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Context is King–*Twombly*, *Iqbal* and the Art of Pleading in Bankruptcy

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As many courts have observed, a text without a context is a pretext.[1] This statement is especially true with regard to pleading requirements under Fed. R. Civ. P. 8, in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*.[3] In both of these cases the Supreme Court addressed the sufficiency of pleadings under Rule 8. Because the Supreme Court's decisions were based on interpretation of Rule 8, they govern pleadings "'in all civil actions and proceedings in the United States District courts.'"[4] Accordingly, bankruptcy courts are now evaluating pleadings arising in or related to bankruptcy cases in light of these precedents.

I. Revised Pleading Standards Under *Twombly* and *Iqbal*

A. *Twombly*

In *Twombly*, the court considered "what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act."[5] The plaintiff in the district court asserted that the defendants had violated § 1 of the Sherman Act by, among other things, conspiracy to prevent competitive entry into their markets and refraining from competing with each other. The plaintiffs alleged several facts concerning the defendants' business practices to support these causes of action, including allegations of certain parallel conduct unfavorable to competition. The plaintiffs moved in the district court to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted the motion to dismiss, holding that the allegations in the complaint were not adequate to state a claim under § 1 of the Sherman Act. The district court reasoned that the defendants

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could just as easily explain the alleged business practices as behavior that is consistent with sound business practices and the defendants' economic best interests as wrongdoing.[6]

On appeal, the Court of Appeals for the Second Circuit reversed the district court. The appellate court, applying the "no set of facts" language from *Conley v. Gibson*,[7] found that the complaint was sufficient because it was conceivable that the plaintiffs could prove that the defendants were liable based on the facts alleged.[8] Accordingly, the court of appeals stated that the plaintiff's allegations "include conspiracy among the realm of 'plausible possibilities in order to survive a motion to dismiss."[9]

On certiorari to the Supreme Court, the court reversed the court of appeals and held that the complaint failed to state a claim. The court began its analysis by reviewing the elements of a claim under § 1 of the Sherman Act.[10] The court then considered the pleading requirements under Rule 8 of the Federal Rules of Civil Procedure. There, the court affirmed that Rule 8 only requires "a short and plain statement of the claim showing that the pleading is entitled to relief." Importantly, the court went on to point out that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[11] The court went on to articulate a plausibility standard for Rule 8 pleadings. This standard is greater than the possibility standards that many courts have articulated, and less than a probability standard for pleading.

With regard to the plausibility standard, the court held that the key for pleading is establishing a context for the allegations relating to the elements of the claim. With regard to the parallel conduct claims, the court stated that "[a]sking for plausible grounds to infer an agreement… simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the elements of the alleged claim]."[12] The court found that this requirement for context for the allegations is consistent with Rule 8 because the Rule itself requires allegations "showing that the pleader is entitled to relief".[13]

The plausibility standard and the requirement for context are greater than the standard that the court of appeals applied. The Supreme Court applied the plausibility standard in particular to the plaintiff's allegations of parallel conduct by the defendants. Here, the court stated that

> [a] statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's com-

> mercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitlement to relief'.

This plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the elements of the claim]."[14]

B. *Iqbal*

In *Iqbal*, the Supreme Court refined its holding under *Twombly* concerning the Rule 8 pleading requirements.[15] The defendant, Iqbal, filed a complaint against several federal officials, including the petitioners the former Attorney General and the former Director of the Federal Bureau of Investigation, concerning harsh treatment of confinement. The plaintiff contended in his complaint that the petitioners unconstitutionally discriminated against the plaintiff on account of his race and religion by approving the harsh conditions of confinement. The petitioners moved the court to dismiss the complaint for failure to state a claim. The district court denied the motion. On appeal to the Court of Appeals for the Second Circuit, the court affirmed the district court's holding.

On certiorari to the Supreme Court, the court reversed the court of appeal, holding that the plaintiff had not stated a claim under Rule 8. Like in *Twombly*, the court began its analysis by considering the elements that the plaintiff must plead to state a claim of unconstitutional discrimination. The court found that the plaintiff must "plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion or national origin."[16] The plaintiff argued that it could plead the petitioner's discriminatory intent "generally."[17] The court rejected this approach, stating that "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context."[18]

The court then turned to the plaintiff's complaint to determine whether the complaint met the plausibility standard as articulated in *Twombly*.[19] The court found that the complaint did not satisfy the plausibility standard from *Twombly* because the allegations in the complaint amounted to "bare assertions" that constituted "nothing more than formulaic recitation of the elements of the constitutional discrimination claim."[20] Thus, the court did not consider many of the allegations that were conclusory. After disregarding the conclusory allegations, the

court held that the plaintiff failed to allege that the petitioners "purposefully adopted a policy of classifying post-September 11 detainees as 'of high interest' because of their race, religion, or national origin."[21]

C. General Rules for Applying *Twombly* and *Iqbal*

A careful review of both *Twombly* and *Iqbal* results in several general rules for pleading. The first rule is context is indeed king for determining whether a pleading is sufficient. In both *Trombly* and *Iqbal*, the court focused on the depth of the factual allegations to determine whether the plaintiff had sufficiently pled his claim. A complaint must contain enough factual matter to raise the right to relief above the speculative level.[22] As the court in *Twombly* stated, a complaint possesses the requisite plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[23] Thus, the inquiry into whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[24]

Because the Rule 12(b) inquiry is so context specific, there begs the question of exactly how much context is necessary. In *Twombly*, the court stated that plausibility lies on the spectrum somewhere between possibility[25] and probability.[26] Nonetheless, this is a rather wide range of possibilities. The court does provide some guidance by stating that plausibility "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the elements of the alleged claim.[27] More practically, one court observed that "[w]hether a party has satisfied Rule 8 must be analyzed on the basis of the subject matter of the litigation, the nature of the claims presented and the relief sought, the respective positions of the parties in terms of the availability of information, the situation of the parties, and a number of other pragmatic matters."[28]

Attorneys may create the expectation that discovery will reveal elements of the alleged claims in several ways. One simple way could be to include copies of documents relating to the claims. As one court has observed, when presented with a Rule 12(b)(6) motion to dismiss, courts may consider: "(1) any document incorporated by reference in the complaint, (2) any documents the plaintiff has in his possession or had knowledge of and upon which he relied in bringing suit, and (3) facts of which judicial notice may be taken."[29] Courts can also consider "documents the authenticity of which are not disputed by the parties and official public records.[30] The plaintiff can use such documents to educate the court and tell the story of the alleged claim. Plaintiffs may also plead facts that tend to exclude other bases for the actions of the parties. In *Twombly*, the court held that the factual allegations of conspiracy were "consistent with conspiracy, but just as much in line with

a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[31] Thus, by eliminating or reducing the possibility of innocuous alternatives, the plaintiff may increase the plausibility of its claims.

II. Bankruptcy-Specific Application of the Revised Pleading Standards Under *Twombly* and *Iqbal*

As one court has observed, "[h]owever inconvenient it may be for a plaintiff, it is apparent that the jurisprudential landscape regarding the adequacy of complaints in civil cases has changed."[32] Thus, bankruptcy courts are applying the revised pleading standard articulated in *Twombly* and *Iqbal* to all manner of actions:[33] from the common preference actions[34] and fraudulent transfer claims[35] to claims for fraud on the court.[36] A complaint must include allegations about each element of the cause of action, or at least allegations from which a court can draw reasonable inferences about each element.[37] While the *Twombly* and *Iqbal* standards apply in all manner of bankruptcy proceedings, they are especially prevalent in avoidance actions under §§ 547 and 548.

A. Application of *Twombly* and *Iqbal* in Preference Actions

In order to plead a preference claim, the complaint must allege all five elements[38] of a preference pursuant to 11 U.S.C.A. § 547.[39] A plaintiff's failure to provide enough factual support to make the allegations concerning any element plausible constitutes grounds for dismissal.[40]

1. Interest of the debtor in property

In the bankruptcy case of *In re Caremerica, Inc.*, the Bankruptcy Court for the Eastern District of North Carolina applied the *Twombly* and *Iqbal* pleading standards to a series of preference complaints commenced by the trustee.[41] In one complaint the trustee alleged that several debtors had deposited funds into a single deposit account and subsequently paid creditors from the account during the 90-day preference period.[42] Several creditors moved to dismiss the complaint for failure to state a claim. The court granted the motion to dismiss. The court began its analysis by stating that "a claim for relief under § 547 must assert facts showing that the debtors had an interest in the property exchanging hands."[43] The court found that the trustee's assertion that the debtors transferred their funds into bank accounts operated by the debtors' principals was "merely a conclusory statement that lacks factual support."[44] The court therefore concluded that "[w]ithout more factual support, there is nothing in the Amended Complaint or Exhibit B to rebut the alternative and reasonable possibility that the funds flowing through BER Care, Inc. originated from sources other than the debtors."[45]

Plaintiffs must be careful to allege sufficient facts to make plausible the allegation that the debtor had an interest in the transferred funds. Of course, an easy way of establishing this allegation is to allege the debtor's interest in the account from which payment was issued[46] and the date and amount of each alleged transfer.[47] A plaintiff may further attach to the complaint a copy of the debtor's bank statement[48] or a copy of the check or other payment to the complaint show that the funds belonged to the debtor, provided that the check or payment bears the debtor's name. Finally, if the debtor's schedules are sufficient, [49] the plaintiff may rely on statements contained in the schedules to further support allegations concerning the debtor's interest in the property transferred.

2. To or for the benefit of the creditor

In *Caremerica*, the court also considered whether the trustee had sufficiently alleged that the transfer was "to or for the benefit of a creditor" as required by § 547(b)(1). The court found that the trustee had sufficiently alleged this element of a preference claim. The trustee had included in his complaint "the names of transferees and the dates and amounts of each transfer."[50] Plaintiffs typically included this type of information in preference complaints prior to *Twombly* and *Iqbal*, and thus there will not be a substantial increase in the burden on pleading this element.

3. For or on account of an antecedent debt owed by the debtor before such a transfer was made

Courts, applying the plausibility standard from *Twombly* and *Iqbal*, now require greater factual context when pleading the antecedent debt requirement of 11 U.S.C.A. § 547(b)(2). Even prior to *Twombly* and *Iqbal*, at least one court required a plaintiff in a preference action to plead "the nature and amount of the antecedent debt" to show entitlement to relief under § 547.[51] In light of the plausibility requirement, plaintiffs should now take care to avoid conclusory allegations concerning antecedent debts and "allege facts regarding the nature and amount of the antecedent debt which, if true, would render plausible the assertion that a transfer was made for or on account of an antecedent debt."[52] These facts could include allegations concerning products provided or services rendered to the debtor prior to the date of transfer.[53]

4. Made while the debtor was insolvent

In the typical preference action, there is a presumption that the debtor was insolvent on and during the 90 days immediately preceding the date that the debtor filed its petition.[54] Therefore, when the plaintiff seeks to

recover transfers made during the 90 days prepetition, the plaintiff need not allege specific facts concerning the debtor's insolvency other than that the transfers were made during the 90-day period.[55]

However, if the complaint asserts that the defendant was an insider, then the plaintiff does bear a burden of alleging that the debtor was insolvent during the period from one year prior to the petition date to 90 days prior to the petition date.[56] Plaintiffs may meet this burden by allegations concerning the valuation of the debtor's assets and liabilities,[57] information provided by the debtor's accountants and financial advisors,[58] and the debtor's petition and schedules.

5. Enables the creditor to receive more than such creditor would receive if the debtor filed under Chapter 7

Under § 547(b)(5), avoidance of a preferential transfer is also contingent on the plaintiff establishing that the alleged preferential transfer enabled the transferee to receive more than it would have under Chapter 7. "Generally, as long as the distribution to general unsecured creditors would be less than 100%, any payment to such a creditor during the preference period would enable the creditor to receive more than it would in a liquidation had the payment not been made. Thus, in a situation where the alleged preferential transferee is an unsecured nonpriority creditor, the trustee must show that the distribution to all such creditors in a Chapter 7 liquidation would be less than 100%."[59] In many cases the plaintiff will commence preference actions after the debtor is discharged in a Chapter 7 case or after plan confirmation in a Chapter 11 case. Therefore, the plaintiff can make reference to insolvency analysis obtained during the pendency of the bankruptcy case.

B. Application of *Twombly* and *Iqbal* in Constructive Fraud Transfer Actions

While a complaint for fraud, including fraudulent transfers,[60] must satisfy the requirements for pleadings under Fed. R. Civ. P. 9,[61] the complaint must also satisfy the pleading requirements under Rule 8.[62] However, courts recognize that a complaint for constructive fraud[63] does not have to satisfy the Rule 9 pleading requirements, and need only satisfy the Rule 8 requirements.[64]

1. Reasonably equivalent value

In order to state a claim for constructive fraud under § 548(a)(1)(B), a party must allege facts concerning the debtor's insolvency and whether the debtor received reasonably equivalent value for the transfer.[65] With

regard to the issue of reasonably equivalent value, the complaint must include facts relating to both (i) the value that the debtor received from the creditor and (ii) the equivalence of the value received to the value of the property the debtor transferred to the creditor.[66]

In *Aphton*, the trustee commenced an action against two creditors alleging that certain transfers to the creditors were constructively fraudulent pursuant to § 548(a)(1)(B). Prior to the petition date, the debtor developed pharmaceuticals for cancer treatment. The debtor entered into a debenture agreement and a promotion agreement with a company that would market and distribute the debtor's products. The debtor also issued $15 million in notes to a group of investors.

The FDA did not approve one of the debtor's primary developments and the marketing creditor required the debtor to redeem the debenture. The debtor redeemed the debenture for the face amount of $3 million and received in return the licensing rights for the failed drug. The redemption constituted an event of default under the notes. The debtor negotiated with the noteholders and paid the noteholders $3 million and also transferred preferred and common stock in the debtor to the noteholders. The debtor subsequently commenced its bankruptcy case.

The trustee of the debtor's estate commenced fraudulent transfer actions against the marketing creditor and the noteholders. In the complaint the court found that the trustee had alleged with regard to the noteholders that the debtor transferred: (i) $3 million, (ii) preferred stock, and (iii) common stock, and in return received the surrender of the $15 million note. The court reasoned that it was plausible that the debtor did not receive reasonably equivalent value. The court reasoned that:

> As the Complaint alleges that Aphton was insolvent at the time of the Exchange Agreement Payment, it must follow that the Notes and the shares, both common and preferred, were also worthless. As such, it is facially plausible that there was not reasonably equivalent value in the Exchange Agreement Payment in which Aphton also provided $ 3 million in cash.[67]

Thus, because the notes and stock were presumed worthless, the only thing of value, $3 million, was transferred to the noteholders.

In *Aphton*, the trustee made sufficient allegations to make his claims plausible. The trustee identified the assets transferred by the debtor by date and recipient and further assigned reasonable values to the assets. Likewise, the trustee identified the assets that the debtor received, and assigned reasonable values to those assets. This is all that is required to plausibly plead to constructively fraudulent transfer. Plaintiffs will run afoul of the plausibility standards if they neglect to adequately allege

any of these facts: (1) asset transferred, (2) date of transfer, (3) recipient of transferred asset, (4) value of the asset transferred, and (5) value of the asset received.[68]

2. Insolvency on the date of the transfer

In addition to alleging that the debtor did not receive reasonably equivalent value, the plaintiff must also allege facts concerning the debtor's insolvency at the date of the transfer.[69] A plaintiff can allege several facts to make plausible the claim that the debtor was insolvent. A common method is to allege insolvency before and after the transaction in question. A plaintiff can establish insolvency prior to the transfer by, among other things, making reference to the debtor's public records such as the debtor's Form 10-K.[70] Additionally, the complaint can make use of the debtor's financial records from accountants.

In *In re Troll Communications, LLC*,[71] the court considered whether a trustee adequately alleged the debtors' insolvency in its claim for avoidance and recovery of fraudulent transfers.[72] This alleged a valuation of the debtors' accounts payable and other liabilities, as well as a negative valuation of the debtors' tangible net worth. Additionally, the trustee provided notes from the debtors' accountant relating to the unlikelihood that the debtors could continue as a going concern.[73] The court found that the financial data in the complaint supported the trustee's allegations that the debtors had a negative net worth and were unable to meet maturing obligations leading up to their bankruptcy filings.[74] The court found sufficient factual allegations of insolvency to permit the trustee to proceed with discovery.[75]

3. General pleading considerations for constructive fraud actions

Plaintiffs must take care to plead clearly each of these elements of a constructively fraudulent transfer. Plaintiffs should avoid combining multiple transfers into a single factual allegation. In *In re M. Fabrikant & Sons, Inc.*, the trustee alleged several transfers to a creditor were constructively fraudulent. In the complaint, the trustee used a "net transfer theory" whereby he netted the value of the transfers from the debtor against the transfers the debtor received to determine the amount of the claim. The court granted the defendant's motion to dismiss because "it is implausible to argue that the debtors never received reasonably equivalent value—measured at the time of each transfer—in exchange for each transfer to a [creditor]."[76] Likewise, the complaint should delineate each recipient of an avoidable fraudulent transfer individually and should avoid collective pleading.[77] Rather, a complaint should "identify

each defendant's role in any fraudulent conduct."[78] Also, the plaintiff should avoid allegations that a group of affiliated companies, even if all debtors, were collectively insolvent.[79] To make the claim plausible, the plaintiff must provide facts relating to each debtor's insolvency at the time that such debtor received the transfer in question.

When filing a motion to dismiss pursuant to Rule 12(b)(6), defendants should be careful not to confuse a plaintiff's failure to plausibly state a claim, and the defendant's possible affirmative defenses. As one court has stated, the "Court may only consider whether the Complaint is facially plausible, and cannot, at this time, consider possible defenses to the allegations in the Complaint.[80] Nonetheless, when considering what constitutes reasonably equivalent value, some courts evaluate "the good faith of the parties, the difference between the amount paid and the market value, and whether the transaction was at arm's length."[81] Accordingly, courts will dismiss complaints "when the transfer is made to pay an antecedent debt."[82] Thus, it is prudent to raise this defense in a motion to dismiss.

III. Conclusion

Courts will continue to refine the plausibility standard articulated by the Supreme Court in *Twombly* and *Iqbal*. As one court has observed, "the task of applying *Bell Atlantic* to the different types of cases that come before us continues. In each context, we must determine what allegations are necessary to show that recovery is 'plausible.'"[83] This is proving to be a difficult task for many courts. However, the underlying theme is clear: the plaintiff must provide sufficient factual context to support its claim. Without a context, courts are finding that the allegations in many complaints are simply conclusory and are not afforded any weight. Parties should be diligent to collect the information necessary to support their claims and preserve this information. Because of the fast-paced nature of many cases and particularly the trustee's responsibilities to bring actions on behalf of the debtors' estates, there will likely be a renewed focus on obtaining the necessary information from the debtor and other parties in interest. Parties that fail to take the necessary precautions may find themselves on the outside of the bankruptcy courthouse with little more than their dismissed and denied papers in their hand.

Notes

1. Souza v. County of Hawaii, 694 F. Supp. 738 (D. Haw. 1988); Doxie v. Ford Motor Credit Co., 603 F. Supp. 624 (S.D. Ga. 1984); Boggan v. Judicial Inquiry Com'n of State, 759 So. 2d 550 (Ala. 1999).

2. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007).

3. Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 2009-2 Trade Cas. (CCH) ¶ 76785, 73 Fed. R. Serv. 3d 837 (2009).

4. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868, 2009-2 Trade Cas. (CCH) ¶ 76785, 73 Fed. R. Serv. 3d 837 (2009) (citing Rule 8).

5. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554-555, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007).

6. Twombly, 550 U.S. at 552.

7. Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80, 9 Fair Empl. Prac. Cas. (BNA) 439, 41 L.R.R.M. (BNA) 2089, 1 Empl. Prac. Dec. (CCH) P 9656, 33 Lab. Cas. (CCH) P 71077 (1957) (abrogated by, `Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007-1 Trade Cas. (CCH) ¶ 75709, 68 Fed. R. Serv. 3d 661 (2007)) (stating in context that a court should not dismiss a complaint unless there is no set of facts that would support the claim).

8. Twombly, 550 U.S. at 553, 561.

9. Twombly, 550 U.S. at 553.

10. Twombly, 550 U.S. at 553-555 (stating that a "the crucial question [for a § 1 claim] is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express") (internal citations omitted).

11. Twombly, 550 U.S. at 554-555. The court also stated that "the pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action." (citations omitted).

12. Twombly, 550 U.S. at 556.

13. Twombly, 550 U.S. at 557 (stating that "the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft 'to show that the pleader is entitled to relief.'").

14. Twombly, 550 U.S. at 556. See also In re Carmell, 424 B.R. 401, 411 (Bankr. N.D. Ill. 2010) ("Plausibility does not require probability").

15. Iqbal, 129 S.Ct. 1937.

16. Iqbal, 129 S.Ct. at 1948-1949.

17. Iqbal, 129 S.Ct. at 1954.

18. Iqbal, 129 S.Ct. at 1954.

19. Iqbal, 129 S.Ct. at 1949. The court summarized the *Twombly* standard by stating that "[to] survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" (internal citations omitted).

20. Iqbal, 129 S.Ct. at 1951.

21. Iqbal, 129 S.Ct. at 1952.

22. Twombly, 550 U.S. at 555-556; Iqbal, 129 S.Ct. at 1949; Grow Up Japan, Inc. v. Yoshida (in re Yoshida), Adv. No. 1-09-01415-jf, 2010 Bankr. Lexis 2502 (Bankr. E.D.N.Y. August 23, 2010) ("to survive a motion to dismiss, a complaint must assert a cognizable legal theory and enough factual averments with respect to the underlying elements of the claim that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

23. Twombly, 550 U.S. at 556. See also In re Levitt and Sons, LLC, 2010 WL 1539878 (Bankr. S.D. Fla. 2010).

24. Francis v. Giacomelli, 588 F.3d 186, 193, 107 Fair Empl. Prac. Cas. (BNA) 1605, 30 I.E.R. Cas. (BNA) 1 (4th Cir. 2009) (quoting *Twombly*). See also In re Image Masters, Inc., 421 B.R. 164 (Bankr. E.D. Pa. 2009) (stating that court would "rely on my judicial experience as a United States Bankruptcy Judge… as well as on my plain common sense.").

25. Twombly, 550 U.S. at 557-558 (stating that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with "a largely groundless claim") (citing Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577, Blue Sky L. Rep. (CCH) P 74529, Fed. Sec. L. Rep. (CCH) P 93218 (2005)).

26. Twombly, 550 U.S. at 556 (stating that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage."); Tolz v. United States of America (In re Brandon Overseas, Inc.), Adv. No. 09-01971-RBR, 2010 Bankr. Lexis 2326 (Bankr. S.D. Fla. July 16, 2010) ("[t]his standard does not require a showing of probable guilt"); Marwil v. Oncale (In re Life Fund 5.1, LLC), No. 09-B-32672, 2010 Bankr. Lexis 1938 (Bankr. N.D. Ill. June 30, 2010) ("'Plausible' does not mean 'probable' but it means more than 'conceivable'") (internal citations omitted).

27. Twombly, 550 U.S. at 556.

28. In re Henderson, 423 B.R. 598 (Bankr. N.D. N.Y. 2010).

29. In re Hydrogen, L.L.C., 431 B.R. 337 (Bankr. S.D. N.Y. 2010); The Liquidation Trust v. Daimler AG (In re Old Carco, LLC (f/k/a Chrysler, LLC)), Adv. No. 09-00505 (AJG), 2010 Bankr. Lexis 2280 *11 (Bankr. S.D.N.Y. July 27, 2010) ("a court may consider the allegations in the complaint; exhibits attached to the complaint or incorporated by reference").

30. Gargano v. Liberty Intern. Underwriters, Inc., 572 F.3d 45, 47 n.1 (1st Cir. 2009).

31. Twombly, 550 U.S. at 554.

32. In re Levitt and Sons, LLC, 2010 WL 1539878 (Bankr. S.D. Fla. 2010); Tolz v. United States of America (In re Brandon Overseas, Inc.), Adv. No. 09-01971-RBR, 2010 Bankr. Lexis 2326 (Bankr. S.D. Fla. July 16, 2010) ("the Supreme Court heighted the burden that a plaintiff must meet to withstand a motion to dismiss"); In re Aphton Corp., 423 B.R. 76 (Bankr. D. Del. 2010) ("Pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss") (citing Fowler v. UPMC Shadyside, 578 F.3d 203, 210, 22 A.D. Cas. (BNA) 353 (3d Cir. 2009). But see Pension Ben. Guar. Corp. v. Divin, 49 Employee Benefits Cas. (BNA) 1923, 2010 WL 2196114 (M.D. Ga. 2010) ("This Court does not interpret *Twombly* and *Iqbal* to represent such a sea change in the pleading requirements under the Federal Rules of Civil Procedure.").

33. Practitioners should be aware that the plausibility standards for 12(b)(6) may be effective not only in adversary proceedings, but in certain circumstances with regard to contested matters as well. See In re Adelphia Communications Corp., 359 B.R. 54, 56 n.5, 47 Bankr. Ct. Dec. (CRR) 125 (Bankr. S.D. N.Y. 2006) (finding that Rule 9014 provides that "[t] he court may at any stage in a particular matter direct that one or more of the other rules in Part VII [including Rule 12(b)(6)] shall apply."). Furthermore, Rule 9013 requires that a "motion shall state with particularity the grounds therefore, and shall set forth the relief or order sought." See In re Weatherford, 434 B.R. 644 (Bankr. N.D. Ala. 2010) (applying the *Twombly* and *Iqbal* plausibility standards to all contested matters).

34. See In re Caremerica, Inc., 409 B.R. 737, 51 Bankr. Ct. Dec. (CRR) 249 (Bankr. E.D. N.C. 2009).

35. Hyundai Translead, Inc. ex rel. Estate of Trailer Source, Inc. v. Jackson Truck & Trailer Repair Inc., 419 B.R. 749 (M.D. Tenn. 2009).

36. In re Woodruff, 2010 WL 386209 (Bankr. M.D. Ala. 2010).

37. Merritt v. Wizzniewski (In re Wiszniewski), Adv. No. 09-00524, 2010 Bankr. Lexis 2894 (Bankr. N.D. Ill. August 31, 2010).

38. To be a preference there must be:

(1) "a transfer of an interest of the debtor in property;"

(2) "to or for the benefit of a creditor;"

(3) "for or on account of an antecedent debt owed by the debtor before such a transfer was made;"

(4) "made while the debtor was insolvent;"

(5) "made on or within 90 days before the date of the filing of the petition" (or one year if an insider); and

(6) one "that enables such creditor to receive more than such creditor would receive" if (A) the debtor filed under Chapter 7, and (B) the transfer had not been made. 11 U.S.C.A. § 547(b). See also In re Ramba, Inc., 437 F.3d 457, 45 Bankr. Ct. Dec. (CRR) 267, 55 Collier Bankr. Cas. 2d (MB) 900, Bankr. L. Rep. (CCH) P 80454 (5th Cir. 2006).

39. In re Caremerica, Inc., 409 B.R. 737, 51 Bankr. Ct. Dec. (CRR) 249 (Bankr. E.D. N.C. 2009) ("Caremerica I")

40. Caremerica I, 409 B.R. at 750; In re Hydrogen, L.L.C., 2010 WL 1609536 at *12 ("Without a single relevant detail such as date, amount or type of transfer, it is impossible to identify any specific avoidable transfer… As such, the Court find the pleading relating to the preference claims… to be deficient under the standard delineated in Twombly and under Federal Rule of Civil Procedure 8").

41. In re Caremerica, Inc., 2009 WL 2253241 (Bankr. E.D. N.C. 2009); In re Caremerica, Inc., 2009 WL 2253232 (Bankr. E.D. N.C. 2009); In re Caremerica, Inc., 2009 WL 2253225 (Bankr. E.D. N.C. 2009); In re Caremerica, Inc., 409 B.R. 759 (Bankr. E.D. N.C. 2009); In re Caremerica, Inc., 409 B.R. 346 (Bankr. E.D. N.C. 2009); In re Caremerica, Inc., 415 B.R. 200 (Bankr. E.D. N.C. 2009); In re CareAmerica, Inc., 2009 WL 1886675 (Bankr. E.D. N.C. 2009).

42. Caremerica I, 409 B.R. at 750.

43. Caremerica I, 409 B.R. at 750.

44. Caremerica I, 409 B.R. at 750.

45. Caremerica I, 409 B.R. at 751.

46. See Farinash v. Bensusan (In re Prebul Jeep, Inc.), 2010 Bankr. LEXIS 2800 (Bankr. E.D. Tenn. 2010) (finding that allegations concerning transfer of interest element were sufficient when the complaint stated that the debtor "made the transfers and those transfers originated from an account owned by [the debtor]").

47. Angell v. Burrell (In re Caremerica, Inc.), Adv. No. L-08-00173-8-JRL, 2009 Bankr. Lexis 2328 (Bankr. E.D.N.C. July 28, 2009) ("Caremerica II") (stating that plaintiff failed to plead the debtor's interest in property on account of the plaintiff's failure to allege facts "such as dates or amounts of each alleged transfer.").

48. Angell v. First Eastern, LLC (In re Caremerica, Inc.), Adv. No. L-08-00157-8-JRL, 2009 Bankr. Lexis 2331 (Bankr. E.D.N.C. July 28, 2009) ("Caremerica III") (holding that plaintiff sufficiently plead transfer of interest of the debtor in property element of § 547 by attaching copies of bank statements of debtor).

49. Hydrogen, 2010 WL 1609536 at *13, n.11 (finding that the debtor's schedules did not contain sufficient information to enable the court to identify the specific transfers with respect to which the preference claims related).

50. Caremerica I, 409 B.R. at 751.

51. In re Valley Media, Inc., 288 B.R. 189, 40 Bankr. Ct. Dec. (CRR) 188 (Bankr. D. Del. 2003).

52. Caremerica II, 2009 Bankr. Lexis 2328, *9; In re McLaughlin, 415 B.R. 23, 2009 BNH 23 (Bankr. D. N.H. 2009), rev'd in part on reconsideration, 2009 WL 4722233 (Bankr. D. N.H. 2009) and rev'd in part on reconsideration, 2009 WL 4722236 (Bankr. D. N.H. 2009)

and rev'd in part on reconsideration, 2009 WL 4706865 (Bankr. D. N.H. 2009) ("*Iqbal* requires the pleadings to assert facts relating to the nature and amount of the antecedent debt."); Vieira v. Trewhella (In re Glassmaster Company), Adv. No. 09-80067-HB, 2009 Bankr. LEXIS 4281 (Bankr. D.S.C. July 20, 2009).

53. See Charys Liquidating Trust v. Hades Advisors, LLC (In re Charys Holding Co., Inc.), Adv. No. 10-50211, 2010 Bankr. Lexis 2072 (Bankr. D. Del. July 14, 2010).

54. 11 U.S.C.A. § 547(f).

55. In re Caremerica, Inc., 409 B.R. 346 (Bankr. E.D. N.C. 2009) (Bankr. E.D.N.C. 2009) ("Caremerica V") (stating that the insolvency pleading requirement is satisfied as to transfers made during the 90-day preference period on account of the § 547(f) presumption).

56. Caremerica III, 2009 Bankr. Lexis 2331, *12-13.

57. Caremerica III, 2009 Bankr. Lexis 2331, *12.

58. Caremerica III, 2009 Bankr. Lexis 2331, *12. See also Charys, 2010 Bankr. Lexis 2072, *18-19.

59. Caremerica I, 409 B.R. at 753 (internal citations omitted); McLaughlin, 415 B.R. at 28; In re Gluth Bros. Const., Inc., 424 B.R. 379 (Bankr. N.D. Ill. 2009).

60. 11 U.S.C.A. § 548

61. Rule 9 of the Fed. R. Civ. P. is made applicable in bankruptcy cases pursuant to Fed. R. Bankr. P. 7009.

62. Iqbal, 129 S.Ct. at 1954 ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid–though still operative–strictures of Rule 8."); In re American Intern. Refinery, 402 B.R. 728 (Bankr. W.D. La. 2008) ("Rule 9(b) of the Federal Rules of Civil Procedure impose additional requirements [to the Rule 8(a) requirements] for pleading claims of fraud.").

63. Section 548(a)(1)(B) allows for the avoidance of certain transfers in which the debtor "received less than reasonably equivalent value" and either (I) was or became insolvent on the date of the transfer; (II) became insufficiently capitalized following the transfer; (III) intended to incur debts that would be beyond its ability to repay; or (IV) made such transfer for the benefit of an insider under an employment contract and not in the ordinary course of business.

64. In re Verestar, Inc., 343 B.R. 444, 459 (Bankr. S.D. N.Y. 2006).

65. Aphton, 423 B.R. at 92.

66. Image Masters, 421 B.R. at 177 (stating that determining reasonably equivalent value is a two-step process: (1) determine if the debtor received *any* value; (2) determining whether the value received was reasonably equivalent to the value that the debtor relinquished when it transferred the property).

67. Aphton, 423 B.R. at 93.

68. Aphton, 423 B.R. at 93.

69. Life Fund 5.1, 2010 Bankr. Lexis 1938, *20 ("Just as a complaint alleging a constructive fraud claim based on a lack of reasonably equivalent value must plead facts in support, a complaint alleging a constructive fraud claim based on insolvency must plead facts from which an inference of insolvency can be drawn.").

70. See Aphton, 423 B.R. at 90.

71. In re Troll Communications, LLC, 385 B.R. 110, 49 Bankr. Ct. Dec. (CRR) 236 (Bankr. D. Del. 2008).

72. Troll Communications, 385 B.R. at 124.

73. Troll Communications, 385 B.R. at 114.

74. Troll Communications, 385 B.R. at 124.

75. See also Charys, 2010 Bankr. Lexis 2072, *19.

76. Buchwald Capital Advisors, LLC v. JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.), Adv. Pro. 07-02780, 2009 Bankr. Lexis 3606 (Bankr. S.D.N.Y. November 10, 2009).

77. American International Refinery, 402 B.R. at739 ("the collective mode of pleading fraud also does not satisfy basic notice pleading standards under Rule 8(a).").

78. American International Refinery, 402 B.R. at739.

79. See generally Life Fund 5.1, 2010 Bankr. Lexis 1938, *20.

80. Aphton, 423 B.R. at 93. Buckley v. Merrill Lynch & Co., Inc. (In re DVI, Inc.), Adv. No. 08-50248(MFW), 2008 Bankr. Lexis 2338 (Bankr. D. Del. September 16, 2008) ("All that is needed at this stage is an allegation that there was a transfer for less than reasonably equivalent value at a time when the Debtors were insolvent.").

81. Peltz v. Hatten, 279 B.R. 710, 736 (D. Del. 2002), aff'd, 60 Fed. Appx. 401 (3d Cir. 2003). See also In re Fruehauf Trailer Corp., 444 F.3d 203,213, 46 Bankr. Ct. Dec. (CRR) 100, 37 Employee Benefits Cas. (BNA) 1796, Bankr. L. Rep. (CCH) P 80483 (3d Cir. 2006).

82. See, e.g., In re APF Co., 308 B.R. 183, 42 Bankr. Ct. Dec. (CRR) 281, 51 Collier Bankr. Cas. 2d (MB) 1797 (Bankr. D. Del. 2004) (Trustee could not state [**29] § 548 constructive fraud claim because "the payments made on the promissory note were made for value, satisfaction of an antecedent debt"); In re Rosen Auto Leasing, Inc., 346 B.R. 798, 46 Bankr. Ct. Dec. (CRR) 235 (B.A.P. 8th Cir. 2006); In re First Alliance Mortg. Co., 298 B.R. 652 (C.D. Cal. 2003), aff'd, 471 F.3d 977, 47 Bankr. Ct. Dec. (CRR) 133, Bankr. L. Rep. (CCH) P 80802 (9th Cir. 2006); In re Carrozzella & Richardson, 302 B.R. 415, 42 Bankr. Ct. Dec. (CRR) 58 (Bankr. D. Conn. 2003).

83. Tamayo v. Blagojevich, 526 F.3d 1074, 1083, 103 Fair Empl. Prac. Cas. (BNA) 847, 27 I.E.R. Cas. (BNA) 1276, 91 Empl. Prac. Dec. (CCH) P 43245, 70 Fed. R. Serv. 3d 896 (7th Cir. 2008).