

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:) Chapter 7
)
THE BROWN SCHOOLS, et al.,) Case No. 05-10841
)
Debtors.)
_____)
)
GEORGE L. MILLER, Chapter 7) Adversary No. 06-50861 (MFW)
Trustee,)
)
Plaintiff,)
)
v.)
)
McCOWN DE LEEUW & CO., INC.;)
KIDS ACQUISITION, LLC; McCOWN)
DE LEEUW & CO. III, L.P.; MDC)
MANAGEMENT COMPANY, III, L.P.;)
MDC MANAGEMENT COMPANY, IIIA,)
L.P.; McCOWN DE LEEUW & CO. III)
(EUROPE), L.P.; McCOWN DE LEEUW)
& CO. III (ASIA), L.P.; GAMMA)
FUND LLC, McCOWN DE LEEUW & CO.)
IV, L.P.; McCOWN DE LEEUW & CO.)
IV ASSOCIATES, L.P.; DELTA FUND)
LLC; MDC MANAGEMENT COMPANY IV,)
LLC; McCOWN DE LEEUW & CO.,)
LLC; GEORGE McCOWN; ROBERT)
HELLMAN; ROBERT J. NAPLES; and,)
WINSTEAD SECHREST & MINICK,)
P.C.,)
)
Defendants.)

OPINION¹

¹ In this Opinion, the Court makes no findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 7052 (applying Fed. R. Civ. P. 52 (a) which provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12"). The facts recited are those alleged in the Complaint.

Before the Court are the Motions of the MDC Defendants², Winstead Sechrest & Minick, P.C. ("Winstead"), and Robert J. Naples ("Naples") for dismissal of the complaint filed against them by the trustee. For the reasons stated below, the Court will grant the Motions in part.

I. BACKGROUND

In 1997 and 1998, the Debtors³ recapitalized. During the recapitalization process, McCown De Leeuw & Co., Inc. ("MDC"), through an affiliate, acquired more than 65% of the stock of The

² The MDC Defendants are collectively McCown De Leeuw & Co., Inc. ("MDC") and the following of its affiliates: Kids Acquisition, LLC, McCown De Leeuw & Co., III, L.P., MDC Management Company III, L.P., MDC Management Company IIIA, L.P., McCown De Leeuw & Co. III (Europe), L.P., McCown De Leeuw & Co. III (Asia), L.P., Gamma Fund LLC; McCown De Leeuw & Co. IV, L.P., McCown De Leeuw & Co. IV Associates, L.P., Delta Fund, LLC, MDC Management IV, LLC, McCown De Leeuw & Co., LLC, George McCown, and Robert Hellman. George McCown is the founder of MDC and was a director of The Brown Schools, Inc. Robert Hellman was the CEO of MDC and a director of The Brown Schools, Inc.

³ The Debtors are: The Brown Schools, Inc. (the "Parent Debtor"), The Brown Schools Management Corporation, The Brown Schools Education Corporation, CEDU Education, Inc. f/k/a CEDU Family of Services, Inc., CEDU School, Inc., North American Boarding Schools, Inc., Rocky Mountain Academy, Inc., Northwest Academy, Inc., The Brown Schools of Florida, Inc., The Brown Schools of Puerto Rico, Inc., CEDU Holdings, Inc., CEDU Business Corporation, Austin TBS, Inc., The Brown Schools Business Corp., Healthcare Living Centers, Inc., Healthcare Rehabilitation Center of Austin, Inc., The Brown Schools Behavioral Health System, Inc., Travis TBS, Inc., The Brown School of San Juan, Inc., Healthcare AHGI, Inc., Elmwood Management Company, Inc., Glenwood Management Company, Inc., TBS Holdings, Inc., and TBS Administrative Corp.

Brown Schools, Inc. (the "Parent Debtor") for \$63 million. MDC, through two affiliates, entered into an Advisory Services Agreement with the Debtors to provide financial, advisory, and consulting services. MDC was to receive the greater of \$400,000 or .3% of the Debtors' net revenues (capped at \$800,000) as compensation for its services. As part of the recapitalization, the Debtors also obtained loans and lines of credit totaling \$100 million from various banks, including Credit Suisse First Boston (collectively "CSFB"). CSFB was granted a security interest in substantially all the Debtors' assets.

In October 1999, the Debtors obtained an additional \$15 million in working capital from Teachers Insurance and Annuity Association of America ("TIAA") in exchange for notes in the principal amount of \$15 million at 18% interest and warrants to purchase 40,000 shares of the Debtors' stock. The TIAA notes were not secured and were subordinate to the CSFB debt.

In 2000, eight of the MDC companies loaned the Debtors a total of \$5 million in exchange for notes in the principal amount of \$5 million and warrants to purchase 74,000 shares of the Debtors' stock. The notes were not secured, were subordinate to the CSFB and TIAA debt, and were issued at an interest rate of 12%, payable-in-kind (the "PIK Notes").

In December 2000, upon default of the CSFB debt, the Debtors restructured the CSFB debt. As part of the restructuring, the

Debtors sold \$32 million in assets. The proceeds from the asset sale were used to reduce the balance of the CSFB debt. CSFB increased the interest rate on the remaining debt. The Debtors raised additional capital (\$7.5 million) through sale of additional PIK Notes to MDC.

As of April 7, 2003, the Debtors owed approximately (i) \$47 million on the CSFB debt; (ii) \$18.4 million in principal and interest on the TIAA notes; (iii) \$12.5 million plus interest on the PIK Notes; and (iv) \$22 million to other creditors. Further, the Debtors were defendants in over thirty lawsuits.

During April 2003, the Debtors sold all their residential treatment centers to third parties for a total of \$64 million. The proceeds were used to satisfy the CSFB debt in full and to pay \$907,000 to the Debtors' financial advisor, \$578,000 to its counsel, \$278,000 to CSFB's legal and financial advisors, and \$1.7 million to MDC. The Trustee alleges that MDC performed no compensable services in exchange for the \$1.7 million payment. (Complaint at ¶ 49.)

In May 2003 the Debtors hired Winstead. In July 2004, the Debtors restructured their debt again (the "July 2004 Restructuring"). As part of the July 2004 Restructuring, TIAA received a first lien and MDC a second lien on substantially all the Debtors' assets. TIAA waived all defaults on the TIAA notes which were restructured into four tranches in the aggregate of

\$20.95 million. The Debtors also agreed to sell \$7 million in assets to reduce the TIAA debt. Subsequently, TIAA and MDC entered into an Intercreditor Agreement. Under the Intercreditor Agreement, MDC was given a participation in the amounts to be received by TIAA under two of the four tranches. The Debtors liquidated more assets and paid more than \$18 million to TIAA, which TIAA shared with MDC.

On March 25, 2005, the Debtors filed voluntary petitions for relief under chapter 7 of the Bankruptcy Code. George L. Miller was appointed trustee (the "Trustee").

On September 26, 2006, the Trustee filed a Complaint against the MDC Defendants, Naples (a director of the Parent Debtor), and Winstead. On October 3, 2006, the Complaint was amended. The Complaint contains counts against all Defendants for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent and/or voidable transfers, deepening insolvency, civil conspiracy, and declaratory relief. There is a separate count for corporate waste against the MDC Defendants and Naples.

On November 27, 2006, the MDC Defendants and Winstead filed Motions to dismiss the Complaint. On December 1, 2006, Naples filed a Motion to dismiss and a joinder in the other Motions. The Motions are opposed by the Trustee. Briefing is complete, and the matters are now ripe for decision.

II. JURISDICTION

The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) & 157(b)(1). This proceeding is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C), (E), (F), (H), (K) & (O).

III. DISCUSSION

The Defendants move for dismissal of the claims against them for failure to state fraud with particularity, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted under Rules 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure, which are made applicable to adversary proceedings by Rules 7009 and 7012(b) of the Federal Rules of Bankruptcy Procedure.

A. Standard of Review

1. Rule 9(b) Dismissal

The plaintiff must allege actual fraud with particularity. Fed. R. Civ. P. 9(b). The facts alleged in the complaint must be stated with sufficient particularity to notify the defendant of the charges against him so that he may adequately prepare an answer. In re Global Link Telecom Corp., 327 B.R. 711, 718 (Bankr. D. Del. 2005). Fair notice requires more than mere parroting of statutory language. Id. See also In re Circle Y of Yoakum, Texas, 354 B.R. 349, 356 (Bankr. D. Del. 2006). "A

bankruptcy trustee, as a third party outsider to the debtor's transactions, is generally afforded greater liberality in pleading fraud." In re Am. Bus. Fin. Servs., Inc., No. A-06-50826, 2007 WL 528859, at *3 (Bankr. D. Del. Feb. 13, 2007).

2. Rule 12(b)(6) Dismissal

A Rule 12(b)(6) motion to dismiss is designed to test the legal sufficiency of the factual allegations in the plaintiff's complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). All well-pleaded allegations in the complaint are accepted as true and are viewed in the light most favorable to the plaintiff. In re Rockefeller Ctr. Props., Inc. Secs. Litig., 311 F.3d 198, 205-06 (3d Cir. 2002). The Court is not required to accept legal conclusions or unsupported assertions. Papasan v. Allain, 478 U.S. 265, 286 (1986); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997). The Court may take judicial notice of certain facts. See, e.g., S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426 (3d Cir. 1999) ("To resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint."). A Rule 12(b)(6) motion will be granted if "it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See also Emerson v. Thiel Coll., 296 F.3d 184, 188

(3d Cir. 2002) (“A complaint will withstand an attack under [Rule] 12(b)(6) if the material facts as alleged, in addition to inferences drawn from those allegations, provide a basis for recovery.”) “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

B. MDC Defendants’ and Naples’ Motions to Dismiss

1. Standing

The MDC Defendants and Naples argue that to the extent the Trustee asserts claims on behalf of creditors, those claims should be dismissed for lack of standing. See, e.g., Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340, 347 (3d Cir. 2001) (“[A] bankruptcy trustee has no standing to assert claims on behalf of an estate's creditors.”).

In the Complaint, the Trustee asserts that (i) MDC’s wrongful prolongation of the Debtors resulted in the unlawful preference and enrichment of MDC at the expense of the Debtors and their creditors; (ii) in connection with the 2004 restructuring, MDC hindered, delayed, and defrauded creditors, including plaintiffs with pending lawsuits against the Debtors; (iii) all Defendants caused inter-company transfers amongst the Debtors resulting in less money for creditors; (iv) the Defendants breached fiduciary duties to the Debtors and

creditors; and (v) the deepening insolvency and liquidation of the Debtors outside bankruptcy was an effort to prefer and enrich MDC at the expense of the Debtors and their creditors.

(Complaint at ¶¶ 44, 50, 64, 70, and 92.)

Although the Trustee has included language that alleges creditors were damaged, the Trustee in every instance also asserts that the Debtors were damaged. (Complaint at ¶¶ 44, 50, 64, 70, 71 and 92.) Even though the Trustee's claims incidentally implicate creditors' rights, the Trustee has standing to assert the claims of the Debtors. See, e.g., R.F. Lafferty, 267 F.3d at 348-49 (concluding that when considering the issue of a trustee's standing "it is irrelevant that, in bankruptcy, a successfully prosecuted cause of action leads to an inflow of money to the estate that will immediately flow out again to repay creditors"). Consequently, the Court will not dismiss the counts against the MDC Defendants and Naples on standing grounds.

2. Breach of Fiduciary Duty

The Trustee asserts a breach of fiduciary duty count against all the MDC Defendants and Naples. The Trustee alleges that the "individual Defendants acted on their own behalf and as agents for and on behalf of the entity Defendants to commit and participate in the wrongs alleged herein." (Complaint at ¶ 66.) The Trustee specifically alleges that "MDC used its power as the

majority and controlling shareholder of [the Parent Debtor] to cause its representatives to serve on the Board of Directors of [the Debtors] and on the executive committee of that Board” (Complaint at ¶ 26.) The Trustee alleges that through this control of the Debtors’ operations, the MDC Defendants and Naples engaged in self-dealing, wrongfully prolonged the life of the Debtors to enrich themselves at the expense of creditors when the duties of “good faith, honest governance and [loyalty]” required an immediate bankruptcy filing and liquidation. (Id. at ¶¶ 43-44.) The Trustee further alleges that the MDC Defendants and Naples made fraudulent, preferential, and voidable transfers to themselves and conspired with TIAA to obtain a first security interest in the Debtors’ assets. The Trustee asserts that these actions were a breach of their fiduciary duties and resulted in damages of more than \$20 million. (Id. at ¶¶ 1-2, 27, 43-71.)

a. Exculpation Clause

The MDC Defendants and Naples argue four grounds for dismissal of the breach of fiduciary duty count. The MDC Defendants and Naples first contend that the Debtors’ charter included an exculpation clause which insulates the directors from liability for good faith breaches of the duty of care. See Certificate of Incorporation of The Brown Schools, Inc. at ¶ 13 (limiting directors’ liability for breach of fiduciary duty to the extent allowed by Delaware General Corporation Law). See

also 8 Del. Code Ann. § 102(b)(7) (2006) (allowing limitation of director liability for fiduciary duties except for the duty of loyalty, bad faith, intentional or knowing illegal conduct, or any transaction from which the director derived an improper personal benefit).

The Trustee responds that the defense of exculpation is an affirmative defense which the Court cannot consider on a motion to dismiss. See, e.g., In re Tower Air, Inc., 416 F.3d 229, 242 (3d Cir. 2005) (noting that "affirmative defenses generally will not form the basis for dismissal under Rule 12(b)(6)"); Deckard v. General Motors Corp., 307 F.3d 556, 560 (7th Cir. 2002) (concluding that granting a motion to dismiss based on an affirmative defense is improper because "the existence of a defense does not undercut the adequacy of the claim.").

The Court agrees with the Trustee. The exculpation clause is an affirmative defense and the determination of the viability of that defense is not proper at this stage. Tower Air, 416 F.3d at 238, 242 (stating that exculpation provisions are affirmative defenses that generally cannot form the basis of a Rule 12(b)(6) dismissal).

b. Business Judgment Rule

The Defendants also argue that the business judgment rule applies to and insulates the directors' decisions from attack. See, e.g., McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000) ("The

business judgment rule is a [rebuttable] presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” (internal quotations and citations omitted).

The Trustee responds that the application of the business judgment rule is also an affirmative defense which cannot form the basis for dismissal of the Complaint. See, e.g., Tower Air, 416 F.3d at 242; Deckard, 307 F.3d at 560; In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) (explaining that the business judgment rule “can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith.”)

The Court agrees with the Trustee. The application of the business judgment rule is an affirmative defense, the determination of which is not proper at the motion to dismiss stage. Tower Air, 416 F.3d at 238, 242.

c. Insider Status

The MDC Defendants argue that they were not “insiders” and thus were not fiduciaries. The Trustee alleges, however, that the MDC entities, through one of their affiliates, acquired 65% of the stock of the Parent Debtor. (Complaint at ¶ 27.) All MDC entities were owned and controlled by MDC. (Id. at 8.)

The Court concludes that the Trustee's allegation that the MDC entities, collectively, were controlling shareholders of the Parent Debtor is sufficient to state insider status and a fiduciary relationship. See, e.g., In re Hechinger Inv. Co. of Del., 274 B.R. 71, 93 (3d Cir. 2002) (stating that controlling shareholders are fiduciaries). See also 11 U.S.C. § 101(31).

d. Statute of Limitations

The MDC Defendants further contend that the Complaint should be dismissed as to any activities that occurred beyond the three-year statute of limitations (or prior to March 25, 2002). See, e.g., 10 Del. Code Ann. § 8106 (2006) (providing for three-year statute of limitations for actions arising out of fiduciary relations); In re Fruehauf Trailer Corp., 250 B.R. 168, 184 (D. Del. 2000) (same). The Trustee responds that the statute of limitations does not preclude the Complaint because the events occurred after April 2003.

The statute of limitations for the breach of fiduciary count is three years and the events that allegedly triggered a breach of fiduciary duty began in April 2003. The statute of limitations had not expired at the time of the bankruptcy petition on March 25, 2005. Therefore, pursuant to section 108(a) of the Bankruptcy Code, the Trustee had until the later of the end of the statute of limitations period or two years after

the bankruptcy petition to file such a claim.⁴ The claim was filed within two years of the petition date. Accordingly, the Court concludes that the claim is within the statute of limitations and the Complaint should not be dismissed on this ground.

3. Aiding and Abetting a Breach of Fiduciary Duty

The MDC Defendants and Naples argue that the aiding and abetting a breach of fiduciary duty count must be dismissed because (1) the claim may only be asserted against non-fiduciaries (which conflicts with the Trustee's assertion that Naples and all MDC defendants are insiders and fiduciaries), (2) the Trustee failed to allege knowing participation and damages, and (3) the statute of limitations precludes a cause of action for activities occurring prior to March 25, 2002. See, e.g., In re General Motors (Hughes) S'holder Litig., No. Civ. A. 20269, 2005 WL 1089021, at *23 (Del. Ch. May 4, 2005) (unpublished

⁴ Section 108(a) provides:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) two years after the order for relief.

11 U.S.C. § 108(a).

opinion) (providing that an aiding and abetting breach of fiduciary duty claim requires: "(1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary."); 10 Del. Code Ann. § 8106 (2006) (providing for three-year statute of limitations for actions arising out of fiduciary relations); Fruehauf Trailer, 250 B.R. at 184 (noting that a claim for aiding and abetting a breach of fiduciary duty under Delaware law carries a three-year statute of limitations).

The Court finds these arguments unpersuasive. Although the elements of a claim for aiding and abetting a breach of fiduciary duty count are couched in terms of the primary violator being a fiduciary and the aider and abettor a non-fiduciary, there is no case law that precludes such a claim against a fiduciary. While a corporate director owes the corporation fiduciary duties, in some instances those duties may be limited (by corporate charter or statute). Thus, the Court may find that a director had no fiduciary duty but aided and abetted a party that did.

The Complaint incorporates by reference the previous paragraphs and alleges:

73. If and to the extent that any Defendant is found not to have had a fiduciary duty to TBS at the time of the transactions complained herein, each such Defendant is nevertheless liable for having aided and abetted the

breach of fiduciary duty by one or more of the other Defendants possessing such duties at the relevant times.

74. Each non fiduciary Defendant substantially and knowingly participated in, benefitted from and aided and abetted the breach of fiduciary duty engaged in by the officers, directors and controlling shareholders of TBS.

(Complaint at ¶¶ 73-74.)

Accordingly, the Court concludes that the Trustee has stated a claim against the MDC Defendants and Naples for aiding and abetting a breach of fiduciary duty. Because the Complaint relies on events that occurred within three years of the petition date, the Court will not dismiss it. Fruehauf Trailer, 250 B.R. at 184.

4. Voidable Transfers

a. Actual Fraudulent Transfers

The MDC Defendants and Naples argue that to the extent the Trustee is pleading a claim of actual fraudulent transfer under the Bankruptcy Code and state law, the claim should be dismissed for failure to state actual fraud with particularity. See, e.g., Fed. R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."); Circle Y, 354 B.R. at 356 ("To plead fraud, the Trustee cannot merely recite the statutory elements.").

In the fraudulent transfer count the Trustee incorporates the previous allegations by reference and further alleges:

76. The Defendants orchestrated, participated in and/or aided and abetted the granting of security interests in property of the Debtors, and the transfer of money and other property directly or indirectly to or for the benefit of MDC . . . and did so with the actual intent to hinder, delay and/or defraud TBS's creditors.

77. To the extent that any Defendant received fees or other sums on account of services allegedly provided, including management fees, legal fees or other sums during the wrongful perpetuation of the Debtors' existence and/or while the breaches of fiduciary duty and other wrongs were being perpetuated by said Defendants, the monies received on account of such services constituted fraudulent and/or voidable transfers for which the Trustee is entitled to recover.

83. The transfers to MDC after January 1, 2003 for ASA fees and/or fees in connection with the April 2003 Transaction were made with actual intent to hinder or delay creditors. . . .

(Complaint at ¶¶ 76-77, 83.)

Although the Trustee is afforded liberality in pleading fraud, the Court concludes that the allegations of actual fraud within the fraudulent transfer count are insufficient and lack the requisite particularity required by Rule 9(b). For example, the Trustee does not specify what individual Defendant received which particular transfer. Further, in pleading actual fraud, the Trustee does little beyond merely reciting the elements of fraud. Accordingly, the Court concludes that the Trustee has failed to state a claim for actual fraudulent transfer. However, the Court will allow the Trustee leave to amend the count to state fraud with sufficient particularity. Fed. R. Civ. P. 15 (a) ("[A] party may amend the party's pleading . . . by leave of

court . . . and leave shall be freely given when justice so requires.”).

b. Constructively Fraudulent Transfers

The MDC Defendants and Naples argue that the Court should dismiss the constructively fraudulent transfer claim because the Trustee failed to identify which transfers were constructively fraudulent, the transferee of the transfers, and the value given for each transfer. Global Link Telecom, 327 B.R. at 718 (dismissing constructive fraud count because the allegations in the complaint provided “no information on the Debtors’ financial status or the value of what was received in exchange” for each transfer).

The Complaint alleges:

79. The Debtors failed to receive reasonably equivalent value in exchange for the transfers to MDC . . . at a time when (i) [the Debtors were] insolvent, (ii) [the Debtors were] engaged in business for which [their] remaining property constituted unreasonably small capital for its needs, and/or (iii) the Defendants knew or should have known that [the Debtors] would incur additional debts that would be beyond [the Debtors’] ability to pay as such debts matured.

83. The transfers to MDC after January 1, 2003 for ASA fees and/or fees in connection with the April 2003 Transaction . . . were made . . . when [the Debtors] believed [they] would incur debts that would be beyond [their] ability to pay as they matured.

(Complaint at ¶¶ 79, 83.) The Trustee does not allege which transfers are avoidable or the date of the transfers. Also, the Trustee did not allege the purported value received in exchange

for the transfers. Further, the Trustee does not allege whether Naples, an employee and not a director of MDC, received any transfers. Accordingly, the Court concludes that the Trustee has failed to state a claim for constructively fraudulent transfers against the MDC Defendants and Naples. The Court will allow the Trustee to amend the count to add the required details. Fed. R. Civ. P. 15(a).

c. Aiding and Abetting Fraudulent Transfers

The MDC Defendants and Naples argue that the Trustee has failed to state a claim against them for aiding and abetting fraudulent transfers because Delaware does not recognize the cause of action. See, e.g., Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 203 (Del. Ch. 2006) (stating, but not holding, that “[d]espite the breadth of remedies available under state and federal fraudulent conveyance statutes, those laws have not been interpreted as creating a cause of action for ‘aiding and abetting’.”). See also Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 637 (3d Cir. 2000) (“The opinions of intermediate appellate state courts are ‘not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise’.”)

The Trustee responds that the Supreme Court of Delaware has not decided the issue of whether a cause of action for aiding and abetting a fraudulent conveyance exists, but there is a sound

basis for believing that the Court would so hold. See, e.g., Nationwide, 230 F.3d at 637 (explaining that if a state's highest court has not decided an issue, a federal court must predict how the state court would decide). See also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 172 (Del. 2002) (recognizing a cause of action for aiding and abetting a breach of fiduciary duty that was created by agreement); Zerby v. Allied Signal, Inc., No. 00C-07-068-FSS, 2001 WL 112052, at *4, 8-9 (Del. Super. Feb. 2, 2001) (unpublished opinion) (failing to dismiss a count alleging aiding and abetting of fraudulent misrepresentation, suppression, and concealment of material information). Furthermore, the Trustee asserts that it is not clear whether Delaware law will even apply to the fraudulent transfer count.

Although the Trenwick decision is well-reasoned, the Court is not prepared at this stage to dismiss this count based on that decision. It is likely this litigation will be protracted and further elucidation on this issue by the Delaware Supreme Court may be forthcoming in the interim. Accordingly, the Court will not dismiss the aiding and abetting fraudulent transfers count.

d. Preferences

The MDC Defendants and Naples argue that the Court should dismiss the preferential transfer claims against them because the Trustee has failed to plead a specific transfer within ninety

days (non-insider) or between 90 days and one year before the date of the filing of the bankruptcy petition (insider), identity of the transferor/transferee, and other required elements of the cause of action, including facts sufficient to make the MDC Defendants and Naples insiders. See, e.g., 11 U.S.C. § 547(b); In re DVI, Inc., 326 B.R. 301, 311 (Bankr. D. Del. 2005) (finding a complaint "adequately [pled] a preference claim by clearly identifying the nature and amount of each antecedent debt and by identifying each improper transfer by date, name of debtor/transferor, name of transferee and the amount of the transfer.").

Section 547(b) provides that a transfer is preferential if it was made

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

In the Complaint, the Trustee alleges:

81. The transfers of the security interests and any property pursuant thereto to MDC were transfers of interests of the Debtors in property (i) to or for the benefit of a creditor, (ii) for or on account of an antecedent debt owed by the Debtors before the transfers were made, (iii) made while the Debtors were insolvent, (iv) made between ninety days and one year before the date of the filing of the bankruptcy petition to MDC who was an insider as defined in 11 U.S.C. §101(31) at the time of such transfers, and (v) that enables MDC as a creditor to receive more than MDC would receive if the case were a case under chapter 7 of the Bankruptcy Code, the transfer had not been made and MDC received payment of such debt to the extent provided by the provisions of the Bankruptcy Code. Accordingly, the transfers of the security interests and any property subject thereto to or for the benefit of MDC are avoidable under 11 U.S.C. §547(b) together with applicable state law and are subject to recovery in accordance with 11 U.S.C. §550.

(Complaint at ¶ 81.) Further, it is alleged that the Debtors owed MDC over \$12.5 million (unsecured antecedent debt) in April 2003 and that, as part of the July 2004 Restructuring transaction, MDC was granted a second lien in substantially all the Debtors' property. (Id. at ¶ 53.) As discussed above in Part III.B.2, the Trustee sufficiently alleges that the MDC entities were controlling shareholders of the Debtors and thus insiders. 11 U.S.C. § 101(31)(B) & (41). Moreover, the individual corporate directors are also insiders. 11 U.S.C. § 101(31)(I). The July 2004 Transaction was within one year of the March 2005 petition date. Finally, the Trustee alleges that the transfer enabled MDC to receive more than it would under chapter 7.

The Court finds the allegations in the Complaint sufficient to state a claim against the MDC entities, but not against McCown, Hellman, or Naples because there is no allegation of a preferential transfer to them. Accordingly, the Court concludes that the preferential transfer claim against the MDC entities is sufficient to withstand the Rule 12(b)(6) motion. The Court will, however, dismiss the count as to the individual Defendants (McCown, Hellman, and Naples).

e. Section 550 Recovery

_____The MDC Defendants argue that the Court must dismiss the Trustee's count against MDC pursuant to section 550 for recovery of the \$18 million payment to TIAA because the Trustee does not plead (i) a voidable transfer; (ii) receipt of proceeds by an MDC Defendant; and (iii) the amount of funds received. The MDC Defendants further argue that to the extent the Trustee seeks recovery of funds relative to the subordinate lien granted to MDC, the Trustee has failed to allege any dilution of the estate.

The Trustee responds that to the extent the security interest granted to and payments made to TIAA were made for the benefit of MDC they are recoverable under sections 550(a) and 544(b) of the Bankruptcy Code and Delaware state law. 11 U.S.C. §§ 550(a), 544(b); 6 Del. Code Ann. § 1308(b).

Section 550 of the Bankruptcy Code provides:

(a) Except as otherwise provided in this section, to the extent that a transfer is

avoided under section 544, 545, 547, 548, 549, 553 (b), or 724 (a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a) (emphasis added). Delaware law similarly provides for recovery in the following instance:

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under § 1307(a)(1) of this title, 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 1st 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 or obligee who took for value or from any subsequent transferee or obligee.

6 Del. Code Ann. 1308(b) (emphasis added).

In the Complaint the Trustee asserts:

85. By receiving the right to participate in payments made to TIAA, MDC received the benefit of the transfers of property and the security interest to TIAA. Pursuant to 11 U.S.C. § 550(a)(1) and applicable state law, MDC is an entity whose benefit the transfer of the security interest and the payment of more than \$18 million to TIAA was made. MDC is therefore liable for the full amount of the transfers to TIAA.

(Complaint at ¶ 85.)

In the Final Cash Collateral Order the Trustee acknowledged that the TIAA lien and payments on the TIAA debt were not avoidable. Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269, 275 (3d Cir. 2004) (explaining that facts conceded in pleadings are binding judicial admissions). Pursuant to the Final Cash Collateral Order, the Trustee had ninety days from the petition date to file any claim challenging the TIAA security interests, liens and pre-petition debt, including such claims arising under sections 506, 544, 547, 544 and 552 and the doctrines of equitable subordination and deepening insolvency. (Final Cash Collateral Order at ¶ 32.)

The Trustee did not do so. The Trustee's failure to timely file such a claim against TIAA resulted in a waiver of his right to do so. Further, the Trustee requested (and the Court approved) the authority to pay a portion of certain asset sale proceeds to TIAA in partial satisfaction of its pre- and post-petition secured claims. (See June 30, 2005 Sale Motion at ¶¶ 84-86.; August 12, 2005 Sale Order at ¶¶ 11, 15.)

Because the Trustee cannot avoid the transfer to the initial transferee, TIAA, the Trustee cannot recover against the mediate transferee, MDC. See, e.g., In re VF Brands, Inc., 282 B.R. 134, 139 (Bankr. D. Del. 2002) ("Under section 550 of the Bankruptcy Code, in order to recover against a mediate or intermediate transferee, the claimant must establish that the transfer is a

voidable fraudulent conveyance vis-à-vis the initial transferee.”). Consequently, the Court will dismiss this claim against MDC.⁵

f. Statute of Limitations

The MDC Defendants and Naples object to the entire fraudulent transfer count on statute of limitations grounds. The Trustee has not specified the dates for many of the alleged transfers. The Court will allow the Trustee to amend the Complaint to allege specific transfer dates, but to the extent that the transfer dates are outside the applicable statute of limitations period, they will be subject to dismissal under Rule 12(b)(6). 11 U.S.C. § 548 (pre-BAPCPA provision providing for avoidance of transfers within one year of filing of petition); 11 U.S.C. 544 (allowing avoidance under state law); 6 Del. Code § 1309 (limiting the avoidance period to four years after transfer was made or within one year after the transfer could have reasonably been discovered).

5. Corporate Waste

The MDC Defendants and Naples argue for dismissal of the corporate waste count on the grounds that the claim fails as a matter of law and the statute of limitations precludes the claim

⁵ The Court will not address the MDC Defendants’ argument that the subordinate lien caused no dilution of the estate because the Trustee’s claim is based on MDC’s participatory interests in funds received in relation to TIAA’s first lien. (Complaint at ¶ 85.)

to the extent it relies on activity pre-dating March 25, 2002. Brehm v. Eisner, 746 A.2d 244, 263-64 (Del. 2000) (finding of corporate waste in risky business transactions is "confined to unconscionable cases where directors irrationally squander or give away corporate assets."); 10 Del. Code Ann. § 8106 (providing three-year statute of limitations).

Although the Trustee does not respond to this argument, the Court cannot conclude that the corporate waste count should be dismissed. The Complaint incorporates the preceding paragraphs by reference and alleges:

88. The payment of fees to MDC in connection with the April 2003 Transaction or otherwise, the payment of fees to [Winstead,] the granting of security interests in which MDC participated had no rational business purpose and were so one-sided that no business person of ordinary sound judgment could believe that [the Debtors] received adequate consideration in exchange for the payments and/or transfers.

(Complaint at ¶ 88.)

A claim for corporate waste under Delaware law is subject to the following standard:

The judicial standard for determination of corporate waste is well developed. Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift. If, however, there is any substantial consideration received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder

would conclude ex post that the transaction was unreasonably risky.

Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000) (emphasis in original). Therefore, before the Court may find corporate waste, it must determine whether adequate consideration was received and whether good faith existed. Such a factual inquiry is inappropriate at the motion to dismiss stage. Further, it appears that the Trustee's corporate waste count is based on the April 2003 transaction and activities beyond. Therefore, the claim falls within the three-year statute of limitations period.

Accordingly, after review of the facts alleged in the Complaint and the standard for corporate waste, the Court concludes that the Trustee has alleged enough facts to place the MDC Defendants and Naples on sufficient notice so that they may prepare a defense. Accordingly, the Court will not dismiss the corporate waste count.

6. Deepening Insolvency

The MDC Defendants and Naples argue that the Court must dismiss the deepening insolvency count because (i) there is no cause of action for deepening insolvency in Delaware, (ii) if there is, all the elements of the cause of action are not pled, (iii) the business judgment rule protects the board of directors' decision concerning debt incurrence; (iv) the count is based on fraud and was not pled with particularity; and (v) the statute of limitations has run.

The Trustee responds by contending, among other things, that Delaware law may not even apply to the count because the Debtors operated in more than ten states and Puerto Rico and the agreements governing the July 2004 Restructuring are governed by New York law. Cf. Royal Indemnity Co. v. Pepper Hamilton LLP, Civ. A. No. 05-165-JJF, 2007 WL 881415, at *9 (D. Del. Mar. 22, 2007) (holding, with little analysis, that a Rule 12(b)(6) dismissal was not warranted for allegations of deepening insolvency under Delaware, Pennsylvania, and North Carolina law after “[c]onsidering the uncertainty of the law in this area and drawing all reasonable factual inferences in the light most favorable to the Plaintiff, [ultimately concluding] that Plaintiff . . . pled sufficient facts to state a claim for deepening insolvency.”).

The MDC Defendants and Naples contend that Delaware law applies. MDC was a controlling shareholder of the Parent Debtor, which is a Delaware corporation. The decisions a company makes, through officer and board action, to incur debt for use in operations and to restructure such debt, are business decisions governing internal affairs that necessarily affect shareholder value. Accordingly, the law of the state of incorporation applies to the deepening insolvency count. See, e.g., McDermott Inc. v. Lewis, 531 A.2d 206, 215 (Del. 1987) (noting that the internal affairs “doctrine governs the choice of law

determinations involving matters peculiar to corporations, that is, those activities concerning the relationships inter settlement of the corporation, its directors, officers and shareholders. . . . [It] requires that the law of the state of incorporation should determine issues relating to internal corporate affairs.”).

The MDC Defendants and Naples further contend that Delaware law does not recognize a deepening insolvency cause of action. See, e.g., Trenwick, 906 A.2d at 174, 204-07 (concluding that the cause of action “deepening insolvency” does not exist under Delaware law but that “[e]xisting equitable causes of action for breach of fiduciary duty, and existing legal causes of action for fraud, fraudulent conveyance, and breach of contract are the appropriate means by which to challenge the actions of boards of insolvent corporations.”). See also In re Radnor Holdings Corp., 353 B.R. 820, 842 (Bankr. D. Del. 2006) (relying on Trenwick in noting that Delaware law does not recognize a claim for deepening insolvency).

Although the Trenwick decision is well-reasoned, the Court is not prepared at this stage to dismiss this count based on that decision. Cf. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, No. 521, 2006, 2007 WL 1453705 (Del. May 18, 2007) (holding that creditors of corporation in zone of insolvency do not have direct, as opposed to derivative, claims for breach of

fiduciary duty against corporation's directors). As noted above, it is likely that this litigation will be protracted and further elucidation on this issue by the Delaware Supreme Court may be forthcoming in the interim. Accordingly, the Court will not dismiss the deepening insolvency count.

7. Civil Conspiracy

The MDC Defendants and Naples argue that the civil conspiracy and aiding and abetting civil conspiracy counts against them fail because civil conspiracy is not an independent cause of action in Delaware, all the elements of a civil conspiracy count are not alleged, and the statute of limitations bars the cause of action as it pertains to activities occurring before March 25, 2002. See, e.g., In re Crown-Simplimatic, Inc., 299 B.R. 319, 327 (Bankr. D. Del. 2003) ("Under Delaware law, civil conspiracy cannot be sustained as an independent tort, but rather the allegations must relate to the completion of a tort independent of the conspiracy itself." (internal quotations and citation omitted)); Nicolet, Inc. v. Nutt, 525 A.2d 146, 149-50 (Del. 1987) (stating that the elements of civil conspiracy are: "(1) [a] confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) [a]ctual damage."); Amaysing Techs. Corp. v. Cyberair Commc'n, Inc., No. Civ. A. 19890-NC, 2005 WL 578972, at *7 (Del. Ch. Mar. 3, 2005) (holding that, except when officers

and agents act pursuant to personal motives, "a corporation generally cannot be deemed to have conspired with its officers and agents for purposes of establishing jurisdiction under the conspiracy theory"); 10 Del. Code Ann. § 8106 (providing three-year statute of limitations); Glassberg v. Boyd, 116 A.2d 711, 717-18 (Del. Ch. 1955) (applying section 8106 three-year statute of limitations period to a civil conspiracy count).

The Trustee responds that he has alleged all required elements, including underlying independent wrongs and a conspiracy amongst separate entities (i.e., the MDC entities, the three directors, TIAA, and Winstead). The conspiracy count of the Complaint incorporates the previous paragraphs and additionally alleges:

95. Each of the Defendant MDC entities conspired with [the Directors McCown, Hellman, and Naples] and [Winstead] and each other, in an effort to perpetrate, facilitate, and aid and abet the breaches of fiduciary duty and other wrongs alleged herein.

96. The Defendants undertook substantial overt acts, as aforesaid, in furtherance of the conspiracies alleged herein and are liable for the damages and harm to TBS.

(Complaint at ¶¶ 95-96.)

As discussed above, the Trustee has alleged underlying independent wrongs against the MDC Defendants, including breach of fiduciary duty. However, the MDC Defendants could not conspire with each other. Amaysing Techs., 2005 WL 578972, at *7 (a corporation cannot conspire with itself or its officers,

directors, or employees). Further, Naples was an employee of MDC who the Trustee alleges acted as an agent for the entity; therefore, the MDC Defendants could not conspire with Naples. (Complaint at ¶¶ 23, 66.) They likewise could not conspire with TIAA because the Trustee has not (and cannot) assert any wrongdoing by TIAA.⁶ The Trustee, however, does allege that Winstead aided and abetted the MDC Defendants in the July 2004 Restructuring, which resulted in the granting of first and second liens in substantially all the Debtors' property to TIAA and MDC. (Complaint at ¶ 53.) The Trustee further alleges that Winstead influenced the Debtors to act in the best interest of McCown and MDC and to prolong the existence of the Debtors so that Winstead could collect substantial legal fees. (Id. at ¶ 57.) Additionally, the Trustee asserts: "[Winstead] aided, abetted, and substantially assisted MDC in effectuating the July 2004 Restructuring, knowing full well of the Defendants' unlawful objective to prefer MDC over non-insider creditors . . . and . . . to hinder, delay and defraud litigants into settling cheaply or abandoning their meritorious claims."

⁶ In footnote 2 in the Complaint the Trustee states: "No claims or wrongdoing are asserted herein against TIAA. The Trustee previously provided a release to TIAA pursuant to a Bankruptcy Court approved agreement whereby TIAA permitted the use of cash collateral by the estates of the Debtors." (Complaint at ¶ 53, footnote 2.)

The Court concludes, however, that the Complaint fails to identify what unlawful acts were done in furthering any conspiracy between the MDC Defendants and Winstead. The allegations that Winstead "influenced," "aided and abetted," and "substantially assisted," the wrongs of the MDC Defendants is not enough to state a claim for conspiracy. Accordingly, the Court concludes that the Trustee has failed to state a claim for civil conspiracy and aiding and abetting civil conspiracy against the MDC Defendants, Naples, and Winstead. However, the Court will allow the Trustee to amend his Complaint to state civil conspiracy with sufficient specificity. Fed. R. Civ. P. 15(a) (providing that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.").

8. Declaratory Relief

_____The MDC Defendants and Naples argue that the Trustee fails to state a claim against them for equitable subordination and other declaratory relief because the Trustee has stated no wrongs committed by them. 11 U.S.C. § 510(c); In re SubMicron Sys. Corp., 432 F.3d 448, 462 (3d Cir. 2006) (stating that the Third Circuit has never adopted an inequitable conduct requirement, but noting that courts generally require three elements for equitable subordination: (1) inequitable conduct on the part of the claimant, (2) a resulting injury to other creditors or an unfair

advantage to the claimant, and (3) consistency of equitable subordination with the Bankruptcy Code).

The Court cannot agree with the MDC Defendants and Naples. As discussed above, the Trustee has sufficiently stated claims of wrongdoing against the MDC Defendants and Naples. The claims allegedly resulted in injury to the Debtors and to other creditors or conferred an unfair advantage on the MDC Defendants and Naples. Accordingly, the Court will not dismiss this count against the MDC Defendants and Naples.

9. Punitive Damages

_____The Trustee seeks punitive damages on the basis that the Defendants' conduct "was intentional, engaged in for an improper purpose and with a bad motive, and was sufficiently outrageous to justify the imposition of punitive damages." (Complaint at ¶ 68.) The MDC Defendants and Naples argue that none of the alleged conduct rises to the level of wanton or willful disregard for the rights of the Debtors. See, e.g., Cloroben Chem. Corp. v. Comegys 464 A.2d 887, 891 (Del. 1983) ("Punitive damages are recoverable where the defendant's conduct exhibits a wanton or wilful disregard for the rights of plaintiff.").

To determine whether conduct rises to a level that warrants the award of punitive damages requires a factual inquiry that is not appropriate at the motion to dismiss stage. See, e.g., In re Am. Bus. Fin. Servs., Inc., No. A-06-50826 (MFW), 2007 WL 465571,

at *10 (Bankr. D. Del. Feb. 13, 2007). Consequently, the Court will not dismiss the punitive damages claim against the MDC Defendants and Naples.

C. Winstead's Motion to Dismiss

_____The Trustee alleges that at the urging of McCown and MDC the Debtors employed Winstead beginning in May 2003. (Complaint at ¶ 56.) Before the Winstead law firm was employed by the Debtors, Winstead had represented the Defendants McCown and/or MDC in unrelated matters. (Id. at ¶55.) Further, the Trustee asserts that Winstead's named principal, William Sechrest, was a close friend of McCown. (Id.)

The only alleged transaction in the Complaint with which Winstead was involved is the July 2004 Restructuring in which TIAA and MDC were granted first and second liens on the Debtors' property. (Id. at ¶ 53.) The Trustee asserts that Winstead aided and abetted MDC in the July 2004 Restructuring which resulted in preferential and fraudulent transfers to MDC. (Id. at ¶ 60.) The Trustee further alleges that Winstead, as a result of its close relationship with McCown and MDC, influenced the Debtor to act in the best interest of McCown and MDC by prolonging the existence of the Debtors, which were insolvent or in the zone of insolvency. (Id. at ¶¶ 57, 59.) Moreover, it is asserted that Winstead also prolonged the Debtors' business so

that Winstead could collect over \$700,000 in fees. (Id. at ¶¶ 57-58.)

1. Breach of Fiduciary Duty

Winstead argues that the breach of fiduciary duty count against it fails because the Trustee has not alleged any facts to support a finding that Winstead had a fiduciary duty or actions which constituted a breach of that duty.

The Trustee responds that Winstead was an insider of the Debtors. See, e.g., 11 U.S.C. § 101(31)(B) (providing that a person (entity) in control of a corporation is an insider); In re Oakwood Homes Corp., 340 B.R. 510, 523 (Bankr. D. Del. 2006) (noting that “courts have applied insider status flexibly to include a broad range of parties who have a close relationship with the debtor.” (internal quotations and citation omitted)); In re Beaver Valley Builder’s Supply, Inc., 177 B.R. 507, 513 (Bankr. W.D. Pa. 1995) (stating that the insider list in section 101(31) is not exhaustive). Further, an attorney stands in a fiduciary relationship with his client. Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988).

Additionally, the Trustee contends that Winstead participated in a scheme with the other Defendants to hinder creditors from recovering against the Debtors’ assets or to cause them to abandon their meritorious claims by granting a first lien to TIAA, a second lien to MDC, and participation rights to MDC.

(Complaint at ¶¶ 51-59.) The Trustee supports his allegations by citing to a memorandum from William Sechrest, a named principal of Winstead, that was addressed to McCown, Hellman, and Naples. (Amended Complaint, Exhibit A, October 8, 2004, Memorandum from Winstead to The Brown Schools, Inc.) In the Memorandum, William Sechrest wrote:

This memorandum concerns The Brown Schools, Inc. ("TBS") and preserving the value of TBS. It assumes TIAA is well secured and that there is exposure in MDC's PIK Notes. It assumes a current value of \$30-35,000,000 for TBS which makes the MDC PIK Notes worth from \$10-15 million.

TBS has always believed that once TIAA and MDC were secured creditors there would be opportunities to settle the material litigation growing out of the six RTCs sold to PSI and the 6 or 7 lawsuits pending in Florida. TBS does, in fact, now have the opportunity to settle most of this litigation for a relatively small amount relative to the assessment by TBS' counsel of TBS' monetary exposure in these cases. The problem is TBS' cash constraints make funding settlements impossible and a continued defense of these claims unaffordable. What needs to happen is a cash infusion to allow the settlement of existing cases and to allow appropriate defensive actions (e.g., insolvency proceedings) in cases where only TBS subsidiaries are exposed. . . .

(Id.) The Trustee asserts that the Memorandum demonstrates Winstead's knowledge of the Debtors' insolvency and the effect of granting liens to TIAA and MDC.

There is a dispute as to whether Winstead was operating in the Debtors' or its own best interests when it assisted in the transaction whereby TIAA and MDC were granted liens in the Debtors' assets and collected fees from the Debtors. The Court

concludes, however, that the Trustee has alleged sufficient facts to state a claim for breach of fiduciary duty against Winstead and should be allowed to prove this claim. See, e.g., Gibson v. Ellis, 126 S.W.3d 324, 330 (Tex. App. 2004) ("An attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interest to his own, retaining the client's funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends."). Consequently, the Court will not dismiss the breach of fiduciary duty count against Winstead.

2. Aiding and Abetting Breach of Fiduciary Duty

Winstead argues that the Trustee fails to state the required elements of its claim for aiding and abetting a breach of fiduciary duty. See, e.g., General Motors (Hughes) S'holder Litig., 2005 WL 1089021, at *23 (stating that the four elements of aiding and abetting a breach of fiduciary duty claim are (1) existence of a fiduciary relationship, (2) breach of fiduciary duty, (3) knowing participation by the non-fiduciary, and (4) "damages to the plaintiff result[ing] from the concerted action of the fiduciary and the non-fiduciary.").

As discussed above, the Trustee has stated a claim for breach of fiduciary duty against the other Defendants, including

MDC. The Trustee alleges that Winstead aided and abetted MDC in its breach of fiduciary duties by assisting in the July 2004 Restructuring which resulted in the granting of first and second liens to TIAA and MDC. (Complaint at ¶ 53.) However, it is not clear from the Complaint what specific actions Winstead took to aid and abet MDC. Therefore, the Court concludes that the Trustee's factual allegations are insufficient to withstand a motion to dismiss. Consequently, the Court will dismiss the aiding and abetting a breach of fiduciary duty count against Winstead but will allow the Trustee to amend to add more factual detail to the allegations. Fed. R. Civ. P. 15(a).

3. Fraudulent and/or Voidable Transfers

Winstead argues that the Trustee has failed to state a claim for fraudulent transfer against it because there is no allegation that Winstead was a transferee or transferor in the July 2004 Restructuring. 11 U.S.C. §§ 548, 544, 550.

In the Complaint, the Trustee alleges:

76. The Defendants orchestrated, participated in and/or aided and abetted the granting of security interests in property of the Debtors, and the transfer of money and other property directly or indirectly to or for the benefit of MDC and [Winstead] and did so with the actual intent to hinder, delay and/or defraud TBS's creditors.

77. To the extent that any Defendant received fees or other sums on account of services allegedly provided, including management fees, legal fees or other sums during the wrongful perpetuation of the Debtors' existence and/or while the breaches of fiduciary duty and other wrongs were being perpetuated by said Defendants, the monies received on account of such

services constituted fraudulent and/or voidable transfers for which the Trustee is entitled to recover.

. . . .
79. The Debtors failed to receive reasonably equivalent value in exchange for the transfers to [Winstead] at a time when (i) [the Debtors were] insolvent, (ii) [the Debtors were] engaged in business for which [their] remaining property constituted unreasonably small capital for its needs, and/or (iii) the Defendants knew or should have known that [the Debtors] would incur additional debts that would be beyond [the Debtors'] ability to pay as such debts matured.

(Complaint at ¶¶ 76-77, 79.)

Although the Trustee alleges that Winstead was the transferee of \$700,000 in legal fees, he does not allege enough facts from which the Court may conclude that the payment was for less than reasonably equivalent value or was to hinder, delay, or defraud the Debtors' creditors. 11 U.S.C. § 548. Accordingly, the Court concludes that the Trustee has failed to state a claim against Winstead for fraudulent transfer, but will allow the Trustee to amend the count to add more detail. Fed. R. Civ. P. 15(a).

4. Deepening Insolvency

Winstead contends that the deepening insolvency count against it must be dismissed because Delaware law does not recognize the cause of action. See, e.g., Trenwick, 906 A.2d at 204-07 (concluding that Delaware law does not recognize the claim of deepening insolvency); Nationwide, 230 F.3d at 637 (explaining that absent a controlling decision from a state's highest court,

a federal court must predict how the state's highest court would decide an issue).

Although the Trenwick decision is well-reasoned, the Court is not prepared at this stage to dismiss this count based on that decision. Cf. N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, No. 521, 2006, 2007 WL 1453705 (Del. May 18, 2007) (holding that creditors of corporation in zone of insolvency do not have direct, as opposed to derivative, claims for breach of fiduciary duty against corporation's directors). As noted above, it is likely that this litigation will be protracted and further elucidation on this issue by the Delaware Supreme Court may be forthcoming in the interim. Accordingly, the Court will not dismiss the deepening insolvency count.

5. Civil Conspiracy

Winstead argues that the civil conspiracy count against it fails because the Trustee fails to state an underlying wrong or allege other facts indicating the formation and operation of a conspiracy. See, e.g., Crown-Simplimatic, 299 B.R. at 327 (noting that civil conspiracy is not an independent cause of action under Delaware law and requires an underlying independent tort); Nicolet, 525 A.2d at 149-50 (providing that the elements of civil conspiracy are: "(1) [a] confederation or combination of two or more persons; (2) [a]n unlawful act done in furtherance of the conspiracy; and (3) [a]ctual damage.")

The Court agrees with Winstead. For the reasons discussed above, the Trustee has failed to provide sufficient detail of the alleged conspiracy among the Defendants. Accordingly, the Court will dismiss this count against Winstead as well, but will allow the Trustee leave to amend to add more detail. Fed. R. Civ. P. 15(a).

6. Declaratory Relief

_____Winstead seeks dismissal of the requested declaratory relief to disallow or equitably subordinate its claims because (i) it filed no proof of claim, (ii) there is no independent claim the Debtors have against it that results in recovery, and (iii) there is no alleged inequitable conduct to warrant equitable subordination. See, e.g., 11 U.S.C. § 502(d) (disallowing claim where debtor has claim against claimant for recovery of transfer that is avoidable); In re Hechinger, 327 B.R. 537, 551 n.22 (D. Del. 2005) (stating that most courts require a showing of inequitable conduct before ordering equitable subordination).

The Court agrees with Winstead. Because there is no filed proof of claim against the estate to be disallowed or subordinated, this request for relief is futile. Consequently, the Court will dismiss this count against Winstead.

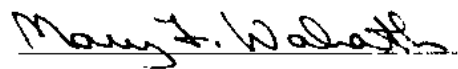
IV. CONCLUSION

For the foregoing reasons, the Court concludes that the Defendants' Motions to dismiss will be granted in part.

An appropriate Order is attached.

Dated: June 5, 2007

BY THE COURT:

A handwritten signature in black ink, appearing to read "Mary F. Walrath". The signature is written in a cursive style with a horizontal line underneath.

Mary F. Walrath
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)	Chapter 7
)	
THE BROWN SCHOOLS, et al.,)	Case No. 05-10841
)	
Debtors.)	
)	
<hr/>		
GEORGE L. MILLER, Chapter 7)	Adversary No. 06-50861 (MFW)
Trustee,)	
)	
Plaintiff,)	
)	
v.)	
)	
McCOWN DE LEEUW & CO., INC.;)	
KIDS ACQUISITION, LLC; McCOWN)	
DE LEEUW & CO. III, L.P.; MDC)	
MANAGEMENT COMPANY, III, L.P.;)	
MDC MANAGEMENT COMPANY, IIIA,)	
L.P.; McCOWN DE LEEUW & CO. III)	
(EUROPE), L.P.; McCOWN DE LEEUW)	
& CO. III (ASIA), L.P.; GAMMA)	
FUND LLC, McCOWN DE LEEUW & CO.)	
IV, L.P.; McCOWN DE LEEUW & CO.)	
IV ASSOCIATES, L.P.; DELTA FUND)	
LLC; MDC MANAGEMENT COMPANY IV,)	
LLC; McCOWN DE LEEUW & CO.,)	
LLC; GEORGE McCOWN; ROBERT)	
HELLMAN; ROBERT J. NAPLES; and,)	
WINSTEAD SECHREST & MINICK,)	
P.C.,)	
)	
Defendants.)	

ORDER

AND NOW, this **5th** day of **JUNE, 2007**, after consideration of the Motions of the MDC Defendants, Winstead Sechrest & Minick, P.C. ("Winstead"), and Robert J. Naples ("Naples") for dismissal

of the Trustee's complaint against them and the Trustee's opposition thereto, it is hereby,

ORDERED that the Motions to Dismiss are **GRANTED** in part and **DENIED** in part; and it is further

ORDERED that the count against the MDC Defendants and Naples for actual fraudulent transfers is **DISMISSED**, with leave to amend the Complaint within thirty days hereof to state fraud with sufficient particularity; and it is further

ORDERED that the constructively fraudulent transfer count against the MDC Defendants and Naples is **DISMISSED**, with leave to amend the Complaint within thirty days hereof to add the required details; and it is further

ORDERED that the preferential transfer count against George McCown, Robert Hellman, and Robert Naples is **DISMISSED**; and it is further

ORDERED that the claim against McCown De Leeuw & Co., Inc. ("MDC") under section 550 for recovery of payments made by the Debtors to TIAA and remitted to MDC is **DISMISSED**; and it is further

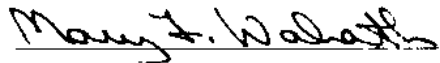
ORDERED that the civil conspiracy count against the MDC Defendants, Naples and Winstead is **DISMISSED**, but the Trustee is granted leave to amend the count to add sufficient facts; and it is further

ORDERED that the aiding and abetting a breach of fiduciary duty count against Winstead is **DISMISSED**, with leave to amend the Complaint within thirty days hereof to add more detail; and it is further

ORDERED that the fraudulent transfer count against Winstead is **DISMISSED**, however, the Trustee is granted leave to amend the count to provide sufficient factual allegations; and it is further

ORDERED that the requested declaratory relief claim against Winstead for claim disallowance and subordination is **DISMISSED**.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: Steven M. Coren, Esquire¹

¹ Counsel is to serve a copy of this Opinion and Order on all interested parties and file a Certificate of Service with the Court.

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