THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 00-10145
	)	Jointly Administered
THE V COMPANIES, et al.,	)	
	)	Chapter 7
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
JEFFERSON COUNTY BOARD OF COUNTY COMMISSIONERS,	)	Adversary Proceeding No. 02-1007
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**MEMORANDUM OF OPINION**
PAUL V. VOINOVICH, et al.,	)	
	)	
Defendants.	)	

Generally, a Chapter 11 debtor-in-possession has the authority to bring actions against third-parties to recover allegedly fraudulent transfers, preferential transfers, and the like. While these cases were in Chapter 11, creditor the Board of County Commissioners of Jefferson County (the "Board") demanded that the Debtors bring such actions against officers, directors, insiders, and affiliates of the Debtors. The Debtors refused, at which point the Board moved for authority to prosecute the actions on behalf of the Chapter 11 estates. The Debtors opposed that request. The Court granted the Board's motion and the Board timely filed this Adversary Proceeding raising the claims (the "Lawsuit").

A few months later, the Chapter 11 reorganization cases were converted to Chapter 7 liquidation cases. Virgil E. Brown, Jr., who is the Chapter 7 trustee in both cases, wishes to be

added as a co-plaintiff and continue to prosecute the Lawsuit with the Board on behalf of the Chapter 7 estates. Certain Defendants ("Defendants") move to dismiss and/or for summary judgment, mainly on the ground that the Board lacked standing to file the Lawsuit.[1]

For the reasons set forth below, the Court finds that the Board had standing to commence the Lawsuit, the Trustee is now entitled to be a party, the Motions to Dismiss and/or for Summary Judgment do not state good cause, and the Lawsuit will go forward with the Trustee as the sole plaintiff.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio.[2]

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[1] These motions raise the related issues that are now before the Court:

(1) Motions to Dismiss filed by Christine Voinovich, Deborah McCann, Paul M. Voinovich, Vocon Design, Inc., Harry Keagler, John Workley, KW Architects, Inc., Paul V. Voinovich, and Step II Development and Management Co. Workley and KW Architects, Inc. also incorporate Armstrong's Motion for Summary Judgment. The Board opposes these motions. (Docket 71, 89, 105, 111, 114, 115, 117, 128, 130);

(2) Armstrong's Motion for Summary Judgment and Amended and Restated Motion for Summary Judgment and/or Motion to Dismiss, as opposed by the Board. Additionally and alternatively, the Board moved for Leave to Amend the Caption, which Armstrong opposes. (Docket 62, 91, 98, 112, 116); and

(3) The Chapter 7 Trustee's motion to be added as a co-plaintiff. Christine Voinovich, Deborah McCann, Paul M. Voinovich, Vocon Design, Inc., John Workley, K.W. Architects, and Heidi Armstrong object. (Docket 119, 143, 144, 150, 152, 155);

[2] The Defendants have filed motions to withdraw the reference of this Adversary Proceeding to the Bankruptcy Court. The District Court docket does not reflect a ruling on those motions.

THE POSITIONS OF THE PARTIES

The Chapter 7 Trustee's position is that he is entitled to be a party to the Lawsuit so that he may pursue recovery of funds for the estates. He wishes to be a co-plaintiff with the Board (rather than the sole plaintiff) so that he can work as a team with the Board to hold down legal fees and expenses. The Defendants argue that the Board lacked standing to file the Lawsuit, the statute of limitations on recovery actions has now run, substituting the Trustee as a party will not cure that defect, and the Lawsuit should be dismissed. Defendant Armstrong also argues that summary judgment should be granted because the case caption does not list the Debtors' estates as parties. If the Lawsuit is to proceed, the Defendants contend that the Trustee should be substituted as the plaintiff, not joined as a co-plaintiff.

DISCUSSION

I.

The Motions to Dismiss and/or for Summary Judgment

In January 2002, the Court granted the Board's motion for authority to prosecute the Lawsuit on behalf of the Chapter 11 Debtors' estates based on the Sixth Circuit decision *Canadian Pacific Forest Prods., Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436 (6th Cir. 1995). (Case No. 00-10145, Docket 409). The Motions to Dismiss[3] and/or for Summary Judgment are premised on the argument that the Board lacked standing to bring this Lawsuit because the Sixth Circuit's reasoning in *Gibson* is flawed and, in any event, *Gibson* is

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[3] The Motions to Dismiss do not cite to any Federal Rule of Civil or Bankruptcy Procedure. Presumably, the Defendants are proceeding under Federal Rule of Civil Procedure 12(b) (made applicable by FED. R. BANKR. P. 7012). If the Defendants rely specifically on Rule 12(b)(6), a complaint should be dismissed under that rule if the "Plaintiff can prove no set of facts to support its claim for relief[.]" *Gibson,* 66 F.3d at 1440.

not good law after the United States Supreme Court decision in *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1 (2000).

In *Gibson*, the Sixth Circuit held that a bankruptcy court may grant derivative standing to a creditor to bring an avoidance action where:

(1) a demand has been made upon the authorized party to take action;

(2) that party declines the demand;

(3) a colorable claim that would benefit the estate if successful exists, based on a cost-benefit analysis performed by the court; and

(4) the debtor-in-possession's inaction is an abuse of discretion in light of its duties in a Chapter 11 case.

Gibson, 66 F.3d at 1446. As this Court found in its oral ruling on the Board's motion for authority to pursue recovery actions, the Board met its burden under *Gibson* by proving that the Debtors had the statutory authority to take action,[4] the Board made demand on the Debtors to do so, the Debtors declined the demand, a colorable claim that would benefit the estates existed if proven, and the Debtors unjustifiably failed to pursue the actions. (Case No. 00-10145, entry for 1/7/02).

The Defendants contend that the Lawsuit should now be dismissed because the Bankruptcy Code authorizes only a Chapter 11 debtor-in-possession to bring estate actions and a creditor may not be given derivative standing to pursue them. They argue that the Sixth Circuit erred in deciding *Gibson* because it relied exclusively on policy considerations and ignored the

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[4] The relevant Bankruptcy Code sections state that a trustee has the statutory power to avoid certain transfers, *see for example* 11 U.S.C. § 548, but the Code also provides that a debtor-in-possession generally has the rights, powers, and duties of a trustee. 11 U.S.C. § 1107(a). Thus, while these cases were in Chapter 11, the Debtors as debtors-in-possession had the power to proceed with the causes of action at issue.

plain language of the Code.[5] The *Gibson* decision is, however, binding precedent in this Circuit and this trial court is required to follow it unless it is inconsistent with a later decision of the United States Supreme Court or the Circuit overrules it.

To try to bring themselves within the exception, the Defendants argue that *Gibson* is no longer viable in light of the Supreme Court's decision in *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1 (2000). The issue in *Hartford* was whether an administrative claimant had independent standing, without court authority, to bring a claim under Bankruptcy Code § 506(c). 11 U.S.C. § 506(c). The Supreme Court held that it did not. In footnote five, the Supreme Court made clear that it was not addressing either derivative standing issues or the *Gibson* decision:

> We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c). *Amici* American Insurance Association and National Union Fire Insurance Co. draw our attention to the practice of some courts of allowing creditors or creditors' committees a derivative right to bring avoidance actions when the trustee refuses to do so, even though the applicable Code provisions, see 11 U.S.C. §§ 544, 545, 547(b), 548(a), 549(a), mention only the trustee. See, e.g., *In re Gibson Group, Inc.*, 66 F.3d 1436, 1438 (C.A.6 1995). Whatever the validity of that practice, it has no analogous application here, since petitioner did not ask the trustee to pursue payment under § 506(c) and did not seek permission from the Bankruptcy Court to take such action in the trustee's stead. Petitioner asserted an independent right to use § 506(c), which is what we reject today. *Cf. In re Xonics Photochemical, Inc.*, 841 F.2d 198, 202-203 (C.A.7 1988) (holding that creditor had no right to bring avoidance action independently, but noting that it might have been able to seek to bring derivative suit).

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[5] The Defendants do not argue that the Board failed to prove the *Gibson* factors at the hearing on the Motion for Authority to bring the Lawsuit, only that *Gibson* is wrongly decided in holding that there are circumstances where a creditor may be given derivative standing to sue.

Hartford, 503 U.S. 13, n.5. There is, therefore, no basis for the Defendants' argument that the Board did not have standing to bring this Lawsuit: the *Gibson* case specifically permits a court to confer derivative standing under appropriate circumstances, the Board proved that it came within the *Gibson* standard, the Sixth Circuit has not overruled *Gibson, Gibson* is not inconsistent with the *Hartford* decision, and this Court declines the invitation to reverse a decision of the Circuit. Consequently, the Motions to Dismiss are denied.

Armstrong's Motion for Summary Judgment raises similar standing issues, but adds an argument that she is entitled to judgment as a matter of law because the Complaint allegedly does not comply with Federal Rule of Civil Procedure 10(a) (made applicable here by FED. R. BANKR. P. 7010).[6] That rule provides in pertinent part that a complaint shall state the names of all the parties. Both the Complaint and the First Amended Complaint (collectively, the "Complaint") list the plaintiff as "Jefferson County Board of County Commissioners, On Behalf of All the Creditors of the Bankruptcy Estate" and goes on to request relief "on behalf of all the [Debtors'] creditors . . . and the Debtors' Estates" under the Bankruptcy Code. (Docket 1 at 1, 4; Docket 24 at 1, 4).

There is no merit to the argument that the Complaint is defective under Rule 10(a). The Court granted the Board authority to file the Complaint as a derivative action, the plaintiff at the

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[6] Summary judgment is only appropriate where there is no genuine 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), made applicable by FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998), *quoting Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992).

time of filing was the Board in its derivative capacity, and the Board is appropriately named in the Complaint's caption. Armstrong is not entitled to judgment as a matter of law and the Motion for Summary Judgment is, therefore, denied.

II.

The Trustee's Motion to be Joined as a Party

Every action must be prosecuted in the name of the real party in interest. *See* FED. R. CIV. P. 17(a) (made applicable by FED. R. BANKR. P. 7017). The real party in interest:

> is the [party] who is entitled to enforce the right asserted under the governing substantive law. The real party in interest analysis turns upon whether the substantive law creating the right being sued upon affords the party bringing the suit a substantive right to relief.

Certain Interested Underwriters at Lloyd's, London, England v. Layne, 26 F.3d 39, 43 (6th Cir. 1994) (citations omitted).[7] The Federal Rules of Civil Procedure recognize, however, that there are times when a party's interest will change during litigation. If an interest is transferred, Rule 25(c) provides that the suit may either be continued by the original party or the transferee may be substituted or added:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party . . . .

FED. R. CIV. P. 25(c) (made applicable here by FED. R. BANKR. P. 7025). The Trustee invokes this rule to join in the Lawsuit based on the fact that the interest in the Lawsuit transferred to him

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[7] As the Sixth Circuit has noted, there is a distinction between questions of Article III standing and Rule 17(a) real party in interest status. *Zurich Ins. Co. v. Logitrans Inc.*, __ F.3d __, 2002 WL 1732803 (6th Cir. 2002). The Board had derivative standing to bring the Lawsuit based on this Court's decision to permit it to pursue the recovery actions and it was the real party in interest to prosecute the Lawsuit.

as trustee after the cases converted to Chapter 7. In Chapter 7, the trustee has the statutory duty to "collect and reduce to money the property of the estate[.]" 11 U.S.C. § 704(1). The causes of action asserted in the Lawsuit are such property. *See* 11 U.S.C. §§ 541(a)(1) and (3) (estate property includes all of a debtor's legal and equitable interests in property and any interest in property that the trustee recovers). As a result of the conversions, the interest in the causes of action transferred from the Debtors (as derivatively represented by the Board in this Lawsuit) to the Trustee. *Cf. Bauer v. Commerce Union Bank,* 859 F.2d 438 (6th Cir. 1988). The Trustee is, therefore, appropriately made a party to the Lawsuit under Rule 25(c).[8] *See, for example, Blachy v. Butcher*, 221 F.3d 896, 911 (6th Cir. 2000) (noting that Rule 25(c) applies where there has been a transfer of the property which is the subject of the lawsuit). *See also, Mroz v. Lee,* 884 F. Supp. 246, 249 (E.D. Mich. 1995) (acknowledging that a Chapter 7 trustee may be substituted for a plaintiff-debtor under Rule 25(c), but declining to order substitution under the circumstances).

Under Rule 25(c), once it is determined that the Trustee should be a party, the issue is whether the Trustee should be substituted for the Board as the plaintiff or added as a plaintiff. The Trustee asks to be joined as a co-plaintiff rather than substituted on the ground that the Board is deeply familiar with the case. Keeping the Board as a party, the Trustee argues, would permit the Trustee to work as a team with the Board going forward. Reducing the Trustee's need to proceed independently would, he feels, be cost efficient and permit him to maximize recovery

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[8] Defendant Armstrong argues that permitting the Trustee to be joined or substituted as a party will enable the Trustee to commence a time-barred lawsuit. This argument fundamentally misconstrues the posture of this Lawsuit. The Board timely commenced the Lawsuit with leave of court. The question at this point is whether the Trustee should be a party to the pending Lawsuit and, if so, whether the Trustee should be an additional plaintiff or the only plaintiff. The Trustee is not commencing a new suit.

for the estates. The Defendants argue that if the Trustee is the real party in interest, then the Trustee should have to go it alone in this Lawsuit without the benefit of the Board's participation.

The language of Rule 25(c) leaves open the possibility that, in appropriate circumstances, a party such as the Board may continue in litigation even after its interest is transferred and the transferee becomes a party. The decision as to whether the transferee should be joined or substituted as a party is generally left to the trial court's discretion. In deciding which alternative is preferable, courts consider whether joinder or substitution will better facilitate the conduct of the lawsuit. *See Television Reception Corp. v. Dunbar*, 426 F.2d 174, 178 (6th Cir. 1970) ("Joinder merely represented a discretionary determination by the District Judge that [adding the party] would facilitate his conduct of the litigation."); *Fed. Deposit Ins. Corp.*, 89 F.R.D. 446, 448 (E.D. N.Y. 1981) (citing *Television Reception)* ("The decision to order substitution or joinder is to be made by considering how the conduct of the lawsuit will be most facilitated[.]").

At this point in the Lawsuit, the Trustee is a real party in interest with the obligation to maximize, collect, and distribute the Chapter 7 estates' assets. In that regard, the Trustee has the duty to determine how to conduct the Lawsuit and, if appropriate, to recommend terms on which it should be compromised. *See* FED. R. BANKR. P. 9019(a). While the Board no doubt has information gained from prosecuting the Lawsuit when it was initiated, the Trustee may benefit from that knowledge by continuing to work cooperatively with the Board even if the Board is not a party. Under these circumstances, the conduct of the lawsuit will be facilitated by the Trustee being substituted as the plaintiff.

CONCLUSION

For the reasons stated,

(1) the Motions to Dismiss filed by Christine Voinovich, Deborah McCann, Paul M. Voinovich, Vocon Design, Inc., Harry Keagler, John Workley, KW Architects, Inc., Paul V. Voinovich, and Step II Development and Management Co are denied;

(2) Heidi Armstrong's Motion for Summary Judgment and Amended and Restated Motion for Summary Judgment and/or Motion to Dismiss, as joined in by John Workley and KW Architects, Inc., is denied;

(3) The Chapter 7 Trustee's motion to be added as a co-plaintiff is granted in part, with the Trustee substituted as plaintiff, and

(4) The Board's alternative Motion for Leave to Amend Caption is moot.

A separate order will be entered reflecting this decision.

Date: 2 August 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on:
Harry Wright, Esq.
Gregory Lichko, Esq.
Michael Zaverton, Esq.
J. Scott Broome, Esq.
Alexander Jurczenko, Esq.
Lester Potash, Esq.
Alec Berezin, Esq.
Leonard Stauffenger, Esq.
Marc Silberman, Esq.
Roger Stevenson, Esq.
Jeffrey Miller, Esq.
James Wilson, Esq.
Alan Lepene, Esq.

By: Joyce L. Gordon, Secretary
Date: 8/2/02

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 00-10145
	)	Jointly Administered
THE V COMPANIES, et al.,	)	
	)	Chapter 7
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
JEFFERSON COUNTY BOARD OF COUNTY COMMISSIONERS,	)	Adversary Proceeding No. 02-1007
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ORDER**
PAUL V. VOINOVICH, et al.,	)	
	)	
Defendants.	)	

For the reasons stated in the Memorandum of Opinion filed this date:

(1) the Motions to Dismiss filed by Christine Voinovich, Deborah McCann, Paul M. Voinovich, Vocon Design, Inc., John Workley, KW Architects, Inc., Harry Keagler, Paul V. Voinovich, and Step II Development and Management Co are denied (Docket 71, 89, 105, 117);

(2) Heidi Armstrong's Motion for Summary Judgment and Amended and Restated Motion for Summary Judgment and/or Motion to Dismiss, as joined in by John Workley and KW Architects, Inc., is denied (Docket 62, 98);

(3) The Chapter 7 Trustee's motion to be added as a co-plaintiff is granted in part, with the Trustee substituted as plaintiff (Docket 119); and

(4) The Board's alternative Motion for Leave to Amend Caption is moot. (Docket 91).

IT IS SO ORDERED.

Date: 2 August 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Harry Wright, Esq.
Gregory Lichko, Esq.
Michael Zaverton, Esq.
J. Scott Broome, Esq.
Alexander Jurczenko, Esq.
Lester Potash, Esq.
Alec Berezin, Esq.
Leonard Stauffenger, Esq.
Marc Silberman, Esq.
Roger Stevenson, Esq.
Jeffrey Miller, Esq.
James Wilson, Esq.
Alan Lepene, Esq.

By: Joyce L. Gordon, Secretary

Date: 8/2/02