

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION  
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In re:  
TOUSA, INC., *et al.*,

Debtors.

OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS OF TOUSA, INC., *ET AL.*,

Plaintiffs,

vs.

CITICORP NORTH AMERICA, INC., *ET AL.*,

Defendants.

Chapter 11 Cases

Case No. 08-10928-JKO

Jointly Administered

**Adv. Pro. No. 08-1435-JKO**

**PLAINTIFF'S OPPOSITION TO  
CITICORP NORTH AMERICA, INC.'S MOTION TO DISMISS**

The Court should deny the motion to dismiss<sup>1</sup> filed by Citicorp North America, Inc. ("Citicorp") in its capacity as administrative agent for the Amended Revolver Agreement.<sup>2</sup> As we show below, the complaint properly states claims upon which relief can be granted and provides sufficient detail to permit the defendants to respond to the claims. The Court also should reject Citicorp's alternative motion for a more definite statement.

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<sup>1</sup> Motion by Citicorp North America, Inc., In Its Capacity As Administrative Agent For The Revolving Credit Agreement, To Dismiss The Complaint Or, In The Alternative, For A More Definite Statement (Adv. Pro. D. E. No. 16) (hereafter, "Mot.").

<sup>2</sup> We use the same terminology and definitions here as we used in the Complaint.

## FACTUAL BACKGROUND

This fraudulent transfer proceeding arises from the ill-fated decision of TOUSA and its subsidiary TOUSA Homes LP (“Homes LP”) to form the Transeastern Joint Venture in June 2005 and to finance it by taking on massive indebtedness to the Transeastern Lenders. Compl. ¶¶ 2, 18. TOUSA and Homes LP were guarantors of the Transeastern Debt,<sup>3</sup> but none of the other Debtor subsidiaries were liable for any of it. Compl. ¶¶ 19-21.

The Transeastern Joint Venture foundered within months. By November 2006, the Administrative Agent for the Transeastern Lenders had sued TOUSA and Homes LP to compel performance of certain alleged guarantees. Compl. ¶¶ 3, 22-24. Only TOUSA and Homes LP were parties to the litigation. Compl. ¶ 24.

After months of litigation, TOUSA and Homes LP settled the cases through a series of agreements that restructured the joint venture, paid off the Transeastern Lenders and the other members of the Joint Venture, and took on at least half a billion dollars, and perhaps as much as \$800 million, in New Debt. Compl. ¶¶ 1, 3, 31. Lenders under the Senior Credit Agreement received cash payments exceeding \$421 million (Compl. ¶ 27); lenders under the Senior Mezzanine Credit Agreement received New Subordinated Notes and certain PIK Notes (Compl. ¶¶ 25, 28); and Lenders under the Junior Mezzanine Credit Agreement received certain warrants to acquire common stock of TOUSA. Compl. ¶¶ 25, 29. Certain Falcone entities, on information and belief, received cash payments of \$49 million. Compl. ¶ 26.

Although only TOUSA and Homes LP were obligors on the Transeastern Debt, the New Credit Agreements – consisting of a \$200 million First Lien Term Credit Agreement, a \$300

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<sup>3</sup> These Transeastern Credit Agreements totaled \$675 million consisting of (1) a \$450,000,000 Senior Credit Agreement; (2) a \$137,500,000 Senior Mezzanine Credit Agreement; and (3) a \$87,500,000 Junior Mezzanine Credit Agreement. Compl. ¶ 19.

million Second Lien Term Credit Agreement, and the Amended Revolver Agreement (the last of which is at issue in this motion) – made every Debtor subsidiary a guarantor and co-borrower of the New Debt that was used to satisfy the obligations of TOUSA and Homes LP. Compl. ¶¶ 31-33. The New Credit Agreements purported to grant liens on “the property and assets of all of the Debtors, whether real or personal, tangible or intangible, and wherever located.” Compl. ¶ 32. In short, TOUSA and Homes LP borrowed some \$675 million to finance the Transeastern Joint Venture and thereafter, using money they had borrowed under some or all of the New Credit Agreements, repaid those debts by encumbering the assets of most of the TOUSA subsidiaries, including all of the Debtors.

The Debtors filed their petition for bankruptcy on January 29, 2008, less than six months after they settled the Transeastern Litigation. Compl. ¶ 8. After Debtors declined to pursue any claims against any of their lenders, plaintiff, the Official Committee of Unsecured Creditors, sought and received the Court’s permission to commence an adversary proceeding seeking to avoid transfers under 11 U.S.C. §§ 544, 548, and 550.

Defendant Citicorp, as Administrative Agent for the Lenders under the Amended Revolver Agreement, now moves for dismissal of portions of the complaint that seek to avoid liens and claims under the Amended Revolver Agreement or, in the alternative, for a more definite statement. The Court should deny this motion in all respects.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is governed by familiar standards. The complaint need contain only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2), made applicable by Fed. Bankr. R. 7008(a). “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200

(2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. —, 127 S. Ct. 1955, 1964 (2007)) (other citations omitted). The Court must “view the allegations of the complaint in the light most favorable to the plaintiff[s], consider the allegations of the complaint as true, and accept all reasonable inferences therefrom.” *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). In analyzing the sufficiency of the complaint, the Court must limit its “consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed.” *Ibid.*<sup>4</sup> The complaint may assert a claim “alternatively or hypothetically,” and the different claims may be inconsistent with each other. Fed. R. Civ. P. 8(d)(2), (3). In any case, the “[p]leadings must be construed so as to do justice.” Fed. R. Civ. P. 8(e).

## **I. THE MOTION TO DISMISS SHOULD BE DENIED**

### **A. The Complaint Adequately Alleges Transfers Arising From The Amended Revolver Agreement**

Citicorp’s principal argument is that all claims arising from the Amended Revolver Agreement should be dismissed because the complaint “fails to allege any new legal conveyance by TOUSA’s subsidiaries that occurred under the Revolver on July 31, 2007.” Mot. at 2-3. The complaint fails to do so, according to Citicorp, because the Amended Revolver Agreement “simply restated the subsidiaries’ pre-existing liabilities” and therefore could not have given rise to “any new obligations.” *Id.* at 11.

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<sup>4</sup> Defendant’s Motion cites several documents for the truth of matters asserted therein. See, e.g. Mot. at 7 (referring to the October 2006 Amendment to the Revolver to explain why the revolver was amended). Even if the Court may consider these documents for some purposes, it may not rely on them to prove the truth of their assertions. *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). In any event, we do not accept Citicorp’s factual recitation.

Citicorp's argument, however, rests on an unstated and false premise, namely that the Amended Revolver Agreement, standing alone, constituted the only relevant transfer or conveyance. That premise is incorrect because it ignores the fact that transfers and conveyances occurred every time that money was borrowed pursuant to the Amended Revolver Agreement. The Amended Revolver Agreement (like the agreement that it amended) made it possible for Debtors to borrow money under its terms, but unless and until the Debtors actually drew money under it, the Amended Revolver Agreement provided "a framework though which [the Debtors] might incur obligations, but they had not done so yet." *Rubin v. Manufacturers Hanover Trust Co.*, 661 F. 2d 979, 990 (2d Cir. 1981).

*Rubin* refutes Citicorp's argument here. In *Rubin*, certain corporate subsidiaries guaranteed loans and credit lines undertaken by other corporate subsidiaries. The borrowing subsidiaries and the guaranteeing subsidiaries later filed for bankruptcy, and the Trustee sought to set aside the guarantees as fraudulent transfers. The guarantor subsidiaries contended that they had incurred an obligation when they executed the guarantees, not when the sister companies drew on the credit lines some months and years later. The Second Circuit rejected that argument, holding that the guarantors "incurred an obligation of repayment . . . whenever [the borrowing subsidiaries] borrowed under the loan line." 661 F. 2d at 990. While the guarantee "obligations existed only because of the system of guarantees, it does not follow that the execution of the guarantees, rather than the creation of contingent liabilities under them, constituted the incurring of the obligations." There could be no liability under the guarantees until the subsidiaries actually borrowed the money. *Id.* at 990.<sup>5</sup>

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<sup>5</sup> Although *Rubin* construed a provision of the Bankruptcy Act of 1898, "decisions applying the relevant section of the Bankruptcy Act have been adopted as applicable to" the comparable

Citicorp's argument that the Amended Revolver Agreement had no legal significance because it "restated the subsidiaries' pre-existing payment obligations" (Mot. at 16) therefore misses the point. Under its current understanding of the factual record, plaintiff does not seek to avoid liens on the outstanding revolver debt that existed before July 31, 2007. Instead, plaintiff seeks to avoid liens on borrowings made on and after July 31, 2007 under the Amended Revolver Agreement.

The complaint does not allege, because plaintiff does not yet know, the outstanding balance under the Revolving Debt as of July 31, 2007. Nor does the complaint allege how much the Debtors actually borrowed on or after July 31, 2007 and before the petition date.<sup>6</sup> But what is clear, and is clearly alleged, is that every time a Debtor drew under the Revolving Debt, it incurred a new obligation under the Amended Revolver Agreement, and by the petition date, the outstanding balance under that agreement was \$316.5 million. Compl. ¶ 31(i) n.8.

When a Debtor actual drew on the Revolver, thereby creating obligations and guarantees of actual (rather merely potential) debt, secured by liens, a transfer within the meaning of

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language of the Bankruptcy Reform Act of 1979. *General Electric Credit Corp. of Tennessee v. Murphy (In re Rodriguez)*, 895 F.2d 725, 727 n.2 (11th Cir. 1990). The relevant language remains unchanged in the current version of 11 U.S.C. § 548.

<sup>6</sup> Available sources suggest some possibilities. TOUSA reported on its 10-Q for the quarter ended June 30, 2007 that it had \$50 million outstanding under the First Amended Revolver Facility and that it had issued some \$236 million in letters of credit. By the time the petition was filed, according to the declaration filed by its Chief Financial Officer, TOUSA had total outstanding Revolver Debt of \$208 million and \$108 million outstanding under the letter of credit facility—a total of \$316 million. If one credits both these sources, TOUSA reduced its outstanding letters of credit by \$128 million and increased its borrowings under the Amended Revolver Agreement by \$158 million. As Debtors may have repaid draws under the Amended Revolver Agreement and then drawn again under the Agreement between July 31, 2007 and the petition date, the Committee cannot now determine how much it will seek to avoid under the Amended Revolver Agreement.

Section 548 occurred.<sup>7</sup> The Bankruptcy Code broadly defines transfer to include any “mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property[] or (ii) an interest in property” of a Debtor, including “the creation of a lien.” 11 U.S.C. § 101(54).<sup>8</sup> “Congress intended for this definition to be as broad as possible and all-inclusive.” *Rosen v. MIF Realty L.P. (In re Vuckovic)*, 211 B.R. 1002, 1005 (Bankr. M.D. Fla. 1997) (interpreting similar language under predecessor code). Every draw under the Amended Revolver Agreement constituted a transfer of a Debtor’s interest in property because it increased the indebtedness of every Debtor and created another lien on each Debtor’s property. See *Ibid.*; *Venice Western Motel, Ltd. v. Venice Motor Inn, Ltd. (In re Venice Western Motel)*, 67 B.R. 777, 780 (Bankr. M.D. Fla. 1986.)

The complaint also properly alleges each of the other elements of a fraudulent conveyance. Section 548 requires proof that “the Debtor (a) within two years, (b) had interest in property, (c) transferred it, (d) and received less tha[n] reasonably equivalent value for that transfer, and (e) was insolvent on the date of that transfer” or became insolvent by the transfer.<sup>9</sup>

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<sup>7</sup> The complaint also seeks recovery under 11 U.S.C. §544 and various state law theories. While these state law counts are not identical to the claims under 11 U.S.C. § 548, we accede to defendant’s suggestion that all claims be analyzed under the provisions of § 548 for this motion only. Mot. at 12 n.10.

<sup>8</sup> The entire definition provides that “[t]he term ‘transfer’ means (A) the creation of a lien; (B) the retention of title as a security interest; (C) the foreclosure of a debtor’s equity of redemption; or (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property.” 11 U.S.C. § 101(54).

<sup>9</sup> The statute provides that a transfer or obligation is avoidable where the Debtor “(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or (III) intended to incur, or

*In re Taylor*, 386 B.R. 361, 368 (Bankr. S.D. Fla. 2008). Citicorp apparently concedes, as it must, that the complaint alleges that the Debtors were or became insolvent (Compl. ¶¶ 1, 5); that the transfers took place less than two years before the petition was filed. (Compl. ¶¶ 1, 8); and that the Debtors did not receive reasonably equivalent value for the transfers (Compl. ¶¶ 4, 21, 33). The debtors failed to receive reasonably equivalent value either because money borrowed under the Amended Revolver Agreement was used to pay the Transeastern Debt<sup>10</sup> (which none of the Conveying Subsidiaries owed), or because money borrowed under the Revolver for some other unknown purpose by any *one* of the Debtors created obligations and liens against the assets of *other* Debtors that failed to receive any of the proceeds of the loan.

**B. The Transfers Are Alleged In Sufficient Detail**

Citicorp also urges dismissal on the grounds that the complaint’s “omnibus” allegations are insufficient to identify the name, date, transferor, transferee, and precise amount for each individual transfer that plaintiff seeks to avoid. Mot. at 17-19. That argument demands more of the complaint than the law requires.

The complaint identifies the parties to the transfers (the Debtors and the Lenders under the Amended Revolver Agreement), the specific agreements (and the dates of those agreements) pursuant to which the transfers occurred, and the maximum amounts that could be at issue. The

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believed that the debtor would incur, debts that would be beyond the debtor’s ability to pay as such debts matured.” 11 U.S.C. § 548(1)(B)(i)-548(1)(B)(ii)(III).

<sup>10</sup> The complaint alleges that the First Lien Term Loan Agreement and the Second Lien Term Loan Agreement require use of the loan proceeds to satisfy the Transeastern Debt, although the loan documents do not limit the use of loan proceeds to that purpose. Compl. ¶ 33. Defendant correctly points out the Revolving Debt Agreement contains no such explicit requirement. Mot. at 10 n.8. None of the provisions in the loan agreements, however, show what actual use the Debtors made of the loan proceeds, and, for purposes of ruling on a motion to dismiss, the Court cannot take the content of these documents as evidence of what actually may have happened. *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

complaint does not allege, because plaintiff did not know when the complaint was filed, how much the Debtors may have drawn under the Amended Revolver Agreement to satisfy the Transeastern Debt or for other purposes, but the complaint gives defendants *notice* of that claim.

Even under authority cited by the defendant, the allegations in the complaint suffice to warrant denial of Citicorp's motion. For example, under *Perkins v. Crown Fin., LLC, (In re Int'l Mgmt. Assocs., LLC)*, No. 06-6421, 2007 Bankr. LEXIS 1566, \*6-7 (Bankr. N.D. Ga. Mar. 6, 2007), on which defendant relies (Mot. at 13),<sup>11</sup> the court denied a motion to dismiss where the complaint set out "the parties, an approximate date, the source of the payment, and the transaction." *Ibid.* Here, the complaint does exactly that. It "sets forth the claims with sufficient detail to permit [defendant] to answer and defend." *Id.* at \*6. It suffices to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *United States v. Baxter Int'l, Inc.* 345 F.3d 886, 881 (11th Cir. 2003) (citation omitted). Indeed, Citicorp reveals that it has understood this theory precisely, because the motion notes that "[t]he complaint alleges Homes LP used the \$800 million in proceeds of those credit facilities 'among other things' to settle the Transeastern litigation. Compl. ¶¶ 3, 31." Mot. at 9.

What is more, the complaint lacks additional detail for the simple reason that the Debtors and Citigroup – who themselves have much of the information – have not yet disclosed it.<sup>12</sup> Debtors acknowledged in a recent filing that they have yet to reveal the history of draws under

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<sup>11</sup> Defendant cites *Perkins* for the proposition that "plaintiffs asserting claims under Section 548 must plead 'the dates and amounts of each alleged transfer, and the instruments by which the conveyances were made.'" Mot. at 13. The quoted passage, though, refers to the holding in another case, *Kipperman v. Onex Corp.*, Civ. Action No. 1:05-CV-1242-JOF (N.D. Ga. 2006), that the *Perkins* court *rejected* as inapposite. 2007 Bankr. Lexis 1566, \*7-8.

<sup>12</sup> When a plaintiff lacks access to detailed information that a defendant has, the court may relax the applicable pleading standards. See *In re TWA Post Confirmation Estate*, 305 B.R. 228, 234 (Bankr. D. Del. 2004).

the Revolver, and proposed an order governing the reports that Debtor would run on their accounting database. The proposed order states that Debtors are “investigating the feasibility” of preparing a report on “Daily Borrowing against the Revolver (for the time period 12/31/06 through 9/30/07).” Debtors’ Proposed Order Governing Access To Debtors’ Electronic Database And Accompanying Software, Appendix B, Item 5. (Adv. Pro. D. E. No. 35). This provision of the proposed order would have been superfluous if Debtors had already provided information about draws under the Revolver. And Citicorp is the administrative agent for the Revolver. It makes no sense for Citicorp to object that the complaint provides insufficient notice of the dates and amounts of loans that Citicorp made to its own customers, when Citicorp knows, but has yet to disclose, that information to plaintiff.<sup>13</sup>

Because a complaint need do no more than provide adequate notice to permit the defendant to understand its contentions and formulate a defense, and because this complaint does so, Citicorp’s motion to dismiss should be denied. However, if the Court were to reach a contrary conclusion and rule that the complaint requires further detail, plaintiff requests leave to amend the complaint to add those details after they have been disclosed through discovery. See Fed. R. Civ. P. 15(a), made applicable by Fed. Bankr. R. 7015 (“The court should freely give leave [to amend] when justice so requires.”).

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<sup>13</sup> Citicorp contends that plaintiff should have learned these facts because it has been engaged in document discovery with the Debtors since April 2008 and because plaintiff’s “current counsel” represented an ad hoc group of noteholders examining potential claims. If this statement was intended to refer to counsel now representing the Committee in this adversary proceeding, it is incorrect; plaintiff’s counsel for this proceeding had no role in the case until late June 2008. And even though the Debtors have responded to some discovery requests, plaintiff has not yet received detailed information about each of the specific transactions that have taken place pursuant to the Amended Revolver Agreement.

**II. THE COURT SHOULD DENY CITICORP’S MOTION, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT**

The Court should deny Citicorp’s motion, in the alternative, for a more definite statement. It is appropriate to grant such a motion only if a complaint is “so vague or ambiguous that the [moving] party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). “In other words, a motion for more definite statement is not a substitute for discovery. . . . The motion is intended to provide a remedy for an unintelligible pleading, rather than a vehicle for obtaining greater detail.” *In re Skyway Communications Holding Corp.*, 389 B.R. 801, 811 (Bankr. M.D. Fla. 2008) (citations and internal quotation marks omitted). The Committee’s complaint provides ample information to permit Citicorp to respond to its allegations; no more is required.

**CONCLUSION**

Citicorp’s motion should be denied.

Dated: September 3, 2008

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications in this Court set forth in Local Rule 2090-1(A)

/s/ Patricia A. Redmond

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I HEREBY CERTIFY that the undersigned attorneys are appearing *pro hac vice* in this matter pursuant to court order dated July 10, 2008 [D.E. 1360, 1362, 1363 in Ch. 11 No. 08-10928]

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**CERTIFICATE OF SERVICE**

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I hereby certify that on September 3, 2008 a true and correct copy of the foregoing document is being served electronically via email or via the Court's CM-ECF Program to each person named on the attached Service List.

          /s/ Patricia A. Redmond            
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