UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	
RICHLAND HOSPITAL,	)	
	)	
DEBTOR(S).	)	CASE NO. 00-60156 (Canton)
	)	
	)	**ADVERSARY NO. 04-5184 (Akron)**
	)	
JOSIAH L. MASON, TRUSTEE,	)	CHAPTER 7
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
MATTHEW PENTZ, et.al.,	)	
	)	
DEFENDANT(S) and THIRD PARTY PLAINTIFFS	)	
	)	
vs.	)	**MEMORANDUM AND ORDER RE: MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**
	)	
BRICKER & ECKLER, LLP and MICHAEL MESS,	)	
	)	
THIRD-PARTY DEFENDANTS.	)	

This matter is before the Court on the Plaintiff's "Motion for Leave to File Second Amended Complaint" (the "Motion") [docket #162], the Defendant's "Memorandum in Opposition to Chapter 7 Trustee's Motion for Leave to File Second Amended Complaint" [docket #191] and the Third-Party Defendant's "Memorandum in Opposition to Trustee's Motion for Leave to File Second Amended Complaint" [docket #189].

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. Because of the relation of the movants

to the Debtor in the chapter 11 proceedings that began the underlying bankruptcy case, resolution of this matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(O), over which this Court has jurisdiction under 28 U.S.C. §1334(b). Other subsections of 28 U.S.C. §157 that may apply in this Adversary Proceeding include (b)(2)(A), (B), (C), (E), (F) and (H). Upon review of the aforementioned pleadings and exhibits filed in this case, as well as a review of certain pleadings in the corresponding Main Case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Richland Hospital, Inc. (the "Debtor" or the "DIP") is an entity organized as a non-profit corporation under Ohio law that operated a psychiatric hospital in Mansfield, Ohio. On April 7, 2000, Richland Hospital filed for relief under chapter 11 of the Bankruptcy Code. Upon filing, the DIP through its then counsel Bricker & Eckler ("B&E"), filed an "Application to Employ Counsel" with an accompanying affidavit [docket # 2, Main Case] requesting B&E serve as counsel to the DIP. In the affidavit, B&E asserted that it "ha[d] no interest adverse to the estate." (Wright Aff. at 2). The application was granted on April 24, 2000 [docket #24, Main Case].
2. Following a court-approved sale of substantially all its assets to Children's Comprehensive Services ("CCS") on November 15, 2000, the DIP converted its chapter 11 case to a chapter 7. Josiah Mason (the "Trustee") was appointed to the case as the chapter 7 trustee with the duty to liquidate the Debtor's remaining assets.

3. The Trustee commenced this Adversary Proceeding on April 5, 2002, when he filed an eight-count suit against the Debtor's former non-profit corporate trustees, Matthew Pentz, M.D., Rudulpho S. Vocal, M.D., Edward R. Adams, David Massie, M.D., Maria Jose Pentz, Walter Massie, M.D., Joann C. Smith, (the "Hospital Trustees"), the Debtor's landlord, Richland Retreat (the "Retreat"), John Doe #1-5, and the Ohio Attorney General (the "Attorney General"). The suit sought relief for misappropriation of corporate opportunities, breach of fiduciary duty, unjust enrichment, civil conspiracy, an accounting of proceeds, piercing the corporate veil, declaratory judgment, and unauthorized post-petition transfers. Those claims were asserted on the basis of allegations that the Hospital Trustees formed the Retreat to purchase the Debtor's premises, and, in turn, charge the Debtor excessive rent and board fees. (Compl. ¶ 7-21) [docket # 1].
4. On July 1, 2002, the Attorney General filed a cross-claim against the Hospital Trustees and the Retreat [docket # 15].
5. On December 11, 2002, the Hospital Trustees and the Retreat filed a Third-Party Complaint against B&E and Michael Mess [docket #32].
6. On February 20, 2003, the Trustee filed his First Amended Complaint [docket # 44] in which he joined other trustees as individual defendants and the trustee's surviving spouses.
7. On December 2, 2004, the Trustee filed the Motion at issue, requesting leave to file a Second Amended Complaint based on new facts and information that first came to some light on December 2, 2003. In the Second Amended Complaint, the

Trustee would assert 14 additional counts against existing defendants (the Hospital Trustees and the Retreat) and would add a new defendant, B&E (hereafter the Hospital Trustees, the Retreat and B&E are collectively, the "Defendants"). B&E is already a party to this Adversary Proceeding as noted in Finding of Fact #5. The additional counts are: breach of fiduciary duty, aiding and abetting tortious conduct, and malpractice; violations of Racketeer Influenced and Corrupt Organizations ("RICO") 18 U.S.C. § 1962 (a) - (d); violations of the Ohio Pattern of Corrupt Activity Act ("PCA") Revised Code § 2923.32; aiding and abetting RICO and PCA violations; fraud and fraudulent transfers; and for the sequestration of rent payments.

8. On December 3, 2004, Judge Kendig, the Bankruptcy Judge handling this case in Canton, recused himself, whereupon the case was transferred to the Akron Bankruptcy Court for further adjudication by Order of Chief Judge Baxter [docket # 164].

9. On December 22, 2004, Judge Shea-Stonum held a pretrial in which she set a schedule for further pleadings in this Adversary Proceeding. In that pretrial, she directed that the Trustee not file a reply brief with respect to the Motion.

10. In the interest of economy, the Court incorporates by reference the alleged Background Facts as set forth in the Trustee's Second Amended Complaint, ¶¶ 7 - 95. These facts do not serve as the ultimate findings of fact in this Adversary Proceeding, but only as the basis for this ruling, in which the Court construes the complaint in the light most favorable to the Trustee and accepts all of the factual

allegations as true, as leave to amend is inappropriate otherwise. *See Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000). In short, the Trustee alleges that:

- the Hospital Trustees and the Retreat abused the non-profit status of the Debtor by demanding it pay unreasonably high and excessive rents to its for-profit lessor (the Retreat, which had been organized by the Hospital Trustees for their personal benefit) and further by requiring that the Debtor pay for all improvements to the hospital facility; by preventing the Debtor from paying any necessary taxes; by prohibiting the Debtor from purchasing any real estate; and by expending the Debtor's $2 million in cash reserves over a nine year period, driving it to insolvency.
- the Defendants undertook to hold the Debtor out as a non-profit entity operating in the interest of charity, when in fact they were taking the Debtor's revenue in the form of rent payments to the Retreat, for the personal benefit of the Hospital Trustees, contrary to the state corporate law provisions under which the Debtor was formed.
- the Defendants designed and executed a plan to place the Debtor in chapter 11, materially misrepresenting its value to the Court and other parties to the case, for the purpose of consummating a sale of the Debtor's assets to CCS, free and clear of any liabilities and at a price well below the Debtor's value; and further that this sale was consummated in accordance to terms that had been substantially

negotiated between and agreed upon by CCS and the Retreat in September 1999, prior to the Debtor's chapter 11 filing, and that the pending sale closed only after the Debtor's lease from the Retreat was deemed to have been rejected under 11 U.S.C. § 365(d)(4).

- B&E began providing legal counsel to the Retreat and the Debtor Trustees in or about 1980 and continued in that capacity during and after the Debtor's bankruptcy. B&E likewise served as legal counsel to the Debtor from mid-1985 through (and after) the Debtor's bankruptcy filing.

11. The Debtor's Schedule F - Creditors Holding Unsecured Nonpriority Claims lists Richland Retreat as holding a claim for $648,267.87, or 55% of the total unsecured claims ($1,187, 364.55) of the Debtor [docket #1, Main Case].

12. B&E was in possession of and had reviewed over 4400 pages of documents produced by Attorney Robert Mabee (the "Mabee documents") for approximately three months before copies were produced, upon demand, to the Trustee for review (Mot. for Protective Order and Memo. in Support at 2-3) [docket #133, Main Case]. The Trustee received the Mabee documents two business days before Mr. Mabee's scheduled deposition, which B&E declined to adjourn by agreement and which the Court ordered should go forward. (*See* Ex. B, Mot. for Protective Order and Memo. in Support; Order Granting in Part and Denying in Part Mot. for Protective Order [docket # 100]).

CONCLUSIONS OF LAW

Leave to amend is governed by FED. R. CIV. P. 15, which is made applicable to this

Adversary Proceeding by FED. R. BANKR. P. 7015. Consistent with the Federal Rule, Rule 7015 requires that, when outside the period in which amendment can be made as a matter of course, a party must request leave from the court to amend its complaint, and such "leave shall be freely given when justice so requires." FED. R. BANKR. P. 7015. Further, both rules favor granting leave to amend and ensuring "[t]hat pleadings are not an end in themselves, but are only a means to the proper presentation of a case; that at all times they are to assist, not deter, the disposition of the litigation on the merits." *In re Metropolitan Co.* 85 B.R. 783, 785 (Bankr. S.D. Ohio 1988) (omitting citations). The decision as to "when justice so requires" is within the sound discretion of the trial court. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *In re Suburban Motor Freight, Inc.* 114 B.R. 943, 950 (Bankr. S. D. Ohio 1990). The trial court's decision on requests for leave to amend is accorded great deference and is reversible only if it was based on erroneous findings of fact, improper application of the law, or use of an erroneous legal standard. *Leary v. Daeschner*, 349 F.3d 888, 904 (6th Cir. 2003).

In *Foman,* the Supreme Court outlined the following relevant factors a court should look to when assessing whether leave should be granted: undue delay, bad faith, or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . [and] futility of the amendment." 371 U.S. 178, 182 (1962). The Sixth Circuit promotes "liberality in allowing amendments to a complaint" and requires "some significant showing of prejudice to the opponent" if the motion is denied. *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986).

***Delay and Prejudice*:** The Sixth Circuit has a long held belief that delay alone, *no matter how long*, is an insufficient basis for denying the plaintiff's request for leave to amend. *Id.* (emphasis added). The "[p]roper analysis, is . . . , to weigh the cause shown for the delay against the resulting prejudice to the opposing party" and not to decide the matter on simply the mere passage of time. *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 874 (6th Cir. 1973). The Defendants argue that the Trustee has exercised undue delay in bringing the Second Amended Complaint based on his acknowledgment that it was December 2, 2003, when he first became aware of facts upon which the additional counts are based. In support, they cite to no less than 20 cases to bolster their general assertion that a Trustee's 12 month delay is inexcusable and well beyond the period in which courts would grant leave to amend. However, not one of the cases cited involved a bankruptcy trustee, as plaintiff, or even a bankruptcy proceeding, as is this case. *Cf. In re Southern Industrial Banking Corp.*, 126 B.R. 294 (Bankr. E.D. Tenn. 1991) (upholding the denial of leave to file a Third Amended Complaint, having just granted the trustee leave to file a Second Amended Complaint two and a half years after initial complaint filed). The Court considers the circumstances and allegations in this case well outside the rubric of cases the Defendants cite in their pleadings.[1]

---

[1] In addition to not including any bankruptcy related cases, the cases presented by the Defendants were typically a at different stage of litigation or had a different factual basis than this case. For example, the Defendants cite to *McDonnell v. Dean Witter Reynolds, Inc.*, 620 F. Supp. 152 (D. Conn. 1985) where the parties requested leave to amend three days before trial was to begin, after the trial has already been rescheduled for the third time in a three year old case. *Id.* at 156. Similarly, in *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1162-64 (5th Cir. 1982) the Court *did* grant the Chitimachas leave to amend their complaint two years after the case was filed, and only upon requesting leave to amend their complaint for a second time, just fours months following their first amendment, were they denied leave. The second request for leave was denied because amendments were not based on newly discovered the information, but rather, information they had when the first amended complaint was filed just four months earlier.

In any bankruptcy, the Trustee enters the case as a new party and a stranger to the facts and players and should be afforded adequate time to familiarize himself with both. This case presents a unique confluence of events that the Court considers ample justification for the time that elapsed between the Trustee's initial receipt of information and the motion seeking permission to file a Second Amended Complaint. Viewing the allegations in the light most favorable to the Trustee, B&E appears to have affirmatively misled the Court, the Trustee, and the Debtor's creditors as to the role it served in the pre- and post-bankruptcy affairs of Debtor and the conflicts that existed therein. Additionally, decades of questionable corporate practices conducted by sophisticated professionals with various legal counsel needed to be untangled before an amended complaint could be drafted. While the Trustee was sorting through the apparent non-profit corporate subterfuge to unearth the complex legal and factual basis for his Second Amended Complaint, an additional 883 bankruptcy cases were added to his Trustee docket.[2] Given these circumstances, the Court considers the 12 month time lapse in bringing the Second Amended Complaint to be reasonable. The Defendants have failed to show a lack of diligence or effort on the part of the Trustee.

The Court finds it ironic that B&E, who arrogated to itself the right to serve as counsel to the DIP without disclosing to the Court that it was existing counsel to the

---

Id.

[2] According to Electronic Case Filing reports, Josiah Mason was named Trustee in an additional 883 cases in the period December 2, 2003 to December 2, 2004.

Debtor and the Retreat, now requests this Court deny the Trustee's Motion on the basis of undue prejudice it would face in defending allegations that it chose, in part, to misrepresent to the Court. Bankruptcy requires a heightened level of disclosure and disinterestedness with respect to employment of professionals.[3] The enhanced disclosure requirements serve to uphold the integrity of the bankruptcy process and to ensure that counsel's loyalties are solely to its client. *In re Sauer*, 191 B.R. 402, 408 (Bankr. D. Neb. 1995) citing *In re Diamond Mtg. Corp.*, 135 B.R. 78, 90 (Bankr. N.D. Ill. 1990); *In re Watson*, 94 B.R. 111, 116 (Bankr. S.D. Ohio 1988). It appears that B&E fell woefully short of the disclosure requirements which might have shed light on the allegations at issue at a much earlier time, yet B&E now asks this Court to find *it* will be prejudiced by the amount of time it took the Trustee to unveil B&E's conduct and that of its fellow Defendants. Furthermore, the only party capable of bringing the RICO, PCA, and misfeasance claims for the benefit of the estate was a new, *and disinterested*, party like the Trustee, who then needed sufficient time to learn of the Defendant's undertakings in order to adequately plead them.

---

[3] Section 327 of the Code dictates the conditions upon which the Trustee may employ professionals for the estate and requires the professionals "not hold or represent an interest adverse to the estate, and that [they] are disinterested." 11 U.S.C. § 327. The Code defines "disinterested person" as someone who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor." 11 U.S.C. § 101(14). This standard is to be strictly applied to those professionals employed by the trustee, or in the case of a chapter 11, the debtor-in-possession, so much so that compensation and reimbursement for expenses can be denied if the there is not a diligent inquiry as to whether the professional is in fact, disinterested. *Collier on Bankruptcy*, ¶ 101.14 at 101-65,66 (15th ed. 1989). Section 327 applies to counsel to the debtor-in-possession by virtue of § 1107(a), meaning B&E had an ongoing duty to remain disinterested (and to continually comply with professional ethical standards) throughout the tenure of the estate. This Court was unable to find an evidence in the record of the Main Case where B&E disclosed to the Court that they served as counsel to one of the Debtor's largest creditors, contrary to the express directive of § 101(14).

The Defendants would also like to paint the proceeding as being much further along procedurally than it truly is, suggesting that the amendment would require re-opening of discovery that has been long-since closed. Though a lengthy amount of time has lapsed since bankruptcy was commenced and this Adversary Proceeding later initiated, when Trustee requested leave to amend his complaint, the Trustee's deposition discovery was scheduled to end only ten days earlier, expert depositions were still ongoing, the dispositive motion deadline was over four months away, and no firm, or even tentative, trial date had been set.[4] (See Memo. and Order Following Status Conference [docket #158]). *Compare Saalrank v. O'Daniel*, 533 F.2d 325, 330 (6th Cir. 1976) (holding that Rule 15 can be employed to "permit amendment after judgment and a realigning of the parties" if there is notice to the parties and no resulting prejudice).

Though most amendments result in some degree of prejudice to the non-moving party, the Court must determine if the prejudice is undue. Any resulting prejudice must be balanced with the reason for delay, bearing in mind Rule 15's overall purpose to decide a case on its merits. *McCann v. Frank B. Hall & Co., Inc.,* 109 F.R.D. 363, 365 (N.D. Ill. 1986)*; Alberto-Culver Co., v. Gillette Co.*, 408 F.Supp. 1160,1162 (N.D. Ill. 1983). Granting the Trustee leave to amend will undoubtedly require additional discovery and an extension to existing deadlines. The Defendants' argue that the time and expenses of additional discovery constitute undue prejudice. The Court finds otherwise, particularly

---

[4] Both Defendants rely heavily on this Circuits decision in *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452 (6th Cir. 2001) upholding the denial of a motion for leave to amend. Again, this Court finds that case inapposite to this case because in *Wade*, all discovery was completed, the dispositive motion deadline had passed, and both parties had already filed summary judgment motions. *Id.* at 458.

noting the lucrative arrangement alleged against the Debtor Trustees and what appears to be the less than forthright nature of all the Defendants throughout the Debtor's bankruptcy case. The Defendants will be given sufficient opportunity to prepare for and defend against the new allegations set for in the amended complaint.

The Court must also consider the degree of prejudice to the Trustee, should leave be denied. *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1164 (5th Cir. 1982). As a representative of the estate, the Trustee is charged with "doing whatever is necessary to advance [the estate's] interests" and maximize the return to the estate and in turn, its creditors. *Collier on Bankruptcy*, ¶ 704.03 at 704-8 (15th ed. 1989). Here, should any of the allegations result in a judgment against the Defendants, the potential benefit to the estate and to its creditors (of which there are over 70 who have filed claims totaling nearly $2 million and this number could grow as a result of the determination that the Debtor has an obligation to amend its state tax returns) is the difference between receiving no dividend and the possibility of payment in full. In addition, the underpinnings of the allegations – that a for profit corporation was created solely to drain money from non-profit hospital, and then the sham non-profit invoked the bankruptcy laws as a means for its trustees and counsel to escape personal and corporate liability – indicate that the prejudice to the Trustee, if leave to amend were denied, far outweighs any articulated prejudice to the Defendants, if leave were granted.

Futility of the Amendment: The Court declines the Defendants' invitation to treat their opposition to the Trustee's request for leave to amend as a motion to dismiss on each count. Instead, the Court will address the sufficiency of the amendments in total. With

respect to the federal RICO and state PCA claims, the Defendants' contend that the counts are not pleaded with particularity pursuant to FED. R. CIV. P. 9(b). In the context of bankruptcy, where the Trustee has not been a party to the transactions and the Defendants have the historical advantage, the Court finds that any additional information with respect to Trustee's RICO and PCA counts can be addressed through discovery. In doing so, the Court adopts the reasoning employed by the Sixth Circuit when they concluded that the enhanced pleading requirements of Rule 9(b) must be "read in harmony" with Rule 8, which requires a short and plain statement of the claim. *Michael's Building Co., v. Ameritrust Co., N.A.* 848 F.2d 674, 679 (6th Cir. 1988). Additionally, that Court notes that Rule 9(b) requires the plaintiff plead only the "circumstances" of fraud with particularity and to present a "reasonable" basis for the claim, but does not require the plaintiff to present facts and evidence in a complaint. *Id.* at 680 n.9. Here, additional discovery will determine whether the Trustee's allegations have merit, but the Trustee has undoubtedly presented a "reasonable" basis for the complaint. Further, because the Court directed that the Trustee should not file a brief in reply to B&E's and the Hospital Trustee's memoranda in opposition, it is not appropriate to engage in the analysis necessary to a motion to dismiss.

Consistent with the Court's determination not to treat this Motion as a motion to dismiss, the Court will not assess each RICO[5] count individually but does note that B&E

---

[5] Because Ohio law looks to federal RICO laws when analyzing PCA claims, the sufficiency of the federal RICO counts is equally applicable to the state-based PCA claims. *See State v. Schlosser,* 681 N.E.2d 911, 913 (Ohio 1997) (finding that "R.C. 2923.32 is based on the federal RICO statute"); *U.S. Demolition & Contracting, Inc. v. O'Rourke Constr. Co.*, 640 N.E.2d 235, 240 (Ohio Ct. App. 1994) (noting that "[i]n applying PCA, Ohio courts look to federal case law applying RICO).

offers several bases on which it considers the RICO counts inapplicable, given that it only "rendered legal services, nothing more" to the Debtor and the Retreat. (Memo. in Opp'n at 13). Specifically, B&E asserts that it did not "conduct or participate" in the enterprise affairs, pursuant to 18 U.S.C. § 1962(c). (Memo. in Opp'n at 11-13). B&E seems to disregard, however, that it served as DIP counsel while allegedly simultaneously serving as counsel to the Retreat and the Hospital Trustees and without the required disclosure under 11 U.S.C. § 327. It is alleged that it did so to facilitate a pre-bankruptcy agreement to sell the Debtor's assets to CCS. Thus, B&E may be shown to qualify as *"a person employed by or associated with [the] enterprise"* who, based on the allegations, appears to have "to conduct[ed] or participate[d], *directly or indirectly*, in the conduct of such enterprise's affairs." 18 U.S.C. § 1962(c) (emphasis added). Given, *inter alia*, B&E's apparent failure to meet the disclosure requirements of 11 U.S.C. § 327 and its alleged failure to protect the DIP's property interests, B&E's role and conduct in the chapter 11 case appears to this Court to present a sufficient degree of operation or management of the enterprise to sustain the count at the pleading stage and to warrant future discovery to determine the merits of the claim. For instance, in the normal course, it is DIP counsel who would file a motion seeking extension of the deadline set forth in 11 U.S.C. § 365 (d)(4). Additionally, B&E maintains that it did not "acquire or maintain" an interest the enterprise adequate to sustain a claim under 18 U.S.C. § 1962(b). (Memo. in Opp'n at 14-15). Again, B&E ignores the entire language of that provision, noting that the statute considers it unlawful "to acquire or maintain, directly or indirectly, any interest in *or control of any enterprise which is engaged in*, or the activities of which affect, interstate or foreign commerce" that constitute a pattern of racketeering. 18 U.S.C. § 1962(b)

(emphasis added). The degree to which B&E was involved as counsel to both the Debtor and the Retreat prior to the bankruptcy filing, compounded by its involvement in the pre-bankruptcy negotiation to sell the Debtor's assets to CCS, makes B&E's lack of forthright disclosure upon seeking and assuming the role of DIP counsel a central part of the analysis as to the sufficiency of the RICO claims set forth by the Trustee. The Court considers that, in the context of a bankruptcy proceeding where B&E allegedly employed chapter 11 of the Bankruptcy Code to extract the Debtor Trustees and the Retreat from future liabilities stemming from past abuse of Ohio's non-profit laws, assumed the role of DIP counsel without the adequate disclosures to the Court, with the knowledge of and participation in a pending sale to for-profit Tennessee-based CCS to the alleged detriment of the Debtor's non-insider creditors, the Trustee has asserted a claim that meets the requisite elements alleging the (1) defendant acquired or maintained, (2) through a pattern of racketeering activity, (3) an interest in or *control of* (4) an enterprise (5) engaged in or affecting interstate commerce, (6) such to cause the Debtor injury.

The Court does recognize, however, that "Count #14 - Aiding and Abetting RICO violations" has no basis in law in light of the Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994) (holding that because there was no express language imposing aiding and abetting liability in the Section 10(b) cases, no such cause of action will lie). Therefore, the Trustee is directed not to include that count in the Second Amended Complaint.

With respect to the Defendants' statute of limitations arguments, these are affirmative defenses that may be asserted by the Defendants in their Answers and will not

serve as the basis upon which the Court will deny the Trustee leave to amend.

Motive of the Trustee: Neither of the Defendants argued that the Trustee's leave to amend stemmed from any bad faith or intent to harm the Defendants, nor does the Court find any evidence in the record or pleadings that would suggest such. Again, the Court considers the length of time necessary to prepare and file the amended pleadings reasonable given the Trustee's need to reconstruct the events that have transpired between multiple parties over three decades and his other duties as a chapter 7 panel trustee operating in an environment of spiraling case filings.

CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED:

1. That Plaintiff's Motion for Leave to file a Second Amended Complaint is granted with exception of Count #14 - Aiding and Abetting RICO violations and the Second Amended Complaint is deemed filed as of the date hereof, excluding Count #14.

2. That the Motions for Partial Judgment on the Pleadings currently pending in this case are hereby rendered moot as they were filed in response to the First Amended Complaint.

3 That the Defendants are to file their responsive pleadings to the Trustee's Second Amended Complaint by March 11, 2005.

4. That, given the discovery that has occurred to date in this case, the Defendants are directed to continue to cooperate with the Trustee's counsel

in the development of stipulations as addressed in this Court's Memorandum of Telephonic Conference Held On December 22, 2004.

5. That a telephonic status conference will be held in this matter on **March 1, 2005 at 1:00 p.m.** to discuss future deadlines in this case.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

❖❖❖❖❖❖❖❖❖❖❖❖

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of FEBRUARY, 2005, the foregoing Order was sent via regular U.S. Mail to:

S. Hoffman
Clerk

JOSIAH L. MASON, ESQ.
153 West Main Street
P.O. Box 345
Ashland, OH 44805

BRUCE LOWE, ESQ.
Taft, Stettinius & Hollister, LLP
3500 BP Tower
200 Public Square
Cleveland, OH 44114-2302

WALLACE WALKER, JR. ESQ.
Wallace Walker & Co., L.P.A.
7774 Oakhurst Circle
Brecksville, OH 44141

MARION LITTLE, JR., ESQ.
Zeiger, Tigges, Little & Lindsmith, LLP
41 South High St., Suite #3500
Columbus, OH 43215

DAVID SIMIELE, ESQ.
Krugliak, Wilkins, Griffiths,& Dougherty Co., LPA
4775 Munson NW, P.O. Box 36963
Canton, OH 44735-3693

MICHEL THOMPSON, ESQ.
Krugliak, Wilkins, Griffiths,& Dougherty Co., LPA
4775 Munson NW, P.O. Box 36963
Canton, OH 44735-3693

SHERRY M. PHILIPS, ESQ.
Charitable Law Section
101 East Town Street
Columbus, OH 43215-5148

JUDGE PETER C. ECONOMUS
United State District Court, Northern District of Ohio
(served electronically)