23 before the date of the filing of the petition, if the debtor
24 voluntarily or involuntarily received less than a reasonably
25 equivalent value in exchange for such transfer, and was insolvent
26 on the date that such transfer was made or became insolvent as a
27 result of such transfer. § 548(a)(1)(B)(i), (ii)(I). The
28 applicable state law for Trustee's claim under § 544(b) is

1 California law, namely CAL. CIV. CODE §§ 3439.04(a)(2) and
2 3439.05.⁶ These state statutes are essentially identical to
3 § 548(a)(1)(B), except the limitations period for avoidance is
4 longer – the later of 4 years after the transfer or 1 year after
5 the date of reasonable discovery. See CAL. CIV. CODE § 3439.09(a).

6 Both state and federal law allow a transfer to be avoided
7 where "the debtor did not receive a reasonably equivalent value in
8 exchange for the transfer and the debtor was either insolvent at
9 the time of the transfer or was engaged in business with
10 unreasonably small capital." In re United Energy Corp., 944 F.2d
11 at 594 (citation and internal quotation marks omitted). Because
12 California law is similar in form and substance to the Code's
13 fraudulent transfer provisions, they may be interpreted
14 contemporaneously. Id.

15 Applying Twombly to the present case, a complaint seeking
16 relief under §§ 544(b) and 548(a)(1)(B)(i) and (ii)(I) must
17 contain sufficient facts plausible on their face that establish
18 the debtor: (1) made a transfer of the debtor's property;
19 (2) within 2 or 4 years of the petition date; (3) received less
20 than a reasonably equivalent value in exchange for the transfer;

21
22 ⁶ Under California law, constructive fraud may be found as
23 to any present or future creditor when a debtor does not receive a
24 reasonably equivalent value in exchange for the transfer, and
25 either: (A) was engaged or was about to engage in a business or a
26 transaction for which the remaining assets of the debtor were
27 unreasonably small in relation to the business or transaction;
28 (B) intended to incur, or believed or reasonably should have
believed that he or she would incur, debts beyond his or her
ability to pay as they became due. CAL. CIV. CODE § 3439.04(a)(2).
Similarly, constructive fraud can be found under CAL. CIV. CODE §
3439.05 "as to an existing creditor if the debtor does not receive
reasonably equivalent value and 'was insolvent at that time or
. . . became insolvent as a result of the transfer." Mejia v.
Reed, 31 Cal. 4th 657, 670 (2003) (quoting CAL. CIV. CODE § 3439.05).

1 and (4) was insolvent on the date the transfer was made or became
2 insolvent as a result of the transfer. In re United Energy Corp.,
3 944 F.2d at 594 (stating elements of a claim under § 548).

4 Whether the Transfers were property of Aletheia and that they
5 were made within 2 or 4 years of the petition date was not
6 disputed. We agree these two elements were supported by the
7 requisite factual allegations. The complaint identified the
8 property transferred (i.e., Aletheia funds paid to Clay Lacy) and
9 provided dates of the Transfers, which were all within 2 or 4
10 years of the petition date. The issue before us is whether
11 Trustee sufficiently pleaded that Aletheia was insolvent at the
12 time of the Transfers (or became insolvent as a result) and
13 whether he sufficiently pleaded that Aletheia did not receive
14 reasonably equivalent value in exchange for the Transfers.

15 **C. The bankruptcy court erred when it granted Clay Lacy's Motion**
16 **to Dismiss.**

17 **1. The bankruptcy court applied an incorrect standard of**
18 **law in ruling that Clay Lacy could not be a transferee.**

19 The bankruptcy court's ruling here is ambiguous, making our
20 review somewhat difficult. It appears the court did two things.
21 First, it seems to have ruled as a matter of law that Clay Lacy
22 could never be a proper transferee because Aletheia "got what it
23 bargained for." This ruling was in error.

24 We agree with Trustee that the bankruptcy court incorrectly
25 determined that because Aletheia directly contracted with Clay
26 Lacy, no fraudulent conveyance claim could be asserted, ruling
27 that "if a principal of the debtor . . . incurs debts and then the
28 debtor pays those debts; that's different. . . . But this is
[Aletheia] who incurred the debt. So I'm going to . . . grant the

1 motion to dismiss." Hr'g Tr. (Feb. 11, 2015) 11:18-25. The
2 general rule is that the party who receives a transfer of property
3 directly from the debtor is the initial transferee. Incomnet,
4 Inc. v. Universal Serv. Admin. Co. (In re Incomnet, Inc.),
5 299 B.R. 574, 578 (9th Cir. BAP 2003), aff'd, 463 F.3d 1064, 1073
6 (9th Cir. 2006). The fact that a corporate debtor directly
7 incurred a debt to a service provider, such as Clay Lacy, is not
8 an automatic bar to recovery for a fraudulent conveyance from the
9 service provider transferee. See Burdick v. Lee, 256 B.R. 837
10 (D. Mass. 2001); Lawrence v. Bonadio, Insero & Co. (In re Interco
11 Sys., Inc.), 202 B.R. 188 (Bankr. W.D.N.Y. 1996); Brandt v.
12 Charter Airlines, LLC (In re Equip. Acquisition Res., Inc.),
13 511 B.R. 527 (Bankr. N.D. Ill. 2014), rev'd in part, 2015 WL
14 4764145 (N.D. Ill. 2015) (hereinafter "EAR").

15 EAR involved substantially similar facts. There, the
16 corporate debtor, EAR, had contracted directly with the defendant,
17 Charter Airlines, to provide flights for EAR's officers in
18 exchange for payment. 511 B.R. at 530, 533. The flights were
19 paid for by EAR. Id. The plaintiff plan administrator sought to
20 avoid certain transfers to Charter Airlines for flights that he
21 contended were taken by the debtor's officers "purely for personal
22 pleasure, not as business trips taken on EAR's behalf," and that
23 did not benefit EAR. Id. at 530, 535. No argument was raised
24 that Charter Airlines charged more than fair market value for the
25 flights. The primary focus was whether EAR received reasonably
26 equivalent value for the chartered flights it contracted and paid
27 for. Id. at 530, 534-35. In its defense, Charter Airlines
28 offered an affidavit of the chief pilot and captain of every

1 flight, who asserted that the flights were for business purposes
2 based on his belief that he was flying EAR's officers to business
3 meetings and his observations of cell phone conversations of a
4 business nature. Id. at 535. Ultimately, the bankruptcy court
5 denied summary judgment to the plan administrator, holding that a
6 factual issue remained for trial as to whether EAR received
7 reasonably equivalent value. Id.⁷

8 A similar claim was at issue in Burdick. There, the
9 corporate debtor had contracted with a charter flight service,
10 Enterprises, for flights taken by one of its officers, Mr. Lee.
11 256 B.R. at 839. The chapter 7 trustee sought to avoid transfers
12 to Enterprises for flights that he alleged benefitted only
13 Mr. Lee. Id. A question for trial was whether the debtor
14 received less than reasonably equivalent value for the flights
15 taken by Mr. Lee and charged to the debtor via the defendant,
16 Enterprises. Id. at 839-40. Enterprises ultimately prevailed.
17 Mr. Lee testified that he used the plane for both business and
18 personal travel, but that he paid with his own funds for any
19 personal use. Therefore, the court held that it could not infer
20 the corporate debtor received less than reasonably equivalent
21 value for the expenses incurred for Mr. Lee's personal use of the
22 plane. Id. at 840.

23 Finally, one of the issues in Interco Systems, Inc. was
24 whether the corporate debtor received reasonably equivalent value
25

26 ⁷ After discovery, the bankruptcy court granted summary
27 judgment in favor of defendant Charter Airlines due to its good
28 faith defense under § 548(c). Id. at 536. However, as we discuss
below, the defense of "good faith" is fact-specific and should not
be considered in the context of a motion to dismiss.

1 for payments it made to attorneys for legal services provided in
2 connection with a sale of one of the debtor's company divisions.
3 202 B.R. at 191. In suing the attorneys for recovery of the fees,
4 the chapter 7 trustee alleged that the legal services requested
5 and paid for by the corporate debtor benefitted only the debtor's
6 corporate officer. Id. at 192-93. Thus, reasonably equivalent
7 value to the debtor was lacking. Ultimately, the trustee lost at
8 trial. The bankruptcy court concluded that the corporate debtor,
9 in its business judgment, believed that it received a financial
10 benefit from the sale transaction. Id. at 194. The court went on
11 to note:

12 Certainly, if the facts and circumstances indicate that
13 a payment of professional fees or other expenses by a
14 corporation was for services or goods which solely
15 benefitted a third party, whether it be a principal,
16 officer or employee, and had no reasonable, good faith
17 business judgment benefit to the corporation, that
18 payment would be avoidable under Section 548 because of
19 a lack of reasonably equivalent value, if all of the
20 other requirements of that Section were met. In this
21 case, the \$150.00 paid by Interco for services rendered
22 to Davie in connection with his matrimonial is such an
23 improper and avoidable transfer. However, when in the
24 exercise of reasonable, good faith business judgment,
25 there is a perceived financial benefit to the corporation
26 which justifies the fees or expenses paid, as in the case
27 of the sale to UDI, unless the Trustee meets his or her
28 burden to prove that there was in fact no benefit, or a
substantially and reasonably quantifiable
disproportionate financial benefit, the payment of
professional fees or expenses to the professionals or
others who perform the services or provided the goods at
the request of the corporation and charged a reasonable
rate is not avoidable as a fraudulent conveyance under
Section 548(a)(2)(B)(I).

25 Id.

26 Regardless of the outcome, these cases have one important
27 common denominator: the corporate debtor contracted and paid for
28 a service that may not have benefitted the debtor, but rather may

1 have benefitted only the debtor's corporate officer or employee.
2 In each case, the defendant service provider was the recipient of
3 the transfer (i.e., money for services rendered), which was
4 potentially avoidable because the corporate debtor may have
5 received less than reasonably equivalent value in exchange. Such
6 defendants, however, may offer an affirmative defense, as did some
7 of the defendants discussed. However, resolution of such defenses
8 is not proper in the context of a motion to dismiss under Civil
9 Rule 12(b)(6). McFarland v. Gen. Elec. Capital Corp. (In re Int'l
10 Mfg. Grp., Inc.), 538 B.R. 22, 33 (Bankr. E.D. Cal. 2015) (citing
11 Picard v. Merkin (In re Bernard L. Madoff Inv. Sec.), 440 B.R.
12 243, 256 (Bankr. S.D.N.Y. 2010)). But see Asarco, LLC v. Union
13 Pac. R.R. Co., 765 F.3d 999, 1004 (9th Cir. 2014) (dismissal under
14 Civil Rule 12(b)(6) on the basis of an affirmative defense is
15 proper only if the defendant shows some obvious bar to securing
16 relief on the face of the complaint.)

17 Therefore, to the extent the bankruptcy court ruled as a
18 matter of law that Clay Lacy could not be a transferee because
19 Aletheia incurred the debt for flight services and got what it
20 bargained for, we believe it erred.

21 **2. The bankruptcy court further erred in making a factual**
22 **determination as to reasonably equivalent value.**

23 The bankruptcy court also appears to have found as a matter
24 of fact that even if Clay Lacy could be a transferee, it
25 undisputedly provided Aletheia with reasonably equivalent value
26 for the Transfers because it provided Aletheia with the service it
27 requested at a fair market price. Such findings are not
28 appropriate in the context of a motion to dismiss under Civil

1 Rule 12(b)(6).

2 The question of whether or not reasonably equivalent value
3 was provided in exchange for a transfer is clearly a question of
4 fact. Nordberg v. Arab Banking Corp. (In re Chase & Sanborn
5 Corp.), 904 F.3d 588, 593 (11th Cir. 1990); Jacoway v. Anderson
6 (In re Ozark Rest. Equip. Co.), 850 F.2d 342, 344 (8th Cir. 1988);
7 Samson v. W. Capital Partners LLC (In re Blixeth), 2012 WL
8 1981719, at *15 (Bankr. D. Mont. June 1, 2012); Salven v. Munday
9 (In re Kemmer), 265 B.R. 224, 232 (Bankr. E.D. Cal. 2001). See
10 also Decker v. Tramiel (In re JTS Corp.), 617 F.3d 1102, 1109-10
11 (9th Cir. 2010) (holding that bankruptcy court's finding as to
12 reasonably equivalent value was not "clearly erroneous"). The
13 primary focus is on the net effect of the transaction on the
14 debtor's estate and funds available to the unsecured creditors.
15 Frontier Bank v. Brown (In re N. Merch., Inc.), 371 F.3d 1056,
16 1059 (9th Cir. 2004); Maddox v. Robertson (In re Prejean),
17 994 F.2d 706, 708-09 (9th Cir. 1993) (reasonably equivalent value
18 under California UFTA is "determined from the standpoint of the
19 creditors"). See also In re United Energy Corp., 944 F.2d at 597
20 ("[T]he analysis is directed at what the debtor surrendered and
21 what the debtor received irrespective of what any third party may
22 have gained or lost.").

23 In reviewing the complaint, Trustee alleged that in exchange
24 for the Transfers, Aletheia received little or no value for
25 flights where (1) employees took the flight for personal purposes
26 or (2) no Aletheia employees were even on board. He provided a
27 comprehensive list of the flights in question, including the
28 dates, names of each passenger on the flight, the flight's

1 destination and the price paid to Clay Lacy. Viewing the
2 complaint in a light most favorable to Trustee, we conclude he
3 stated sufficient facts to show Aletheia may not have received
4 reasonably equivalent value from Clay Lacy for the Transfers.

5 **3. Trustee failed to plead sufficient facts to establish a**
6 **plausible claim for insolvency.**

7 The bankruptcy court did not rule on Trustee's allegation of
8 Aletheia's insolvency. However, our review is de novo, and we
9 conclude Trustee's complaint fell short on the matter.

10 For this required element under both state and federal law,
11 Trustee alleged generally that at the time Aletheia made each of
12 the alleged Transfers to Clay Lacy, "Aletheia was insolvent."
13 Trustee's complaint failed to set forth any factual support for
14 this conclusion that would demonstrate plausibility. He did not
15 offer a **single** fact to show that Aletheia was insolvent at the
16 time of the Transfers or became insolvent as a result. This
17 threadbare allegation does not pass muster under Twombly.
18 550 U.S. at 555 ("Threadbare recitals of the elements of a cause
19 of action, supported by mere conclusory statements, do not
20 suffice."). Notably, some of the alleged Transfers reach back as
21 far as four years before Aletheia filed its bankruptcy case; thus,
22 plausibility for those transfers is highly questionable without
23 more supportive facts from Trustee. However, he will have another
24 opportunity to plead his claim.

25 **D. The bankruptcy court abused its discretion when it dismissed**
26 **Trustee's complaint without leave to amend.**

27 Trustee contends the bankruptcy court abused its discretion
28 by not granting his request for leave to amend. The court did not

1 discuss amendment at the hearing. In addition, the order
2 dismissing Trustee's complaint fails to state whether it was
3 dismissed with or without prejudice. However, because the court
4 believed that Trustee could never plead a fraudulent conveyance
5 claim against Clay Lacy, we can only presume it believed any
6 amendment would be futile and that dismissal was with prejudice.
7 Due to the errors committed by the court discussed above, we agree
8 with Trustee.

9 Under Rule 7015, incorporating Civil Rule 15(a)(2), "[t]he
10 court should freely give leave [to amend] when justice so
11 requires." If a Civil Rule 12(b)(6) motion is granted, the "court
12 should grant leave to amend even if no request to amend the
13 pleading was made, unless it determines that the pleading could
14 not possibly be cured by the allegation of other facts." Lopez v.
15 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal
16 quotation marks and citation omitted). In other words, dismissal
17 is proper if any potential amendment of the complaint would be
18 futile. Although Trustee failed to plead sufficient facts to show
19 insolvency, we do not conclude that amending his complaint would
20 be futile.

21 VI. CONCLUSION

22 Accordingly, we VACATE and REMAND to the bankruptcy court
23 with instruction that Trustee be allowed to amend his complaint.
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