IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
U.S.A. FLORAL PRODUCTS, INC., et. al,	)	Case No. 01-1230 (MFW)
Debtors	)	Jointly Administered
ROBERT F. TROISIO, Plan Administrator for the estate of USA FLORAL PRODUCTS, INC.	)	Adv. Proc. No. 03-52514-MFW
Plaintiff,	)	
v.	)	
ROBERT POIRIER, VINCENT W. EADES, EDWARD J. MATHIAS, GUSTAVO MORENO, and JONATHON LEDECKY	)	
Defendants.	)	

MEMORANDUM OPINION[1]

Before the Court is the Motion of the Defendants to dismiss four of the five Counts of the Complaint filed by the Plan Administrator of USA Floral Products, Inc. ("the Debtor"). The Plan Administrator opposes this Motion. For the reasons set forth below, we grant the Motion in part and deny the Motion in part.

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[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. BACKGROUND

Founded in April of 1997, the Debtor was created to acquire commercial importers/exporters of perishable floral products and related goods. After an initial public offering in October of 1997, the Debtor entered into a revolving credit agreement with a variety of lenders for $100 million. The Debtor used the proceeds of the loan to acquire smaller regional companies and to integrate them into one large chain. By the end of its acquisitions, the Debtor had acquired thirty-two companies.

On April 4, 2001, the Debtor filed a petition for relief under chapter 11, together with several of its subsidiaries.[2] The estate was liquidated and a liquidation plan was confirmed on December 12, 2001. The Plan Administrator was approved by this Court, pursuant to the Confirmation Order, to prosecute the estates' causes of action and to wind-down the Debtor's affairs in accordance with the Confirmed Plan.

On April 1, 2003, the Plan Administrator filed suit against former officers and directors of the Debtor, alleging that they negligently managed the Debtor, causing it to incur substantial

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[2] Sixteen of the Debtor's subsidiaries also filed petitions under chapter 11. They are: ASG Acquisition Corp., CFL Acquisition Corp., Channel Islands Floral, Inc., Petals Distributing, Inc., Rose City Floral, Inc., CFX, Inc., EFI Acquisition Corp., EFM Acquisition Corp., EFTA Acquisition Corp., FloraMark, Inc., Flower Trading Corp., H&H Flowers, Inc., Maxima Farms, Inc., Monterey Bay Bouquet, Inc., Sandlake Farms, Inc., and XL Group, Inc. (collectively "the Debtors").

losses and driving it into bankruptcy. Counts I and II of the complaint allege breaches of fiduciary duties by the Defendants to the Debtor and the unsecured creditors respectively. Count III of the Complaint alleges negligent misrepresentations were made to the unsecured creditors. Counts IV and V seek to avoid a fraudulent conveyance under sections 544 and 548 of the Bankruptcy Code.

The Defendants' Motion seeks to dismiss Counts I, II, III, and V of the Complaint. Briefing was completed on March 3, 2004. This matter is ripe for decision.

II. JURISDICTION

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157(b)(2)(H) & (O).

III. DISCUSSION

A. Standard of Review

In deciding a motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must determine whether the plaintiff could be entitled to relief based on any reasonable reading of the pleadings. In doing so, the court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them. Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d

Cir. 2000). A motion to dismiss should not be granted unless it "appears beyond a doubt that 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).

B. Breach of Fiduciary Duty to the Debtor

The Defendants argue that the Plan Administrator has failed to state a claim on which relief can be granted in Count I of the Complaint because the claim for breach of fiduciary duty is barred by statute and by the business judgment rule.

1. Exculpatory Clause

Directors of a corporation are fiduciaries to both the corporation and its shareholders. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993). There are three fiduciary duties that a director has: the duty of loyalty, the duty of due care, and the duty to act with honesty and in good faith. Official Comm. of Unsecured Creditors of TEU Holdings, Inc. v. Kemeny (In re TEU Holdings, Inc.), 287 B.R. 26, 32 (Bankr. D. Del. 2002).

Under section 107(b)(7) of the Delaware Code, a corporation may insulate its directors from lawsuits brought against them for the exercise of their corporate duties. Del. Code Ann. § 107(b)(7). To do so, the corporation must include an exculpatory clause in its certificate of incorporation. Id.

The scope of such an exculpation is not unlimited, however.

Only claims for breach of due care may be barred by such an exculpatory clause. Further, claims for egregious breaches of due care may not be sheltered by an exculpatory clause. Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins, 2004 WL 1949290 at *9 (Del. Ch. Aug. 24, 2004).

In this case, the Debtor had an exculpatory clause in its certificate of incorporation, which stated:

> No director shall be personally liable to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty by such director as a director. Notwithstanding the foregoing sentence, a director shall be liable to the extent provided by applicable law (i) for breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, (iii) pursuant to Section 174 of the Delaware General Corporation Law or (iv) for any transaction from which the director derived an improper personal benefit.

Therefore, to survive the Defendants' Motion to dismiss, the Plan Administrator must assert claims for a breach of the duty of loyalty or the duty of good faith. Emerald Partners v. Berlin, 787 A.2d 85, 93 (Del. 2001). The Plan Administrator can also avoid the effect of the exculpatory clause by pleading facts that show an egregious breach of due care. In re Walt Disney Co. Derivative Litig., 825 A.2d 275, 289-90 (Del. Ch. 2003); Elkins, 2004 WL 194290 at *9, n.37.

The Plan Administrator's Complaint states that the Defendants, as directors, failed to carry out their duties of

oversight and to inform themselves of all material information prior to making key business decisions. A claim for lack of oversight or management can implicate all three fiduciary duties. See, e.g., Arnold v. Society for Sav. Bancorp., Inc., 650 A.2d 1270, 1288 (Del. 1994) (discussing the relationship between good faith and the duty of loyalty in the context of the duty to disclose); Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003) (holding that to meet the standard of liability for failure of oversight, the plaintiff must show the directors have breached their duty of loyalty by failing to attend to their duties in good faith); In re Caremark Int'l Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996) ("the core element of any corporate law duty of care inquiry [is] whether there was [a] good faith effort to be informed and exercise judgment."); In re J.P. Stevens & Co. Shareholders Litig., 542 A.2d 770, 780-81 (Del. Ch. 1988) (holding that where allegations of lack of due care are so egregious as to call into question the rationality of the decision, good faith may be lacking). See also John M. Reed & Matt Neiderman, "Good Faith" and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty, 29 Del. J. Corp. L. 111, 122 (2004).

In this case, the Plan Administrator alleges that the

Defendants failed to exercise proper oversight by ignoring repeated warnings of problems with the Debtor's information systems, failing to execute a business plan and continuing to approve acquisitions when they knew the financial information provided to the board was unreliable. The Plan Administrator provides 15 pages of detailed factual allegations concerning these failures.

The Defendants argue nonetheless that the Plan Administrator has failed to state a claim for breach of good faith, because the Complaint does not allege that any of the Defendants engaged in intentional misconduct or a knowing violation of the law. Instead, the Plan Administrator alleges only that the Defendants acted with negligence and reckless indifference to the Debtor, which the Defendants state is insufficient as a matter of law.

We disagree. A claim for lack of oversight may support a claim of bad faith. A complaint states a claim for bad faith where it alleges that the directors "consciously and intentionally disregarded their responsibilities, adopting a 'we don't care about the risks' attitude concerning a material corporate decision." Disney, 825 A.2d at 289. Bad faith involves a knowing lack of attention and care towards exercising one's duties. See Caremark, 698 A.2d at 971. The Plan Administrator's allegations of breach of good faith by failure of oversight are sufficient to state a claim.

Second, the Defendants argue that the Plan Administrator fails to state a claim for breach of the duty of loyalty, because he did not allege there was intentional misconduct on the part of the Defendants that caused pecuniary harm to the Debtor. We disagree. Where a director acts in bad faith, claims for breach of loyalty can be brought because one cannot be loyal while acting in bad faith. See Guttman, 823 A.2d at 506. A sustained and systematic failure of the board to exercise oversight constitutes bad faith, contrary to the proper exercise of its duty of loyalty. See id. at 506 (holding that Third Circuit case law defines the duty of loyalty as requiring good faith); Pereira v. Cogan, 294 B.R. 449, 528 (S.D.N.Y. 2003) ("Directors shirk their duty of loyalty where there exists an 'abdication of directorial duty'.").

Third, the Defendants argue that the exculpatory clause bars claims for breach of due care. As noted, however, exculpatory clauses will not bar claims for egregious breaches of due care. Where directors fail to oversee the operations of a corporation to such a degree that they abdicate or shirk their duties, they have not exercised the duty of due care required of fiduciaries. Caremark, 698 A.2d at 969; Pereira, 294 B.R. at 530 ("unconsidered failure to act in a situation in which due attention would arguably have prevented the loss is a violation of the duty of due care."). Abdication of directorial duties is

an egregious breach of due care, which may not be sheltered by the exculpation clause. Therefore, we conclude that the Plan Administrator has alleged sufficient grounds to state a claim for breach of all three fiduciary duties.

2. Business Judgment Rule

The Defendants also argue that the Plan Administrator's claims must fail because the business judgment rule grants a presumption in favor of directors. The business judgment rule acts both procedurally and substantively. Procedurally, it establishes a presumption that in making a decision, the directors acted with due care, in good faith and with the honest belief that their action was in the best interests of the company. Cede & Co., 634 A.2d at 360. "The Rule operates to preclude a court from imposing itself unreasonably on the business affairs of a corporation." Id. (citations omitted).

Substantively, the business judgment rule establishes gross negligence as the base level of liability for directors. United Artists v. Walton, 315 F.3d 217, 231 (3d Cir. 2003) (directors may make "bet the company" decisions that in retrospect seem inappropriate or even outlandish without being held liable, so long as their decision-making at the time was not grossly negligent). See also Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000) (the question for the courts is not whether the behavior of the directors was commendable, but whether it was legal).

However, if the directors did not inform themselves of "all material information reasonably available," then their decision-making process is grossly negligent and the directors are afforded no shelter by the business judgment rule. Walton, 315 F.3d at 232.

In this case, the Plan Administrator has alleged that the process the Defendants used was flawed because they ignored repeated warnings from professionals. The Plan Administrator's Complaint states that the information the board received was "woefully inadequate." Furthermore, the Plan Administrator alleges that the Defendants were informed of the inadequacy of this information by PriceWaterhouseCoopers's 1998 Audit Report. In addition, the Plan Administrator asserts that Legg Mason, retained by the Debtor to explore merger and investment opportunities, advised the Defendants of flaws in the Debtor's financial records systems that could prevent acquisition offers by third parties.

Ignoring a recommendation made to the board of directors concerning a material decision is a sufficient allegation to withstand a motion to dismiss. TEU, 287 B.R. at 33-34. In addition, cash flow projections are considered material information. Brandt v. Hicks, Muse & Co.(In re Healthco, Int'l), 208 B.R. 288, 306-7 (Bankr. D. Mass. 1997). Finally, just as sustained and systematic failures to manage fall outside an

exculpatory clause, they also fall outside the business judgment rule. Stanziale v. Nachtomi, 2004 U.S. Dist. LEXIS 15664 *10-11 (D. Del. Aug 6, 2004)(discussing the holding of Caremark); Disney, 825 A. 2d at 286.

In this case, the Plan Administrator alleges repeated and continuous warnings were given to the Defendants concerning the lack of proper and adequate information flowing to the board. These allegations paint a portrait of a board making decisions without being materially informed and call into question the decision-making processes of the board. Thus, the Plan Administrator's claims, if accurate, are not barred by the business judgment rule. Finding no basis to dismiss, we deny the Motion as to Count I of the Complaint.

C. Breach of Fiduciary Duty to Unsecured Creditors

The Defendants argue that Count II of the Complaint should be dismissed because the Plan Administrator alleges a breach of fiduciary duty where no fiduciary duty was owed. They argue that directors of a corporation do not owe any duty to unsecured creditors until the corporation is insolvent. The Defendants argue that the Debtor became insolvent on July 1, 1999, while the acts forming the basis of the Plan Administrator's Complaint took place in 1998.

The Plan Administrator argues that a director's duty to unsecured creditors arises when the corporation is in "the zone

of insolvency," not when the corporation is unable to, or actually does not, meet debts as they come due. See, e.g., Pereira, 294 B.R. at 519; Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Fleet Retail Fin. Group, 280 B.R. 90, 92 (D. Del. 2002).

Courts assess whether a corporation is in the vicinity of insolvency by applying a two part test: the balance sheet test and the cash flow test. Pereira, 294 B.R. at 501. See also Richard Ceiri & Michael J. Reila, Protecting Directors and Officers of Corporations That Are Insolvent or in the Zone or Vicinity of Insolvency: Important Considerations, Practical Solutions, 2 DePaul Bus. and Comm L.J. 295 (2004). The balance sheet test compares the company's debts to the "fair value" of its assets. Pereira, 294 B.R. at 501. The cash flow or capital adequacy test evaluates whether a company can generate or obtain sufficient capital to pay for potential liabilities and obligations. Id. at 501-12; Geyer v. Ingersoll Publ'n Co., 621 A.2d 784, 792 (Del. Ch. 1992). Whether a company can pay its debts to a lender, should they come due or be called in, is a part of this consideration. Pereira, 294 at 511. Further, a transaction that leaves a company with "unreasonably small capital" may support a claim for breach of fiduciary duty when it creates an unreasonable risk of insolvency. Brandt, 208 B.R. at 302.

The Plan Administrator alleges that the Debtor was in the zone of insolvency at least by December 31, 1998, because they were not in compliance with their financial covenants as of that date. The noncompliance allowed the lenders to terminate their credit agreement and call the loans. The Plan Administrator alleges that it was impossible for the Debtors to pay their outstanding debt if the lenders cancelled their loan. See Periera, 294 B.R. at 521. The Plan Administrator further asserts that by December 31, 1998, the Debtor was extremely over-leveraged due to its many acquisitions. The Plan Administrator argues that he need only establish that a particular transaction created an unreasonable risk of insolvency; he asserts the Florimex acquisition, completed in October of 1998, meets this criteria.

We agree that the Plan Administrator has met its burden of pleading by pointing to specifics which show the potential that the company was technically solvent but doomed to fail. Further, the Plan Administrator's complaint includes specific allegations that the purchase of Florimex rendered the company insolvent. This is sufficient to plead a breach of fiduciary duty. Brandt, 208 B.R. at 302. Since the Plan Administrator has alleged facts sufficient to meet its burden that the company was in the zone of insolvency, we deny the Motion as to this Count.

C. Negligent Misrepresentations to Unsecured Creditors

The Plan Administrator alleges in Count III of the Complaint that the Defendants failed to inform the unsecured creditors of the company's looming insolvency. These omissions, the Plan Administrator asserts, were intentional and negligent, causing harm to the unsecured creditors by inducing them to continue to trade with the ailing company. The Defendants argue that the Plan Administrator's claims in Count III are insufficient to state a claim for several reasons.

1. The Delaware Economic Loss Doctrine

The Defendants argue that the Delaware economic loss doctrine bars the Plan Administrator's negligent misrepresentation claim. The economic loss doctrine under Delaware law generally bars tort claims where the damages are only economic. Danforth v. Acorn, 608 A.2d 1194, 1195 (Del. 1992). However, there is an exception to the doctrine which allows claims for negligent misrepresentation. Guardian Constr. Co. v. Tetra Tech Richardson, 583 A.2d 1378, 1383 (Del. Super. 1990). This exception applies only when: (1) the defendant supplied information to the plaintiff for use in business transactions with third parties and (2) the defendant is in the business of supplying information. Id.

The Defendants argue that this exception is inapplicable to this case, because they are not in the business of supplying

information. Rather the Defendants were directors of a business that supplied flowers and related products.

The Plan Administrator disagrees. He argues that what constitutes "supplying information" is not clearly defined and requires a case-by-case analysis. The Plan Administrator states that the proper standard to apply is whether the information was supplied for the guidance of others. See, e.g., Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg. Inc., 2002 WL 1335360 at *7 (Del. June 13, 2002).

At this stage of the case, we must deny the Motion to dismiss unless there is no set of facts on which the plaintiff can get relief. Official Comm. of Unsecured Creditors v. Young's Med. Equip. Indep. Practice Ass'n, Inc. (In re Coram Res. Network, Inc.), 305 B.R. 386, 387 (Bankr. D. Del. 2004). Whether the Defendants provided information for the guidance of others, as the Plan Administrator pleads, is a question of fact that we must assume. Assuming these facts, the Plan Administrator has stated a claim on which relief can be granted.

2. Elements of Negligent Misrepresentation

The Defendants argue that the Plan Administrator did not plead all the elements necessary to state a claim of negligent misrepresentation, namely: 1) a duty to provide accurate information; 2) the supply of false information; 3) failure to exercise reasonable care in obtaining or communicating the

information; and 4) pecuniary loss caused by justifiable reliance on the false information. Brug v. Enstar Group, Inc., 755 F.Supp. 1247, 1258-59 (D. Del. 1991).

The Defendants argue that the Plan Administrator did not allege the fourth element, reliance on the information in question. We disagree. In his Complaint, the Plan Administrator states that the unsecured creditors were "induced" by the misrepresentations of the Defendants to continue to do business with the Debtor. It is reasonable to infer that there can be no inducement without reliance on the misinformation.

The Defendants also argue that the Plan Administrator did not allege the second element, that the Defendants supplied false information. They argue that Delaware law distinguishes between an omission and the supplying of false information. Id. at 1259. The Defendants assert they never spoke to or otherwise communicated with the unsecured creditors. They note that the Plan Administrator bases his claim for negligent misrepresentation solely on omissions, namely that the Defendants failed to inform the unsecured creditors of the Debtor's looming insolvency.

The Plan Administrator counters that he has alleged that the Defendants made material misrepresentations, as well as omissions. Specifically, the Complaint states that "the defendants misrepresented facts and omitted certain material

facts, regarding, among other things, the financial status of USA Floral and its profitability, net worth and insolvency." Thus, the Plan Administrator's Complaint clearly alleges misrepresentations.

We must "accept as true all of the allegations in the Complaint." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). Therefore, we find that the Plan Administrator has pled the elements of negligent misrepresentation and the Motion to dismiss on this ground must be denied.

3. Standing

The Defendants argue that the Plan Administrator lacks standing to bring claims on behalf of particular creditors rather than on behalf of all unsecured creditors.[3] They argue that the Plan Administrator's claim is not a general one, instead he alleges claims belonging only to specific creditors.

A cause of action is a general one, not a specific one, where the inquiry underlying it is common to all creditors. St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc., 884 F.2d 688, 701 (2d Cir. 1989). To be general, the claims must not be unique or

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[3] The confirmed Plan grants the Plan Administrator the right to pursue all causes of action that the estate may have. See, e.g., Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 562 (3d Cir. 2003) (court can authorize creditor's committee or others to pursue derivative causes of action belonging to the estate).

individualized. In re Ben Franklin, 1999 U.S. Dist. LEXIS 16645 at *19 (N.D. Ill. 1999). Furthermore, if a claim could be brought by any creditor of the Debtor, then a trustee may assert the claim. See St. Paul Fire Ins., 884 F.2d at 697.

The Defendants argue that the claim is specific, not general. However, the Defendants do not establish that all creditors were not harmed in the same manner, only that it is possible that they were not. To succeed on a motion to dismiss, they must show there is no conceivable set of facts under which the Plan Administrator can get relief. It is conceivable that all creditors were harmed similarly. Thus, we cannot agree that the Plan Administrator lacks standing to bring this claim. Therefore we cannot dismiss this Count of the Complaint.

D. Section 548 Fraudulent Conveyance

Section 548 of the Bankruptcy Code allows a debtor or the estate to avoid a fraudulent conveyance. Section 548 states that a fraudulent conveyance occurs if the debtor was insolvent when the transfer was made, received less than reasonably equivalent value for the transfer and the transfer was made within one year of filing the bankruptcy petition. 11 U.S.C. § 548.

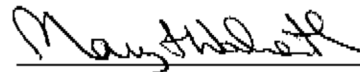
In this case, the Plan Administrator seeks recovery of an allegedly fraudulent conveyance to Mr. Poirier under a separation agreement. This Agreement entitled Poirier to receive $1.25 million within fifteen days of his resignation. Poirier resigned

on March 1, 2000. The Plan Administrator alleges that Poirier did receive the payment within fifteen days of his resignation. The bankruptcy petition was filed on April 2, 2001, one year and 18 days after Poirer received his payment. Consequently, we conclude that Count V of the complaint is time-barred under section 548 of the Code. We will grant the Motion to dismiss on this Count.

IV. CONCLUSION

For the reasons set forth above, we deny the Motion to Dismiss as to Counts I, II and III and grant the Motion as to Count V. An appropriate order is attached.

BY THE COURT:



Dated: November 24, 2004

Mary F. Walrath
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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Defendants.	)	

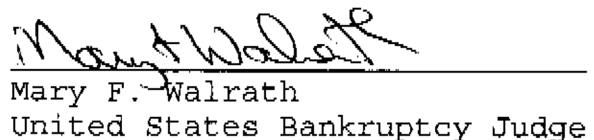
ORDER

AND NOW this **24th** day of **November, 2004**, upon consideration of the Motion of the Defendants to Dismiss and the Plan Administrator's Responses thereto and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motion to Dismiss is **DENIED** as to Counts I, II, and III; and it is further

ORDERED that the Motion to Dismiss is **GRANTED** as to Count V.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: Laura Davis Jones, Esquire[1]

[1]Counsel shall distribute a copy of this Opinion and Order to all interested parties and parties listed on attached Service List and file a Certificate of Service with the Court.

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