UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	CASE NO. 99-53673
International Tank Trailer, Inc.,	CHAPTER 7
DEBTOR(S)	
Harold Corzin,	**ADVERSARY NO. 01-5404**
PLAINTIFF(S),	JUDGE MARILYN SHEA-STONUM
vs.	**MEMORANDUM OPINION RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**
Stainless Tank and Equipment East LLC, et al.,	
DEFENDANT(S).	

This matter is before the Court on the motion for summary judgment filed by the Plaintiff (defined below), and the responses and cross-motions for summary judgment filed by Molder (defined below) and M&R (defined below) and Donohew (defined below).

Background

International Tank Trailer, Inc. ("ITTI" or the "Debtor") filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on November 30, 1999 (the "Petition Date"). On December 2, 1999, the United States Trustee for Region 9 appointed Harold Corzin (the "Trustee" or "Plaintiff") as the interim trustee pursuant to 11 U.S.C. § 701. On March 8, 2000, after conducting, but not concluding, the first meeting of creditors, the Trustee filed an

Application to Employ Michael Moran as Counsel (the "Application") for the purpose of pursuing the assets of the estate including possible causes of action against third parties or insiders for conversion, fraudulent conveyance or preferential transfers. On March 30, 2000, the Court entered an Order Granting the Application.

Counsel for the Trustee filed a motion to compromise the controversy between the estate of ITTI and Lorel Molder on April 6, 2001 [docket #19] for $1,500. The Motion to Compromise provides, in pertinent part,

> 2. That on or about the 9th day of February, 1999, Stainless Tank & Equipment East, L.L.C. and STE Properties, L.L.C., the Debtor, M&R Realty and Lorel L. Molder entered into an agreement to sell certain assets owned by the Debtor and by M&R Realty for the price of $164,110.00 plus the assumption of debt in the approximate amount of $1,078,437.10.
> 3. That as a result of the transaction, the Debtor received no cash and Lorel Molder and M&R Realty were relieved from certain obligations owing to Central Trust and to Bank One creating the possibility of a preferential or fraudulent transfer of assets of the Debtor to or for the benefit of Lorel Molder.
> 4. That thereafter the Trustee did commence investigation of the transaction and obtained copies of all documents relating to said sale, conducted an examination of the Chief Financial Officer of the corporation and conducted a 2004 examination of Lorel Molder.
> 5. That based upon such investigation, it appeared likely that the transfers may have benefitted the Debtor by enabling the Debtor to satisfy a greater portion of its debt than the value of its assets, which were conveyed under the transaction, and although certain obligations of Ms. Molder were satisfied as a result of such transaction, she was only an accommodation party or a guarantor of such obligations. Further, Ms. Molder was required to make certain payments to various entities in order to enable the transaction to close and to facilitate the payment of most of the debt owing from International Tank Trailer, Inc.

EnviroServe, J.V., a pre-petition creditor of ITTI, by and through its counsel Robert McIntyre of McIntyre, Kahn, Kruse & Gillombardo, filed an objection to the Motion to Compromise [docket #20]. Before the Court held a hearing on the Motion to Compromise

and the objection, the Trustee withdrew his Motion to Compromise and, on June 1, 2001, filed a motion to employ Mr. McIntyre and his firm as special counsel. Mr. McIntyre and his firm were hired as special counsel pursuant to the following arrangement "McIntyre, Kahn, Kruse & Gillombardo have offered to perform their services pursuant to an agreement whereby such firm will represent the estate on a one-third contingency fee basis.[1] Further, such firm has agreed to pay and indemnify the Estate from all expense associated with such litigation and to pay to the Estate the sum of $1,500, the amount of the compromise for which the Trustee has previously sought approval as a compromise." Docket # 23, p.2.

The Complaint

On November 30, 2001, the Trustee, by and through special counsel, Mr. McIntyre, filed a Complaint (the "Complaint") against Stainless Tank and Equipment East, LLC ("Stainless Tank"), STE Properties, LLC ("STE"), Lorel Molder ("Molder"), Donald Rostad ("Rostad"), Monty Donohew ("Donohew") and M&R Realty ("M&R"). The Complaint sets forth five counts against Stainless Tank, STE, Molder, Rostad, Donohew and M&R (collectively referred to as the "Defendants"). On September 11, 2002, the Plaintiff dismissed all claims against Rostad [docket #36]. During many pre-trial conferences before the Court,[2]

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[1]The proposed order submitted and entered with respect to the application to employ special counsel did not identify with specificity the terms of Mr. McIntyre's employment. Docket # 25.

[2]This case has consumed a significant amount of chamber's resources. Plaintiff's special counsel has been given the fullest benefit of the discovery process. The Court has conducted at least 14 pre-trial conferences in this adversary proceeding. *See* docket ## 23, 34, 40, 45, 60, 61, 66, 68, 71, 76, 79, 82 and 86. From the first pre-trial conference forward, the Court has requested that counsel exchange proposed

Plaintiff's special counsel stated that he would be dismissing all counts of his complaint as against Stainless Tank and STE. *See, e.g.,* the Court's Memorandum of Pre-Trial, docket ## 79 and 82. In addition, he stated that he would be dismissing counts IV and V as against Molder, Donohew and M&R. *Id.* The notice of dismissal subsequently filed by Plaintiff's special counsel only dismissed counts I and V with respect to Stainless Tank and STE. *See* docket #80. Despite the Court's repeated instruction to Plaintiff's special counsel to file a corrected notice of dismissal in this adversary proceeding immediately, Plaintiff's special counsel has failed to do so. *See, e.g.,* Court's Memorandum of Pre-Trial, docket ## 82 and 86.[3] Therefore, based on special counsel's representations noted above, and in light of the fact that counts II, III and IV do not appear to seek relief against Stainless Tank or STE, the Court hereby dismisses Count I, II, III, IV and V of the Complaint against Stainless Tank and STE.

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stipulations. After discovery should have been complete, the failure of plaintiff's special counsel to comply with the Court's directions concerning the development of stipulations caused the Court to become concerned that, despite his duty as the interim trustee in this bankruptcy case and an officer of this Court to do so, the Plaintiff was not exercising sufficient client oversight of his special counsel's actions in this matter. Therefore, at the 10th pretrial conference on May 19, 2004, the Court specifically directed Plaintiff to consider the positions that were or would be taken by his special counsel. In doing so, this court was simply seeking ongoing compliance with Rule of Bankruptcy Procedure 9011. Comparing the Motion for Summary Judgment filed by Plaintiff's special counsel to the narrow focus established by the Court at the last pretrial conference, it seems that despite the Court's direction to Plaintiff, he failed to exercise any oversight or client judgment in this matter. The consequences of Plaintiff's failure to do so remain to be seen as the other parties to this litigation have not, to date, sought sanctions against Plaintiff or his special counsel.

[3]Plaintiff's special counsel did, however, refile with the Court the same report two more times. *See* docket ## 83 and 84.

In addition, during the last pretrial conference conducted in this matter, Plaintiff's special counsel represented to the Court that he was not pursuing any fraudulent conveyance or transfer claims against any of the remaining defendants, and that Plaintiff had authorized the dismissal of all counts except the insider preference count. *See* docket #86. Therefore, as a part of this opinion and order, the Court dismisses Count I (fraudulent transfer) as to all defendants. In addition, Count II of the Complaint only seeks relief against Rostad and, therefore, does not state a claim as against the remaining defendants. Similarly, the Complaint does not seek to recover the transfer of $7,000 to Donohew, and therefore, does not state a preference claim against him.[4] Thus, Count III is the only remaining count.

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[4]In his Motion for Summary Judgment the Plaintiff seeks judgment against Donohew with respect to a $7,000 transfer. Federal Rule of Civil Procedure 56(a), which is made applicable to this adversary proceeding pursuant to Rule of Bankruptcy Procedure 7056, provides that a claimant may seek summary judgment "upon a claim, counterclaim, or cross claim." Plaintiff did not move to amend the complaint, and any effort to do so would have had to overcome the time limitations in 11 U.S.C. § 546. Rule 56 contains no provision allowing a party to seek or a court to grant summary judgment on arguments that are not set forth in a claim, counterclaim or cross-claim. Therefore, the Trustee's Motion for Summary Judgment against Monty Donohew shall be and hereby is denied with respect to Donohew.

Apparently, Donohew intended to file with the Court a response to the Trustee's Motion and a Cross Motion for Summary Judgment. However, rather than filing the response and cross-motion, Donohew merely provided the Court with an unfiled courtesy paper copy and served opposing counsel with the response and cross-motion. The Trustee filed a response to Donohew's cross-motion for summary judgment and then filed a motion to strike. Given the Court's finding that the Trustee is not entitled to judgment against Donohew on a preference claim, because he did not assert such a claim in his Complaint, the issues raised in Donohew's unfiled pleading and the Trustee's response and motion to strike are moot and will not be further addressed.

Count III (Preference, 11 U.S.C. § 547) seeks to recover "[t]he transfer of the sum of $217,659.96 in partial satisfaction of the Bank One mortgage" made in connection with that certain asset purchase agreement between Molder, M&R, the Debtor and STE and Stainless Tank dated February 9, 1999 (the "Asset Purchase Agreement").[5] Count III further states:

> 34. Said transfer was made to M&R, Molder and Rostad as insiders and/or affiliates of ITTI within one (1) year preceding the filing of ITTI's petition which transfer was made on account of an antecedent debt while ITTI was insolvent or that rendered ITTI insolvent and that allowed M&R, Molder and Rostad, to receive more than they would have received in a liquidation under Chapter 7 of the Bankruptcy Code.
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> 35. By reason of the foregoing, the transfer should be avoided pursuant to 11 U.S.C. § 547 of the Bankruptcy Code and judgment should be rendered in favor of the estate and against the defendants, Molder, M&R and Rostad jointly and severally, in the amount of at least $217,659.96 together with interest at the rate of 10% per annum from and after February 9, 1999 until paid.

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F), (H) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b).

SUMMARY JUDGMENT STANDARD

A court shall grant a party's motion for summary judgment "if...there is no genuine

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[5]Pursuant to the Asset Purchase Agreement, ITTI agreed to sell substantially all of its assets to Stainless Tank and M&R agreed to sell substantially all of its assets, including real estate, to STE. Stipulation, ¶ 24 [docket #70].

issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056.

> Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

DiCarlo v. Potter, 358 F.3d 408, 414 (6th Cir. 2004). The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, the court should draw all reasonable inferences in favor of the nonmoving party. *DiCarlo v. Potter,* 358 F.3d at 414; *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). A material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When a motion for summary judgment is made and supported by affidavit or otherwise,

> an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Bankruptcy Rule 7056(e).

On cross-motions for summary judgment, "the Court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *BF Goodrich Co. v. United States*

Filter Corp., 245 F.3d 587, 592 (6th Cir. 2001).

STIPULATED FACTS and FACTS SET FORTH IN UNCONTROVERTED AFFIDAVITS

Retired Judge Harold F. White conducted a stipulation conference in this matter. As a result of the stipulation conference, the parties filed a joint stipulation on March 29, 2004 [docket # 70] (the "Stipulations").[6] The parties stipulated to many facts, as more fully set forth below, but they did not stipulate as to whose funds were paid to Rostad and Bank One in connection with the Asset Purchase Agreement. Therefore, on this issue **alone**, the Court allowed the parties to file motions for summary judgment. *See* docket # 86. The Plaintiff ignored the Court's explicit instruction and filed a motion for summary judgment which ignores the central disputed question: Was there a transfer of an interest of the debtor in property?

Rather, Plaintiff's Motion for Summary Judgment unjustifiably presumes the answer to this question and seeks to recover three separate transfers made from Donohew's IOLTA account: a $185,000 payment to Rostad, a $273,194.17 payment to Bank One (presumably the transfer identified in Count III of the Complaint as a $217,659.96 transfer to Bank One);

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[6]Plaintiff's special counsel filed with the Court, despite the Court's instruction to email not file, proposed findings of fact and conclusions of law. These filings are captioned on the Court's docket as "Amended" or "Supplemental" stipulations of fact. *See* docket ## 81 and 85. In order to clarify the record in this matter, the Court notes that these filings are only *proposed* findings of fact submitted by Plaintiff's special counsel. The only stipulations in this adversary proceeding are those reflected in the written Stipulations [docket # 70].

and a $7,000 transfer to Donohew which is never mentioned in the Complaint.

The parties stipulated to the following:

ITTI was an Ohio corporation conducting business at 436 12th Street, N.E., Strasburg, Ohio (the "Property"). Stipulations ¶ 2. M&R owns the Property. Stipulations ¶ 10. Molder was president of ITTI in 1998 and 1999 and a general partner of M&R. Stipulations ¶ 4. Molder and M&R are insiders of ITTI. Stipulations ¶¶ 6 and 8. Donohew performed legal services related to a sale of assets on ITTI's behalf. Stipulations ¶¶ 12 and 16. Bank One was a secured creditor of both ITTI and M&R. Stipulations ¶ 17.

ITTI, M&R, Molder, Stainless Tank and STE entered into the Asset Purchase Agreement. *See* Exhibit A to the Complaint. Pursuant to the Asset Purchase Agreement, Stainless Tank and STE were to deposit money into Donohew's IOLTA account. Stipulations ¶ 32. Stainless Tank and STE deposited the required funds. Stipulations ¶ 32.

It is undisputed that on January 22, 1999, Molder, as Trustee for the Lorel L. Molder Revocable Trust issued a check for $185,000 payable to the "Monty L. Donohew Trust Account." Stipulations ¶ 20. A copy of a check dated Jan. 22, 1999 in the amount of $185,000 is attached to the proof of claim filed by Molder in this case. The memo line on the check reads "Don Rostad final pay off". [7] It is also undisputed that on February 3, 1999,

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[7]Despite the clear and legible text of the memo line on this check, the Plaintiff's Motion for Summary Judgment asserts that "These checks were loans to ITTI because the memo section of the two checks referenced the intent exactly of the check's proceeds - a "loan to ITTI." This is simply not true with respect to the January 22, 1999 check and the Court's record does not contain a copy of the other check.

Molder, as trustee of the Molder Trust, issued a check for $125,000 payable to the "Monty Donohew Trust Account." Stipulations ¶ 23. None of the parties has provided the Court with a copy of the February 3, 1999 check.

According to the affidavit of Lorel Molder, which is attached as an Exhibit to Molder's and M&R's Motion for Summary Judgment [docket #89],

> I never intended the payment of $125,000 to be used for general operating purposes of the Debtor. On the contrary, these funds were to be used to satisfy the balance of the obligations owed by M&R to Bank One as provided under the Asset Purchase Agreement...I also paid $185,000 to Mr. Donohew's trust account in order to pay Donald Rostad the remaining balance owed to him from a buyout agreement dating from 1993 on which I was personally obligated. I never intended these funds to become part of the Debtor's general operating account, and that is why I paid them to Mr. Donohew's trust account rather than deposit these funds into the general operating account of the Debtor.

Molder Aff. ¶¶ 8 and 9. The funds were paid to enable the sale of assets to close. Molder Aff. ¶ 7.

Donohew was instructed to return the funds if the sale did not close. Molder Aff. ¶ 8.

By affidavit, attached as an Exhibit to the Motion of Molder and M&R for Summary Judgment [docket #89], Mr. Donohew confirms that he understood the funds belonged to Molder and could only be used pursuant to her directions. See Donohew Aff. ¶ 5-7. The sale closed and the money was disbursed by Donohew to pay certain debts of ITTI and M&R. Stipulations ¶¶ 30 and 33.

The Trustee argues that Molder's timely filed proof of secured claim in the amount of $3,520,414.08, which includes the January 22, 1999 transfer from Molder to Donohew's IOLTA account and the February 3, 1999 transfer from Molder to Donohew's IOLTA

account, conclusively establishes that the money deposited into Donohew's IOLTA account by Molder constituted a loan to ITTI. In contrast, Molder argues that the characterization of moneys owed to her by the Debtor made in her proof of claim is not conclusive. Molder may assert other legal theories, such as § 509 subrogation, as a basis for claiming the amounts she paid to third parties for the obligations of ITTI.

Based upon the language on the January 22, 1999 check and the Affidavits of Lorel Molder and Monty Donohew, which are uncontroverted despite the unsupported assertions of Plaintiff's special counsel who has had the benefit of full discovery in this matter, the Court finds that there is no genuine issue of fact. The funds placed in Donohew's IOLTA account, some of which were later transferred to Bank One, remained property of Molder, subject to the terms of the Asset Purchase Agreement. The funds did not belong to the Debtor. Further, the Debtor did not have any property interest in the funds.

Furthermore, the Trustee has not shown that the cash proceeds from the sale of M&R and ITTI's assets that were placed in Donohew's IOLTA account became property of the Debtor. The Trustee ignores the fact that property of M&R was sold along with property of ITTI and suggests that all of the cash proceeds belonged to ITTI. This is not the case, as M&R was a party to the Asset Purchase Agreement and sold its assets as well. According to the Affidavit of William J. Lemmon[8] the M&R property was worth $840,000, over two-thirds

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[8]On October 25, 2004, contemporaneous with the filing of Molder and M&R's opposition to the Trustee's Motion for Summary Judgment, Molder and M&R filed the Affidavit of William J. Lemmon with the Court. *See* docket nos. 94 and 95. According to the Lemmon Affidavit, in January, 1999, he conducted an appraisal of the property sold to STE by

of the total purchase price of $1,238,306.30 under the Asset Purchase Agreement. *See* Lemmon Aff. and Exhibit A to Molder Aff. Plaintiff's special counsel did not contest any of the factual statements made in the Lemmon Affidavit.[9] Thus, the allocation of all of the cash proceeds is not appropriately made to ITTI.

DISCUSSION

The Plaintiff cites no legal authority for his proposition that upon deposit into Donohew's IOLTA account in connection with the asset purchase agreement, Molders' funds or the cash proceeds became property of the Debtor. The proposition is not supported by the facts in this case or by law.

Attorneys are required to maintain accounts, separate from their own personal funds, in which the attorney holds funds of clients or third parties in connection with a representation. *See*, e.g. Ohio DR 9-102; Wisconsin Supreme Court Rule 20:1.15. In this

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M&R.

[9]The Trustee's special counsel filed a motion to strike the Lemmon affidavit, or in the alternative for the Court to take notice of the Trustee's objection to the Lemmon affidavit. [docket #99]. Although the Trustee argued that the affidavit is irrelevant, and that Mr. Lemmon was never disclosed as a potential witness during discovery, the Trustee's special counsel did not dispute any factual statements made in the Lemmon Affidavit. In response, Molder and M&R explain that Lemmon's Affidavit is relevant as to the allocation of the purchase price and that Lemmon's appraisal, referenced in his affidavit, was provided to Molder and M&R by Trustee's counsel as a part of a package of documents marked during the 2004 examinations conducted in this case.

The Court believes the Lemmon Affidavit is relevant, is uncontested and is properly before the Court as a part of its consideration of the pending motions for summary judgment. The Lemmon Affidavit will not be stricken from the record.

instance, Mr. Donohew deposited the funds of a third party, Molder, in his IOLTA account in connection with his representation of, *inter alia,* the Debtor regarding the sale of certain assets to Stainless Tank and STE. The funds were not deposited into the Debtor's account or otherwise transferred to the Debtor.

Although not cited by either party, the decision of the Ohio Court of Appeals for the Eleventh District in *City of Ravenna v. Fouts, et al.*, 1994 WL 88980 (Ohio App. 11 Dist.) is instructive. *Fouts* involved a sale of real estate gone sour. Mr Kunar (the "Buyer") responded to an ad of Ms. Fouts (the "Seller") for the sale of certain real property. Buyer and Seller agreed on a price and at the suggestion of Seller agreed that the Seller's attorney ("Collins") would handle the legal aspects of the transaction. The Buyer wrote a check made payable to, "Collins Client Escrow Account" for the purchase price and Collins began drafting the purchase agreement. Before the purchase agreement was signed, but after the Buyer's funds had been deposited into Collin's trust account, the Buyer rescinded the contract. Despite the Buyer's recision of the contract and request for the return of the funds, Collin's distributed the funds from his trust account to the Seller. The Court found that Collins held the funds in trust for the Buyer and Seller and Collins breached the trust in distributing the funds at the Seller's request. *Fouts* shows that the deposit of funds into an IOLTA account does not automatically turn them into funds of the attorney's client. The Plaintiff has cited no authority contrary to *Fouts*.

Here, Molder deposited funds into Donohew's trust account as a part of an asset purchase agreement to which Molder, M&R, the Debtor, STE and Stainless Tank were

parties. Donohew distributed the funds pursuant to the agreement. The funds never became property of the Debtor. Indeed the funds never came into the Debtor's possession. The Plaintiff ignores the function of escrow accounts. An escrow account is "a bank account generally held in the name of the depositor and an escrow agent which is returnable to depositor or paid to third person on the fulfillment of the escrow condition." Blacks Law Dictionary 545 (6th ed. 1990). In other words, escrow accounts are used to maintain the property interest of the party who places an item in escrow until a specified event that will alter the depositor's interest in the property in the manner specified in the documents governing the escrow. Under no circumstance did the documents governing the escrow that the Plaintiff seeks to put at issue in this case provide that the Debtor would have an interest in the funds that Molder deposited in the Donohew IOLTA account.

The Plaintiff's avoidance powers are limited to the avoidance of transfers of an interest of the debtor in property. *Poss v. Morris,* 260 F.3d 654 (6th Cir. 2001); 11 U.S.C. § 547(b). Transfers of property belonging to non-debtor third parties may not be avoided by a bankruptcy trustee as preferential. *Spradlin v. Jarvis*, 323 F.3d 439 (6th Cir. 2003). Since the transfer to Bank One came from third parties and not the Debtor, they are not properly subject to an avoidance action. Therefore, the Court finds that the Trustee is not entitled to judgment as a matter of law, but Molder and M&R are so entitled.

THEREFORE, the Plaintiff's Motion for Summary Judgment is denied and the Motion of Molder and M&R is granted. The Court will enter judgment in favor of Molder and M&R on count III and will dismiss, with prejudice, the remaining counts of the Complaint with

respect to all Defendants. The adversary proceeding will remain open for a period of at least 20 days following the entry of this order for the purpose of considering any motion under Federal Bankruptcy Rule 9011 that might be filed in that period. If any such motion is filed, the adversary proceeding will remain open for the period of time necessary to resolve such motion(s).

IT IS SO ORDERED.

Marilyn Shea-Stonum
United States Bankruptcy Judge