UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 02-CV-11497-RGS

DENNIS J. BUCKLEY, as the Trustee of the
Globe Holdings, Inc. and Globe Manufacturing Corp. Litigation Trust

v.

GOLDMAN, SACHS & CO., et al.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

May 20, 2005

STEARNS, D.J.

On July 24, 2002, Dennis Buckley, in his capacity as the Litigation Trustee for Globe Holdings, Inc., and Globe Manufacturing Corporation (the Globe companies), sued thirty-six defendants whose involvement in a recapitalization plan and leveraged buyout (LBO) in July of 1998 is said to have rendered the Globe companies insolvent "before the ink was dry." The Trustee, who is seeking to recover $300 million in damages, has brought claims on behalf of the estates of the bankrupt debtor-corporations and their creditors. The defendants can be sorted into five groups, each of which will be described. The groups in various combinations seek to dismiss the entirety of the Trustee's Complaint, although not always on the same grounds. After a conference with the parties, the court agreed to hold three separate hearings on the motions.[1]

[1]The hearings were held on May 22, 2003, May 30, 2003, and June 14, 2004. A fourth hearing was held on May 27, 2004, on an unrelated issue raised *sua sponte* by the court.

The basic facts set out in the Complaint are as follows. Globe Holdings was a Massachusetts corporation. Its headquarters and operating subsidiary, Globe Manufacturing, were based in Fall River.[2] For over fifty years, Globe Manufacturing was a leading domestic manufacturer of spandex and latex elastomeric fibers. The Globe companies were managed by Thomas Rodgers, Jr., and several members of his family (the Rodgers defendants).[3]

In 1992, Goldman, Sachs & Co. (Goldman Sachs) and five affiliated limited partnerships (the Goldman Funds) acquired 46 percent of Globe Holdings' stock. The purchase gave the Goldman Funds the right to appoint three members of Globe Holdings' board of directors. The Goldman Funds nominated Robert Gregory, Elizabeth Cogan, and Richard Friedman (the Goldman directors) to serve on the board. In late 1997, the Rodgers defendants and the Goldman Funds decided to sell their respective interests in the Globe companies. Globe Holdings retained Goldman Sachs as its financial advisor in connection with the sale. Globe Manufacturing hired Valuation Research Corporation (VRC) to evaluate a contemplated LBO. Goldman Sachs, the Goldman Funds, the Goldman directors, and VRC comprise the Goldman defendants.

Goldman Sachs then solicited offers to purchase the Globe companies. The investment banking firm of Code Hennessy & Simmons, LLC (CHS) became interested and

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[2]Although some corporate names differed before the LBO, the parties use the post-LBO names, a practice that the court will follow.

[3]The nine Rodgers defendants include five individuals who held management positions in the Globe companies, Thomas Rodgers, Jr., Thomas Rodgers, III, Robert Bailey, Americo Reis, and Lawrence Walsh, and four shareholders, Maureen Bateman, Sara Rodgers, Robert Stoico, and Gisela Rodgers.

recommended that one of its investment funds, Code Hennessy & Simmons III LP (CHSIII), purchase the companies. CHS, CHSIII , and three managers of CHS who were involved in implementing the LBO – Andrew Code, Peter Gotsch, and Edward Lhee – comprise the CHS defendants. The CHS defendants retained the law firm of Kirkland & Ellis to provide legal advice and to prepare the necessary documents. Globe Holdings retained the law firm of Hale & Dorr to do the same. Kirkland & Ellis, Hale & Dorr, and John Burgess, a partner at Hale & Dorr, comprise the Law Firm defendants.[4]

On July 31, 1998, the LBO took place. The LBO consisted of a series of transactions: Globe Manufacturing received $121.8 million from several financial institutions (the Bank Group) in the form of a Senior Credit Facility; Globe Manufacturing issued $150 million of senior subordinated notes (the Manufacturing Notes); and Globe Holdings issued $25 million worth of senior discount notes (the Holdings Notes). Globe Holdings simultaneously transferred most of its assets and liabilities to Globe Manufacturing. When all was said and done, Globe Holdings' shareholders had received $243.6 million for the tender of their shares, while Globe Manufacturing owed $120 million in short term debt and $150 million in long term debt to the Bondholders.

The LBO yielded $2.3 million in management bonuses to the officers and directors of the Globe companies. The Professional defendants reaped $8.7 million in fees. Of the $243.6 million paid to the Globe shareholders, the lion's share went to the stockholders of the Goldman Funds, to the Rodgers defendants, and to certain minority shareholders.

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[4]The Law Firm defendants, along with CHS, VRC, and Goldman Sachs are sometimes referred to in the briefs as the Professional defendants.

Of the minority shareholders, Thomas Roos, Christine Fennelly, Thomas Roos and Geraldine Roos, the M. Rita Trust C and D, Alexander Rodgers, Patricia Hayes, and Daniel Hayes are named as defendants. They are referred to in the briefs as the Outside Shareholder defendants.

After the LBO, Globe Manufacturing scraped along for two and a half years before defaulting on the Senior Credit Facility and Holdings Notes. On January 31, 2001, the Globe companies filed for Chapter 11 bankruptcy in the Northern District of Alabama. On March 14, 2001, the Bankruptcy Court approved the sale of the Globe companies' remaining assets to Radicispandex Corporation for $52 million, leaving unpaid the bulk of the debt incurred as a result of the LBO. On January 23, 2002, the Bankruptcy Court approved the Globe companies' Joint Chapter 11 Plan. The Trustee maintains that under the terms of the Joint Plan, he acquired any cause of action related to the LBO owned by the debtor companies, as well as any related claims belonging to the Globe companies' creditors.

The Trustee's Complaint alleges fifteen causes of action. They are: fraudulent transfer with intent to defraud; fraudulent transfer based on constructive fraud; common-law fraud; breach of fiduciary duty; aiding and abetting breach of fiduciary duty; aiding and abetting fraud; breach of contract; negligence; negligent misrepresentation; gross negligence; professional malpractice; unjust enrichment; breach of the duty of good faith and fair dealing; unlawful distribution; and inevitably, a violation of G.L. c. 93A. The five groups of defendants have each filed motions to dismiss. Collectively, the motions attack all counts of the Complaint.

More Definite Statement

Defendants complain that while the Trustee purports to be acting on behalf of both the creditors of the debtor-corporations and the estates of the debtor-corporations, he has failed to specify which claims arise from which of the two groups of entities. The failure impacts upon both the defendants' claims and defenses.[5] The fraud claims suffer from the same lack of precision and attribution, forcing defendants to argue contingent theories of dismissal. While the Trustee's opposition clarifies the nature of the claims to some extent, the Complaint has not been amended to incorporate the clarifications. Consequently, the motions to dismiss will be ALLOWED without prejudice, in anticipation of the filing of a more definite Amended Complaint.[6]

Res Judicata

All defendants argue that the claims brought on behalf of the estates of the debtor-corporations are barred by res judicata (claim preclusion). Defendants begin with the proposition that a final judgment in bankruptcy extinguishes a debtor's claims. "Like final judgments, confirmed plans of reorganization are binding on all parties, and issues that could have been raised pertaining to such plans are barred by *res judicata*." In re Heritage

[5]For instance, defendants have asserted the affirmative defense of res judicata against claims brought by the Trustee on behalf of the debtor-corporations, but the Complaint does not specify the claims that are alleged to have been acquired from the corporate debtors.

[6]While the court could simply stop here and wait for an Amended Complaint to be filed, in the interests of avoiding further delay, the court will assume that the amendments will conform to the positions taken by the Trustee in his opposition, and will rule on the remaining motions to dismiss accordingly.

Hotel Partnership I, 160 B.R. 374, 377 (9th Cir. BAP 1993), quoting J.S. Gilbert, Substantive Consolidation in Bankruptcy: A Primer, 43 Vand. L. Rev. 207, 239 (1990). There is, however, an exception to the general rule. "Under a generally accepted exception to the res judicata doctrine, a litigant's claims are not precluded if the court in an earlier action expressly reserved the litigant's right to bring those claims in a later action." Apparel Art Int'l, Inc. v. Amertex Enterprises Ltd., 48 F.3d 576, 586 (1st Cir. 1995), citing Kale v. Combined Ins. Co. of Am., 924 F.2d 1161, 1167 (1st Cir. 1991). See also Restatement (Second) of Judgments § 26(1)(b) (1982).

Defendants argue that the judgment approving the Globe companies' Joint Plan and creating the Litigation Trust does not fall within this exception. Relying on D & K Properties Crystal Lake v. Mut. Life Ins. Co. of N.Y., 112 F.3d 257, 261 (7th Cir. 1997), defendants contend that "[t]o avoid res judicata the reservation of a cause of action must be both express, as in writing, and express, as in specifically identified," the latter of which the defendants contend the Joint Plan does not do.

The Joint Plan's Reservation of Rights clause, at § VIII-D, states that:

> [a]ll claims, rights to payment, causes of action, cross-claims and counterclaims of the Debtors of any kind or nature whatsoever including, without limitation, Causes of Action and Avoidance Actions, against third parties arising before the Confirmation Date that have not been disposed of prior to the Confirmation Date shall be preserved and assigned to the Litigation Trust.

The Plan then explains that the term "'claim' has the meaning set forth in section 101(5) of the Bankruptcy Code." Under the Bankruptcy Code, 11 U.S.C. § 101(5), a "claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

"Causes of Action" are defined in ¶ 25 of § I-A of the Plan, as follows:

> [c]auses of [a]ction means all Claims and causes of action now owned or hereafter acquired by the Debtors or the Estates, or any of them, or which may be maintained by the Debtors or the Estates, or any of them, for their own benefit or for the benefit of creditors, whether arising under any contract or under the Bankruptcy Code or other federal or state law, including, without limitation, Avoidance Actions, but excluding Claims and causes of action and related recoveries (a) transferred to the Buyer under the terms of the Asset Purchase Agreement; (b) released pursuant to the Plan; and (c) constituting rights of recharacterization or subordination released pursuant to the Plan.

Similarly, "Avoidance Actions" are defined in ¶ 16 of § I-A as:

> any claim or cause of action of the Debtors, or either of them, or the Estates or creditors thereof, or any of them, that is or may be the subject of an adversary proceeding or other action under sections 510, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, or 553 of the Bankruptcy Code, or other applicable law.[7]

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[7]In apparent anticipation of defendants' res judicata attack, the Plan at § VIII-D(2), states:

> [t]he foregoing enumeration of potential claims and causes of action is nonexclusive and shall not constitute a limitation or waiver of any claim, right to payment, demand or cause of action not so enumerated. Such claims and causes of action shall not, under any circumstances, be waived, deemed waived or otherwise limited as a result of the failure of the Debtors to describe a particular cause of action with more specificity. . . . Accordingly, except as otherwise provided in the Plan, Confirmation of the Plan, approval of the Disclosure Statement, entry of the Confirmation Order, and the consummation of the Plan shall not constitute res judicata, collateral estoppel, claim preclusion or issue preclusion so as to preclude the prosecution of any claim or cause of action after Confirmation and will not in any way estop (judicially or otherwise) the Debtors or the Litigation Trustee

Defendants argue that the court should be guided by the reasoning of Browning v. Levy, 283 F.3d 761, 774-775 (6th Cir. 2002). In Browning, a reservation of rights, very much like the one at issue in the Joint Plan, was found of too high an order of generality to survive challenge. The plan in Browning reserved the Trustee's right to:

> enforce any claims . . . that the Debtor or its bankruptcy estate may hold against any person or entity, including, without limitation, claims and causes of action arising under sections 542, 543, 544, 547, 548, 550, or 553 of the Bankruptcy Code.

The Browning court held that this "blanket reservation was of little value to the bankruptcy court and the other parties to the bankruptcy proceeding because it did not enable the value of [the successor corporations'] claims to be taken into account in the disposition of the debtor's estate. Significantly, it neither names [the defendant law firm] nor states the factual basis for the reserved claims. We therefore conclude that [the corporation's] blanket reservation does not defeat the application of res judicata to its claims against [the law firm]."[8] Id. at 775.

> from transferring to the Litigation Trust or the Litigation Trustee from pursuing any claim or cause of action, except for the claims and causes of action released pursuant to section VII.B of the Plan.

Defendants argue that an improperly reserved claim cannot be salvaged by a boilerplate savings clause.

[8]But see In re Kmart Corp., 310 B.R. 107 (Bankr. N.D. Ill. 2004), where after a comprehensive survey of cases, including Browning and D & K Properties, the court concluded that:

> identifying causes of action by type or category are not mere blanket reservations. Therefore, categorical reservation can effectively avoid the *res judicata* bar. Dispensing with a requirement of cataloging claims by name comports with the Court's view . . . that section 1123(b)(3) does not require "specific and unequivocal" identification. It also comports with the Court's

While Browning is a well-reasoned case, a more recent (and for this court, controlling) decision, In re Bankvest Capital Corp., 375 F.3d 51, 59-60 (1st Cir. 2004), parts company with Browning.

> Several circuits have concluded that, pursuant to sections 1123 and 1141, confirmation of a plan is given res judicata effect, which bars a debtor or trustee from bringing avoidance actions not expressly reserved in the plan. See, e.g., P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.), 140 F.3d 1111, 1117-18 (7th Cir.1998); McFarland v. Leyh (In re Texas Gen. Petroleum Corp.), 52 F.3d 1330, 1335 n.4 (5th Cir.1995); Harstad v. First American Bank (In re Harstad), 39 F.3d 898, 903 (8th Cir.1994); In re Mako, 985 F.2d 1052, 1056 (10th Cir.1993). "The requirement that retention of the avoidance powers be clear serves to protect the unsecured creditors and to ensure that post-confirmation avoidance proceedings are for their benefit." In re Mako, 985 F.2d at 1056 (10th Cir.1993).
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> Assuming, without deciding, that we follow the reasoning of these decisions, Fleet's argument fails because the Plan expressly provides that Gray has the right to pursue avoidance actions:
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>> The Liquidating Supervisor, under the supervision of the Post-Effective Date Committee . . . is authorized to investigate, prosecute and, if necessary, litigate, any Cause of Action [the definition of which expressly includes avoidance actions] . . . on behalf of the Debtor and shall have standing as an Estate representative to pursue any Causes of Action and Claim objections, whether initially filed by the Debtor or the Liquidating Supervisor. . . .

> observation that the section is "broad enough to encompass both those situations where a debtor is trying to preserve a potential future claim about which the affected party has no notice and the subset of claims that have already been filed.

Id., 310 B.R. at 124.

> Fleet contends that this language does not preserve the right to pursue claims as it fails specifically to mention the claim against Fleet. Compare D & K Props. Crystal Lake v. Mut. Life Ins. Co. of N.Y., 112 F.3d 257, 260- 61 (7th Cir.1997) (stating, "[a] blanket reservation that seeks to reserve all causes of action reserves nothing."). We disagree. See Bergner, 140 F.3d at 1117 (stating, "[t]he courts that have spoken of the need for 'specific' and 'unequivocal' language have focused on the requirement that plans unequivocally retain claims of a given type, not on any rule that individual claims must be listed specifically.") (citations omitted); Harstad, 39 F.3d at 903 (ruling that debtors "should have specifically reserved the right to pursue claims of this sort postconfirmation."); Cohen v. TIC Fin. Sys. (In re Ampace Corp.), 279 B.R. 145, 160 (Bankr. D. Del. 2002) (stating, "the Bankruptcy Code contemplates that debtors may seek confirmation of their plans prior to litigating all avoidance actions . . . [t]herefore, in my opinion, a general reservation in a plan of reorganization indicating the type or category of claims to be preserved should be sufficiently specific to provide creditors with notice that their claims may be challenged post-confirmation.") (citations omitted). The cases upon which Fleet primarily relies involve provisions of a far more general nature. See D & K Properties Crystal Lake, 112 F.3d at 259 (plan purported to reserve "all causes of action existing in favor of the Debtor."); Harstad, 39 F.3d at 902 (plan purported to reserve "any right of Debtors to recover assets pursuant to the provisions of the Bankruptcy Code."). The Plan, we believe, adequately preserves Gray's right to bring avoidance actions.

The language of the Joint Plan is comparable to that in Bankvest as the reservation of rights specifically references "Avoidance Actions." Moreover, the Disclosure Statement that was attached to the Joint Plan stated that the Trustee will pursue "causes of actions" and "claims" relating to the LBO and the recapitalization of the Globe companies. Moreover, Section II.C. of the Disclosure Statement provides that:

> [c]ertain entities, including the Manufacturing Bondholders Committee and Trade Creditors Committee, have asserted that the Recapitalization gave rise to fraudulent transfer claims against the selling shareholders, the Lending Group and others. . . . Claims related to the Recapitalization against parties other than the Released Parties are reserved and, pursuant to the Plan, shall be transferred to and pursued by the Litigation Trust for the benefit of the Debtors' creditors.

Because the Joint Plan provides sufficient notice that claims arising out of the LBO were intended to survive the bankruptcy judgment, they are not barred by res judicata.[9] Consequently, the defendants' motions seeking dismissal on this ground are DENIED.

Fraudulent Transfer Claims

The Trustee has alleged a transfer with intent to defraud in Count I and a transfer based on constructive fraud in Count II.[10] While the Complaint fails to specify the statutory or common-law basis for these claims, the Trustee in his opposition states that Counts I and II are brought pursuant to 11 U.S.C. § 544(b), which empowers a trustee to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim. . . .[11]

The Rodgers defendants, the Outside Shareholder defendants, and the Goldman defendants argue that the "settlement payments" exception to § 544(b) bars the Trustee from asserting these claims.[12]

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[9]Defendants' attack on the Trustee's ability to bring claims on behalf of the corporations' creditors is similarly misplaced. Defendants contend (correctly) that a bankruptcy trustee does not stand in the shoes of the debtor's creditors. The Trustee, however, is not bringing the creditors' claims in his capacity as a bankruptcy trustee, but in his capacity as a Litigation Trustee to whom the creditor claims have been assigned. There is nothing untoward (or unusual) about a trustee acting in such a dual capacity. See Young v. Lepone, 305 F.3d 1 (1st Cir. 2002).

[10]The Trustee has pled a related claim of unjust enrichment in Count XII.

[11]A bankruptcy trustee (or his successor) is also authorized by § 548(a) of the Bankruptcy Code to bring a fraudulent transfer claim. The claim, however, must be brought within the two-year limitations period, and is therefore not applicable to this case. 11 U.S.C. § 548(a)(1)(A).

[12]As the Outside Shareholder defendants are not named in Count I, they have not joined the motion to dismiss this count.

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment . . . or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(e). Defendants maintain that transfers of funds that took place in effecting the LBO were "settlement payments" made through "financial institutions" and therefore fall within the exception. See Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846, 849 (10th Cir. 1990) (Kaiser I); Kaiser Steel Corp. v. Pearl Brewing Co., 952 F.2d 1230, 1239-1240 (10th Cir. 1991) (Kaiser II). Unfortunately, the definition of "settlement payment" referenced by § 546(e) sheds little light on exactly what Congress intended the exception to include. It states that a

> "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade.[13]

11 U.S.C. § 741(8). Judge Queenan of our Bankruptcy Court has aptly observed that "[t]he statutory definition of th[e] term [settlement payment] . . . is as opaque as it is circular." In re Healthco Int'l, Inc.,195 B.R. 971, 983 (Bankr. D. Mass. 1996).

In a very thoughtful opinion, Zahn v. Yucaipa Capital Fund, 218 B.R. 656, 675 (D. R.I. 1998), the district court noted that the only function served by the statutory definition

[13] 11 U.S.C. § 101 is even less helpful.

is to “point the curious to the common use of the term in the securities trade.” As the Zahn court explained.[14]

> [t]he securities industry utilizes a “clearance and settlement” system, wherein parties use intermediaries to make trades of public stock which are instantaneously credited, but in which the actual exchange of stock and consideration therefor takes place at a later date. See Wieboldt II, 131 B.R. at 664-65 [(N.D. Ill. 1991)], (citing Neil M. Garfinkel, Note, No Way Out: Section 546(e) Is No Escape for the Public Shareholder of a Failed LBO, 1991 Colum. Bus. L. Rev. 51 (internal citations omitted) (“Note”)). This later date is known as the “settlement” date; on this date the trade is “settled” by actually exchanging what was promised on the trade date. Id.
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> The intermediaries’ role in this system is critical; typically there are several layers of brokers on each side of a trade, with a clearing agency positioned in the middle. Id. The clearing agency, on the date of the trade itself, makes entries (credits or debits) in the accounts of its members (financial institutions or brokers), which reflect the trade. Id. Thus, while settlement occurs later, the trade itself is functionally instantaneous. The system depends upon a series of guarantees, made by all parties in the chain, that they will live up to their obligations regardless of a default by another party in the chain. Id. These guarantees allow the parties to trade free of worry about events between the trade date and the settlement date.
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> The need to preserve the stability of this system led Congress to create the § 546(e) exception to the trustee’s avoidance powers. See Jewel Recovery, L.P. v. Gordon, 196 B.R. 348, 352 (N.D.Tex.1996); Wieboldt II, 131 B.R. at 664. If the pre-bankruptcy trades by a bankrupt intermediary could be set aside, then the guarantees that allow the system to function would be threatened, the parties could not proceed with confidence, and a bankruptcy by one party in the chain could spread to other parties in the chain, threatening a collapse of the entire industry. Id.
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> Against this background, it appears unlikely that Congress intended the term “settlement payment” to cover the present transfers. True, these transfers “settled” a purchase and sale of securities. The Tenth Circuit has held that payments made by brokers to selling shareholders in an LBO are “settlement payments” covered by the § 546(e) exception. Kaiser Steel, 952 F.2d at 1240. Another court, however, has held that such payments were not meant

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[14]The extract that follows is lengthy, but I do not think I can improve on Chief Judge Lagueux’s analysis.

> to be covered by § 546(e). Wieboldt II, 131 B.R. at 664-65. In addition, commentators have criticized Kaiser for applying § 546(e) in a situation that did not implicate the concerns behind that exception. See, e.g., Frank R. Kennedy & Gerald K. Smith, Fraudulent Transfers and Obligations: Issues of Current Interest, 43 S.C. L. Rev. 709 (1992); William C. Rand, Comment, In re Kaiser Steel Corporation; Does Section 546(e) of the Code Apply to a Fraudulent Conveyance Made in the Form of an LBO Payment?, 19 Fordham Urb. L.J. 87 (1991); Jane Elizabeth Kiker, Casenote, Judicial Repeal of Fraudulent Conveyance Laws: Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846 (10th Cir.1990), 14 Hamline L. Rev. 453 (1991).
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> In both Kaiser and Wieboldt II, the LBOs involved the clearance and settlement system; while the respective courts split on whether the LBOs were sufficiently connected to the system to justify the application of § 546(e), the system was at least involved. Kaiser Steel, 952 F.2d at 1235-36; Wieboldt II, 131 B.R. at 664-65.
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> Here, however, the question is not nearly as close . . . . The only possible link between this transaction and the securities industry is the fact that securities were sold; however, the stock at issue was not even publicly traded. The stock transfers thus had no connection whatsoever to the clearance and settlement system, and allowing avoidance would have no impact at all on that system.

Id., at 675-676.[15]

The holding in Zahn is unmistakably at odds with Kaiser, as well as with In re Resorts Int'l, Inc., 181 F.3d 505, 515 (3rd Cir. 1999).[16] In Resorts Int'l, the Third Circuit

[15]See also In re Healthco Int'l, Inc.,195 B.R. at 983 ("Congress intended to protect ordinary course of business transfers related to the purchase or sale of securities . . . [and was] concerned that avoidance of such transfers would leave a securities clearing agency exposed on its guaranty of payment of the sales price and delivery of the securities. The payment [at issue] was a one-time distribution in complete liquidation of its stock interest. These circumstances, particularly where there is no showing of a guaranty by a securities clearing agency, are not what Congress had in mind in enacting section 546(e).").

[16]See also Hechinger Inv. Co. of Del. v. Fleet Retail Fin. Group, 274 B.R. 71, 86-89 (D. Del. 2002) (agreeing with Kaiser and Resorts Int'l).

was persuaded that the term "settlement payment" was expansive enough in meaning to encompass payments made to bring about an LBO.

> In the securities industry, a settlement payment is generally the transfer of cash or securities made to complete a securities transaction. See Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846, 849 (10th Cir.1990) (citing various securities industry texts). Here, the securities passed from Lowenschuss's broker, Merrill Lynch, to the transfer bank, Chase Manhattan. Resorts wired funds to Chase which Chase then forwarded to Merrill Lynch who paid Lowenschuss. Although no clearing agency was involved in this transfer, two financial institutions – Merrill Lynch and Chase – were. Under a literal reading of section 546, therefore, this was a settlement payment "made by . . . a financial institution." 11 U.S.C. § 546(e).

Id. at 515. Thus, the court could "see no absurd result from the application of the statute's plain language and [we] will not disregard it."[17] Id. While the Third Circuit's conclusion is etymologically defensible, as Judge Learned Hand observed "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." (Judge Hand is quoted in both Bevill, Bresler & Schulman Asset Management Corp. v. Spencer Sav. & Loan Ass'n, 878 F.2d 742, 750 (3rd Cir. 1989), and In re Healthco Int'l, Inc.,195 B.R. at 983). The object that Congress sought to accomplish by enacting § 546(e) was to protect the operation of the security industry's clearance and settlement

[17] But see Munford v. Valuation Research Corp., 98 F.3d 604, 610 (11th Cir.1996), holding that even if a payment is a settlement payment under § 546(e), the exemption is not applicable in an LBO unless the transfer (or settlement payment) was ultimately made "by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency." Because the recipients of the allegedly fraudulent transfers in this case were the shareholders, under Munford's reasoning, § 546(e) would not apply.

system. That interest is not furthered in any meaningful sense by bringing an LBO like the one at issue in this case under the exemption of § 546(e) simply because funds fortuitously passed through financial institutions on their way into the hands of the defendants.[18] Consequently, defendants' motions to dismiss the fraudulent transfer counts will be DENIED.[19] [20]

Fraud and Misrepresentation

Defendants next attack is on the adequacy of the fraud-related allegations set out in the Complaint. The court will turn first to the arguments that concern only the CHS defendants and the Law Firm defendants. The CHS defendants argue that Count III and Count IX, which allege fraud and negligent misrepresentation, respectively, fail to attribute any misrepresentation or misstatement to any CHS defendant. This is true. Hence, the motion to dismiss Counts III and IX as to these defendants will be ALLOWED. Second, the Law Firm defendants, joined by CHS, argue that Counts V and VI, which allege aiding

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[18]The sale of securities at issue was the shareholders' tender of their shares to the Globe companies. This transaction is not the type of securities trade the avoidance of which would avert injury to the securities industry as it does not expose buyers and sellers who were strangers to the transaction to liability or loss.

[19]The CHS defendants point out that CHS has been improperly named in Count II. The $25 million bridge loan alleged by the Trustee to have been a fraudulent transfer was made by CHSIII and not CHS. Similarly, the CHS defendants note that the individually named CHS defendants are not alleged by the Trustee to have been recipients of the disputed funds. Both points are well taken and the court will allow the motions to dismiss Counts I and Count II, to the extent they are alleged against these defendants.

[20]Defendants argue that symmetry requires that the unjust enrichment count also be dismissed if the fraudulent transfer counts are barred by § 546(e). Because the court does not agree with the latter proposition, the motion(s) to dismiss Count XII will be DENIED.

and abetting a breach of fiduciary duty and aiding and abetting fraud (Kirkland & Ellis and Hale & Dorr in Count V, and Kirkland & Ellis, Hale & Dorr, and CHS in Count VI), fail to allege that the defendants acted with unlawful intent. Paragraph 231 of the Complaint contains the only allegation of scienter pertaining to these counts. It states that "the Professional Defendants knew, or should have known, of these actions or designs by Goldman Sachs, the Officers and Director Defendants and/or Valuation Research." Defendants contend (correctly) that the law requires more than mere negligence in this regard.

> The second element [of aiding and abetting] is that defendant must have an unlawful intent, i. e., knowledge that the other party is breaching a duty and the intent to assist that party's actions. [Brown v. Perkins, 83 Mass. (1 Allen) 89, 98 (1861)]. See McGrath v. Sullivan, 303 Mass. 327 (1939); The American Agricultural Chemical Co. v. Robertson, 273 Mass. 66 (1930)."

Payton v. Abbot Labs, 512 F. Supp. 1031, 1035 (D. Mass. 1981). See also Commerce Bank & Trust Co. v. Vulcan Industries, Inc., 2002 WL 1554389, *2 (Mass. Sup. Ct. May 17, 2002).[21] Consequently, the defendants' motions to dismiss Counts V and VI will accordingly be ALLOWED.

The court will now turn to the defendants' more global assault on the fraud-related claims. The defendants contend that the purported misstatements and omissions alleged are not actionable, as they fall either broadly into the category of opinion and prediction or are not alleged to have been false when made.

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[21]The Trustee points to (then) Judge Breyer's decision in Maruho v. Miles, 13 F.3d 6 (1st Cir. 1993). Judge Breyer, however, supports the defendants' position. "The Massachusetts courts have made clear that a defendant 'aids and abets' a tortfeasor only if, at the least, the defendant actually *knows* about 'its substantial, supporting role in an unlawful enterprise.'" Id. at 10-11.

The misrepresentations in the LBO Offering Memorandum identified by the Trustee were as follows.

- "[M]angement estimates that worldwide sales of spandex fiber will increase at a compound annual growth rate of 9% over the next three years and that fine denier spandex sales will exceed the overall market growth rate during this period. Complaint, ¶ 104.

- The demand for fine denier spandex has "increased faster than the overall market" and "this trend is expected to continue." Complaint, ¶ 105.

- "[T]he Company does not believe that, after giving effect to the Transactions, it (i) was or will be insolvent or rendered insolvent, (ii) was or will be engaged in a business or transaction for which its remaining assets constituted unreasonably small capital or (iii) intends or intended to incur, or believes or believed that it will or would incur, debts beyond its ability to pay such debts as they mature. These beliefs are based on the Company's operating history and analysis of internal cash flow projections and estimated values of assets and liabilities of the Company at the time of the Offering. There can be no assurance, however, that a court passing on these issues would make the same determination." Complaint, ¶ 128.[22]

The Trustee also alleges that the Opinion Letter issued by VRC contained the following misrepresentations. The Opinion Letter stated that:

- "Each of (a) Holdings and its subsidiaries on a consolidated basis and (b) the Borrower [New Manufacturing] and its subsidiaries on a consolidated basis are and will be able to pay their respective debts and other liabilities (including, without limitation, the New Financing, the State Liabilities, and the Identified Contingent Liabilities) as such

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[22]The Trustee also alleges, in ¶ 108 of the Complaint, that the language of the Offering Memorandum "portray[ing] favorable near term growth" is an actionable misrepresentation. But the actual language of the Memorandum from which the "portrayal" is culled simply recites historical facts about Globe's prior record of successful penetration of the domestic spandex market. According to the Trustee, this recital implicitly promises similar success in the future. Not only is this implied promise difficult to read into the historical analysis, there is no allegation that any of the historical facts it recites are untrue.

debts become absolute and matured in the ordinary course of business. “ Complaint, ¶ 114.

- It considers the company’s forecasts to be “reasonable and attainable in light of current and near term economic expectations, and nothing has come to our attention that would cause [us] to believe the basic assumptions used in the forecasts were unreasonable.” Complaint, ¶ 115.

- “[N]othing [has] come to [our] attention, that causes us to believe that [the Company] would not be viewed as a going concern” after the LBO. Complaint, ¶ 116.

Defendants contend that these statements, read in context with the accompanying cautionary language, are nothing more than opinions and predictions. It has long been the law that statements of a promissory nature or predictions about future events are not actionable unless at the time the statements were made the speaker knew that the predictions were false or the promise impossible to keep. Commonwealth v. Drew, 36 Mass. 179, 185 (1837). See Rodowicz v. Massachusetts Mut. Life Ins. Co., 192 F.3d 162, 175 (1st Cir. 1999) (“[F]alse statements of opinion, of conditions to exist in the future, or of matters promissory in nature ‘are not actionable in a claim for misrepresentation.’”); In re Fidelity/Apple Securities Litig., 986 F. Supp. 42, 49 (D. Mass. 1997) (“[M]ere opinions, predictions about future events, and statements that are true when made, are not actionable as misrepresentations under Massachusetts law.”).

The first two alleged misrepresentations alleged in the Offering Memorandum state that “management estimates that worldwide sales of spandex fiber will increase at a . . . rate of 9%,” and that “this trend [of increased demand for] fine denier spandex is expected to continue.” [Emphasis added]. The third states that “the Company does not believe that,

after giving effect to the Transactions, it (i) was or will be insolvent or rendered insolvent, (ii) was or will be engaged in a business or transaction for which its remaining assets constituted unreasonably small capital or (iii) intends or intended to incur, or believes or believed that it will or would incur, debts beyond its ability to pay such debts as they mature." [Emphasis added.] Under established law, these statements are not actionable.[23]

The Trustee counters that "[e]ven if [a] statement is viewed as a representation as to future events, it falls within the exception to the general rule precluding recovery [if] it involves a situation 'where the parties to the transaction are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the misrepresentations relate.'" Gopen v. American Supply Co., 10 Mass. App. Ct. 342, 345 (1980), citing Williston, Contracts § 1496, at 373-374 (3d ed. 1970). See also Stolzoff v. Waste Systems Int'l, Inc., 58 Mass. App. Ct. 747, 760-763 (2003) (company officers falsely represented to shareholders that their business was thriving). The Trustee argues that because the defendants had superior knowledge about the market environment in which the Globe companies operated, their predictive statements should be viewed as assertions of fact. See Commonwealth v. Anthony, 306 Mass. 470, 474-475 (1940); Briggs v. Carol Cars, Inc., 407 Mass. 391, 395-396 (1990). The Trustee, for example, contends that the failure to warn readers of the Offering Memorandum that an increase in foreign imports would impact the company's sales and its ability to meet its

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[23]Moreover, the precatory language of the Offering Memorandum specifically warned that "statements regarding the Company's future financial position, business strategy, budgets, projected costs and plans and objective[s] of management for future operations are forward looking statements . . . [for which] it can give no assurance that such expectations will prove to have been correct."

debt obligations amounts to a misrepresentation by omission. That cheaper imports compete with more expensive domestically produced goods hardly seems the kind of specialized knowledge that defendants would uniquely possess or would be beyond the ability of a reader of the Offering Memorandum to acquire. Moreover, the Offering Memorandum was not silent on the issue of competition.

> The elastomeric fiber industry is highly competitive. . . . There can be no assurance that the Company will be able to compete successfully in the future against its competitors or that the Company will not experience increased price competition, which could materially and adversely affect the Company's results of operations, financial condition and ability to meet its obligations under the Notes.
>
> . . .
>
> In 1997, approximately 92% of the Company's sales were to the textile and apparel industries. These industries are highly cyclical and are characterized by rapid shifts in consumer demand, as well as competitive pressures and price and demand volatility. The demand for the Company's products is principally dependent upon the level of demand for certain types of apparel. . . . A reduction in the level of demand for apparel or a decrease in consumer demand for products containing elastomeric fibers could have a material adverse effect on the Company's results of operations, financial condition and ability to meet its obligations under the Notes.

This discussion of the potential effects of competition on the Globe companies' later sales would have alerted any reasonable reader to the possibility that fluctuations in the elastomeric fiber market could impact the financial health of any investment. Consequently, the motions to dismiss with respect to the alleged misrepresentations in the Offering Memorandum will be ALLOWED.

The conclusion is different with respect to the VRC Opinion Letter. The statements of VRC identified in the Complaint are presented as the professional opinion of an "acknowledged leader in the rendering of insolvency opinions . . . using sophisticated

financial modeling." Complaint, ¶ 132. The statements attributed to VRC are not couched as future-oriented or forward looking, but as solid assurances that the debt ratio resulting from the LBO would not overburden New Manufacturing or impair its ability to service the debt. As such, these allegations survive the motions to dismiss.[24]

Duty Based Claims

The Law Firm defendants, the Goldman defendants, the CHS defendants, and the Rodgers defendants have each moved to dismiss the duty-based claims.[25] The Law Firm defendants argue that the claims against them for malpractice, breach of fiduciary duty, and Chapter 93A must be dismissed because the only duty that the law firms owed was to their clients (in Kirkland & Ellis' case, CHS, and in Hale & Dorr's case, Globe Holdings). Defendants acknowledge that under Massachusetts law, an attorney may owe a duty of care to a third party whom he knows is relying on the legal services he is rendering to his client. The Van Brode Group, Inc. v. Bowditch & Dewey, 36 Mass. App. Ct. 509, 516 (1994). But as Spinner v. Nutt, 417 Mass. 549, 556 (1994), makes clear, the duty to a third party will not be imposed (even where reliance is shown) if it would conflict with the attorney's duty to his client. The Trustee's allegations against the Law Firm defendants

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[24]Defendants also argue that the fraud claims are not pled with the specificity required by Rule 9(b). I am satisfied that the allegations pled in ¶¶ 111-117, 151-162 of the Complaint, are sufficiently specific with respect to the VRC Opinion Letter. See Rodi v. Southern N.E. Sch. of Law, 389 F.3d 5 (1st Cir. 2004) (the specificity requirement in a fraud context "extends only to the particulars of the allegedly misleading statement itself"). Defendants may also prove correct in their prediction that the Trustee will be unable to prove reliance, but that issue is not now before the court.

[25]The arguments of the Rodgers defendants are addressed in the context of the court's order requiring the Trustee to amend his Complaint to specifically state on whose behalf each of the Trustee's claims are brought.

fail to identify any duty beyond that owed by each firm to its own client. Consequently, the motion to dismiss the duty-based claims will be ALLOWED.[26]

In similar vein, the CHS defendants and the Goldman defendants argue persuasively that the Complaint fails to set forth the basis and identity of any fiduciary or contractual duty that they allegedly owed to any of the entities the Trustee represents. See Aviall, Inc. v. Ryder Systems, Inc., 913 F. Supp. 826, 832 (S.D.N.Y. 1996); Page v. Frazier, 388 Mass. 55, 64 (1983); Brandt v. Hicks, Muse & Co. (In re Healthco Int'l, Inc.), 208 B.R. 288, 310 (Bankr. D. Mass. 1997).[27] Accordingly, the motions to dismiss these claims will also be ALLOWED.

ORDER

For the foregoing reasons, the motions to dismiss will be ALLOWED consistent with the rulings made within the body of this opinion.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE

[26]The Law Firm defendants' motion to dismiss the contract-based claims will be ALLOWED as the Complaint fails to identify a basis on which a contractual relationship between the defendants and the Trustee entities could be inferred. Nor is any plausible allegation made that the entities were the intended beneficiaries of a contractual relationship between any of the law firm defendants and a third party.

[27]Defendants also argue that CHSIII, as the buyer in the transaction, did not owe a duty to any of the seller debtor-corporations. The Trustee, however, points out that after the sale, the CHS defendants approved the $25 million loan in alleged breach of the obligations that they assumed as a result of the LBO.