UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
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RANDALL JOSEPH HAKE,	*	
***et al.*,**	*	**CASE NUMBER 04-41352**
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Debtors.	*	
	*	
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BUCKEYE RETIREMENT CO.,	*	
LLC LTD.,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	**ADVERSARY NUMBER 04-4189**
	*	
RANDALL JOSEPH HAKE,	*	
***et al.*,**	*	
	*	
Defendants.	*	
	*	

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M E M O R A N D U M O P I N I O N
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This cause is before the Court on Motions to Dismiss for Failure to State a Claim under FED. R. CIV. P. 12(b)(6) ("Motions to Dismiss") filed by (i) Debtors/Defendants Randall Joseph Hake and Mary Ann Hake (collectively "Debtors") and (ii) Defendants Christopher R. Hake and Founders Square, L.L.C. Plaintiff Buckeye Retirement Co., LLC Ltd. ("Buckeye") responded by filing a Response to Defendants' Motions to Dismiss for Failure to State a Claim ("Buckeye's Response"). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F) and (H). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. STANDARD OF DISMISSAL

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) to test whether a cognizable claim has been pleaded in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.[1]

In determining whether to grant a motion to dismiss, the court must analyze the complaint. To withstand dismissal, the complaint must provide a plain and clear statement of the claim that shows the plaintiff is entitled to relief, provide the defendant with notice of the claim, and the grounds upon which the claim rests. *See* FED. R. CIV. P. 8(a); *Conley v. Gibson,* 355 U.S. 41, 47 (1957). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under Fed.R.Civ.P. 12(e) for a more definite statement is the proper avenue rather than under Fed.R.Civ.P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (2003) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d. ed. 1990)).

FED. R. CIV. P. 12(b)(6) requires that a complaint be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can not prove a set of facts to support a claim that would entitle the plaintiff to relief. *Conley,* 355 U.S. at 45-46. In determining the sufficiency of a complaint, the court must construe the complaint in the light most favorable to the plaintiff, accept the allegations set forth as true, and resolve any

[1]The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

ambiguities in favor of the plaintiff. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge,* 282 F. Supp. 2d. at 803. However, the court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc.* (*In re KDI Holdings, Inc.*), 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *KDI Holdings Inc.,* 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)); see also *Lewis v. ABC Bus. Servs., Inc.* , 135 F.3d 389, 405-06 (6th Cir. 1998). Thus, in evaluating a 12(b)(6) motion, the court should construe the complaint very liberally. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

II. FACTS

Debtors filed a voluntary petition for reorganization under Chapter ll of the Bankruptcy Code on March 25, 2004. The Debtors are continuing to manage and operate their business and assets as debtors-in-possession pursuant to § 1107 of the Bankruptcy Code. The United States Trustee has not appointed an official committee of unsecured creditors. Nor has there been a Chapter 11 trustee assigned to this case.

Buckeye is a party in interest because it is a creditor of the Debtors by virtue of a judgment[2] entered February 25, 2002 and a proof of claim filed with this Court on April 7, 2004 in the amount of One Million Eight Hundred Ninety-Four Thousand Five

[2] *Buckeye Retirement Co., LLC Ltd. v. Randall J. Hake Contracting Corp., et al.*, Trumbull County Court of Common Pleas, Case No. 2000-CV-01700.

Hundred One and 97/100 Dollars ($1,894,501.97). Buckeye has been an active and aggressive participant throughout the duration of the Chapter 11 proceeding. Buckeye has, *inter alia*, objected to the employment of counsel, filed forty eight (48) motions for Rule 2004 examinations, filed a motion to convert this case to one under Chapter 7, filed a motion to appoint a trustee and filed motions for relief from stay. Buckeye even opposed setting a bar date in this case.

Without leave of the Court, Buckeye initiated this adversarial proceeding by filing the Complaint on October 8, 2004. The Complaint purports to set forth avoidance actions under 11 U.S.C. §§ 547 and 548 (preference and fraudulent transfer claims). Preference and fraudulent transfer claims are specifically reserved for the debtors-in-possession or trustee; no other party may bring such actions without the express authorization of the Court. Buckeye brings the action as "plaintiff" and baldly asserts that it has "standing as a creditor and a 'party in interest'" to bring the action. Buckeye does not appear to comprehend that, even if the Court approves a creditor to bring a derivative suit, such suit is for the benefit of the bankruptcy estate and not the individual creditor bringing the suit.

Debtors and Christopher R. Hake and Founders Square, L.L.C. (collectively "Defendants") filed Motions to Dismiss. All parties allege that Buckeye does not have standing to bring the derivative suit. Buckeye's Response asserts that it has derivative standing. Neither party addresses the elements required for a creditor to bring a derivative suit as set forth in *Canadian Pacific*

Forest Products, Ltd. v. J.D. Irving, Ltd. (*In re The Gibson Group, Inc.*), 66 F.3d 1436 (6th Cir. 1995).

III. DISCUSSION

A. *Standing*

Movants seek to dismiss the Complaint pursuant to FED. R. CIV. P. 12(b)(6), for failure to state a claim upon which relief can be granted. Movants allege Buckeye lacks standing to bring the adversary proceeding on behalf of the Debtors. This Court must review the standing issue pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). The Supreme Court instructs this Court that "the standing 'inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *KDI Holdings, Inc.*, 277 B.R. at 502 (quoting *Thompson v. County of Franklin*, 15 F.3d 245, 247 (2nd Cir. 1994)).

Under FED. R. CIV. P. 12(b)(1), it is the burden of the party invoking jurisdiction to demonstrate that he is the proper party to seek judicial resolution of the dispute. *Thompson*, 15 F.3d at 249. After reviewing the entire record, the court must dismiss the complaint if the court can not perceive a basis for the plaintiff's standing. *Id.*

Under FED. R. CIV. P. 12(b)(6), the court should not dismiss a complaint for lack of standing "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley,* 355 U.S. at 45-46.

B. *Derivative Suits*

Avoidance actions brought pursuant to 11 U.S.C. §§ 547 and 548 (preference and fraudulent transfer claims) are causes

of actions that are specifically reserved in those statutes for the debtor-in-possession or the trustee. However, the Sixth Circuit Court of Appeals in *Gibson Group* set forth a test that allows a court, under certain circumstances, to grant standing to a creditor to bring an avoidance action. *Gibson Group, Inc.*, 66 F.3d at 1438-39.

The court in *Gibson Group* stated:

> We believe that Congress has not precluded the bankruptcy court from granting standing to a creditor if such standing furthers Congress's purpose in creating the avoidance actions found in 11 U.S.C. §§ 547 and 548 in the context of a Chapter 11 reorganization. We decide, therefore, that a bankruptcy court <u>may permit</u> a single creditor in a Chapter 11 case to initiate an action to avoid a preferential or fraudulent transfer instead of the debtor-in-possession if the creditor: 1) has alleged a colorable claim that would benefit the estate, if successful, based on a cost-benefit analysis performed by the bankruptcy court; 2) has made a demand on the debtor-in-possession to file the avoidance action; 3) the demand has been refused; and, 4) the refusal is unjustified in light of the statutory obligations and fiduciary duties of the debtor-in-possession in a Chapter 11 reorganization.

Id. at 1438 (emphasis added).[3] *Gibson Group* expressly requires that a single creditor obtain court authorization before proceeding with an avoidance action on behalf of the estate. In the Sixth Circuit, a creditor seeking to pursue an avoidance claim must be granted

[3]A "colorable claim that would benefit the estate" requires a cost-benefit analysis that the alleged claim has merit and is likely to bring assets back into the estate. The action must benefit the bankruptcy estate and not the creditor bringing the derivative suit. The following factors should be considered in determining whether the claim will result in a benefit to the estate: (1) whether the party against whom the claim is sought is collectible; (2) the cost to the estate to defend the action; and (3) the cost to the estate to pursue the action. (It should be noted that the creditor must file the appropriate motion to have its fees paid and the court must approve such fees.) There is no benefit to the estate if the avoidance recovery is completely depleted by the cost of the action and the cost of collection.

leave of court to file the adversary proceeding.[4] *Jefferson County Bd. of County Comm'rs v. Voinovich* (*In re The V Companies*), 292 B.R. 290 (B.A.P. 6th Cir. 2003).

In the instant case, Buckeye never sought - and this Court never granted Buckeye - leave to file this adversary proceeding. Buckeye has yet to seek the Court's permission despite the fact that, this Court, at a hearing on another matter, questioned whether Buckeye had standing to bring this adversary proceeding. Buckeye admits that it has not obtained permission, but states, "Plaintiff has standing under *Gibson Group* without obtaining leave of Court to pursue standing." (Buckeye's Response at 6.)[5] Buckeye's failure to seek leave of the Court is even more astonishing in light of its apparent recognition of such requirement. (*Id.*)

Since Buckeye has failed to follow the proper procedure for this Court to consider the test in *Gibson Group*, Buckeye has no standing to bring the avoidance claims. Without first seeking leave of the Court, Buckeye can not prove that it is the proper party to seek judicial resolution of this suit, as required under FED. R. CIV. P. 12(b)(1).

In addition to failing the standing requirement in FED. R. CIV. P. 12(b)(1), Buckeye also fails the standing requirements set forth in FED. R. CIV. P. 12(b)(6). This Court never granted Buckeye permission to initiate the derivative suit as required by

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[4]Movants cite *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) to support their proposition. This case is not applicable to the instant case. See *Hartford Underwriters Insurance Co.*, 530 U.S. at 13 n.5; *The V Companies*, 292 B.R. at 294-98.

[5]Buckeye's flagrant disregard of the requirements of *Gibson Group* and assertion that it has the right to bring this suit without this Court's approval shows complete disregard for procedure and the authority of the Court.

Gibson Group. Consequently, it appears beyond doubt that there is no set of facts to support Buckeye's claim. Buckeye is not entitled to relief, as required by FED. R. CIV. P. 12(b)(6), because Buckeye needs to prove that this Court granted it leave to pursue this claim.

III. Granting Relief *Nunc Pro Tunc*

Buckeye's only attempt to remedy its failure to obtain prior leave of the Court is to urge that such failure is not fatal when pursuing this claim because leave can be granted *nunc pro tunc*. (Buckeye's Response at 10.) Buckeye also suggests that granting leave *nunc pro tunc* is permissible because the Court can use the Motions to Dismiss to consider the factors in the *Gibson Group* test. (*Id.*) The Court declines to adopt Buckeye's suggested - and ill conceived - procedure. Buckeye attempts to use Defendants' Motions to Dismiss to belatedly obtain relief that it has failed and refused to seek. This is not proper procedure.

Simply stated, granting leave of Court *nunc pro tunc* is not permissible under these circumstances. The function of a *nunc pro tunc* order is to correct irregularities in the entries of judicial mandates or correct irregularities in procedural errors. *Mohrmann v. Kob*, 51 N.E.2d 921, 922 (N.Y. 1943). "Relief is to be granted on a *nunc pro tunc* basis only under the most limited of circumstances, not to do something new or additional, but only to correct that which was to have been done at the earlier occasion." *Weld v. Robert A. Sweeney Agency, Inc.* (*In re Patton's Busy Bee Disposal Serv., Inc.*), 182 B.R. 681, 687 (Bankr. W.D. N.Y. 1995). Buckeye has failed to seek leave of Court; such relief cannot be accomplished - *nunc pro tunc* or otherwise - through another party's

motion to dismiss. What Buckeye is suggesting is not a cure for a procedural defect, but rather something new and additional.

Furthermore, the purpose of seeking prior leave of court is to (i) reduce confusion, (ii) ensure that the debtor-in-possession is informed of the creditor's intent to assert a right reserved for the debtor-in-possession, and (iii) provide an avenue for the debtor-in-possession to explain to the court its reason for failing to prosecute the claim. *Chem. Separations Corp. v. Foster Wheeler Corp.* (*In re Chem. Separations Corp.*), 32 B.R. 816, 819 (Bankr. E.D. Tenn. 1983). If this Court granted Buckeye leave *nunc pro tunc*, the purpose of obtaining prior leave of court would be completely abrogated; the Debtors would not have advance knowledge that a creditor intended to assert the avoidance claim, thus depriving the Debtors of the opportunity to explain why they did not and/or why the estate should not prosecute the claim. Additionally, because Buckeye failed to move for leave, the matter is not properly before the Court.

Buckeye cites numerous cases purportedly in support of its argument that prior leave of court is not necessary to entitle it to bring this adversary proceeding. These cases are all distinguishable. In *Official Committee of Unsecured Creditors of Grand Eagle Companies, Inc. v. Asea Brown Boveri, Inc.*, 313 B.R. 219 (N.D. Ohio 2004), the court concluded "that the bankruptcy court properly interpreted the Cash Collateral Order to require the filing of the action, not the approval of the action, by the deadline." *Id.* at 228. This is not the case here. In *Liberty Mutual Insurance Co. v. Official Unsecured Creditors' Committee* (*In re Spaulding Composites Co., Inc.*), 207 B.R. 899 (9th Cir. B.A.P. 1997), "the

Committee did, eventually, seek the bankruptcy court's permission to represent the estate and to continue prosecution of the suit." *Id.* at 904. In comparison, Buckeye has yet to seek the Court's permission to bring this adversary proceeding. In *Official Committee of Unsecured Creditors v. Hudson United Bank* (*In re America's Hobby Center, Inc.*), 223 B.R. 275 (Bankr. S.D. N.Y. 1998) and *KDI Holdings Inc.*, 277 B.R. 493, the courts granted *nunc pro tunc* relief because "time was of the essence" and "there was little 'likelihood of confusion' as to who [*i.e.* unsecured creditors committee] would file the adversary proceeding." *Am.'s Hobby Ctr., Inc.*, 223 B.R. at 281-82 ; *KDI Holdings, Inc.*, 277 B.R. at 506. *Chemical Separations Corp.*, 32 B.R. 816, involved a situation where the unsecured creditors' committee was informed by debtor's counsel that it was not going to pursue the action, debtor's counsel informed the committee that it was appropriate for the committee to bring the adversary proceeding and the adversary proceeding was brought in the debtor's name to avoid confusion. *Id.* at 819. The instant case does not involve any of these facts. The bankruptcy court for the Eastern District of California in *Catwil Corp. v. Derf II* (*In re Catwil Corp.*), 175 B.R. 362 (Bankr. E.D. Ca. 1994), ruled it was appropriate to grant *nunc pro tunc* relief because the debtor and the unsecured creditors' committee had in-depth discussions about bringing an avoidance action, "time was of the essence" and there was little, if any, confusion created by the committee's filing of the adversary proceeding. *Id.* at 365. In comparison, time is not of the essence here, there is no evidence of discussions between Buckeye and the Debtors about bringing an avoidance claim and this adversary proceeding, commenced by Buckeye, could lead to confusion.

The court in *Louisiana World Exposition, Inc. v. Federal Insurance Co.* (*In re Louisiana World Exposition, Inc.*), 832 F.2d 1391 (5th Cir. 1987), granted the unsecured creditors' committee approval to bring the adversarial proceeding; whereas, this Court has not granted Buckeye leave of court to pursue this adversary proceeding. *Id*. at 1397-98. The court in *Patton's Busy Bee Disposal Service, Inc.,* 182 B.R. 681, granted *nunc pro tunc* relief to pursue avoidance claims authorized by order and denied any other cause that was not intended in the order. *Id*. at 687. Contrary to *Patton's Bee Disposal Service, Inc*., this Court has not granted Buckeye leave to pursue any claims. *Id*. As a result of the aforementioned, Buckeye did not provide any authority that would permit, much less require, this Court to grant *nunc pro tunc* relief.

For the foregoing reasons, this Court can not grant Buckeye leave to file the adversary proceeding *nunc pro tunc*.

IV. CONCLUSION

Viewing the evidence and its inferences in the light most favorable to Buckeye, this Court grants Defendants' Motions to Dismiss. Buckeye lacks standing as required in FED. R. CIV. P. 12(b)(1) and 12(b)(6) due to its failure to seek prior leave of court, as required by *Gibson Group.* This Court must decline to follow Buckeye's suggestion that the Court grant it leave *nunc pro tunc*.

An appropriate order will follow.

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HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
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RANDALL JOSEPH HAKE,	*	
***et al.*,**	*	**CASE NUMBER 04-41352**
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BUCKEYE RETIREMENT CO.,	*	
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	*	
Defendants.	*	
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O R D E R
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For the reasons set forth in this Court's Memorandum Opinion entered this date, the Motion to Dismiss for Failure to State a Claim filed by Randall J. Hake and Mary Ann Hake and the Motion to Dismiss for Failure to State a Claim filed by Christopher R. Hake and Founders Square, L.L.C. are granted.

IT IS SO ORDERED.

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HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE