SO ORDERED.

SIGNED this 31 day of March, 2020.

Austin E. Carter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In re:	
Oconee Regional Health Systems, Inc., *et al*.,	Case No. 17-51005-AEC
Debtors.	Chapter 11
Clifford Zucker, as Liquidating Trustee of the Oconee Liquidation Trust,	
Plaintiff,	
v.	Adv. Proc. No. 19-05010
Oconee Regional Healthcare Foundation, Inc.,	
Defendant.	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS ADVERSARY PROCEEDING

Before the Court is Defendant's *Oconee Regional Healthcare Foundation, Inc.'s Motion to Dismiss Adversary Proceeding* (Doc. 9). In its motion, the Defendant requests that the Adversary Proceeding filed by Plaintiff, Clifford Zucker, as

Liquidating Trustee of the Oconee Liquidation Trust (the "Trustee") be dismissed with prejudice on the grounds that the Complaint (Doc. 2)[1] fails to state a claim upon which relief can be granted and that the Trustee not be granted leave to amend. The Trustee filed a response in opposition (Doc. 15) and the Defendant filed a reply in support of its motion (Doc. 16).

For the reasons stated below, the Defendant's Motion is denied.

I. Standards of Review: Rule 12(b)(6) Motion to Dismiss and Preferential Transfers under § 547(b)

In an adversary proceeding to avoid preferential transfers, a trustee must satisfy each element of 11 U.S.C. § 547(b):[2]

> the trustee must show that the [transfer] was (1) to the creditor,[3] (2) on the account of a previous debt, (3) made while the debtor was insolvent, (4) made [within] 90 days before the bankruptcy petition was filed,[4] and (5) [was] effective in enabling the creditor to receive more than it would have received had the debtor's estate been liquidated under Chapter 7.

Gordon v. Harrison (In re Alpha Protective Servs., Inc.), 531 B.R. 889, 897 (Bankr. M.D. Ga. 2015) (Laney, J.) (quoting *Carrier Corp. v. Buckley (In re Globe Mfg. Corp.)*, 567 F.3d 1291 (11th Cir. 2009) (internal quotation marks omitted)).

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[1] The Trustee incorrectly identified the division of the U.S. Bankruptcy Court for the Middle District of Georgia in the header of the initial Complaint filed on May 6, 2019. (Doc 1 at 1). The Trustee filed an amended document that corrected this error on May 8, 2019. (Doc. 2 at 1). Beyond the correction in the header, the amended document and the initial Complaint are identical. In its Motion to Dismiss, the Defendant cites to the Trustee's initial Complaint. *See* Doc. 9 at 3. For the purpose of this order, all citations to the Trustee's Complaint will reference the amended document filed as docket entry no. 2.

[2] Unless otherwise indicated, all references herein to "section" or "§" refer to a corresponding section of the Bankruptcy Code, and all references to the "Bankruptcy Code" or the "Code" refer to Title 11 of the United States Code.

[3] A creditor who did not receive the transfer but benefited from it may be subject to a preferential transfer avoidance action. *See* 11 U.S.C. § 547(b)(1).

[4] Transfers made "between ninety days and one year before the filing date of the petition" are avoidable under section 547(b) "if such creditor at the time of such transfer was an insider . . . ." 11 U.S.C. § 547(b)(4)(B).

A motion to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6) for failure to state a claim upon which relief can be granted is available in adversary proceedings. *See* Fed. R. Bankr. P. 7012(b). To state a claim, a plaintiff must plead "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Bankr. P. 7008(a). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim [for] relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim for relief is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inferences that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). "However, a plaintiff is not required to plead specific facts, and the complaint need only provide 'the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *In re Alpha Protective Servs.*, 531 B.R. at 897 (quoting *Twombly*, 550 U.S. at 555).

When a court reviews a motion to dismiss under Rule 12(b)(6), "the factual allegations in the complaint must be accepted as true, and all reasonable inferences are construed in the light most favorable to the plaintiff." *Gordon v. Sturm* (*In re M2DIRECT, Inc.*), 282 B.R. 60, 62 (Bankr. N.D. Ga. 2002). But a court will not extend this assumption of truth to "threadbare recitals of cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Although "legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Id*. at 679.

Determining plausibility of a claim for relief is a "context-specific task" in which the court should "draw on its judicial experience and common sense." *Id*. (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). This "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" that supports the

claim. *Twombly*, 550 U.S. at 563 (citing *Sanjuan v. Am. Bd. Of Psychiatry and Neurology*, 40 F.3d 247, 251 (7th Cir. 1994). Therefore, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id*.

The Defendant argues that, in response to *Twombly* and *Iqbal*, "courts universally recognize that a Section 547 claim may survive a motion to dismiss only if the trustee has alleged facts that, if true, would render plausible the assertion that each of these required elements are met." (Doc. 9 at 6). In support of this argument, the Defendant cites, among other cases, *Angell v. BER Care, Inc. (In re Caremerica, Inc.)*, 409 B.R. 737 (Bankr. E.D.N.C. 2009).

In *Caremerica*, the court analyzed *Twombly* and *Iqbal* to determine "what pleading requirements the trustee must satisfy when asserting a claim for the avoidance of transfers . . . under § 547." *Id*. at 748. During this analysis, the court discussed *Valley Media, Inc. v. Borders, Inc. (In re Valley Media, Inc.)*, 288 B.R. 189 (Bankr. D. Del. 2003), which, prior to the Supreme Court's decision in *Twombly*, identified specific factual information necessary in a preferential transfer complaint to survive a motion to dismiss.[5] *In re Caremerica*, 409 B.R. at 748. The court acknowledged that the standard set in *Valley Media* "has been distinguished or ignored by the majority of bankruptcy courts both nationwide as well as in Delaware."[6] *Id*. at 753 n.2. Nevertheless, the court concluded that "the decisions by

[5] Such necessary factual information includes: "(a) an identification of the nature and amount of each antecedent debt and (b) an identification of each alleged preference transfer by (i) date, (ii) name of debtor/transferor, (iii) name of transferee and (iv) the amount of the transfer." 288 B.R. at 192.

[6] A number of courts, including in the District of Delaware, have declined to follow *Valley Media's* heightened pleading standard for preferential transfers. *See Family Golf Ctrs., Inc. v. Acushnet Co. and Fortune Brands, Inc. (In re Randall's Island Family Golf Ctrs., Inc.)*, 290 B.R. 55, 65 (Bankr. S.D.N.Y. 2003) ("[A] preference complaint may provide a defendant with fair notice of the claim despite the lack of information required by *Valley Media* []"); *Official Comm. of Unsecured Creditors v. Brandywine Apartments (In re The IT Grp., Inc.),* 313 B.R. 370, 373 (Bankr. D. Del. 2004) (Linsey, J.) (finding the specific information required by *Valley Media* in the initial pleading "inappropriate

the Supreme Court in *Twombly* and *Iqbal* breathe new life into the pleading requirements implemented in *Valley Media* for § 547 preference claims." *Id*.

This heightened pleading standard for preference claims, as adopted by *Caremerica*[7] and its progeny, is inconsistent with the liberal fair notice pleading standard of Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7008(a)(2), as well as the Supreme Court's assertion that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Twombly*, 550 U.S. at 555. Bankruptcy Rule 7008 does not require a heightened pleading standard for preferential transfer claims. *Cf.* Fed. R. Bankr. P. 7009(b) (requiring allegations of fraud to be stated with particularity). Rather, complaints to avoid preferential transfers must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Bankr. P. 7008(a)(2); *see Gold v. Winget (In re NM Holdings Co., LLC)*, 407 B.R. 232, 256–57 (Bankr. E.D. Mich. 2009); *Butler v. Anderson (In re C.R. Stone Concrete Contractors, Inc.)*, 434 B.R. 208, 221 (Bankr. D. Mass. 2010) (quoting *Official Comm. of Unsecured Creditors v. Brandywine Apartments (In re The IT Grp., Inc.)*, 313 B.R. 370, 373 (Bankr. D. Del. 2004) ("The fact that Bankruptcy Rule 7008, which contains special pleading requirements in certain adversary cases before bankruptcy judges, fails to provide any such additional requirements for preference actions indicates it was intended that the adequacy of pleadings in such action be judged under the notice pleading standard of Civil Rule 8(a)(2).")).

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and unnecessarily harsh"); *Gold v. Nova Indus., Inc. (In re NM Holdings Co., LLC)*, 376 B.R. 194, 204 (Bankr. E.D. Mich. 2007) ("The heightened pleading requirements imposed by the *Valley Media* cases are inconsistent with the liberal notice pleading principles underlying the civil rules[.]"); *Butler v. Anderson (In re C.R. Stone Concrete Contractors, Inc.)*, 434 B.R. 208, 221 (Bankr. D. Mass. 2010) (agreeing with conclusion of *The IT Group* and not applying the "heightened pleading standard" of *Valley Media*.).

[7] It should be noted that factual circumstances surrounding the alleged preferential transfers in the case at bar are less complex than those of *Caremerica*. Also, as discussed below, the Trustee's complaint includes additional factual assertions regarding the elements of § 547 that are not present in the *Caremerica* complaint.

The Defendant cites no case in this Circuit, nor is the Court aware of any, where *Caremerica* has been adopted in wholesale fashion as the Defendant urges. To the contrary, Judge Drake has observed that "*In re Caremerica* and its progeny . . . has not been followed in this Circuit." *Howell v. Fulford (In re S. Home and Ranch Supply, Inc.)*, Case No. 11-12755, Adv. No. 13-1043, 2013 WL 7393247, at *5 (Bankr. N.D. Ga. Dec. 20, 2013).

The bankruptcy court for the Southern District of Florida addressed the heightened pleading standard of *Caremerica* in *TOUSA Homes, Inc. v. Palm Beach Newspapers, Inc. (In re TOUSA, Inc.)*, 442 B.R. 852 (Bankr. S.D. Fla. 2010). The *TOUSA* court found "[t]he pleading requirements of *Caremerica* require more than the standard promulgated in *Twombly* and *Iqbal* and the liberal pleading policy underlying the civil rules." 442 B.R. at 855–56. In declining to follow *Caremerica*, Judge Olson notes that "so long as the complaint makes clear who transferred what to whom and when, a preference defendant will have enough information to mount whatever defense may be available." *In re TOUSA, Inc.*, 442 B.R. at 856.

For these reasons, this Court declines to adopt the heightened pleading standard for preferential transfers as articulated in *Caremerica* and related cases. Based on the standard of review outlined above, the Court now turns to the Defendant's argument that the Trustee's complaint fails to state a claim upon which relief can be granted. In its Motion to Dismiss, the Defendant argues that the Trustee has failed to provide sufficient factual detail to support each necessary element of its preferential transfer claim. (Doc. 9 at 7). The Defendant identifies certain elements and issues in the complaint for specific scrutiny. *Id*. Each of the Defendant's arguments to dismiss is discussed in turn.

II. Trustee Has Sufficiently Alleged that Defendant is a Creditor

To avoid a transfer as a preference, a trustee must establish that the transfer was "to or for the benefit of a creditor." 11 U.S.C. § 547 (b)(1). A guarantor who

holds a contingent claim may receive a benefit in the form of an indirect preferential transfer. An indirect transfer occurs when a debtor makes payments directly to the obligee of a guaranteed obligation. Such a transfer is avoidable against the guarantor since "[t]he guarantor's obligation was reduced by the amount of the transfers made to the [obligee]." 5 *Collier on Bankruptcy* ¶ 547.03[3][a] (16th ed. 2019); *see Travelers Ins. Co. v. Cambridge Meridian Grp., Inc. (In re Erin Food Servs., Inc.)*, 980 F.2d 792, 797 (1st Cir. 1992) ("There can be no question that an insider-guarantor derives measurable economic benefit from a payment on the guaranteed debt, *to the extent the insider's contingent liability on the personal guaranty is reduced*.") (emphasis in original).[8]

The Defendant argues that "the Trustee did not attach the alleged guaranty to the Complaint, nor did he allege facts which show that [Oconee Regional Health Foundation, Inc. (ORHF or the Defendant)] had any right of contribution, subrogation, indemnity or other rights of recourse against [Oconee Regional Medical Center, Inc. (ORMC or the Debtor)] thereunder." (Doc. 9 at 7). Therefore, the Defendant argues that "the Complaint contains no facts which show that ORHF was a creditor of ORMC at the time that alleged transfers were made, and the Trustee has therefore failed to allege facts which fulfill 11 U.S.C. § 547(b)(1)." *Id*.

"To prevail under §§ 547 and 550, the Trustee must establish that [the Defendant] was a creditor at the time of the Transfers." *Scully v. Danzig (In re Valley Food Servs., LLC)*, No. 06-50038, Adv. No. 08-4013, 2008 WL 5423495, at *4

[8] At the hearing, counsel for the Defendant asserted that, when attempting to avoid and recover an indirect preferential transfer, the elements of § 547(b) must be shown as to both to the direct transfer and the indirect transfer. Such an assertion is incorrect. There is no requirement that a trustee seeking avoidance of an indirect transfer plead, much less prove, that the elements of § 547(b) also apply to the direct transfer. *See Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586, 594 (5th Cir. 1987) ("[B]ecause the direct and indirect transfers are separate and independent, the trustee does not even need to challenge the direct transfer . . . or seek any relief at all from [the direct transferee] in order to attack the indirect transfer and recover under 11 U.S.C. § 550 from the indirect transferee . . . .").

(Bankr. W.D. Mo. Dec. 23, 2008); *see* 11 U.S.C. § 547(b)(1), (b)(4). "Sections 101(5)(A) and 101(10)(A) of Title 11 provide that a guarantor is a creditor of the debtor, because a guarantor has a contingent right to payment." *Davis v. Walker (In re Wefelmeyer Constr. Co.)*, No. 93-442251-172, Adv. No. 94-4344-172, 1997 WL 37574, at *2 (Bankr. E.D. Mo. Jan. 14, 1997) (citing *In re Friendship Child Dev. Ctr., Inc.*, 164 B.R. 625, 626 (Bankr. D. Minn. 1992)). A guarantor's contingency claim arises "from the moment of the execution of the guaranty." *Covey v. Northwest Cmty. Bank (In re Helen Gallagher Enters., Inc.)*, 126 B.R. 997, 1000 (Bankr. C.D. Ill. 1991) (citation omitted). A guarantor is a contingent creditor because it has "a potential claim for reimbursement against the debtor if it defaults on a loan and the guarantor[] [has] to satisfy the debt." *Houston Heavy Equip. Co., Inc. v. Gould*, 198 B.R. 693, 694 (S.D. Tex. 1996).

In his Complaint, the Trustee alleges that the Debtor was the "principal obligor" on certain bonds issued by the Baldwin County Hospital Authority and that the Defendant was a guarantor on these bonds. (Doc. 2 at ¶¶ 3–4). The Complaint states that the Defendant executed a Guaranty Agreement on June 1, 2016. *Id*. at ¶ 23. A portion of that Guaranty is cited, which states that the Defendant:

> unconditionally guarantees to the [Bond Trustee], its successors and assigns the following: (a) the full and prompt payment of principal, premium, if any, interest, fess, advances and expenses associated with the Note when due, whether at stated maturity, by acceleration or otherwise; and (b) the full and timely performance of all other terms, conditions, covenants and obligations of the Authority and ORMC under the Master Indenture[.]

Id. The Complaint further states that, during the one-year period prior to the Petition Date,[9] the Debtor made certain transfers to the Bond Trustee. *Id*. at ¶ 22.

[9] The Petition Dates for the lead case, Oconee Regional Health Systems, Inc. (17-51005), and associated cases, including Oconee Regional Medical Center, Inc. (17-51006), are identified in the complaint as "May 10 and 11, 2017." (Doc. 2 at ¶ 8).

All transfers (which are identified in Exhibit A attached to the Complaint) occurred either on or after June 1, 2016— the date when the Defendant executed the alleged Guaranty Agreement. *See Id*. at ¶ 23; Exhibit A.

Based upon the Trustee's factual pleadings and the plain language of the Bankruptcy Code, the Court reasonably infers that the Defendant, holding a contingency claim as a guarantor of the Debtor's obligation, was a creditor as of the execution date of the agreement and as of the dates of the alleged avoidable transfers.

The Defendant asserts that, because the Trustee did not attach the guaranty agreement to his Complaint, the Trustee has failed to factual assert the Defendant's status as a creditor. The Defendant does not cite any legal precedent or federal rule to support this argument. Instead, the Defendant seeks to foist an additional pleading requirement upon the Trustee of its own design.[10] *See* Fed. R. Bankr. P. 7008(a)(2).

Although the alleged guaranty agreement will be central to the adversary proceeding, it is not necessary for the Trustee to attach the agreement to his Complaint in order to sufficiently state a claim. Nor is the Court required to look beyond the four-corners of the Complaint. *See generally SMF Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010) ("the district court *may* consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged.") (emphasis added); *Adinolfe v. United Tech. Corp.*, 768 F.3d 1161, 1168 (11th Cir. 2014) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006) ("The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence the parties might present at trial, but to assess whether the

[10] The Defendant has more than fair notice of the alleged guaranty agreement, and its terms, as it was a party to the agreement. Indeed, counsel for the Defendant acknowledged at the hearing on this matter that he was in possession of it, and various arguments in the Defendant's motion are based on its contents. *See* (Doc. 9 at 4).

plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.") (citation and internal quotation marks omitted)).

Likewise, the Defendant asserts, without supporting authority, that, because the Trustee did not "allege facts which show that ORHF had any right of contribution, subrogation, indemnity or other right of recourse against ORMC," the Complaint should be dismissed. (Doc. 9 at 7). However, because "[a] guarantor holds a contingent claim from the moment of the execution of the guaranty," ORHF is a creditor in this case. *In re Helen Gallagher Enters., Inc.*, 126 B.R. at 1000 (citation omitted). While a guarantor's contingent claim may ripen into a right of reimbursement if the primary obligor defaults, the guarantor's status as a creditor remains the same. *See Id*.

The Defendant asserts "the alleged guaranty provides that ORHF *waived* subrogation or indemnity claims against ORMC arising out of or related to the guaranty, and as a result, ORHF was not a creditor of the Debtors at the time the alleged transfers were made." (Doc. 9 at 4) (emphasis added). Defendant argues that the Trustee's failure to acknowledge this issue is "fatal" to the Trustee's claim. (Doc. 9 at 3). However, because the guaranty agreement is not (yet) in the evidentiary record for this adversary, its terms (about which the parties appear to disagree) are not dispositive of the Trustee's claims at this stage.

Moreover, a waiver is an affirmative defense. *See* Fed. R. Bankr. P. 7008(c)(1). Therefore, the Defendant in essence argues that the Trustee's Complaint should be dismissed due, in part, to a lack of sufficient facts to overcome this affirmative defense. However, it is well settled law that a plaintiff "is not required to negate an affirmative defense in [its] complaint." *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (quoting *Tregenza v. Great Am. Comm. Co.*, 12 F.3d 717, 718 (7th Cir. 1993); *see Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004) ("Complaints need not contain *any*

information about defenses and may not be dismissed for that omission.") (emphasis in original) (citations omitted). Accordingly, the Defendant's assertation that the Trustee's Complaint should be dismissed as it relates to rights of subrogation, contribution, or indemnification fails as it is beyond the scope of a Rule 12(b)(6) motion.[11]

For these reasons, the Court finds that the Trustee has adequately pled the elements of 11 U.S.C. § 547(b)(1).

III. The Trustee Sufficiently Alleged that the Transfers were on Account of an Antecedent Debt

The Defendant argues that the Trustee "has failed to allege facts which fulfill the antecedent debt element of 11 U.S.C. § 547(b)(2)." (Doc. 9 at 8). The Motion faults the Trustee for not alleging facts which: "(i) describe the nature of or provide any detail with respect to ORMC's alleged obligations under such bonds, or (ii) show that a debt was actually owed on the bonds at the time the alleged transfers were made, or the amount of such debt." *Id*. In support of this argument, the Defendant cites *Valley Media* for the proposition that a preference complaint must identify the "nature *and amount* of each antecedent debt." *Id*. (emphasis in the original); *see In re Valley Media, Inc.*, 288 B.R. at 192.

As noted, the Court considers a heightened pleading standard as advocated in *Valley Media* as inconsistent with the Rule 8 pleading standard. The Trustee is under no obligation to plead the antecedent debt element of § 547(b)(2) to the specificity as demanded by the Defendant. *See Carn v. Heesung PMTech Corp.*, 579

[11] The Defendant also argues that "ORMC's alleged debts to the Bond Trustee were incurred in the ordinary course of ORMC's and the Bond Trustee's business, and the alleged transfers were made in the ordinary course of ORMC's business." (Doc. 9 at 4). Although § 547 prevents a trustee from avoiding transfers which were "payment of a debt incurred by the debtor in the ordinary course of business," such a statement is an affirmative defense which holds no weight in evaluating a Rule 12(b)(6) motion. 11 U.S.C. § 547(c)(2)(A). *See In re TOUSA*, 442 B.R. at 856 ("I further find that under no reasonable interpretation of *Twombly* and *Iqbal* is a plaintiff required to negate affirmative defenses (arising under § 547(c) or otherwise) in its complaint.").

B.R. 282, 297–98 (M.D. Ala. 2017) (finding defendant's argument that antecedent debt must be plead with specificity as "unavailing at this stage of the proceedings"). Instead, the Trustee need only plead sufficient factual allegations that the transfers were "on account of an antecedent debt owed by the debtor before such transfer was made" to raise a plausible claim for relief. 11 U.S.C. § 547(b)(2); *see Twombly*, 550 U.S. at 545.

"A debt is 'antecedent' to the transfer sought to be avoided under § 547(b) if it is *pre-existing* or is incurred *before* the transfer." *Midwest Holding #7, LLC v. Anderson (In re Tanner Family, LLC)*, 566 F.3d 1194, 1196 (11th Cir. 2009) (emphasis in original) (finding that lease termination fee was paid "for or on account of an antecedent debt" since debt had arisen at time of lease signing). Such antecedent debt "exists when a creditor has a claim against the debtor, even if the claim is unliquidated, unfixed, or contingent." *Warsco v. Preferred Tech. Group*, 258 F.3d 557, 569 (7th Cir. 2001).

The Complaint states that ORMC was principal obligor for bonds issued by the Baldwin County Hospital Authority and that Defendant was a guarantor on said bonds. (Doc. 2 at ¶¶ 3–4). In addition, the Trustee alleges that ORMC made payments to the Bond Trustee and lists five payments, the earliest of which is dated June 1, 2016. (Doc. 2 at ¶ 4; Exhibit A). As a guarantor, the Defendant holds a contingent claim against the obligor in the event it is required to pay as a result of the obligor defaulting on its obligations. *See Houston Heavy Equip. Co., Inc. v. Gould*, 198 B.R. 693, 695 (S.D. Tex. 1996). Finally, the Complaint states that the Defendant executed the guaranty agreement on June 1, 2016–the same date that ORMC made its first payment to the Bond Trustee. (Doc. 2 at ¶ 23).

Therefore, the Court finds that the Trustee has stated sufficient factual assertions to make a plausible allegation that the transfers were "on account of an antecedent debt." 11 U.S.C. § 547(b)(2).

IV. The Trustee Sufficiently Alleged that the Debtor was Insolvent

The Defendant asserts that the Trustee "failed to allege facts which fulfill the insolvency element of 11 U.S.C. § 547(b)(3)." (Doc. 9 at 8). The Defendant cites *Gavin Solmonese, LLC v. Shyamsundar (In re AmCad Holdings, LLC)*, Adv. No. 15-51979 (MFW), 2017 WL 1316922, at *5 (Bankr. D. Del. Apr. 7, 2017) for its assertion that the Trustee must state factual allegations in the complaint of the value of Debtor's assets and liabilities on the date of transfer in order to sufficiently plead § 547(b)(3). The Court disagrees. Under *Twombly* and *Iqbal* such a "level of specificity [as to insolvency] is not required to state a plausible claim." *Scarver v. Patel (In re Haven Trust Bancorp, Inc.)*, 461 B.R. 910, 914 (Bankr. N.D. Ga. 2011).

Whether the Debtor was insolvent at the time of the transfers "remains a fact to be established at trial or at another juncture." *Id*. at 913. "The Trustee does not need to have to prove each element at the pleading stage; he must only put forth enough factual allegations to raise a reasonable expectation that discovery will reveal evidence of his claim." *In re Alpha Protective Servs.*, 531 B.R. at 902. Therefore, at the pleading stage, the Trustee need only state factual allegations that the Debtor was insolvent at the time the transfers occurred or became insolvent as a result of the transfers to raise a reasonable inference to state a claim under § 547(b)(3). *See In re Southern Home and Ranch Supply,* 2013 WL 7393247, at *5. As the Bankruptcy Code presumes insolvency in the ninety days preceding the petition date, the Trustee must sufficiently plead that the Debtor was insolvent only for the transfers that allegedly occurred on June 1 and December 1, 2016. *See* 11 U.S.C. § 547(f).

The Complaint shows that: "ORMC was insolvent at all times relevant to this Complaint as the value of its assets was exceeded by the value of their liabilities"; that, as of the petition date, "ORMC's assets were valued at $12 million" and Navicent, subsequently paid $12.2 million to purchase said assets; on the petition

date "ORMC's liabilities were valued not less than $34.7 million"; that, after the sale of its assets, "the bulk of [the Debtor's] pre-bankruptcy creditors [were] unpaid"; and that "[t]he transfers were made while ORMC was insolvent." (Doc. 2 at ¶¶ 17–21, 28).

Although the Complaint incorporates the language of § 547(b), the Trustee includes factual allegations to support its assertion that the Debtor was insolvent at the time these transferred occurred. Specifically, the Complaint includes values of the Debtor's assets and liabilities that demonstrate, as of the petition date, the Debtor's liabilities were almost three-times greater than its assets. As the earliest transfer occurred eleven months prior to the petition date, the Trustee cannot rely solely on the presumption of § 547(f). However, even without the presumption, a "[d]ebtor's financial position after the transfer provides a basis to infer [d]ebtor's financial position at the time of the transfer." *In re Haven Trust Bancorp*, 461 B.R. at 913 (citing *Pereira v. Grecogas Ltd. (In re Saba Enters., Inc.)*, 421 B.R. 626, 646–47 (Bankr. S.D.N.Y. 2009) (finding complaint that relied on value of debtor's assets and liabilities on petition date sufficiently alleged that debtor was insolvent at time of transfers ten months earlier)). Although "[t]here is no bright line rule that establishes an amount of time beyond which the debtor's insolvency on a petition date is no longer probative of [the debtor's] earlier financial condition," a significant period of time between the transfers and petition date, without further factual allegations, may be insufficient.[12] *Gordon v. Savannah Coll. of Art and Design, Inc. (In re Mancini)*, No. 17-50825-LRC, 2019 WL 4739262, at *3 (Bankr. N.D. Ga. Sept.

[12] In *Haven Trust Bancorp*, Judge Diehl found that the debtor's schedules, showing $9 million in liabilities and no assets, allowed a reasonable inference that the debtor was insolvent when alleged constructive fraudulent transfers occurred thirteen months prior to the petition date. *In re Haven Trust Bancorp*, 461 B.R. at 913–14. In *Alpha Protective Servs.*, Judge Laney found preferential transfers totaling over $325,000 that occurred between the ninety days and a year prior to the petition date to lend a reasonable inference that debtor was insolvent at the time said transfers occurred or became insolvent as a result. *In re Alpha Protective Serv.,* 531 B.R. at 902.

26, 2019); *Washington Bancorporation v. Hodges (In re Washington Bancorporation)*, 180 B.R. 330, 333 (Bankr. D.D.C. 1995).

Based on the allegations in the Complaint as to the amount of the transfers, the extent of the Debtor's liabilities on the petition date, and the eleven months that elapsed between these events, the Court finds a reasonable inference that the Debtor was insolvent on the dates—June 1 and December 1, 2016—of the transfers. Therefore, the Trustee has provided sufficient factual allegations to raise a plausible claim of insolvency.

V. Trustee has Sufficiently Alleged that Defendant was an Insider of the Debtor

The Defendant asserts that the Trustee's adversary proceeding should be dismissed, in part, as the Complaint fails to allege sufficient factual detail that ORHF was an insider of the Debtor. (Doc. 9 at 7). Specifically, the Defendant states that Complaint "contains no facts whatsoever which show how Oconee Regional Health Systems, Inc. was allegedly in control of ORHF." *Id*.

Section 547 limits the trustee's avoidance powers for preferential transfers that occur "before ninety days and one year before the date of filing the petition" to creditors who were an insider of the debtor. 11 U.S.C. § 547(b)(4)(B). A creditor's insider status "is to be determined on the exact date of the transfer." *Official Comm. of Unsecured Creditors v. Liberty Savings Bank, FSB (In re Toy King Distrib., Inc.)*, 256 B.R. 1, 97–98 (Bankr. M.D. Fla. 2000).

In this adversary proceeding, the Trustee seeks to avoid five transfers that occurred from June 1, 2016 to April 3, 2017. (Doc. 2 at 7). As the petitions of Oconee Regional Health Services, Inc. and associated Debtors were filed on "May 10 and 11, 2017," three transfers occurred more than ninety days prior to the petition

date.[13] (Doc. 2 at 2). Thus, an insider relationship between the Defendant and the Debtor, as it relates to the dates of these transfers, must be plausibly alleged.

Judge Laney faced this issue in *In re Alpha Protective Services, Inc.*:

> [A]n insider of a corporate debtor includes the following: (1) a director of the debtor; (2) an officer of the debtor; (3) a person in control of the debtor; (4) a general partner of the debtor; (5) a relative of a general partner, director, officer, or person in control of the debtor; or (6) an affiliate or insider of an affiliate of the debtor. However, the list of insiders provided in Section 101(31) is not exclusive and insider status may be found even if the creditor falls outside those categories listed in § 101(31). When considering whether a creditor is an insider of the debtor, courts focus on two factors: (1) the closeness of the relationship between the parties; and (2) whether the transaction was negotiated at arm's length. Therefore, *the question of whether a creditor is an insider of the debtor is primarily a question of fact to be decided at some point after the pleading stage*.

In re Alpha Protective Servs., 531 B.R. at 901 (citations omitted) (emphasis added). The Court agrees with Judge Laney's approach. Therefore, at the pleading stage, a complaint need only to "raise the possibility that the Defendant[] [was] an insider of [the debtor] at the time of the payments above the speculative level." *Id*. (internal quotation marks omitted).

In his Complaint, the Trustee states that: "[t]he Defendant was a non-debtor affiliate of the Debtors, and a subsidy of Debtor"; "[t]he Defendant was sold to Navicent Health, Inc. in 2017 as part of the Debtors' asset sale in their bankruptcy cases"; the Defendant "was a guarantor of certain bonds issued by the Baldwin County Hospital Authority, the proceeds of which were used for capital improvements and operating expenses of the Debtors";[14] and "[t]he Defendant was

[13] These transfers took place on June 1, 2016 as well as two separate transfers that occurred on December 1, 2016 for a total of $1,345,289.72. (Doc. 2 at 7). The remaining $247,466.79 of transfers occurred less than ninety days before the petition date. *Id*.

[14] Said guaranty agreement was executed on June 1, 2016. (Doc. 2 at ¶ 23). June 1, 2016 is also the date of the earliest transfer that the Trustee seeks to avoid. (Doc. 2 at 7).

an insider of the Debtor because, without limitation, Debtor Oconee Regional Health Systems, Inc. was a person in control of the Defendant." (Doc. 2 at ¶¶ 2–3; 18).

Such factual allegations support a plausible inference of a closeness between the Defendant and the Debtor.[15] Therefore, the Trustee has plausibly pled that the Defendant was an insider at the time the transfers occurred.

VI. The Trustee Sufficiently Alleged that Defendant Received More Than It Would Have in a Hypothetical Chapter 7 Liquidation

The Defendant argues that the Complaint fails to provide factual details to support a claim as it relates to § 547(b)(5). Rather, the Motion states that the Trustee merely recites a "formulaic recitation of a cause of action's elements" that directly contradicts the pleading standard of *Twombly* and *Iqbal*. (Doc. 9 at 9) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 545 (2007)). The Defendant contends that:

> [t]he Complaint contains no facts whatsoever which show (i) that ORHF received *anything* on account of the alleged transfers, (ii) what ORHF or the Bond Trustee would have received in a chapter 7 case had the alleged transfers not been made is more than what they actually received on account of the alleged transfers.

Id. (emphasis in original). Similarly, the Defendant argues that the Complaint "fails to note that the alleged transfers were made from assets subject to the Bond Trustee's lien and security interest in the Debtors' property, and they had no effect on what the Bond Trustee, or ORHF, would have received in a Chapter 7 case." *Id.* at 4.

[15] The Defendant's Motion further supports this determination as it discloses that "[p]rior to the Bankruptcy Cases, ORHF operated as the charitable fundraising arm of the Debtors" and that its "sole purpose was to raise charitable funds and invest them into charitable purposes associated with the Hospital" which was ORMC or the Debtor relevant to this adversary proceeding. (Doc. 9 at 2–3).

Before determining whether the Trustee sufficiently pled a claim as it relates to § 547(b)(5), the Court must address what, if any, inquiry is required of the Bond Trustee, or the party that directly received the transfers at issue from the Debtor. As "a valid security interest survives a liquidating bankruptcy," whether a creditor is secured or unsecured is determinative of the outcome of a hypothetical chapter 7 test in § 547(b)(5) as "payment to [a fully secured] creditor in satisfaction of the security interest is not a preferential transfer." *Hays v. DMAC Investments, Inc. (In re RDM Sports Grp., Inc.)*, 250 B.R. 805, 814 (Bankr. N.D. Ga. 2000) (citation omitted). At the hearing on this matter, counsel for the Trustee and the Defendant disagreed as to whether the Bond Trustee was fully secured or undersecured as of the petition date. Such a factual dispute goes beyond the scope of Rule 12(b)(6) and may be determined at another juncture.

In order to satisfy § 547(b), a trustee "need not actually reconstruct a hypothetical Chapter 7 liquidation, with the precision of a forensic accountant." *Levine v. Custom Carpet Shop, Inc. (In re Flooring Am., Inc.)*, 302 B.R. 394, 403 (Bankr. N.D. Ga. 2003). Instead, a trustee must show that, "unless creditors will receive a 100 percent distribution, 'any unsecured creditor who receives a payment during the preference period'" has received more than it would under a hypothetical Chapter 7 liquidation. *In re RDM Sports Grp., Inc.*, 250 B.R. at 814 (citing *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 465 (6th Cir. 1991). At the summary judgment stage, such proof may consist of an affidavit of a financial officer of the debtor or the trustee, a prior finding that the estate was administratively insolvent, or the debtor's schedules. *In re Flooring Am., Inc.,* 302 B.R. at 403. Each of these examples places a lesser burden on the trustee than those argued for by the Defendant here, at the initial pleading stage. As such, the Court finds that the specific factual information demanded by the Defendant as

necessary to state a claim under § 547(b)(5) is not required under the pleading standard of *Twombly* and *Iqbal*.[16]

The Trustee's Complaint alleges that: the "Transfers enabled the Defendant . . . to receive more than it would receive" under a hypothetical Chapter 7 liquidation; on petition date, the value of the Debtor's assets was $12 million and its liabilities were "not less than $34.7 million," and '[t]he Debtors' bankruptcy cases resulted in the sale of substantially all of their assets, leaving the bulk of their pre-bankruptcy creditors unpaid." (Doc. 2 at ¶¶ 17, 20–21, 29). Based on these allegations, "[viewed] . . . in a light most favorable to the Trustee," the Court can reasonably infer that, under a hypothetical Chapter 7 liquidation, creditors would receive less than a 100 percent distribution. *In re Alpha Protective Serv.*, 531 B.R. at 900. Thus, the Defendant, as an unsecured creditor who received alleged indirect transfers during the preferential period, received more than what it would have received under a hypothetical Chapter 7 liquidation.

Therefore, the Trustee has sufficiently pled a claim as it relates to § 547(b)(5).

VII. Conclusion

For the above reasons, the Trustee has alleged sufficient factual allegations that his Complaint seeking avoidance of preferential transfers states a plausible claim for relief. Accordingly, it is ORDERED that Defendant's Motion to Dismiss is DENIED.

END OF DOCUMENT

[16] "[W]hether Defendant received more by way of the subject transfers than it would have under a Chapter 7 liquidation is a factual question inappropriate for resolution on a motion to dismiss." *Luria v. United States Dept. of Agric. (In re Taylor, Bean & Whitaker Mortg. Corp.)*, 470 B.R. 219, 222 (Bankr. M.D. Fla. 2012).