UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-60589-CIV-JORDAN

IN RE TOUSA, INC., et al.

Debtors

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TOUSA, INC., et al.

Appellant

vs.

CITICORP NORTH AMERICA, INC.

Appellee

ORDER AFFIRMING DECISION OF BANKRUPTCY COURT

This appeal arises from the bankruptcy court's dismissal of certain fraudulent conveyance claims asserted in an adversary complaint by the Official Committee of Unsecured Creditors (the "Committee") of TOUSA, Inc., against Citicorp North America, Inc. Following oral argument and a review of the record and the parties' briefs, the bankruptcy court's decision is AFFIRMED.

I. THE ALLEGATIONS AND PROCEDURAL BACKGROUND

A. THE ALLEGATIONS

TOUSA and certain of its subsidiaries are the debtors in this case. Along with their non-debtor affiliates, they were in the business of building homes in certain regions in the United States.

In January of 2007, to help fund their operations, TOUSA and certain of its subsidiaries (the "conveying subsidiaries") became co-borrowers on a revolving line of credit (the "January Revolver") extended by a number of banks.[1] The January Revolver worked much like a shared credit card; subject to an aggregate limit, the borrowers could take out loans (or draws) that they would each have to later repay. The January 2007 Revolver granted the lenders liens on the co-borrowers'

[1] There were prior (and similar) lines of credit as far back as March of 2006, but it is not necessary to discuss them here.

assets, and prevented the co-borrowers—including the conveying subsidiaries—from further encumbering the liens through additional loans. Citicorp was the administrative agent for the January Revolver. *See* First Am. Adversary Compl. ¶¶ 32-34.

In August of 2005, TOUSA and Holmes L.P. had obtained approximately $675 million in loans from various lenders (the "Transeastern Lenders") for the acquisition of Transeastern Properties, Inc. and the creation of the Transeastern Joint Venture. *See id.* ¶ 19. For one reason or another, the Transeastern Joint Venture failed, and the Transeastern Lenders sought to recover the money still owed from TOUSA and Holmes L.P., the only debtors liable for the debt. *See id.* ¶¶ 19-22. The Tanseastern Lenders eventually sued TOUSA and Holmes L.P. In the summer of 2007, TOUSA settled this litigation. *See id.* ¶¶ 2-3, 22.

On July 31, 2007—the same day the Transeastern settlement closed—TOUSA and the conveying subsidiaries entered into a Second Amended and Restated Revolving Credit Agreement (the "July Revolver"). The Committee alleges that each conveying subsidiary was insolvent at this time or became insolvent as a result of the July Revolver and subsequent Revolvers. *See id.* ¶ 1. At this time, about $277 million was outstanding under the January Revolver ($50 million in draws and about $227 million in letters of credit). *See id.* ¶ 38. Citicorp was and is the administrative agent for the July Revolver, which by its terms is governed by New York law.

The July Revolver stated that it "supersede[d] all prior agreements and understandings," and that the January Revolver was "being amended and restated in its entirety" [D.E. 2-10 at 145; D.E. 2-14 at 6]. Yet it also indicated that it was the "intent of the parties . . . that the security interests and [l]iens granted in the [c]ollateral under and pursuant to the [o]riginal [s]ecurity [a]greement shall continue in full force and effect" [D.E. 2-14 at 6]. In another part, the July Revolver stated that the parties intended to keep all rights and obligations incurred from the January Revolver [D.E. 2-27 at 3]. Pursuant to the July Revolver's terms, the co-borrowers—including the conveying subsidiaries—agreed to repay not only the amount of their own respective draws, but also the draws of other co-borrowers. Finally, the July Revolver allowed TOUSA and the conveying subsidiaries to obtain further loans from other lenders. *See* First Am. Adversary Compl. ¶ 34.[2]

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[2] As permitted by the July Revolver, TOUSA and the conveying subsidiaries secured additional loans from other lenders.

In September of 2007, TOUSA's chief financial officer refused to certify that TOUSA was solvent. This refusal constituted a default under the July Revolver, but in October of 2007 the parties entered into another amended agreement resolving this default issue (the "October Revolver"). *See id.* ¶¶ 40-41. In December of 2007, there was yet another amendment to the agreement (the "December Revolver"). *See id.* ¶ 42.

TOUSA and various subsidiaries, including the conveying subsidiaries, filed for bankruptcy in January of 2008. As of the petition date, approximately $316.5 million was outstanding under the July Revolver. *See id.* ¶ 32 n.7.

B. PROCEEDINGS BEFORE THE BANKRUPTCY COURT

The bankruptcy court allowed the Committee to file an adversary complaint against Citicorp. In its initial complaint, the Committee alleged that TOUSA became insolvent on July 31, 2007 [D.E. 2-2 ¶¶ 1]. Alleging that the conveying subsidiaries entered the July Revolver without receiving fair consideration, the Committee brought a claim for fraudulent transfer under Florida law, under New York law, and under 11 U.S.C. §§ 544 and 550 [*Id.* ¶¶ 33, 38, 41, 48, 53]. Citicorp moved to dismiss the initial complaint. In its opposition to the motion to dismiss, the Committee argued that, every time TOUSA or its conveying subsidiaries drew money pursuant to the July Revolver, it and the conveying subsidiaries incurred an obligation [D.E. 2-16 at 5]. In making this argument, the Committee relied heavily on a Second Circuit opinion, *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 990–91 (2d Cir. 1981) (holding, under the former Bankruptcy Act, that a borrower incurred an obligation every time the borrower drew money from line of credit).

The bankruptcy court ruled in Citicorp's favor but granted the Committee a chance to file an amended complaint. The Committee accepted the opportunity and filed a first amended adversary complaint.

The Committee alleged in its first amended adversary complaint that the July Revolver was a "new loan commitment, because the lenders under the January [ ] Revolver retained the absolute discretion to refuse to make further loans under that agreement," and that further draws or borrowing "would be regarded as having been created" under the July Revolver. *See* First Am. Adversary Compl. ¶ 34. Because all of the conveying subsidiaries were obligated as co-borrowers and guarantors for draws made by, loans given to, and letters of credit issued on behalf of, other TOUSA

entities, the Committee reasoned that the conveying subsidiaries "did not receive reasonably equivalent value in exchange for incurring obligations as co-borrower[s] and guarantor[s]." *See id.* ¶ 39. The Committee sought to avoid the allegedly fraudulent transfers on federal grounds and/or state grounds in Counts 3-6. For example, in Count 4, the Committee alleged that each of the conveying subsidiaries failed to receive "fair consideration" for the "transfer of its property interests and the incurrence of a new obligation" in the July Revolver, the October Revolver, and the December Revolver, and sought to avoid the allegedly fraudulent transfers under 11 U.S.C. §§ 544(b), 548, and 550, as well as under New York Debtor and Creditor Law §§ 274 and 278. *See id.* ¶¶ 64-70.[3]

Citicorp again moved to dismiss the complaint. At oral argument, Citicorp's counsel argued that "[t]he theory of the amended complaint seems . . . to be the same as the theory in the original complaint" [D.E. 2-34 at 112:15-17]. When the Committee had its turn to respond, its counsel, without prodding or questioning by the court, said the following:

> First off, I'd like to dispel the suggestion that this issue was somehow already litigated and resolved by the Court the last time I stood before the Court and argued the revolver motion to dismiss.
>
> The last argument was entirely devoted to the proposition that under the [Second] Circuit's decision in *Rubin*, the date of the draws on the revolver are the operative date for purposes of a transfer and an obligation.
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> *The Court rejected that and we do not reargue it and we do*

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[3] As noted above, the Committee had asserted fraudulent transfer claims related to the July, October, and December Revolvers in its initial adversary complaint, but those claims had been dismissed by the bankruptcy court. Once the Committee filed its first amended adversary complaint and again asserted fraudulent transfer claims related to these Revolvers, the precursor claims in the initial complaint became a nullity. Thus, any fraudulent transfer theories asserted in the initial complaint with respect to these Revolvers cannot be relied upon here by the Committee. *See, e.g.*, *Pintado v. Miami-Dade Hous. Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) (per curiam) ("As a general matter, '[a]n amended pleading supersedes the former pleading; the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.'") (alteration in original) (citation omitted). That is also the case because, as explained later, the Committee's counsel told the bankruptcy court that the Committee, though again asserting fraudulent transfer claims in the first amended adversary complaint, was no longer proceeding on the legal theories it had earlier advanced in support of the initial adversary complaint.

> *not rely on it and the complaint does not rely on it*, an inference that I think the Court would be forgiven for not realizing when reading the motion to dismiss. *We are not arguing* Rubin.
>
> *We are, if anything, arguing the opposite of* Rubin. We are arguing that what happened in July of 2007, what happened when they amended again in October of '07, when they amended again . . . and materially changed the terms of the agreement . . . that is an event which the English language will always call the incurrence of an obligation.

[D.E. 2-34 at 123-124] (emphasis added). Thus, the Committee did not simply fail to argue *Rubin* to the bankruptcy court; it explicitly informed the bankruptcy court that the first amended adversary complaint rejected *Rubin*.

The bankruptcy court, following oral argument, granted Citicorp's motion to dismiss the claims related to the July, October, and December Revolvers, except as to any new collateral pledged after the January 2007 Revolver. It explained its ruling from the bench as follows:

> I find that collateral, which existed and was subject to the [January] [R]evolver and as of the amendments of July, October, and December 2007, remain subject to that [R]evolver. To the extent that collateral was added, then that, it seems to me, is a transfer of property.
>
> Now, what do I mean by collateral? I do not mean that to the extent that Citi[corp] had a blanket lien on intangibles, contract rights, and the like, that the existence of a new contract constitutes new collateral. I'm talking about new categories of collateral or new specific items of collateral.
>
> Mr. Robbins [counsel for the Committee] has made the point that there was new collateral granted under the terms of the July security agreement. Okay. To the extent of new collateral, I will allow this complaint to survive, but only to the extent of new collateral.
>
> I do not accept the proposition that in respect of existing collateral, which came into effect prior to . . . July 2007, that a new lien was created by virtue of the entry of the parties into a new lending agreement, be it in July, October, or December.
>
> The preexisting liens, which were granted in the October 2006 [R]evolver, as amended in January 2007, carried forward, and to the extent that the collateral that was granted under those prior agreements carried forward under the July amendments, I find that there was no new transfer that's subject to avoidance as a

> fraudulent transfer under [11 U.S.C. §] 548.
>
> . . . . [I]t's clear to me . . . that the lending terms, including default and repayment provisions, were modified in the three agreements starting in July 2007, but to the extent that the collateral that had been posted for the prior revolver remained the same, that flows through and is, in my view, immune from attack under [§] 548 as set forth in the [C]ommittee's complaint.
>
> Insofar as the [11 U.S.C. § 544] claims that are asserted under New York Law in Counts 3, 4, and 5 of the amended complaint, . . . it seems to me the result under either the Florida Uniform Fraudulent Transfer Act or the New York Uniform Fraudulent Conveyance Act, the New York Debtor Creditor Law, appear to be the same as under [§] 548, that a transfer is made at the execution of the loan document and the perfection of the liens and not at the date of a draw or an amendment to the loan documents where the liens themselves are not modified or changed.
>
> Because the revolver liens here were perfected no later than January of 2007, I don't think that the subsequent modifications in July, October, and December 2007 affect the liens previously granted. So I will grant the motion to dismiss with leave to amend with respect only to claims that may be made by the [C]ommittee in a second amended complaint that address new collateral granted in July, October, or December 2007.

[D.E. 2-34 at 142-45].

The Committee filed a second amended adversary complaint, but did not include any claims concerning new collateral related to the July, October, or December Revolvers, as the bankruptcy court had permitted. Instead, it chose to appeal the bankruptcy court's ruling, which was subsequently entered as a Rule 54(b) judgment.

II. STANDARD OF REVIEW

The bankruptcy court's dismissal of the claims in the Committee's first amended adversary complaint related to the July, October, and December Revolvers is reviewed de novo, with all well-pled factual allegations being accepted as true. *See, e.g.*, *In re Fernandez-Rocha*, 451 F.3d 813, 815 n.3 (11th Cir. 2006).

III. DISCUSSION

As noted above, when it filed the second amended adversary complaint, the Committee did not include any fraudulent transfer claims related to the July, October, or December Revolvers. That strategic decision, however, is not a bar to appellate review of the bankruptcy court's ruling as to the

first amended adversary complaint. The Eleventh Circuit has repeatedly held that if certain claims are dismissed, those claims need not be included in an amended complaint for the plaintiff to be able to appeal the dismissal. *See Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 n.5 (11th Cir. 1999); *Varnes v. Local 91*, 674 F.2d 1365, 1370 (11th Cir. 1982); *Wilson v. First Hous. Inv. Corp.,* 566 F.2d 1235, 1237-38 (5th Cir. 1978), *vavcated on other grounds*, 444 U.S. 959 (1979). The Committee's appeal, therefore, is properly here.

The critical statute in this appeal is 11 U.S.C. § 548. In relevant part, § 548 provides that "(a) [t]he trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily . . . (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation."

The Committee makes three arguments in support of reversal under § 548. The arguments attempt to depict the July Revolver as an event that caused TOUSA and its conveying subsidiaries either to incur an obligation or to make a transfer, as defined under § 548. First, the Committee contends that the conveying subsidiaries "incurred" an "obligation" to repay the amount of each post-July 31 draw at the time the draw was made. Second, it asserts (alternatively) that the conveying subsidiaries "incurred" an "obligation" to repay each post-July 31 loan on July 31, when they executed the July Revolver and promised in writing to make such repayments. Third, it says that the conveying subsidiaries "made" a "transfer" on or after July 31 by granting the Revolver lenders liens on their property. Based upon these arguments, the Committee also asks that its state-law claims be reinstated. I address each of the Committee's arguments below.

A. THE COMMITTEE'S RELIANCE ON THE SECOND CIRCUIT'S DECISION IN *RUBIN*

In support of its first argument—that the conveying subsidiaries "incurred" an "obligation" under § 548 to repay each post-July 31 draw at the time the draw was made—the Committee relies heavily on the Second Circuit's decision in *Rubin v. Manufacturers Hanover Trust Co.,* 661 F.2d

979 (2nd Cir. 1981).[4] In *Rubin*, the Second Circuit held that, under a fraudulent transfer provision of the former Bankruptcy Act (the former 11 U.S.C. § 107(d)(6)), certain debtors "incurred" an "obligation" when other entities, whose debts they guaranteed as second guarantors, drew on their lines of credit. The entities incurred an obligation of repayment upon drawing on the line of credit, and the debtors, though secondary guarantors, became "contingently liable" to step in if there was a default. *See id.* at 990-91. The Committee, citing *Rubin* in 5 of 6 pages of its first argument, contends that the conveying subsidiaries incurred a new "obligation" every time there was a draw on the July Revolver [D.E. 10 at 9-14].

As I discussed with the Committee's counsel at oral argument, there is a significant impediment to this first theory. In the proceedings below, Citicorp argued that the Committee's fraudulent transfer claims in the first amended adversary complaint related to the July, October, and December Revolvers were as legally deficient as the fraudulent transfer claims that the bankruptcy court had dismissed in the initial adversary complaint. In response, the Committee (through the same counsel who handled oral argument here) told the bankruptcy court that nothing could be further from the truth, because the Committee was no longer relying on *Rubin*, as it had in the initial complaint. Indeed, the Committee informed the bankruptcy court, explicitly, that the complaint did *not* rely on *Rubin* or the theory that the conveying subsidiaries incurred a new "obligation" whenever it drew money on the July Revolver [D.E. 2-34 at 123-24].

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[4] Few cases have relied on *Rubin* for the proposition that an obligation is incurred every time a borrower draws money on a revolving credit line. *See* Thomas J. Hall & Keith Levenberg, *Revolving Credits as Fraudulent Conveyances: Is* Rubin v. Manufacturers Hanover Trust Company *Still Good Law?*, 126 BANKING L.J. 354, 358 (2009). Those that have cited *Rubin* for this proposition, moreover, have done so in dicta and without much analysis. *See, e.g.*, *In re Heartland Chems.*, 103 B.R. 1012, 1016 (Bankr. C.D. Ill. 1989). No cases that I am aware of have explicitly rejected *Rubin*. Nevertheless, commentators have vociferously criticized *Rubin*, and 44 states rejected its holding through passage of the Uniform Fraudulent Transfer Act. *See, e.g.*, UNIFORM FRAUDULENT TRANSFER ACT § 6 cmt. 3 (1984) ("Paragraph (5) is new. It is intended to resolve uncertainty arising from *Rubin* . . . , insofar as the case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties."); Steven L. Schwarcz, *The Impact of Fraudulent Conveyance Law on Future Advances Supported by Upstream Guaranties and Security Interests*, 9 CARDOZO L. REV. 729, 741 (1987) ("Logic and policy compel the result that the *Rubin* case should be limited to its facts.").

Now, having disclaimed any reliance on *Rubin* for its fraudulent transfer claims in the bankruptcy court, the Committee argues on appeal that *Rubin* demands reversal. Normally, legal theories or arguments are not considered if they are presented for the first time on appeal. *See, e.g.*, *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009) ("It is well established in this circuit that, absent extraordinary circumstances, legal theories and arguments not raised squarely before the district court cannot be broached for the first time on appeal."); *Access Now, Inc. v. Sw. Airlines*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court. The reason for this prohibition is plain: as a court of appeals, we review claims of judicial error in the trial court. If we were to regularly address question . . . that district courts never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.") (citations omitted). The Committee here did more than just fail to rely on *Rubin* below; it expressly disavowed *Rubin* and told the bankruptcy court that it was in fact relying on the theory that *Rubin* had rejected—that an obligation on a line of credit is incurred when the relevant documents and agreements are executed. Not surprisingly, therefore, the bankruptcy court did not discuss *Rubin* in its oral ruling dismissing the fraudulent transfer claims. The Committee's actions did not just constitute the mere forfeiture of a theory (i.e., the failure to assert the theory), but rather amounted to a flat-out waiver (i.e., the intentional relinquishment of the theory). *Cf. United States v. Horsfall*, 552 F.3d 1275, 1283-84 (11th Cir. 2008) (criminal defendant waived any objection to district court's upward departure at sentencing because he asked his trial counsel to withdraw the objection, and therefore could not raise issue on appeal).[5]

I recognize that "the rule foreclosing review of issues not presented below is not jurisdictional and may be abrogated in certain exceptional circumstances," *Car Transp. Brokerage Co. v. Blue Bird Body Co.*, 322 F. App'x 891, 896 (11th Cir. 2009) (per curiam) (also discussing invited error doctrine), but under the circumstances it is not appropriate for the Committee to rely

[5] For a discussion of the difference between waiver and forfeiture, albeit in the criminal context, see *United States v. Lewis*, 492 F.3d 1219, 1222 (11th Cir. 2007) (*en banc*). For a discussion of related doctrines which seek to prevent a party from changing its legal position, see, e.g., *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (judicial estoppel), and *In re Carbon Dioxide Industry Antitrust Litigation,* 229 F.3d 1321, 1325-26 (11th Cir. 2000) (invited error).

on *Rubin* here. First, the Committee affirmatively led the bankruptcy court to believe that it was no longer relying on *Rubin* or its underlying theory to support the fraudulent transfer claims in the first amended adversary complaint. I decline to consider an argument in support of reversal when that argument was expressly abandoned below. Second, the Committee has not made any persuasive argument "for the application of one of the exceptions to the rule regarding a party's waiver of an issue raised for the first time on appeal." *See id.* Third, I reject the Committee's argument that the reference to post–July 31, 2007, draws in ¶ 43 of the first amended adversary complaint was enough to put the bankruptcy court on notice that, despite its counsel's express disavowal of *Rubin,* the Committee was still relying on *Rubin*. I therefore do not address the Committee's argument that the bankruptcy court should have followed *Rubin* and held that every draw on the July, October, and December Revolvers constituted an "obligation" for purposes of § 548.[6]

B. THE COMMITTEE'S "OBLIGATION" ARGUMENT

The Committee's second (and alternative) argument is that the conveying subsidiaries "incurred" an "obligation" to repay each post-July 31 loan on July 31, when they executed the July Revolver and promised in writing to make such repayments. This argument suffers from the same problem as the prior argument. As counsel for the Committee acknowledged at oral argument, *Rubin* is the basis for its "obligation" argument. But as explained above, the Committee cannot rely on *Rubin* here.

In any event, this argument, it seems to me, is not persuasive. The term "obligation" is not defined in §548, but the dictionary definition is a "formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons, [such as] a duty arising by contract." BLACK'S LAW DICTIONARY 1179 (9th ed. 2009). *See also* 2 SHORTER OXFORD ENGLISH DICTIONARY 1966 (5th ed. 2002) (a "binding agreement committing a

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[6] To the extent that the Committee may be trying to challenge the bankruptcy court's rejection of *Rubin* when it dismissed the fraudulent transfer claims related to the July, October, and December Revolvers in the initial adversary complaint, that challenge is misplaced. The Committee chose to amend its complaint after that dismissal, and chose to include the same fraudulent transfer claims in the first amended adversary complaint under different legal theories. Having done so, the theories advanced in the initial adversary complaint became a nullity. *See, e.g.*, *Pintado*, 501 F.3d at 1243.

person to a payment or other action"). As noted earlier, the July Revolver stated that it was the "intent of the parties . . . that the security agreements and [l]iens granted in the [s]ecurity [a]greement shall continue in full force and effect." Similarly, under the July Revolver, the parties kept all rights and obligations incurred from the January Revolver. Thus, notwithstanding the general language in the July Revolver that all prior agreements were being restated in their entirety, obligations already incurred were not voided, extinguished, or superseded, and the Committee's argument therefore fails. *See Montgomery-Ostego-Schoharie Solid Waste Mgmt. Auth. v. Cnty. of Ostego*, 671 N.Y.S. 545, 547 (App. Div. 1998) ("[W]hen a contract provision is in conflict with a specific one the latter will generally be enforced . . . ."); *Cnty. of Suffolk v. Alcorn*, 266 F.3d 131, 139 (2d Cir. 2001) ("It is axiomatic that courts construing contracts [under New York law] must give specific terms and exact terms . . . greater weight than general language.") (second alteration in original) (internal quotation marks omitted); *Aramony v. United Way of Am.*, 254 F.3d 403, 413-14 (2d Cir. 2001) ("Even where there is no 'true conflict' between two provisions, 'specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate.'"). And because the July Revolver actually *decreased* the credit limit available to TOUSA and its subsidiaries, this language shows that the "new obligations" are nothing more than the previous obligations from the January Revolver. The bankruptcy court therefore properly ruled that the Committee could assert claims under § 548 only as to new collateral granted in the July 2007, October 2007, or December 2007 Revolvers. *Cf. B.Z. Corp. v. Cont'l Bank, N.A.*, 34 B.R. 546, 549 (Bankr. E.D. Pa. 1983) (refinancing of loan within avoidance period did not reset conveyance dates of original loan: "The renewal of the loan occurring within the one-year period would not be avoidable under § 548(a)(2) since § 548(d)(1) provides that the renewal is deemed to have occurred at the time of the granting of the original loan because the loan was 'so far perfected' at the time of the granting of the original loan that a bona fide purchaser could not have acquired rights in the collateral superior tot he transferee.").

At oral argument, the Committee proposed that, because the July Revolver allowed TOUSA and its conveying subsidiaries to obtain new secured loans from other lenders, TOUSA and its conveying subsidiaries incurred new obligations above those in the January Revolver. As I explained to the Committee at oral argument, TOUSA and its subsidiaries may have incurred new

obligations with respect to the new lenders that gave TOUSA and the subsidiaries new loans, but TOUSA and its conveying subsidiaries did not incur new obligations with respect to Citicorp. After all, TOUSA and the subsidiaries were not obligated by the July, October, or December Revolvers to obtain new loans.[7]

C. The Committee's "Transfer" Argument

In its final argument, the Committee argues that Citicorp and the conveying subsidiaries made a transfer by granting liens under the July Revolver. Problematically for the Committee, however, Citicorp already held perfected liens to the alleged transferred property under the January Revolver.[8]

According to § 548(d), "a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee." *See also In re Emerald Oil Co.*, 807 F.2d 1234, 1237 (5th Cir. 1987) (stating same definition). Citicorp had perfected liens on the relevant property before the July Revolver, and the Committee acknowledges as much [D.E. 10 at 15]. In other words, before July of 2007, Citicorp had liens so perfected that a bona fide purchaser could not acquire an interest in the property transferred superior to Citicorp's interest. As a result, the "transfer" occurred before July 31, 2007.

The Committee responds by arguing that it is not trying to set aside the liens perfected before July of 2007. Rather, the Committee explains, it is trying to set aside the liens perfected after July 31. It notes that Citicorp filed financing statements concerning the July Revolver after July 31, 2007. In my view, this argument is unsound because it ignores the dictates of § 548. Under the Bankruptcy

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[7] Upon questioning, the Committee essentially capitulated, collapsing this argument with its original argument: that the obligation was new "because it was a new loan agreement with materially different terms and conditions" [D.E. 33 at 63]. Yet, as already mentioned, the obligations under the January Revolver and the July Revolver were the same (except as to new collateral).

[8] The conveying subsidiaries apparently gave Citicorp liens on new property. But the bankruptcy court allowed the Committee to continue on its claims to the extent that it sought to set aside the transfer of any liens not already created under the January Revolver. Thus, the only issue here is whether those liens already created and perfected under the January Revolver nevertheless constituted a "transfer" under the July Revolver.

Code, the question is at what point Citicorp acquired a perfected interest barring a bona fide purchaser from acquiring a superior interest to the liens. The answer is that a bona fide purchaser would have had to acquire an interest sometime in 2006, for before the July Revolver, Citicorp had a perfected interest on the same liens that the Committee claims were transferred in July of 2007. The transfers, under this analysis, happened in 2006. No transfer of liens occurred on July 31, 2007 or afterwards, except as to new collateral.

Nor can the Committee escape this conclusion by arguing, as it does, that the post-July 31 liens are the liens it is attempting to set aside. Nothing was transferred on July 31, 2007, or afterwards. The fact that Citicorp filed new financing statements on already-perfected liens does nothing to change the analysis. The only way the Committee's argument can logically work is if the July Revolver wiped all of the previous liens. In that situation, a bona fide purchaser could theoretically acquire a superior interest over Citicorp's interest in the small window between cancellation of the previous liens and perfection of the new liens. But this, again, logically boils down to the argument that the July Revolver cancelled all existing liens, an argument that I have already rejected. The July Revolver explicitly states the already-existing liens carried forward. The bankruptcy court, therefore, did not err in its judgment.

D. The Committee's State Law Claims

The Committee's state law claims depend entirely on the § 548 claims, and, indeed, the Committee argues that those claims should be reinstated because its fraudulent conveyance claims should be reinstated. But, as explained above, the bankruptcy court properly dismissed the Committee's fraudulent conveyance claims. Therefore, it also properly dismissed the Committee's state law claims.

IV. Conclusion

The bankruptcy court's decision is AFFIRMED. This case is CLOSED.

DONE and ORDERED in chambers in Miami, Florida, this 4th day of March, 2011.

Adalberto Jordan
United States District Judge

Copy to: All counsel of record