STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 3, 2014)

RE-SOURCE, INC.,	:	
Plaintiff/Defendant-in-Counterclaim,	:	
	:	
v.	:	**C.A. No. PB 03-1940**
	:	
IRA CARLIN,	:	
Defendant/Plaintiff-in-Counterclaim/	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
DOMAINE, LTD., d/b/a/ DOMAINE	:	
CONSUMER PRODUCTS,	:	
Third-Party Defendant.	:	

DECISION

SILVERSTEIN, J. Before the Court for decision is Defendant Ira Carlin's (Carlin), as Plaintiff-in-Counterclaim/Third-Party Plaintiff, Motion for Partial Summary Judgment, pursuant to Super. R. Civ. P. 56, against Plaintiff/Defendant-in-Counterclaim Re-Source, Inc. (Re-Source) and Third-Party Defendant Domaine, Ltd., d/b/a Domaine Consumer Products (Domaine). Specifically, Carlin seeks an order from this Court granting partial summary judgment with respect to Count XI of Carlin's Second Amended Counterclaim and Count I of Carlin's Third-Party Complaint—each alleging violations of Rhode Island's Uniform Fraudulent Transfer Act, G.L. 1956 §§ 6-16-1, et seq. (the RIUFTA or Act) by Re-Source and Domaine, respectively—stemming from an alleged fraudulent transfer of two patents for a consumer product known as the "The Battery Rack" (and its allied products) from Re-Source to Domaine. Carlin asserts that the transfer of the intellectual property from Re-Source to Domaine was executed for no consideration in violation of the Act as an attempt to avoid Carlin as a creditor of Re-Source.

Carlin alleges that both Re-Source and Domaine are wholly owned by Stanley J. Wachtenheim (Wachtenheim). In response to Carlin's motion seeking partial summary judgment, Re-Source and Domaine collectively deny that any fraudulent transfer occurred.

The present Motion before the Court follows this Court's grant of Carlin's request to amend his Complaint so as to plead an additional cause of action for a violation of the RIUFTA against Re-Source, as well as to add Domaine to the subject litigation as a third-party defendant and allege a RIUFTA cause of action against it. In issuing the above order, this Court denied Carlin permission to assert any additional claims against Domaine. While the subject litigation emanates from the initial filing of a Complaint to seek a declaration of the parties' rights with respect to commissions for certain sales of the Battery Rack and related products from Re-Source to Home Depot, the Court now only considers the narrow issue before it: whether Re-Source fraudulently transferred a valuable asset (i.e., the patent) to Domaine in violation of the RIUFTA, thereby entitling Carlin to partial summary judgment with respect to those two specific Counts asserted in Carlin's Second Amended Counterclaim and Third-Party Complaint. Defendant-in-Counterclaim Re-Source and Third-Party Defendant Domaine jointly object to the Motion.

I

Facts and Travel

By way of background, beginning with a contract executed on April 25, 2000 between Carlin and Re-Source (hereinafter the Contract), a series of events ultimately led to Re-Source's insolvency and inevitably thereafter, the assertion of several claims by trade creditors. (Wachtenheim Dep., 10:10-15, 42:25-43:11, Apr. 2, 2012). Re-Source was a Rhode Island corporation that handled the importing and selling of the Battery Rack and allied products. (Wachtenheim Aff. ¶ 3, Oct. 12, 2011 (hereinafter 2011 Aff.)). The Battery Rack was an

"organizational product that Re·Source sold to retailers that [held] and [displayed] various sizes, shapes and models of batteries." Id. at ¶ 4.

In 1999, Re-Source had engaged Carlin to sell the Battery Rack and its allied products to Re-Source's customers, including Home Depot and Publix Supermarkets. Id. at ¶ 5. The Contract entered into between Carlin and Re-Source provided Carlin with the exclusive rights to marketing, distribution, and sales of the Battery Rack and allied products to customers within certain designated sales territories, as well as outlined the commission-based compensation that Carlin would receive. Id. at ¶ 6; (Re-Source and Domaine's Mem. in Supp. of Obj. to Carlin's Mot. for Partial Summ. J. 1-2 (hereinafter Mem. in Supp. of Obj.)). Specifically, the Contract—a letter from Bruce Holland (then President of Re-Source) to Carlin—set forth:

> "Any sales made by you of the Battery Rack and allied products to Home Depot, its affiliates and any other customer accounts sold by you including Publix Supermarkets, which have been pre approved in advance by Resource Inc., shall be commissionable to you under the following terms and conditions.
>
> "These accounts are yours exclusively for as long as Resource Inc., its subsidiaries, affiliates and or successors continue to supply these accounts with the above products, unless mutually agreed otherwise." (Carlin's Answer to Pl.'s Compl. and Countercl. Ex. 1).

Ultimately, Carlin's agreement with Re-Source for the marketing, distribution, and sales of the Battery Rack and allied products was terminated, and Carlin ceased receiving any further commissions from Re-Source pursuant to the Contract. (Mem. in Supp. of Carlin's Mot. for Partial Summ. J. 1-2). While the dispute as to whether Carlin is entitled to relief from this Court—stemming from the alleged breach of the Contract by Re-Source and subsequent termination of its engagement with Carlin—is not the subject of the motion presently before the Court, the facts relevant to the current dispute focus on the events that transpired during the "winding-up" phase of Re-Source. While Re-Source's winding-up began in or about 2010, the

company's decision to cease business operations resulted from, among other events, the company's claimed insolvency around 2005. See Wachtenheim Dep. 7:7-8:4, 43:3-44:11.

Relevant to the within matter before the Court is the deposition testimony of Wachtenheim, taken on behalf of Carlin on April 2, 2012. According to Wachtenheim's testimony, Re-Source's determination to wind up business operations was made shortly after the death of Jeffrey Jacober (Jacober), the founder and primary individual in charge of running the company, in March of 2005. Id. at 7:25-8:9. At that time, Jacober and Wachtenheim were co-shareholders, each owning fifty percent of the company. Id. at 8:22-9:2. Following Jacober's passing, and sometime between 2005 and 2010, Wachtenheim became the sole shareholder of Re-Source. Id. at 8:20-21.

In 2010, after Wachtenheim made the decision to wind up Re-Source's business, the company had several trade creditors, including Merchants Overseas, a product vendor for Re-Source and a business entity that was wholly owned by Wachtenheim and of which Wachtenheim served as an officer. Id. at 10:10-11:15, 14:1-10. Wachtenheim noted in his deposition testimony that the obligation to Merchants Overseas was eventually paid off over the course of several years, with a discharge of the obligation occurring in or about 2010 or 2011. Id. at 12:12-18, 13:15-22. However, as Wachtenheim further testified, an unrelated creditor, Apex, which in 2010 was owed a separate obligation by Re-Source for warehousing its product at Apex's facility, was not paid in 2010 or anytime thereafter. Id. at 15:2-21.

Additionally, Wachtenheim acknowledged that in 2010 Carlin had a claim for money damages against Re-Source, but he did not consider whether Carlin should be given a payment for any outstanding claims against Re-Source. Id. at 20:22-21:23. Moreover—and relevant to Carlin's instant argument in support of claims against Re-Source and Domaine—Wachtenheim

further testified that a primary reason behind Re-Source's decision to informally wind down its business operations (rather than file an action in a Rhode Island Superior Court or United States Bankruptcy Court) was due to a patent-infringement suit commenced in Utah by a New Zealand inventor.[1] Id. at 24:2-25:23. Wachtenheim testified that "[the patent infringement suit] was a major part of the decision to wind down Resource, Inc." Id. at 27:7-8. Wachtenheim also noted that "the goal of the wind down was to satisfy all the creditors." Id. at 28:16-17.

As Re-Source wound down its operations in 2010, the estimated valuation of all remaining assets (liquid, tangible, or intangible), apparently excluding the Battery Rack patent, was approximately $8000.[2] See id. at 32:4-33:11. Included in the remaining assets of Re-Source was the patent to the Battery Rack. Id. at 47:21-22. Sometime around May of 2010, Re-Source conveyed the patent to Domaine. (Carlin's Answer to Pl.'s Compl. and Second Am. Countercl. ¶ 67; Third-Party Compl. ¶ 5). The relevant provisions of Wachtenheim's testimony read, as follows:

> "Q. Okay. Well, if I were to tell you that at some point in early 2011[3], that patent was transferred to another entity in which you're the 100 percent owner, that doesn't ring a bell, you don't have any recollection of that?

[1] A judgment was believed to be entered against Re-Source in the patent-infringement action in Utah for an unknown amount. Id. at 26:16-25.

[2] The $8000 valuation of the company's assets was from the sale of Re-Source's remaining products to an independent company, Ollie's, which deals in closeouts. Id. at 33:12-18.

[3] There is a discrepancy in the evidence proffered by Carlin as to whether the transfer of the patent occurred in 2010 or 2011. Moreover, while Carlin references a singular patent in its Supporting Memorandum that was transferred in early 2011, Wachtenheim asserts in his 2011 Affidavit that there were two patents relating to the Battery Rack that were transferred to Domaine. (2011 Aff. ¶ 21.) The two patents, Design Patent No. 391,078 (issued on February 24, 1998) and Design Patent No. 413,442 (issued on September 7, 1999) were "assigned" to Domaine in January of 2010 and February of 2010, respectively. Id. at ¶ 21; (Wachtenheim Aff. ¶¶ 4, 6, Jan. 10, 2013 (hereinafter 2013 Aff.)). Nonetheless, at some point during that time, the patent was indeed transferred from Re-Source to Domaine. This discrepancy is not, however, a material fact.

"A. I do have a recollection of that.

"Q. Oh, you do. Well, when did that occur?

". . .

"A. The patent was transferred at that time frame.

"Q. In or about early 2011?

"A. To the best of my recollection, I would probably say yes.

"Q. Who made the decision to transfer the patent from one entity in which you were the 100 percent shareholder to another entity in which you were the 100 percent shareholder?

"A. I made that decision.

"Q. Why did you make that decision?

"A. Well, I made the decision for a number of reasons. One reason being that Resource had this Utah litigation going that it was impossible to defend from a financial perspective, and the second reason being that we felt that customers who had purchased the Battery Rack product were counting on the continuation of that product. So it was really like a -- it was like a stopgap measure just to service them with those -- with that product.

"Q. Any other reason?

"A. No.

". . .

"Q. Okay. And did you have any understanding or belief that that patent might have some value in or about early 2011?

". . .

"A. I didn't really give it much thought. The Battery Rack was a dead -- dying item. It really had very little value outside of the few accounts still running." (Wachtenheim Dep. 48:8-50:8).

Wachtenheim explained that Re-Source's decision to transfer the Battery Rack patent to Domaine was that "[t]hese were accounts that were counting on that product, and we felt that

they were loyal customers of this product for many years. We felt that it was not fair to them to just stop it from one day to the next." Id. at 50:15-19.

Additionally, Wachtenheim did not recall whether Domaine paid for the Battery Rack patent, whether he gave any consideration for the transfer, or whether a transfer application was filed with the United States Patent and Trademark Office (USPTO); moreover, Wachtenheim did not conduct any appraisals of the patent's value. See id. at 52:4-55:8. Additionally, Home Depot's purchases of the Battery Rack declined during the period between 2005 to 2008 and, in 2008, Home Depot ceased purchasing the Battery Rack. (2011 Aff. ¶¶ 16-17). Wachtenheim asserts in his 2013 Affidavit that Re-Source believed the value of the patent to be approaching zero. (2013 Aff. ¶ 8). Moreover, Wachtenheim asserts that Re-Source did not conceal the transfer of the patents to Domaine, abscond with any assets, or remove or conceal any assets. Id. at ¶¶ 9-11. Re-Source discontinued its business operations around March of 2010. (2011 Aff. ¶ 20).

As briefly outlined above, this litigation first came before this Court on April 17, 2003 when Re-Source filed a Complaint seeking a declaration of the parties' rights with respect to their contractual agreements. Now, some eleven years later, the litigation is ongoing. On November 30, 2012, Carlin filed the instant Motion with this Court, and a hearing was held on the matter in December 2012. The case was continued by agreement of the parties. Thereafter, in January 2013, an Objection was filed by Re-Source and Domaine. The case was subsequently scheduled for mediation. Following unsuccessful mediation, the case is now before this Court for a determination of the fraudulent transfer claims asserted by Carlin.

II

Standard of Review

"Summary judgment is a proceeding in which the proponent must demonstrate by affidavits, depositions, pleadings and other documentary matter . . . that he or she is entitled to judgment as a matter of law and that there are no genuine issues of material fact." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992) (citing Steinberg v. State, 427 A.2d 338 (R.I. 1981)). The hearing justice is permitted to grant a motion for summary judgment only after he or she determines, through the required analysis, that "'no issues of material fact appear and the moving party is entitled to judgment as a matter of law . . . .'" Estate of Giuliano v. Giuliano, 949 A.2d 386, 391 (R.I. 2008) (quoting Steinberg, 427 A.2d at 340). Importantly, the court, on a motion for summary judgment "does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Palmisciano, 603 A.2d at 320 (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). The court's purpose during the summary judgment procedure is issue finding, not issue determination. O'Connor v. McKanna, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976). Therefore, the only task for the judge in ruling on a summary judgment motion is to determine whether there is a genuine issue concerning any material fact. Id.

The moving party bears the initial burden of establishing that no such genuine issues of material fact exist. Estate of Giuliano, 949 A.2d at 391. If the movant satisfies that requirement, then the opposing party must demonstrate the existence of competent evidence necessary to dispute the existence of a material, factual issue. Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010); Estate of Giuliano, 949 A.2d at 391 (citing Benaski v. Weinberg, 899 A.2d 499, 502 (R.I. 2006)); Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 631-32 (R.I. 1998)).

Although it need not disclose all of its evidence, the party opposing summary judgment must demonstrate that evidence beyond mere allegations exists to support its factual contentions. See, e.g., Nichols v. R.R. Beaufort & Assocs., Inc., 727 A.2d 174, 177 (R.I. 1999); Ludwig v. Kowal, 419 A.2d 297, 301 (R.I. 1980). In that regard, the opposing party must not rely on "mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Tanner v. Town Council of E. Greenwich, 880 A.2d 784, 791 (R.I. 2005) (internal quotation marks omitted). Accordingly, "[s]ummary judgment is a drastic remedy and should be cautiously applied . . . ." Ardente v. Horan, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976).

III

Discussion

In both Counts—Count XI of the Second Amended Counterclaim against Re-Source and Count I of the Third-Party Complaint against Domaine—Carlin alleges that the patent for the Battery Rack and its affiliated products was intentionally transferred by Re-Source, while Re-Source was insolvent, without consideration so as to avoid any claims Carlin may have as a creditor or claimant against it. Specifically, pursuant to the provisions of §§ 6-16-1, et seq., Carlin alleges in Count XI that Re-Source violated the RIUFTA by divesting itself of a valuable asset for no consideration when the patent was transferred from one entity to another entity, both of which were owned by the same individual, in an alleged attempt to prevent Carlin from satisfying any judgment award in his favor. Similarly, Carlin alleges in Count I of his Third-Party Complaint that Domaine accepted the patent without having paid a reasonably equivalent value to Re-Source, coupled with the intent to defraud Carlin as a creditor or claimant, as Re-Source, following the transfer, was without sufficient assets to satisfy any judgment Carlin may receive in his favor.

In rebutting Carlin's allegations and objecting to the Motion for Partial Summary Judgment, Re-Source and Domaine allege that questions of fact exist as to whether the patent had any value at the time of the transfer, whether consideration was required to be paid for the transfer, and whether the requisite intent of the nonmoving parties was to "hinder, delay or defraud" a creditor. Moreover, Domaine and Re-Source additionally allege that any remedy ordered by this Court would be insufficient as the patent had no value and that Carlin's claim is time-barred. In order to decide the rights of the parties and whether Carlin is entitled to relief on his Motion for Partial Summary Judgment, a thorough analysis of the RIUFTA is required.

A

"Reasonably Equivalent Value"

In the instant matter, Carlin alleges that Re-Source transferred the Battery Rack patent to Domaine absent any "reasonably equivalent value" in order to thwart any attempt by Carlin to recover potential damages as a creditor of Re-Source. Section 6-16-4 of the RIUFTA, entitled "[t]ransfers fraudulent as to present and future creditors," sets forth the applicable standard for evaluating claims of fraudulent transfers. Section 16-16-4(a) provides in pertinent part:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> ". . .
>
> "(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> "(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

> "(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." Sec. § 6-16-4(a)(2).

Additionally, § 6-16-5 of the Act, which governs fraudulent transfers solely as to present creditors, similarly provides:

> "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time, or the debtor became insolvent as a result of the transfer or obligation." Sec. § 6-16-5(a).

"Under the [A]ct a conveyance is fraudulent in regard to creditors, without regard to the transferor's actual intent, if the conveyance was made without fair consideration and the debtor was either insolvent at that time or was thereby rendered insolvent." R.I. Depositors' Prot. Corp. v. Mollicone, 677 A.2d 1337, 1339 (R.I. 1996). A party is not required to prove actual fraud in establishing that a conveyance made without consideration is fraudulent as to creditors. Oury v. Annotti, 113 R.I. 506, 508, 324 A.2d 325, 327 (1974) (citing Tanner v. Whitney, 52 R.I. 391, 394, 161 A. 122, 123-24 (1932)). Thus, "[w]hen a creditor has been harmed by a fraudulent transfer, he or she may obtain '[a]voidance of the transfer . . . to the extent necessary to satisfy the creditor's claim' . . . and seek '[a]n injunction against further disposition by the debtor or a transferee, or both, of the asset transferred . . . .'" Duffy v. Dwyer, 847 A.2d 266, 269 (R.I. 2004) (internal citations omitted) (citing §§ 6-16-7(a)(1), (a)(3)(i)).

A threshold issue is whether Carlin qualifies as a present or future "creditor" of Re-Source. The RIUFTA requires that a debtor-creditor relationship exist at the time of the alleged

transfer.[4] Kondracky v. Crystal Restoration, Inc., 791 A.2d 482 (R.I. 2002). Under § 6-16-1(4) of the Act, a "creditor" means "a person who has a claim" and under § 6-16-1(6), a "debtor" means "a person who is liable on a claim." Undoubtedly, Carlin qualifies as a "creditor" of Re-Source: Carlin is seeking to recoup money damages from Re-Source stemming from the Contract surrounding his rights associated with the Battery Rack. According to Carlin, the patent represented a substantial asset of Re-Source and without the patent Re-Source was without any sufficient assets to satisfy any judgment in Carlin's favor.[5] (Carlin's Answer to Pl.'s Compl. and Second Am. Countercl. ¶¶ 69-70). Thus, whether or not Carlin's claims have not yet been reduced to a judgment, Carlin remains a claimant, and thereby a creditor, of Re-Source.

Additionally, this Court finds that Carlin is permitted to pursue claims against Domaine as a transferee of the Battery Rack patent. While "most courts have been reluctant to extend the reach of fraudulent conveyance actions so as to include parties that are only participants in a fraudulent transfer," the RIUFTA specifically permits causes of actions against a transferee—just as the Act permits actions against the debtor who transferred the assets. See Rohm & Haas Co. v. Capuano, 301 F. Supp. 2d 156, 161 (D.R.I. 2004) (holding "a transferee of assets . . . is properly named as a party to this action" but rejecting extension of liability to mere participants in a fraudulent transfer). Therefore, Carlin has appropriately alleged a violation against Domaine because Domaine was a transferee of the Battery Rack patent. See n.4 (noting Battery Rack

[4] The Act defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Sec. 6-16-1(12).
[5] It is undisputed that Re-Source was indeed "insolvent" at the time of the transfer. "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." Sec. 6-16-2(a). According to Wachtenheim's deposition, Re-Source became insolvent in 2005. (Wachtenheim Dep. 43:8-11). Specifically, Wachtenheim confirmed that the company's liabilities exceeded its assets or property. Id. at 43:15-23.

patent either transferred in 2010 or 2011). Whether Carlin may allege a claim against Wachtenheim in his individual capacity is an issue not now before the Court.

Next, and pursuant to §§ 6-16-4(a)(2) and 6-16-5(a) of the RIUFTA, a transfer will be deemed fraudulent if it was made without the debtor receiving a "reasonably equivalent value"[6] from the transferee, subject to the requirement that the debtor (in this case, Re-Source) either believes or intends to believe that it would incur debts beyond its ability to pay after the transfer, or that the debtor was insolvent at the time of the transfer. In Mollicone, our Supreme Court discussed whether a fraudulent transfer in violation of the RIUFTA occurred when defendant Joseph Mollicone, Jr. (Mollicone) withdrew funds from several retirement accounts and transferred some of those funds to his mother, defendant Anna Mollicone (Mrs. Mollicone). Mollicone, 677 A.2d at 1338. The transfer of the funds from Mollicone to Mrs. Mollicone occurred after he had been served with a judgment against him. Id. The plaintiff alleged that the transfer was made in an attempt to avoid the plaintiff as a judgment creditor. Id. In response, Mollicone alleged—among other arguments relevant to the following discussion of intent—that the transfer was in exchange for certain legal services to be provided by Mrs. Mollicone in the future. Id. The court held that Mrs. Mollicone in fact did not provide Mollicone with any consideration for the funds transfer. Id. at 1339. Specifically, the Court ruled that Mrs. Mollicone's holding of the funds in anticipation of any future needs was not "a reasonably equivalent value in exchange for the transfer." Id. at 1340. Thus, the Court ultimately found that

[6] The Act does not provide a definition of "reasonably equivalent value." However, the Act does provide that "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." Sec. 6-16-3(a).

the transfer violated the RIUFTA and had diminished the assets to which the plaintiff creditor was to be paid. Id.

Additionally, in Nisenzon v. Sadowski, 689 A.2d 1037, 1043-44 (R.I. 1997), a trial justice's findings were found not clearly erroneous in determining that a fraudulent transfer occurred when defendant transferred certain property to his attorney. The Nisenzon Court examined whether defendant received reasonably equivalent value and whether defendant was insolvent or became insolvent as a result of the transfer in violation of § 6-16-5(a) of the RIUFTA. Id. at 1044. On that particular issue, the trial justice had determined that the real property was conveyed without receiving reasonably adequate value because, in part, a purported loan of $17,000, where the property would serve to secure the loan, was undocumented. Id. at 1043-44. As the Court held, the discrepancies in the case regarding exactly what consideration, if any, was given for the transfer led the trial justice to determine that the transfer was fraudulent in contravention of the Act. See id. at 1044.

In the case at bar, this Court must similarly determine whether *any* consideration was given for the transfer of the patent from Re-Source to Domaine and, if so, whether it amounted to a "reasonably equivalent value." Carlin claims that there was no consideration for the subject transfer and that "another principal consideration in transferring the subject patent was also to avoid the reach of a judgment creditor relative to a Utah federal court proceeding. On its face, the subject transfer is exactly the type of conveyance that the Act is intended to curb." (Mem. in Supp. of Carlin's Mot. for Partial Summ. J. 9). Re-Source and Domaine respond by arguing that there indeed *was* consideration for the transfer and that the consideration was non-monetary. (Mem. in Supp. of Obj. 3). Specifically, Re-Source and Domaine argue the patent was transferred in exchange for the promise to serve the customers of the Battery Rack. In support of

this argument, they allege that there were only two years left on the patent's validity and, as a result, Re-Source "considered the value of the Patents in their waning days to be declining, rapidly approaching zero." (2013 Aff. ¶ 8; Mem. in Supp. of Obj. 4). Whether there was cash or non-cash consideration provided by Domaine to Re-Source, both entities allege there are questions of material fact as to the value of the patent with respect to whether reasonably equivalent value was actually given.

This Court, however, is not convinced. Where Re-Source and Domaine's arguments inherently fall short is with the distinction between *approaching* zero and *actually* zero. This is not merely a question of semantics. Supported by Wachtenheim's deposition testimony, Carlin has successfully demonstrated that the patent constituted the sole remaining valuable asset of Re-Source. Thus, it is undisputed that the patent indeed had *some* value. See Wachtenheim Dep. at 50:5-51:17 ("[The patent] had very little value outside of the few accounts still running"). Simply put, the value of the patent was not, at the time of the transfer, absolute zero. According to Wachtenheim, as a stand-alone product, the Battery Rack produced revenue that outweighed Domaine's costs associated with manufacturing, distribution, and shipment. Id. at 51:4-17. Consequently, by virtue of the continuation of the Battery Rack sales, it is properly inferred that the patent was a valuable asset of Re-Source and, subsequently, a valuable asset of Domaine. Besides the patent to the Battery Rack, Carlin has demonstrated that Re-Source's remaining assets were unreasonably small and that Re-Source was fully aware of its inability to pay its remaining debts in full satisfaction of § 6-16-4(a)(2). Additionally, Wachtenheim testified that the company was insolvent in 2005 when the company began to wind down, thus satisfying RIUFTA's alternative requirements for a fraudulent transfer under § 6-16-5(a). Regardless of the exact value of the patent, this Court determines, from the evidence before it, that there is no

issue of material fact that the patent was indeed valuable (albeit not highly valuable) and still capable of generating some revenue.

With respect to the issue of consideration, it is well established that consideration consists of "some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise." DeAngelis v. DeAngelis, 923 A.2d 1274, 1279 (R.I. 2007) (quoting Darcey v. Darcey, 29 R.I. 384, 388, 71 A. 595, 597 (1909) (internal quotation marks omitted)). Further, in determining whether sufficient consideration exists for the proper formation of a contract, a bargained-for exchange test is employed by the court. Id. The test provides that "something is bargained-for 'if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.'" Filippi v. Filippi, 818 A.2d 608, 624 (R.I. 2003) (quoting Restatement (Second) of Contracts § 71(2) (1981)).

While it may be held that an agreement was formed between Re-Source and Domaine for the transfer of the patent, Wachtenheim did not testify that Domaine, in exchange for its receipt of the patent, had promised to continue selling the Battery Rack to its customers. Wachtenheim merely stated that a primary reason behind the transfer was to continue servicing the Battery Rack's customers. Without more, such motivation does not constitute fair or valuable consideration and certainly cannot constitute "reasonably equivalent value." See Mollicone, 677 A.2d at 1339. There is no evidence to suggest that Re-Source bargained for Domaine's continued selling of the product, in any form, in exchange for the ownership, and thereby the right to sell, the consumer product. See Filippi, 818 A.2d at 624. Furthermore, there is nothing in the record to suggest that Re-Source benefited from the transfer of the patent to satisfy the requirement of "reasonably equivalent value." Wachtenheim (as the nonmoving parties argue) testified that he did not recall whether cash consideration was given for the transfer; thus, there is

no evidence that any payment was given for the transfer. See Wachtenheim Dep. 52:4-13. Absent Re-Source demonstrating the receipt of "reasonably equivalent value" for the transfer, the Court is compelled to find a fraudulent transfer occurred in violation of the RIUFTA. See Mollicone, 677 A.2d at 1340.

Accordingly, under §§ 6-16-4(a)(2) and 6-16-5(a) of the RIUFTA, the transfer of the patent to Domaine is voidable because the transfer was made without Re-Source receiving reasonably equivalent value. Therefore, because no genuine issues of material fact remain, partial summary judgment is appropriate as to Count XI of the Second Amended Counterclaim and Count I of the Third-Party Complaint.

B

"Intent to Hinder, Delay, or Defraud"

Assuming, arguendo, that consideration was found to satisfy the "reasonably equivalent value" standard put forth in § 6-16-4(a)(2), as well as in § 6-16-5(a), this Court alternatively may still find a violation of the RIUFTA if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." See § 6-16-4(a)(1); see also Supreme Bakery, Inc. v. Bagley, 742 A.2d 1202, 1204 (R.I. 2000) ("[A] transfer made by a debtor is fraudulent in respect to a creditor if the debtor made the transfer with an actual intent to hinder, delay, or defraud the creditor."). In support of his Motion for Partial Summary Judgment, Carlin alleges that Re-Source's transfer of the patent was conducted "with the sole intent to hinder, delay and/or defraud Carlin, a known creditor/claimant of Re-Source in or about 2010" and was an attempt to put the property out of reach of both himself and the Court. (Mem. in Supp. of Carlin's Mot. for Partial Summ. J. 8-9). Re-Source and Domaine, in opposition to summary judgment, argue that questions of fact remain as to whether an actual intent to hinder, delay, or

defraud a creditor existed. Specifically, both entities argue that because some of the factors weigh in favor of Carlin and some of the factors weigh against him, it would be improper to decide the issue of intent at this time.

Subsection (b) of § 6-16-4 of the Act codifies several factors to guide a court's determination of "actual intent" with respect to a finding of a fraudulent transfer pursuant to § 6-16-4(a)(1). It provides:

> "(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
> "(1) The transfer or obligation was to an insider;
> "(2) The debtor retained possession or control of the property transferred after the transfer;
> "(3) The transfer or obligation was disclosed or concealed;
> "(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> "(5) The transfer was of substantially all the debtor's assets;
> "(6) The debtor absconded;
> "(7) The debtor removed or concealed assets;
> "(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> "(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> "(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> "(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor." Sec. 6-16-4(b).

"[A] trial justice is empowered under the act to set aside transfers made with the intent to delay, to hinder, or to defraud creditors." Mollicone, 677 A.2d at 1339; see also Fricke v. Fricke, 491 A.2d 990, 994 (R.I. 1985) (explaining trial justice permitted to set aside fraudulent conveyance as void as to all transferees except bona fide purchasers who take the property without notice). In considering whether fraud motivated a particular transfer of property, circumstantial evidence may be considered and reasonable inferences may be drawn therefrom so long as it is not based on suspicion or conjecture. Fricke, 491 A.2d at 994 (citing 37 C.J.S. Fraud § 115, at 436

(1943)). Relatedly, proof of fraud in fact is not required for a finding of a fraudulent conveyance. Warwick Mun. Emps. Credit Union v. Higham, 106 R.I. 363, 368, 259 A.2d 852, 855 (1969) (citing Savoie v. Pion, 52 R.I. 422, 161 A. 219, 220 (1932)).

Our Supreme Court clarified the issue of finding "actual intent" for purposes of § 6-16-4(a)(1) in Warwick Mun. Emps. Credit Union, 106 R.I. at 368, 259 A.2d at 855. The court found:

> "[T]he decisive question in this case with regard to fraudulent intent is not whether it was the comakers' intent to put their property out of the reach of plaintiff, who was their creditor, but rather whether such a conveyance had the effect of depriving plaintiff of a right which would have been legally effective had the conveyance not been made. This is especially so since there is nothing in this record showing that they had other means with which to pay the judgment." Id.; accord Supreme Bakery, 742 A.2d at 1204 (quoting Whitney, 52 R.I. at 394, 161 A. at 124) (explaining "validity of the conveyance is to be determined, not by the debtor's fraudulent intention, even if honest, but by the effect on the creditor's right of recovery"); Nisenzon, 689 A.2d at 1045.

Moreover, as the Court articulated in Whitney, "[t]he vital question is, [d]oes the conveyance deprive the creditor of a right which would be legally effective had the conveyance not been made?" Whitney, 52 R.I. at 394, 161 A. at 123.

Here, in analyzing the subject transfer pursuant to the factors set forth in § 6-16-4(b), this Court is satisfied that no genuine issues of material fact exist regarding Re-Source's actual intent to hinder, delay, or defraud Carlin as a creditor in violation of the RIUFTA. First, the transfer of the patent was undoubtedly to an "insider." Section 6-16-1(7) defines an "insider" for purposes of the Act; the subsection provides in relevant part:

> "(ii) If the debtor is a corporation:
> "(A) A director of the debtor;
> "(B) An officer of the debtor;
> "(C) A person in control of the debtor;
> "(D) A partnership in which the debtor is a general partner;
> "(E) A general partner in a partnership described in subdivision (7)(ii)(D); or
> "(F) A relative of a general partner, director, officer, or person in control of the debtor;

". . .

"(iv) *An affiliate, or an insider of an affiliate as if the affiliate were the debtor*; and
"(v) A managing agent of the debtor." Sec. 6-16-1(7) (emphasis added).

Further, § 6-16-1(1) defines "affiliate" for purposes of the definition of an "insider." An "affiliate" means, among other definitions:

> "(ii) A corporation twenty percent (20%) or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities:
> "(A) As a fiduciary or agent without sole power to vote the securities; or
> "(B) Solely to secure a debt, if the person has not in fact exercised the power to vote; . . . ." Sec. 6-16-1(1).

Here, the transfer was to an "insider" under § 6-16-1(7)(iv). Pursuant to the definition, the transfer was to an "insider" as an "affiliate," as an "affiliate" in this instance encompasses a corporation that is more than twenty percent directly owned by a person who directly owns more than twenty percent of the debtor. As Wachtenheim solely owns both Re-Source and Domaine, the transfer was to an insider in full satisfaction of the definition. See Mollicone, 677 A.2d at 1339 (affirming trial court's granting of summary judgment for fraudulent transfer where trial justice found transfer was made by insolvent debtor to an insider who knew of debtor's insolvency).

Second, with respect to whether the "debtor retained possession or control of the property transferred after the transfer" under § 6-16-4(b)(2), Re-Source and Domaine do not put forth any evidence disputing whether Re-Source would have any possession or control of the patent after the transfer, as Wachtenheim was the sole owner and officer of both companies.[7] As

[7] Wachtenheim testified that the patent was "transferred" to Re-Source; however, he did not recall whether any transfer applications were filed with the USPTO or exactly what steps were

Wachtenheim was the sole owner of both entities, this factor weighs in Carlin's favor. Additionally, because suit regarding Carlin's rights with respect to the Contract and payment of certain commissions was commenced seven years prior to the transfer of the patent, it was reasonable for Re-Source, under § 6-16-4(b)(4) to realize that the patent may have constituted a part of any judgment reward rendered. Furthermore, as discussed above, the patent was one of Re-Source's sole remaining assets under § 6-16-4(b)(5) and no "reasonably equivalent value" was found to be given in exchange for the transfer of the patent from Re-Source to Domaine,

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taken to effect a transfer. See Wachtenheim Dep. 52:19-53:2. Furthermore, he testified that he was not very involved in the process and it was mostly the responsibility of Lori Plante to transfer the Battery Rack patent from Re-Source to Domaine. See id. at 53:5-18. According to 35 U.S.C. § 261:

> "Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing. The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States.
>
> ". . .
>
> "An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage." 35 U.S.C. § 261 (2012).

In other words, a transfer of a patent from one entity to another entity will be valid without a recording in the USPTO if executed by a written instrument, until an assignment occurs to a subsequent purchaser, at which point the assignment is void unless it is recorded in the USPTO within three months of the date of the transfer. See id.; see also 37 C.F.R. § 3.1 (2014) ("*Assignment* means a transfer by a party of all or part of its right, title and interest in a patent, patent application, registered mark or a mark for which an application to register has been filed." (emphasis in original)). Here, the transfer of the patent from Re-Source to Carlin is not void because of any absence of an application with the USPTO. However, it is unclear whether a written instrument was executed for a valid assignment of the patent to Domaine. In any event, whether or not a writing was executed, this Court must continue in its analysis of whether a fraudulent transfer of the patent occurred in violation of the RIUFTA because Wachtenheim admitted that the patent was assigned from Re-Source to Domaine. Accordingly, no genuine issue of material fact exists on the issue of the transfer of the patent.

under § 6-16-4(b)(8). Cf. Oury, 113 R.I. at 508, 324 A.2d at 327 n.2 ("Proof . . . that a conveyance to a wife was of all her husband's property and was for a nominal consideration, makes out a prima facie case that it was made with the intent or purpose to hinder, delay or defraud creditors."). Lastly, under §§ 6-16-4(b)(9) and (b)(10), Re-Source was insolvent for at least five years prior to the transfer, and the transfer was made in anticipation of a judgment creditor in the patent infringement litigation in Utah and while Re-Source was indebted to several creditors, respectively.

Re-Source and Domaine argue that some of the factors, such as Re-Source did not "abscond" with the asset, did not remove or conceal the asset, the transfer did not occur shortly before or shortly after any debt was incurred, and Re-Source did not transfer the assets to a lienor who transferred the assets to an insider of the debtor, demonstrate the absence of a fraudulent intent. However, based on the accumulation of the factors, it is conclusive that Re-Source had the "actual intent to hinder, delay, or defraud" Carlin as a creditor. Furthermore, the transfer of the patent effectively deprived Carlin of any opportunity or right to recovery from Re-Source as a claimant. See Warwick Mun. Emps. Credit Union, 106 R.I. at 368, 259 A.2d at 855; Supreme Bakery, 742 A.2d at 1204; Nisenzon, 689 A.2d at 1045. Based on the statute's wording, it appears clear that the intent of our Legislature was not to require an establishment of all the factors in a particular case in order to find a fraudulent transfer, but rather to find such a transfer when the factors, on balance, tilt in favor of the contesting party. While Re-Source and Domaine are correct that some factors do not weigh in Carlin's favor based on the evidence, this Court holds the subject transfer of the patent was a fraudulent transfer in violation of the RIUFTA.

In support of their argument, Re-Source and Domaine argue that the deposition testimony does not reveal an intent to hinder, delay, or defraud Carlin, as the decision to transfer the patent

was in contemplation of a separate suit commenced in Utah. Wachtenheim, in his deposition, explained that one of the primary reasons in transferring the Battery Rack's patent—one of the few remaining valuable assets of the company—to a separate corporate entity was ultimately to put the asset out of reach of any judgment eventually rendered against it. By virtue of such an admission, it may be inferred that the intent to put an asset out of the reach of a separate judgment creditor could likewise apply to other judgment creditors, i.e. Carlin. Indeed, Wachtenheim testified that the Utah litigation "was impossible to defend from a financial perspective" and thus decided to remove the patent as an asset of Re-Source. (Wachtenheim Dep. 49:5-6). Furthermore, it is undisputed that at the time of the transfer to Domaine, Carlin's litigation had been before this Court for approximately seven years. Unquestionably, Wachtenheim knew that Carlin may prevail in the litigation and attempt to enforce any such judgment against Re-Source. If Wachtenheim wanted to put a valuable asset out of reach of a separate potential judgment creditor from Utah, it stands to reason he would similarly want to put the same valuable asset out of reach of a different potential judgment creditor in the instant litigation. Such motivation embodies the exact type of fraudulent intent that this Act was intended to prevent, as Carlin has aptly stated.

On the evidence before it, this Court finds that the transfer of the Battery Rack patent to Domaine in 2010 or 2011 was made with the "actual intent to hinder, delay, or defraud" Carlin as a potential judgment creditor and claimant of Re-Source. Therefore, this Court will grant partial summary judgment to Carlin pursuant to Counts XI and I of the Second Amended Counterclaim and Third-Party Complaint, respectively.

C

Remedies of Creditors Under § 6-16-7 of the RIUFTA

In opposition to Carlin's Motion for Partial Summary Judgment, Re-Source and Domaine argue that the remedies available to creditors are limited under the RIUFTA and, as a result, no practical remedy exists for Carlin because, as the nonmovants allege, the patents had no value as of February 24, 2012. They allege that endeavoring to fashion a remedy will prove to be a "fool's errand" because, even if the patent was transferred back to Carlin, it is currently valueless. (Mem. in Supp. of Obj. 7). If Carlin ultimately successfully proves he is a creditor of Re-Source through the litigation before this Court, Carlin will recognize no financial gain. In Carlin's supporting memorandum to his Motion for Partial Summary Judgment, there is no discussion as to the amount of damages which he is now seeking, but Carlin does request an evidentiary hearing on the matter of damages against the nonmovants in joint and several liability.

In terms of remedies, § 6-16-7 of the RIUFTA states:

> "(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in § 6-16-8, may obtain:
> "(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
> "(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by applicable statutes and rules of procedure;
> "(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
> "(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
> "(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
> "(iii) Any other relief the circumstances may require." Sec. 6-16-7(a).

Moreover, § 6-16-8 provides:

> "(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under § 6-16-7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
> "(1) The first transferee of the asset or the person for whose benefit the transfer was made; or
> "(2) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.
> "(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require." Sec. 6-16-8.

In Nisenzon, the Rhode Island Supreme Court analyzed whether the trial justice's imposition of money damages was clearly erroneous when the transferee of the property argued that there was "no evidence of the value of the property when conveyed. Therefore the imposition of money damages as a result of the transfer was unsupported by any evidence." Nisenzon, 689 A.2d at 1044. The Court upheld the award of damages based on the trial justice's conclusions that the value should be based on the plaintiff's claim against the defendant rather than the value of the property transferred. Id. (quoting Spaziano v. Spaziano, 122 R.I. 518, 522, 410 A.2d 113, 115 (1980) ("[E]quity will not allow itself to be frustrated but will adapt its relief to the exigencies of the case and will enter a money judgment if this will achieve an equitable result.")). The Court therefore upheld the equitable result. See id.

Re-Source and Domaine's arguments that Carlin is left without any feasible monetary remedy is misguided. Section 6-16-7(c) expressly provides that the judgment for a fraudulent transfer found in violation of the Act would be for an amount representative of the value of the asset at the time of the transfer, as opposed to the current value of the asset as the nonmovants seem to allege. However, because Carlin has yet to prevail in his litigation against Re-Source and Domaine, the issue of fashioning an appropriate remedy under § 6-16-7 with respect to this

Court's finding of a fraudulent transfer is deferred. While Carlin is entitled to partial summary judgment on Counts XI and I of his Second Amended Counterclaim and Third-Party Complaint, respectively, this Court must wait to establish that Carlin is indeed adjudicated as a judgment creditor of Re-Source and Domaine.[8]

D

Statute of Limitations Challenge to Claims Under § 6-16-5(b) of the RIUFTA

Lastly, this Court must address the issue raised by Re-Source and Domaine as to the potential time-barring of any claim asserted by Carlin for a violation of § 6-16-5(b) of the RIUFTA. Re-Source and Domaine assert that any such claim is time-barred pursuant to § 6-16-9(3) of the Act that establishes a one-year statute of limitations period for such claims. However, this Court need not reach the issue of whether the statute of limitations applies to any claims for fraudulent transfers under § 6-16-5(b), or whether the one-year statutory period may be tolled due to any application of the discovery rule, as this Court has already found that a fraudulent transfer occurred pursuant to §§ 6-16-4(a)(1), 6-16-4(a)(2), and 6-16-5(a). Pursuant to §§ 6-16-9(1) and (2), a cause of action with respect to a fraudulent transfer under either §§ 6-16-4(a)(1), 6-16-4(a)(2), or 6-16-5(a) is extinguished unless the action is brought within four years after the transfer was made. Sec. 6-16-9(1)-(2). There are no statute of limitations issues with respect to Carlin's claims under the above-cited sections because claims were brought within four years

[8] Indeed, the RIUFTA defines a "creditor" as any person who has a claim under the Act; however, whether the Court will fashion a remedy under § 6-16-7 hinges on Carlin establishing his rights under his original claim for money damages through the causes of action contained in his Second Amended Counterclaim and Third-Party Complaint. Accordingly, the Court will withhold any remedy under the Act until such claims are fully adjudicated and Carlin is deemed entitled to money damages. If and when that time occurs, the Court will then be tasked with determining an appropriate remedy.

after the alleged transfer date of the patent and this Court need not entertain this argument any further.

IV

Conclusion

After due consideration to the arguments of the parties, this Court finds that partial summary judgment should be granted as to Count XI of the Second Amended Counterclaim and Count I of the Third-Party Complaint because the evidence presented has established, as a matter of law, that Re-Source and Domaine—without reasonably equivalent value and with actual intent to hinder, delay, or defraud a claimant-creditor—committed a fraudulent transfer in violation of the provisions of the RIUFTA. This Court will, however, wait to establish a remedy pending a finding that Carlin is indeed a creditor of Re-Source and Domaine. In the interim, the Court will enjoin and restrain Re-Source and Domaine from any transfers, assignments, or conveyances to any party, except for those transfers, assignments, or conveyances occurring in the ordinary course of business.

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Re-Source, Inc. v. Ira Carlin v. Domaine, Ltd., d/b/a Domaine Consumer Products**
CASE NO:	**PB 03-1940**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 3, 2014**
JUSTICE/MAGISTRATE:	**Silverstein, J.**
ATTORNEYS:	
For Plaintiff:	**Douglas J. Emanuel, Esq.**
For Defendant:	**Christopher M. Mulhearn, Esq.**