UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: EQUIPMENT ACQUISITION RESOURCES, INC., Debtor.	CHAPTER 11 Case No. 09-B-39937 Hon. Timothy Barnes
WILLIAM A. BRANDT, JR., solely in his capacity as Plan Administrator for Equipment Acquisition Resources, Inc., Plaintiff, v. LEASING ONE CORPORATION, Defendant.	Adv. No. 11-02224

REPLY IN SUPPORT OF LEASING ONE CORPORATION'S PARTIAL MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

Defendant Leasing One Corporation ("Leasing One"), moved to dismiss Counts I and II (and partial dismissal of Counts IV and V) of the Third Amended Complaint ("TAC") filed by William A. Brandt, Jr., as Plan Administrator of Equipment Acquisition Resources, Inc. ("EAR"), pursuant to Federal Rule of Bankruptcy Procedure 7012(b), and in reply to the Plan Administrator's Response (Doc# 69), respectfully states as follows:

INTRODUCTION

Leasing One moved to dismiss the Third Amended Complaint based on the failure of the Plan Administrator to plead the Debtor's intent with respect to the thirty-eight alleged transfers (the "Leasing One Payments"). The Plan Administrator searches far and wide in his Response to

find or invent badges of fraud that would permit the Court to infer that EAR intended to defraud other creditors by paying Leasing One. However, his purported badges do not apply for at least three reasons: 1) they do not relate to the thirty-eight transfers under attack; 2) they are not supported by the facts as alleged; or 3) they are not recognized by the Seventh Circuit in the context of a fraudulent conveyance. The Plan Administrator continues to focus his pleading on the underlying leases, decrying them as "unnecessary" and "harmful," but he has not sought to avoid them. The leases, as it stands, are valid contractual obligations of the Debtor.[1] Bemoaning the leases, however, says nothing about EAR's intent in making the transfers. No fraudulent motive for the Leasing One Payments has been alleged with Rule 9(b) material and the Third Amended Complaint should suffer a worse fate than its progenitors: dismissal with prejudice.

ARGUMENT

I. The Alleged Badges of Fraud Do Not Speak to the Specific Transfers Under Attack.

In Section 548(a)(1), the "intent" modifier focuses on the specific transfer, and the badges of fraud necessarily also must focus on the specific transfer. Since the Plan Administrator only seeks to avoid the Leasing One Payments, not the incurrence of the underlying obligation, allegations of fraud relating to the creation of those obligations are irrelevant to the Debtor's intent in making the payments. The major failing in the Third Amended Complaint is that the Plan Administrator does not relate the allegations labeled as "badges of fraud" to the motive for the Leasing One Payments.

In *B.E.L.T., Inc. v. Wachovia Corp.*, 403 F.3d 474 (7th Cir. 2005), a plaintiff asserted a fraudulent transfer claim against the defendant lender, alleging that the debtor paid the lender with "actual intent to hinder, delay or defraud" creditors. *Id.* at 478. The debtor defrauded other

[1] The Bankruptcy Code provides trustees with a mechanism to avoid obligations fraudulently incurred. *See* 11 U.S.C. § 548(a)(1) ("or any obligation incurred by the debtor"). The Plan Administrator elected not to attempt to avoid the lease obligations here.

lenders and took those funds and paid the defendant. *Id*. at 476. The Plan Administrator argues that "the courts specifically noted that the transfers to the defendants did not relate to the underlying fraud," Response, ¶ 32, but this is precisely why the TAC must be dismissed. The only alleged connection between the fraud and the transfers—both here and in *B.E.L.T.*—is that the alleged fraud *funded* the transfers under attack.[2] The Plan Administrator believes this connection is sufficient, but it was not sufficient in *B.E.L.T.* Instead, the Seventh Circuit affirmed dismissal and this Court should likewise dismiss the Third Amended Complaint.

The Plan Administrator also argues that *Sharp* is distinguishable because the court "specifically noted that '[t]he fraud alleged in the complaint relates to the manner in which [the debtor] obtained new funding from the Noteholders, not [the debtor's] subsequent payment of part of the proceeds to [the defendant].'" Response, ¶ 32 (quoting *Sharp Int'l Corp. v. State St. Bank & Trust Co. (In re Sharp Int'l Corp.)*, 403 F.3d 43, 56 (2d Cir. 2005)). This is also exactly what the TAC does: at best, it alleges a fraud relating to the manner in which EAR obtained new funding from the Financial Entities, which EAR (somehow) then used to pay these obligations. The Plan Administrator believes this connection to be sufficient, but it was not sufficient in *Sharp*. Instead, the Second Circuit affirmed dismissal and this Court should likewise dismiss the Third Amended Complaint.

In *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1506 (1st Cir. 1987), the creditor received a payment of funds that was procured by fraud. The fraudulently generated proceeds in *Boston Trading* were alleged to have been used to pay the defendant. Likewise, the Plan Administrator alleges that EAR fraudulently generated funds, and (somehow) paid them to

[2] Leasing One has previously argued that the Plan Administrator has failed to allege with Rule 9(b) particularity that the funds used to make the Leasing One Payments were generated by the alleged fraud. *See* Memorandum in Support of Motion to Dismiss Second Amended Complaint, Doc 46-1, at 8–9. Since that deficiency persists in the TAC, and for purposes of preserving that argument in the record, Leasing One incorporates it by reference.

Leasing One. The Plan Administrator believes this connection to be sufficient, but it was not sufficient in *Boston Trading*. Instead, the First Circuit affirmed dismissal and this Court should likewise dismiss the Third Amended Complaint

All of the transfers at issue in *B.E.L.T.*, *Sharp*, and *Boston Trading* were funded with proceeds generated by fraud occurring at the debtor. The three cases each stand for the proposition that fraudulent borrowing does not imply fraudulent transferring. How a fraudster obtained funding does not answer the question of why he spent it, and it is that question that matters. *B.E.L.T.*, *Sharp* and *Boston Trading* each require that the alleged badges of fraud be directed at or describe *the transfers* that the plaintiff is attempting to avoid in order to infer fraudulent intent. The Plan Administrator's generalized badges of fraud say nothing about the intent or motive EAR possessed when paying Leasing One the transfers at issue. The Third Amended Complaint should be dismissed.

II. The Alleged Badges of Fraud are Insufficient to Support An Inference That the Debtor Made the Payments with Fraudulent Intent.

The Plan Administrator does not seek to avoid the underlying leases. He only seeks to avoid *the transfers* made to Leasing One on account of those leases. Without the Ponzi scheme presumption, he must now "specifically plead the intent" behind the transfers to Leasing One to avoid dismissal. *See* Memorandum Opinion, Doc# 59, at 10 (the "Opinion"). Based on the plain language of the applicable statutes, the focus is the intent of the debtor in making the transfer, and not the debtor's intent regarding other matters.

A. The Badges of Honesty.

Before examining the numerous instances where the Plan Administrator misapplies the Court-directed badges of fraud and/or attempts to add new ones, it is important to review the "badges of honesty" attendant to the Leasing One Payments. *See Luker v. Eubanks (In re*

Eubanks), 444 B.R. 415, 424 (Bankr. E.D. Ark. 2010) (characterizing the absent badges of fraud as "badges of honesty"). EAR made the contractually-obligated payments to Leasing One, an arms-length assignee of a lessor, not an insider or family member. EAR relinquished all control over the payments to Leasing One. The Leasing One Payments amounted to a minuscule portion of EAR's assets. Reasonably equivalent value—in the form of debt reduction—supported each payment made on the leases. None of the Leasing One Payments were subsequently returned to an insider of EAR. These five badges of honesty are not in dispute and must be overcome by sufficient allegations from the Plan Administrator to make it plausible that EAR made the Leasing One Payments with actual fraudulent intent.

B. The Plan Administrator Misapplies the Recognized Badges of Fraud.

In attempting to allege the recognized badges, the Plan Administrator fails to allege facts make the badges applicable. Insolvency, the only badge properly alleged, is insufficient for an inference of intent. Besides the presence of these badges of honesty, it is important to recognize that not all badges are created equal. *See Murphey v. Crater (In re Crater)*, 286 B.R. 756, 764 (Bankr. D. Ariz. 2002).[3] The badges can be divided into three categories: Implicitly fraudulent; economically questionable so likely fraudulent; and questionable timing. *Id.*

1. The Badge indicates concealment, deception, or fraudulent intent.

The presence of the following badges strongly suggests fraudulent intent. *See Crater*, 286 B.R. at 764–65.[4] However, none apply to the Leasing One Payments.

First, while retention of possession or control of the transferred property is a badge of fraud, *Id*. at 764, n. 10, the Plan Administrator does not and cannot allege that EAR retained

[3] Though *Crater* involved a non-dischargeability action, unlike the non-dischargeability cases cited by the Plan Administrator and discussed below in Section II.C., the *Crater* court analyzed the badges of fraud codified in the Arizona UFTA, which are the same as those in the Illinois UFTA. *Id.* at 760.

[4] *Crater* lists the following badges of fraud for the first category: the debtor retained possession or control of the property transferred after the transfer; the transfer or obligation was . . . concealed; the debtor absconded; and the debtor removed or concealed assets. *Id.* at 764.

possession or control of the Leasing One Payments.

Second, while concealment of a transfer is a badge of fraud, there is no allegation that the Leasing One Payments were concealed. Rather, the Plan Administrator only alleges that EAR concealed its ownership of the equipment. Under *B.E.L.T.*, it is only concealment of the transfer that matters. *See B.E.L.T.*, 403 F.3d at 478 ("Plaintiffs say that [Debtor's] fraud was concealed, which is true enough, but the debt to [Financing Entity], and the transfers in payment of that debt, were disclosed and transparent."). The Leasing One Payments were not concealed.

Third, while absconding with transferred property is a badge of fraud, the Plan Administrator's allegation that Sheldon Player absconded with $700,000 in 2009 is completely unconnected to the Leasing One Payments. The badge requires that the debtor abscond *with* the proceeds of the transfer immediately after receipt. *Grochocinski v. Schlossberg (In re Eckert)*, 388 B.R. 813, 830–32 (Bankr. N.D. Ill. 2008). (finding that the trustee failed to show the debtor had absconded with the sale proceeds from the property). The Plan Administrator does not allege that the payments to Leasing One generated proceeds for EAR, or that the $700,000 is connected to Leasing One in any way.

Fourth, courts often discuss the removal or concealment of assets in the context of objections to a debtor's discharge. *See, e.g., First Commer. Fin. Group v. Hermanson (In re Hermanson)*, 273 B.R. 538, 545 (Bankr. N.D. Ill. 2002). While this badge is listed in the UFTA, *see* 740 ILL. COMP. STAT. 160/5(b), it is rarely analyzed by courts in the context of fraudulent conveyances. Also, the Plan Administrator's allegations focus on how EAR's principals looted the company for their own benefit. Response, ¶ 14. However, the Plan Administrator does not connect this looting to the Leasing One Payments. The concealment allegations do not relate to Leasing One: the Plan Administrator does not allege receipt by Leasing One of concealed assets,

and does not otherwise connect any alleged concealment to the Leasing One Payments' purpose.

None of the foregoing "implicitly fraudulent" badges are present or connected to the Leasing One Payments.

2. The Badge suggests an ulterior motive because it would otherwise be economically irrational.

The next three badges—insider transfers, lack of consideration, and transfers of essential assets—are not implicitly fraudulent but may suggest a possible fraudulent motive. *Crater*, 286 B.R. at 764.[5] First, a transfer to an insider may suggest that "the debtor did not seek to maximize his economic benefit by exposing the asset to the market." *Id.* at 764, n. 11. This badge is not present, of course, because Leasing One is not alleged to have been an insider.

Second, the transfers to Leasing One were made in exchange for reasonably equivalent value because they satisfied, in part, EAR's lease obligations. The Plan Administrator alleges that MTD received a 2% fee or commission for each lease transaction, but this is not an allegation that the Leasing One Payments lacked reasonably equivalent value. EAR paid Leasing One no more than Leasing One was owed (and, as the Plan Administrator knows, substantially less than that). *See* Proof of Claim 105-1, Case 09-39937. This badge of fraud is not present.

Third, the payments to Leasing One did not transfer the Debtor's essential assets to be subsequently transferred to an insider. This badge of fraud is not present. None of the foregoing "economically questionable" badges of fraud are present or connected to the Leasing One Payments.

[5] *Crater* lists the following badges of fraud for the second category: the transfer or obligation was to an insider; the value of the consideration received by the debtor was [not] reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. *Id.* at 764.

3. The Badge itself is innocuous but the presence of the other badges raises suspicion.

It is only in conjunction with the previous badges of fraud that the following inherently innocent badges can support an inference of intent. *See Crater*, 286 B.R. at 772–73.[6]

The Plan Administrator alleges that the transfers were made while EAR was under "potential" threat of lawsuits. This allegation misapplies the actual badge which examines whether the debtor has actually been sued or threatened with a lawsuit. There are no allegations that the Leasing One Payments were made in response to, or were motivated by, any actual threat of a lawsuit. Besides the allegation not constituting a badge of fraud, the earliest it could apply is late 2009, after most of the Leasing One Payments had been made.

The Plan Administrator does not and cannot allege that the payments to Leasing One represented substantially all of EAR's assets. This badge of fraud is not present.

The Plan Administrator alleges that "EAR had incurred, and was continuing to incur, substantial debt while it was making its payments to the Defendant." *See* TAC, ¶ 76. A substantial portion of the debt incurred, however, was owed to Leasing One. Between April 12, 2006, and August 17, 2009, EAR allegedly made payments to Leasing One totaling $1,974,163.45. During that same time period, Leasing One entered into leases providing EAR with $1,787,500.00 in funds. *See* TAC, ¶¶ 57–71. This badge of fraud has been found to be present, for instance, when the debtor incurs substantial medical debt, withdraws more than the amount of debt from his savings, and transfers his real property and business interests to his son. *Berland v. Mussa (In re Mussa)*, 215 B.R. 158, 169–170 (Bankr. N.D. Ill. 1997). It would not be a badge of fraud for a debtor to incur substantial medical debt, borrow funds from a lender, and

[6] *Crater* identifies the following badges of fraud as innocuous: before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; the transfer was of substantially all of the debtor's assets; the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; and the transfer occurred shortly before or shortly after a substantial debt was incurred. *Id.* at 764–65.

pay the medical debt with the borrowed funds. At most, that is what EAR did here. In any event, there is no allegation that EAR paid Leasing One to keep that money away from other creditors.

C. Neither Illinois nor the Seventh Circuit Recognizes the Remaining Purported Badges in the Context of an Alleged Fraudulent Conveyance.

1. The So-Called "Straw Man" Badge of Fraud

The Plan Administrator would like the Court to recognize a "Straw Man" badge of fraud. *See* Response, ¶ 15. *Brach v. Moen* involved a fraud, rather than a fraudulent conveyance, associated with the Chicago candy manufacturer committed on an unsophisticated[7] Iowa farmer. *See Brach v. Moen*, 35 F.2d 475, 476 (8th Cir. 1929). The fraudster in *Brach* used straw men to attempt to insulate himself from the fraud. *Id.* at 477. The Plan Administrator also cites to *In re Russo* which includes the "use of dummies" as a badges of fraud. *In re Russo*, 1 B.R. 369, 382 (Bankr. E.D.N.Y. 1979). Besides New York's law being based on the Uniform Fraudulent Conveyance Act, *see* NY Debtor Creditor Law §§ 270–281, not the Uniform Fraudulent Transfer Act (like Illinois), *Russo* did not actually involve the use of a dummy. *Id.* Black's Law Dictionary defines a "straw man" as a "third party used in some transactions as a temporary transferee to allow the principal parties to accomplish something that is otherwise impermissible." Black's Law Dictionary 1461 (8th ed. 2004).

The Plan Administrator cites to one Illinois case for the proposition that the use of a straw man constitutes a badge of fraud. *See Olds v. Adams Clark Bldg. Corp.*, 277 Ill. App. 157, 166 (Ill. App. Ct. 1934). This case involved an attorney who had his client, on the eve of judgment, execute a mortgage in favor of another client to benefit the attorney yet keep the attorney's name

[7] The Eighth Circuit held Mr. Moen in low regard: "It would be difficult to find in all the category of swindles an easier or more gullible victim than Moen."; "[Moen] was as completely lost as a babe in the woods."; and "While nothing can be said to justify the stupidity of Moen, in a contest of wits between him and these numerous parties he had little chance." *See Brach v. Moen*, 35 F.2d 475.

off the record. *Id.* But the *Olds* court did not focus on the use of a "mere dummy," it focused on the lack of consideration the mortgagee client gave to the mortgagor client. *Id*. Unlike in *Olds*, Leasing One gave EAR consideration (*i.e.*, debt reduction) in exchange for each of the Leasing One Payments. The Plan Administrator's allegations do not support the conclusion that EAR used MTD as a fraudulent "straw man." This purported badge, not recognized by the current statutory scheme adopted after *Olds*, has nothing to do with the Leasing One Payments. MTD, the so-called "straw man" was not a party to the leases, or to the Leasing One Payments.

2. The "Existence and Cumulative Effect of Events" Badge of Fraud

The Plan Administrator finds this purported badge of fraud in the context of denial of discharge proceedings, which this of course is not. *See* Response, ¶ 16 (collecting cases addressing § 727(a)). Further, most of the cases cited by the Plan Administrator merely recite this purported badge, and include no real analysis. *See Henbest v. Meyer (In re Meyer)*, 307 B.R. 87, 91–92 (Bankr. N.D. Ill. 2004). Additionally, the Plan Administrator has not quoted the purported badge completely: "cumulative effect of the transactions and course of conduct *after onset of financial difficulties or threat of suit*." *See Morrissy v. Dereve (In re Dereve)*, 381 B.R. 309, 326 (Bankr. N.D. Fla. 2007) (emphasis added). The *Dereve* court did discuss the badge to address transfers made post-judgment and prepetition. *Id.* at 325. Again, with this purported badge, the Plan Administrator has focused on the initial leases, not the contractually-obligated payments, and fails to plead that EAR made Leasing One Payments with fraudulent intent.

3. The "General Chronology of Events" Badge of Fraud

The Plan Administrator finds this purported badge in the same cases as the "Cumulative Effect" purported badge. *See* Response, ¶ 17 (drawing citations from previous paragraph). But now the Plan Administrator adds a case addressing badges of fraud in the fraudulent conveyance context. *See Luker v. Eubanks (In re Eubanks)*, 444 B.R. 415, 421–22 (Bankr. E.D. Ark. 2010).

Setting aside that *Eubanks* applied Eighth Circuit badges,[8] it is very distinguishable from this case. The debtor, Eubanks, attempted to refinance his farm loan in early 2006. *Id.* at 418–19. At a meeting with the bank, the debtor learned that it would be difficult for him to refinance. *Id*. at 421. Six days later, the debtor transferred his remainder interest in 120 acres to his mother. *Id*. at 419. After the bank officially rejected the refinance, the debtor made the decision to cease farming. *Id*. at 421. He sold his farm equipment to pay down the loan to the bank. *Id.* Nine months after transferring the remainder interest, the debtor and his spouse filed for bankruptcy. *Id.* at 424, n. 13. The general chronology in *Eubanks* could not be more dissimilar to the case at bar, and is loaded with independent badges of fraud, such as the transfer of a major asset to a relative in response to identified creditor pressure. None of these things are alleged to exist here.

4. The "Refusal to Testify" Badge of Fraud

To find this badge mentioned in an Illinois case, the Plan Administrator had to search back 125 years. *See Heeren v. Kitson*, 28 Ill. App. 259 (Ill. App. Ct. 1888).[9] Though the appellant argued that the debtor did not testify, the *Kitson* court affirmed that the judgment debtor's contractually-obligated payment of all his assets to his son of all of his assets was not a fraudulent conveyance. *Id*. at 267.[10] Rather than being a separate badge, courts have likened the failure to testify to the debtor absconding. *See Youngstown Osteopathic Hosp. Ass'n v. Pathways Ctr. for Geriatric Psychiatry Inc. (In re Youngstown Osteopathic Hosp. Ass'n)*, 280 B.R. 400, 412 (Bankr. N.D. Ohio 2002). In *Youngstown*, the court allowed adverse inferences against parties who refuse to testify in response to probative evidence. *Id*. at 408 (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). While a finder of fact may make a negative inference

[8] While some Eighth Circuit badges overlap with those listed in the Opinion, they do differ from the Seventh Circuit.
[9] Understanding the general difficulty in reading 19th Century opinions, it may be forgivable that the Plan Administrator has cited to a recitation of the argument from the appellant's brief, rather than the opinion itself. *See Kitson*, 28 Ill. App. at 261 (opinion beginning at Page 263).
[10] The *Kitson* court held that the evidence of the transfer to the son merely disclosed a preference, not a fraudulent transfer. *Id.* at 268.

from a refusal to testify, such an inference is only appropriate *as against the party who refuses to testify*. Further, Player, Anstett, and Ferguson have not refused to testify *in this action* as no discovery has been taken. Finally, the alleged refusal to testify concerns the underlying leases and transfers of equipment, not the contractually-obligated payments to Leasing One.

5. The "Exceptional and Peculiar Conduct" Badge of Fraud

Again citing to the appellant's argument rather than the opinion, the Plan Administrator asks the Court to recognize a badge of fraud based on exceptional and peculiar conduct. *See* Response, ¶ 19.[11] The exceptional and peculiar conduct alleged in *Kitson* was the debtor's payment of a debt to his son. Thus, not only was there an independent badge of fraud (payment to a relative) that is absent here, in *Kitson*, the peculiar conduct actually described a characteristic of the transfer itself. The Plan Administrator alleges neither: EAR and Leasing One are not related; and the TAC's alleged "peculiar" conduct (altered serial numbers on equipment) has nothing to do with the transfers under attack.

6. The "Significant Misrepresentations" Badge of Fraud

The Plan Administrator also relies on a preliminary injunction case to stretch the badges of fraud to include "Significant Misrepresentations." *See Toledo Trust Co. v. Poole (In re Poole)*, 15 B.R. 422, 424 (Bankr. N.D. Ohio 1981). The underlying issue in *Toledo Trust* involved a transfer of the debtor's interest in a real estate company to his wife. *Id.* The court issued an injunction to hold the sale proceeds of the transferred property in escrow pending resolution. *Id*. at 433. The misrepresentations in *Toledo Trust* created a strong motivation to transfer the unencumbered assets to his wife who "presumably would support him if the circumstances warranted it." *Id*. at 432. However, the Plan Administrator identifies *no*

[11] Though no pinpoint page is provided, the *Kitson* case reporter only includes the words "peculiar" and "exceptional" prior to the opinion beginning on Page 263.

misrepresentations, let alone with particularity, regarding the Leasing One Payments, and this case lacks the weighty independent badge of fraud in *Toledo*: the transfer of an asset to a spouse.

7. The So-Called "Lack of Reasonable Justification" Badge of Fraud

The Seventh Circuit case law does not recognize the "Lack of Reasonable Justification" as a badge of fraud in fraudulent conveyances. Instead, the Plan Administrator looks to export the badge from a non-dischargeability case. *See* Response, ¶ 21. But the generalized inability to justify prepetition conduct is a reason to deny discharge, not to infer that a particular transfers was made with fraudulent intent. *See* 11 U.S.C. § 727(a)(5). Even if the Court recognized this badge, it is not applicable because the TAC admits that EAR possessed a justification for making the Leasing One Payments: it was contractually-obligated to do so. *See* TAC, ¶ 44.

8. The "Questionable Conduct Outside the Ordinary Course" Badge

To provide analysis for this purported badge, the Plan Administrator directs the Court to a brokerage firm successor liability case analyzing the fraud exception. *See Ryan Beck & Co. v. Campbell*, 2003 U.S. Dist. LEXIS 17428 (N.D. Ill. Oct. 2, 2003). Like *Russo*, *Ryan Beck* examined New York fraudulent conveyance law, not Illinois law. *Id.* at *23–24. Even if the Court recognizes this as a badge of fraud, it does not apply to the facts as alleged in the TAC. The Plan Administrator does not (and cannot) allege that paying its lessors was outside the ordinary course of its business. In fact, the TAC goes to great lengths to establish that paying lessors was a part of its business. *See* TAC, ¶ 26.

9. The So-Called "Secrecy and Haste" Badge of Fraud

The Plan Administrator cite a Ponzi scheme case to encourage the Court to recognize this badge. *See Picard v. Estate of Chais (In re Bernard L. Madoff Inv. Secs. LLC)*, 445 B.R. 206 (S.D.N.Y. 2011). Because this is not a Ponzi scheme case, the Court should decline to do so. Even if recognized, the badge does not apply because he has not alleged one fact indicating

secrecy, haste, or unusualness in making the Leasing One Payments.

10. The So-Called "Lack of Documentation" Badge of Fraud

The Plan Administrator asks the Court to recognize the lack of documentation as a badge of fraud based on a case attempting to enforce a foreign judgment. *See Kaibab Indus., Inc. v. Family Ready Homes, Inc.*, 372 N.E.2d 139, 140–1 (Ill. App. Ct. 1978). The court reversed in order to allow the judgment creditor further discovery into the current location of the judgment debtor's assets that had been allegedly transferred to his children. *Id*. at 143. If the Court decides to recognize this badge, then it should recognize the complete badge: "the absence of any documents indicating the purpose of the transactions." *Id.* at 142. There is no allegation that documentation establishing the purpose of the Leasing One Payments is absent. The TAC admits that the purpose was to pay the lease obligations on which EAR was obligated, the leases establish the obligations, and the TAC (and Leasing One's Proof of Claim) overtly references them. *See* TAC, ¶¶ 44–71.

11. The "Inability to Pay Creditors" Badge of Fraud

This badge of fraud is not recognized in this Circuit, nor is it recognized in the case cited by the Plan Administrator. *See MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F.Supp. 913, 935–36 (S.D.N.Y. 1995) (holding that the foreseeability of being able to pay creditors is not an appropriate consideration when dealing with actual fraudulent transfers). In any event, there is no allegation that the thirty-eight Leasing One Payments (payments to a creditor) were motivated by an inability to pay creditors.

The Plan Administrator does not allege badges of fraud, let alone with particularity, that support an inference that EAR intended to defraud other creditors when paying Leasing One. The TAC admits that EAR was contractually obligated to pay Leasing One and did so. Without

associating these specific transfers to recognized badges of fraud, which the Plan Administrator has failed to do, there is no basis to infer fraudulent intent. The TAC should be dismissed.

CONCLUSION

WHEREFORE, Leasing One respectfully requests that the Court dismiss Counts I and II (and Counts IV and V to the extent that Counts I and II are dismissed) of the Third Amended Complaint, and grant such further relief as the Court may deem equitable and just. Based on the Plan Administrator's many attempts to allege intent, dismissal should be with prejudice.

Respectfully submitted,

October 25, 2013

/s/ Brian H. Meldrum

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, I electronically filed Leasing One Corporation's Reply in Support of its Motion to Dismiss the Third Amended Complaint with the clerk of Court using the CM/ECF system; copies of which will be served by electronic filing on this 25th day of October, 2013 and upon:

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