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1 at 3.)

2 The FDIC alleges, “At the time of the asset transfers, Tamboer knew of his liabilities to FDIC
3 arising from his grossly negligent acts and breach of fiduciary duty as a former director of
4 Westernbank, and of his liabilities to other creditors.” (Id.) The FDIC continues, “At the time of
5 the transfers, Tamboer was a debtor of FDIC and other creditors and was insolvent in that he lacked
6 assets sufficient to pay FDIC’s claims against him. Tamboer made the transfers in fraud of FDIC.”
7 (Id.) The FDIC claims it was “injured by the transfers because they are designed so as to hinder and
8 prevent FDIC from recovering on its claims against Tamboer. FDIC has no other remedy to recover
9 on its claims against Tamboer.” (Id. at 32.) The FDIC seeks judgment “invalidating, voiding, and
10 rescinding the transfers under both Puerto Rico and federal law.” (Id.)

11 The court also previously addressed the fraudulent transfer claims against other former
12 directors. (See Docket No. 304 at 14-16) (ruling on Dominguez’s and Stipes’s motions to dismiss).
13 The court denied the motions to dismiss because the FDIC sufficiently alleged facts to plausibly state
14 a claim for relief under 12 U.S.C. § 1821(d)(17)(A), the FDIC’s federal vehicle for challenging
15 purportedly fraudulent transfers. (Id.) Acosta claims the court should dismiss the fraudulent transfer
16 claim because the FDIC, pursuant to Puerto Rico law, does not hold the requisite “due and payable
17 claim” against Tamboer. (See Docket No. 442 at 3.) Dismissal on this ground would merit
18 dismissal of all pending fraudulent transfer claims.

19 The court did not consider Tamboer’s allegedly fraudulent transfer because he did not move
20 to dismiss it. (See id. at 15 n.4.) For reasons previously stated, which are supplemented below, the
21 court **DENIES** Acosta’s motion to dismiss at Docket No. 442. (See Docket No. 304 at 14-16.)

22 **II. Motion to Dismiss Standard**

23 “The general rules of pleading require a short and plain statement of the claim showing
24 that the pleader is entitled to relief.” Gargano v. Liberty Intern. Underwriters, Inc., 572 F.3d 45,
25 48 (1st Cir. 2009) (citations omitted) (internal quotation marks omitted). “This short and plain
26 statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon
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1 which it rests.” Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

2 Under Rule 12(b)(6), a defendant may move to dismiss an action against him for failure
3 to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). To survive a
4 Rule 12(b)(6) motion, a complaint must contain sufficient factual matter “to state a claim to
5 relief that is plausible on its face.” Twombly, 550 U.S. at 570. The court must decide whether
6 the complaint alleges enough facts to “raise a right to relief above the speculative level.” Id. at
7 555. In so doing, the court accepts as true all well-pleaded facts and draws all reasonable
8 inferences in the plaintiff’s favor. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008). However,
9 “the tenet that a court must accept as true all of the allegations contained in a complaint is
10 inapplicable to legal conclusions.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “Threadbare
11 recitals of the elements of a cause of action, supported by mere conclusory statements, do not
12 suffice.” Id. at 678-79 (quoting Twombly, 550 U.S. at 555). “[W]here the well-pleaded facts do
13 not permit the court to infer more than the mere possibility of misconduct, the complaint has
14 alleged-but it has not ‘show[n]’-that the pleader is entitled to relief.” Iqbal, 556 U.S. at 679
15 (quoting FED. R. CIV. P. 8(a)(2)).

16 **III. Section 1821(d)(17) Creates a Distinct Federal Cause of Action for Fraudulent Transfer**

17 12 U.S.C. § 1821(d)(17) gives the FDIC power to pursue fraudulent transfers against its
18 debtors or institution-affiliated parties who make transfers with the intent to hinder, defraud, or delay
19 recovery of debts owed to the FDIC. See 12 U.S.C. § 1821(d)(17)(A). Only three years after its
20 codification, the First Circuit opined, “It is unclear whether . . . Section 1821(d)(17) embodies a
21 separate federal fraudulent conveyance law, or whether it merely codifies state law.” FDIC v.
22 Anchor Props., 13 F.3d 27, 31 n.11 (1st Cir. 1994) (internal citations omitted) (internal quotation
23 marks omitted). No First Circuit case since Anchor Properties has elucidated whether Section
24 1821(d)(17) creates a distinct federal right of action or looks to state law for its application.¹

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26 ¹ The Trustee points to FDIC v. Houde, in which the First Circuit interpreted 12 U.S.C. §
27 1821(d)(2)(A) as a federal scheme that uses state law to show “its entitlement to sue on a transferred

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3 asset like [a] Note.” 90 F.3d 600, 604 (1st Cir. 1996). The First Circuit relied on Supreme Court
4 precedent in holding that “matters left unaddressed in [Section 1821(d)] are controlled by state law.”
5 *Id.* (citing O’Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994)). In Houde, however, the First
6 Circuit interpreted Section 1821(d)(2)(A), not Section 1821(d)(17)(A), and O’Melveny & Myers
7 provides for application of “state law *except where some provision in the extensive framework of [§*
8 *1821(d)] provides otherwise.*” 512 U.S. at 87 (emphasis added). Section 1821(d)(17)(A) creates
9 such a framework:

7 The Corporation, as conservator or receiver for any insured
8 depository institution, and any conservator appointed by the
9 Comptroller of the Currency may avoid a transfer of 1) any interest
10 of 2) an institution-affiliated party, or any person who the
11 Corporation or conservator determines is a debtor of the institution,
12 in property, or any obligation incurred by such party or person, 3) that
13 was made within 5 years of the date on which the Corporation or
14 conservator was appointed conservator or receiver 4) if such party or
15 person voluntarily or involuntarily made such transfer or incurred
16 such liability 5) with the intent to hinder, delay, or defraud the
17 insured depository institution, the Corporation or other conservator,
18 or any other appropriate Federal banking agency.

12 U.S.C. § 1821(d)(17)(A) (numbers added). Sometimes, the elements of state fraudulent transfer
15 laws mirror Section 1821(d)(17)(A). In such cases, courts refrain from determining whether a
16 separate federal regime exists or state law governs. See Anchor Props., 13 F.3d at 31 n.11 (“Because
17 we can see no material difference between the [Massachusetts state and federal fraudulent transfer
18 laws], our conclusions apply with equal strength under either law.”). Puerto Rico fraudulent transfer
19 law, however, does not parallel Section 1821(d)(17). While the federal law permits the FDIC to
20 deem any party a debtor, the Trustee notes and the previous opinion and order explains that a party
21 must be a true creditor with a due and payable claim before bringing a fraudulent transfer law. (See
22 Docket No. 304 at 14-16.) Regardless, the court finds that Congress clearly meant to distinguish the
23 FDIC’s power to pursue a fraudulent transfer claim from Puerto Rico’s fraudulent transfer scheme.

21 The Trustee also cites RTC v. Spagnoli to substantiate that state law governs Section
22 1821(d)(17) claims. 811 F. Supp. 1005, 1016 (D.N.J. 1993). However, the Spagnoli court simply
23 *used* state law to interpret the elements of the plainly worded federal regime. *Id.* The court even
24 noted the distinction between New Jersey fraudulent transfer law and Section 1821(d)(17). See id.
25 at 1016 n.4 (“Under New Jersey law, once the Court finds that the transfers were made with intent
26 to hinder, delay, or defraud . . . the transfers can be set aside and the Court need not investigate
27 whether value was given,” while explaining that the federal regime burdens the transferee “to
28 provide that value was given for the transfer.”) (internal citations omitted) (internal quotation marks
omitted). The court merely used state jurisprudence clarifying how to “prove that value was given
for” a transfer under Section 1821(d)(17). *Id.* at 1016.

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1 The benefits of the plain meaning of the statute and nearly two decades of persuasive jurisprudence,
2 however, allow the court to conclude that Section 1821(d)(17) creates a distinct federal framework.

3 The District of Columbia compiled the opinions of various courts in finding, generally, that
4 federal law governs the FDIC's rights and defenses against it. See Linde Thomson v. RTC, 5 F.3d
5 1508, 1513 n.5 (D.C. Cir. 1993). The court cited several cases supporting that federal law controls
6 the rights of the FDIC. For example, state law only guides federal courts after federal law has been
7 exhausted, the notion that "federal law controls" is not merely jurisdictional; rather, federal courts
8 are not bound by state law, federal law governs questions involving rights of the government arising
9 under nationwide federal programs, and federal law governs the application of defenses against the
10 FDIC. Id. (citing cases).

11 Within the specific context of Section 1821(d)(17), the statute plainly establishes a navigable
12 framework. The FDIC "may avoid a transfer of *any interest* of an institution-affiliated party, or *any*
13 *person who the Corporation or conservator determines* is a debtor of the institution." 12 U.S.C. §
14 1821(d)(17)(A) (emphasis added). Congress, in no uncertain terms, gave the FDIC the ability to
15 classify a party as a debtor. "We have consistently held that when the plain meaning of a statute is
16 clear, we are not to look beyond that text to discern legislative intent." Palmiere v. Nynex Long
17 Distance Co., 437 F.3d 111, 115 (1st Cir. 2006). Because the court accepts as true all of the FDIC's
18 well-pleaded allegations at this stage, and the FDIC sufficiently pleads facts indicating that Tamboer
19 is a debtor, the FDIC's claims withstand the motion to dismiss. (See Docket No. 182 at 22, 31-32.)

20 Several courts agree that the plain meaning of the text grants the FDIC vast authority. "There
21 is no requirement in [1821(d)(17)] that [the defendant] be a debtor with respect to any particular
22 transfer. Rather, the FDIC may avoid an intentionally fraudulent transfer of *any person* who the
23 FDIC determines is a debtor of the institution." Jahn v. FDIC, 828 F. Supp. 2d 305, 314 (D.D.C.
24 2011) (citing Section 1821(d)(17)(A)) (emphasis added). The Ninth Circuit held, "Subsection (17)
25 explicitly authorizes the avoidance of fraudulent transfers involving banking institutions. It is

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1 obvious that the thrust of this provision is to recover transactions which defraud [the FDIC],”
2 implying broad coverage under the statute. FDIC v. Garner, 125 F.3d 1272, 1278 (9th Cir. 1997).
3 The Tenth Circuit stated, “The text of [Section] 1821(d)(17) . . . evidences Congress’ clear intent
4 to *augment* the [FDIC]’s ability to avoid fraudulent conveyances” RTC v. Cruce, 972 F.2d
5 1195, 1199 (10th Cir. 1992) (holding Section 1821(d)(17) broadened the FDIC’s authority while
6 expressing confusion over whether federal or state law applied) (emphasis added). The Second
7 Circuit opined that Section 1821(d)(17) affords the FDIC expansive authority to prohibit fraudulent
8 transfers. See In re Gimbel, 77 F.3d 593 602 (2d. Cir. 1996) (“The statute clearly authorizes the
9 FDIC to avoid *any transfer* made by Gimbel with the intent to defraud the FDIC. Thus, the FDIC’s
10 investigative powers extend to *any transfer*.”) (emphasis added). The Sixth Circuit interpreted
11 Section 1821(d)(17) to read that the FDIC “has broad authority to operate institutions in a way that
12 will place them on firm ground as quickly as possible.” RTC v. Chesire Mgmt. Co., 18 F.3d 330,
13 335 (6th Cir. 1994). The court agrees with these perspectives. Although state law may assist a
14 reviewing court with analyzing certain federal elements, see RTC v. Spagnoli, 811 F. Supp. 1005,
15 1016 (D.N.J. 1993), Section 1821(d)(17) is a distinct federal scheme. Requiring the FDIC to hold
16 a due and payable claim against Tamboer before declaring him a debtor would “frustrate the
17 purpose” of Section 1821(d)(17)(A). McClellan v. Chipman, 164 U.S. 347, 357 (1896).

18 The FDIC seeks to recover the transfer of \$3.55 million to Tamboer’s family trust. It deemed
19 Tamboer a debtor, claiming he lacks the requisite liquidity to satisfy his liability for allegedly grossly
20 negligent loans he approved while leading Westernbank. (See Docket No. 182 at 22.) The FDIC
21 alleges Tamboer transferred the funds on December 1, 2010, just seven months after the FDIC
22 became Westernbank’s receiver, slightly over a year before the FDIC filed this case, and after a
23 separate case was filed alleging negligence against the Westernbank directors and officers. (See
24 Docket No. 182 at 31-32); see also Wylie v. Stipes, 797 F. Supp. 2d 183 (D.P.R. 2012) The FDIC
25 asserts that Tamboer transferred this money because he anticipated suit. (Id.) These allegations,
26 taken as true, comprise a confluence of badges of fraud that plausibly entitle the FDIC to relief under
27 Section 1821(d)(17)(A). See Anchor Props., 13 F.3d at 32 (identifying actual or threatened

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1 litigation, a purported transfer of all or substantially all property, insolvency or other unmanageable
2 indebtedness, and a special relationship between debtor and transferee as badges of fraud). The
3 Trustee's motion to dismiss the federal fraudulent transfer claim is **DENIED**.

4 **IV. Fraudulent Transfer Claims Under Puerto Rico Law**

5 The FDIC's amended complaint alleges fraudulent transfer under Puerto Rico law as well.
6 (See Docket No. 182 at 32.) As discussed in a prior opinion and order, ripeness questions persist.
7 (See Docket No. 304 at 15-16.) The court refrains from adjudicating this claim at this time.

8 **V. Conclusion**

9 For the abovementioned reasons, the court **DENIES** the Trustee's motion to dismiss at
10 Docket No. 442.

11 **SO ORDERED.**

12 In San Juan, Puerto Rico this 8th day of May, 2013.

13 /s/ Gustavo A. Gelpí
14 GUSTAVO A. GELPI
15 United States District Judge
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