The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: June 12 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 03-3370
	)	SIPA Liquidation
Continental Capital Investment Services,	)	
Inc. and Continental Capital Securities,	)	
Inc.,	)	Adv. Pro. No. 05-3322
	)	
Debtors.	)	Hon. Mary Ann Whipple
	)	
Thomas S. Zaremba, SIPA Trustee,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Merle E. Pheasant, Jr.,	)	
	)	
Defendant.		

MEMORANDUM AND ORDER DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS

This adversary proceeding is before the court on Defendant's Motion to Dismiss [Doc. # 13], Plaintiff's opposition [Doc. # 14] and Defendant's reply [Doc. # 22]. Plaintiff Thomas S. Zaremba ("Plaintiff"), as the trustee for the liquidation of Continental Capital Investment Services, Inc. ("CCIS"), and Continental Capital Securities, Inc. ("CCS"), filed a complaint against Defendant Merle E. Pheasant,

Jr., ("Defendant"), asserting claims for turnover and accounting (Count One), avoidance of preferential transfers under 11 U.S.C. § 547, fraudulent transfers under 11 U.S.C. § 548(a)(1)(A) and (B) (Counts Three and Four) and under Ohio Revised Code §§ 1336.04(A)(1), (2) and 1336.05(A) (Counts Five, Six and Seven), and violations of the Ohio Securities Act, Ohio Revised Code § 1707.01 *et seq.* (Count Eight).

The court has jurisdiction over this adversary proceeding under to 28 U.S.C. §1334(b) and the general order of reference entered in this district. Defendant moves to dismiss the complaint under Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rules 7012 and 7009 of the Federal Rules of Bankruptcy Procedure. For the reasons that follow, Defendant's motion will be granted in part and denied in part.

FACTUAL ALLEGATIONS

The following factual allegations are set forth in the complaint. On August 25, 2003, the Securities Investor Protection Corporation ("SIPC") filed a complaint and application against Debtors CCIS and CCS (collectively "Debtors") in the United States District Court for the Northern District of Ohio. SIPC sought the issuance of a protective decree adjudicating that the customers of Debtors were in need of protection under the Securities Investors Protection Act ("SIPA"), 15 U.S.C. § 77aaa *et seq.* On September 29, 2003 the District Court entered its order commencing the liquidation proceeding of Debtors, appointing Plaintiff as Trustee and referring the liquidation proceeding to the bankruptcy court. [Doc. # 1, Complaint, ¶¶ 1-2].

Debtors are wholly owned subsidiaries of Continental Capital Corporation ("CCC"). CCC was not, at least in recent years, an operating entity and has been "for some time" insolvent. [*Id.* ¶¶ 14-15]. CCC was a conduit for a network of subsidiary and other related entities, a network largely, if not completely, supported financially by funds from Debtors' operations. [*Id.* ¶ 19]. William Clark Davis ("Davis") and William Faulkner ("Faulkner") served in various capacities with CCC, CCIS and CCS, including as officers, directors, and investment advisors. [*Id.* ¶¶ 16-17]. Defendant is an attorney and served as general counsel for CCC and CCS until 1999, and as retained counsel from time to time thereafter for CCIS, CCS and/or CCC. [*Id.* ¶ 21]. He had personal relationships with and acted as advisor to Davis, Faulkner, CCC and Debtors. [*Id.* ¶¶ 21, 23].

Plaintiff alleges the following four separate fraudulent schemes carried out by Davis and/or Faulkner in which Defendant aided or participated. The first scheme is described as the "Minimum Net Capital Requirements Scheme." In 2002 and/or 2003, Defendant advanced funds to CCC, knowing that the purpose of the advances was to permit CCC to transfer the money to Debtors so that Davis and/or Faulkner could

falsely report compliance with the minimum net capital requirements of federal and state law that are designed to afford protection to account holders and to maintain the financial stability of Debtors. The money transferred from CCC to Debtors was falsely reported as payment by CCC of accounts receivable due and owing to Debtors. Upon completion of the false Net Capital Reports, the money was re-transferred to CCC and to Defendant. Debtors actual net capital regularly fell below the net minimum capital requirements, leaving them with insufficient capital to conduct their legitimate and profitable operations. The false reporting scheme prevented regulatory entities from discovering that Debtors were not in compliance with federal and state law and allowed them to continue other fraudulent activities, including sales of unregistered, non-exempt securities. [*Id.* ¶¶ 22-28].

Second, Plaintiff alleges various fraudulent activities of Davis that included the following done without the authority and knowledge of Debtors' account holders: executing risky and speculative transactions that were unsuitable for Debtors' account holders and liquidating investments in marketable, safe investments and, in turn, issuing account holders unregistered promissory notes in non-marketable, private placement investments. In addition, Plaintiff alleges that Davis sold securities in companies that were fabricated or were no longer operating. Davis consummated these transactions by using forged and/or blank letters of authorization. Plaintiff alleges Defendant aided Davis in these fraudulent activities despite having actual or constructive knowledge of their fraudulent nature. [*Id.* ¶¶ 30-38].

Third, Plaintiff alleges a Ponzi scheme conducted by Davis where returns to investors were derived from money invested by new investors and not from the operations of an underlying business enterprise. Davis did not inform account holders of the true financial condition of the entities in which the investments were made and, on occasion, presented the account holder with spreadsheets that purported to indicate the status of their investments but which were incomplete, inaccurate, misleading and false in multiple material respects. Plaintiff alleges that Defendant aided Davis in selling millions of dollars of securities in private placement companies that did not exist, were insolvent or had little likelihood of being able to repay the promissory note and that certain of these proceeds were used to support the Ponzi scheme or used for Davis' own benefit. Plaintiff alleges that Defendant, given his position as CCS general counsel and his working and personal relationships with Davis and Faulkner, should have known of the Ponzi scheme. [*Id.* ¶¶ 39-52].

The fourth scheme alleged relates to an inquiry letter received by CCC from the National Association of Securities Dealers ("NASD") addressing complaints by CCIS investors dealing with the sale of unregistered and unsecured promissory notes. At the direction of Faulkner, Defendant conducted an

investigation of the investors' allegations. As a result of his investigation, Plaintiff alleges that Defendant had actual knowledge of a number of facts, including that the notes were not registered with the Securities Exchange Commission or the Ohio Division of Securities, that the notes were not secured by any lien upon the assets of a small business, that they were sold as a regular business practice of CCC, that CCC and related affiliates had direct and indirect interests in the issuing entities, and that other CCC affiliates received commissions from the note sales. On or about August 20, 2002, Faulkner, as a representative of CCC, submitted a response to the NASD inquiry in the form of a letter ("the Letter") that was materially false. Specifically, the Letter falsely stated that CCIS and CCS had no involvement in the sales of the unregistered notes, and that the sales were a separate undertaking of Davis. In addition the Letter took the false and misleading position that the notes were not securities because they were secured by liens upon small businesses. Plaintiff alleges that Defendant aided Faulkner by advising, structuring, preparing, and/or by assisting in the preparation of the Letter and that he either failed to disclose his knowledge of the actual facts or agreed to conceal such knowledge from the NASD.

Plaintiff then alleges that Defendant received a transfer from CCIS in the amount $10,000 on or about August 31, 2002, and eleven different transfers totaling $397,085.88 from CCC between August 26, 2002, and February 18, 2003. Other pertinent allegations are set forth in the court's analysis of the motion to dismiss as they specifically relate to each count of the complaint.

LAW AND ANALYSIS

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal where the plaintiff has failed to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). The Sixth Circuit summarized the analysis required when addressing a Rule 12(b)(6) motion as follows:

> A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations. Thus this Court must assume that all allegations are true and dismiss the claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," i.e., that the legal protections invoked do not provide relief for the conduct alleged. In addition, "while liberal, this standard of review does require more than the bare assertion of legal conclusions." "In practice, 'a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.'"

Golden v. City of Columbus, 404 F.3d 950, 958-59 (6th Cir. 2005) (citations omitted). The court will apply this standard to each count of the complaint in the order argued by Defendant.

I. Avoidance of Preferential Transfers under 11 U.S.C. § 547(b)[1]

In Count II of the complaint, the Trustee seeks to avoid the prepetition transfers to Defendant alleged in the complaint as preferences under 11 U.S.C. § 547(b). In order to survive a motion to dismiss, the complaint must contain allegations regarding the following elements: (1) the transfers were of an interest of Debtors in property; (2) the transfers were made to or for the benefit of a creditor; (3) the transfers were for or on account of a debt owed by Debtors before the transfer was made; (4) Debtors were insolvent when the transfers were made; (5) the transfers were made within ninety days before the filing of the petition or between ninety days and one year before the filing of the petition if the creditor was an insider; and (6) the transfers enabled the creditor to receive more than he would otherwise have received if the transfer had not been made and he had received his pro rata share of the property of the estate under Chapter 7. 11 U.S.C. § 547(b).

Referring to the requirement under § 547(b) that the transfers were made within a certain time period before the filing of the petition, Defendant argues that the Trustee has no cause of action for preferential transfer because no petition for relief under the Bankruptcy Code was ever filed in this case. According to Defendant, only the filing of a bankruptcy petition will trigger the right to seek the return of preferential transfers. This argument, however, has no merit.

The underlying liquidation proceeding relating to Debtors is being conducted pursuant to the provisions of SIPA. SIPA makes the provisions of the Bankruptcy Code applicable to the liquidation of Debtors and defines "petition date" for purposes of applying the Bankruptcy Code in this proceeding as follows:

> To the extent consistent with the provisions of this chapter, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under chapters 1, 3, and 5 and subchapters I and II of chapter 7 of Title 11. For the purposes of applying such title in carrying out this section, a reference in such title to the date of the filing of the petition shall be deemed to be a reference to the filing date under this chapter.

15 U.S.C. § 78fff(b). And SIPA defines "filing date" as "the date on which an application for a protective decree is filed under section 78eee(a)(3)," with certain exceptions not applicable here. 15 U.S.C. § 78lll(7).

[1] The Bankruptcy Code was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005("BAPCPA" or "the Act"), effective October 17, 2005. However, Debtors' liquidation proceeding was commenced before the effective date the Act. Therefore, all references to the Bankruptcy Code in this opinion are to the pre-BAPCPA version of the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title XV, § 1501(b)(1) (stating that, unless otherwise provided, the amendments do not apply to cases commenced before the effective date of the Act).

As set forth in the complaint in this proceeding, SIPC filed its complaint and application for protective decree against Debtors on August 25, 2003. Thus, for purposes of determining whether the transfers to Defendant were preferential transfers under § 547(b), the "date of the filing of the petition" is August 25, 2003.

Plaintiff alleges that the transfers were made more than ninety days but less than one year before the August 25, 2003, filing date. Accordingly, the transfers are avoidable only if Defendant was an insider at the time of the transfers. Defendant argues, albeit in a footnote, that Plaintiff alleges only that Defendant was corporate counsel and does not allege facts showing that he met the definition of "insider" as set forth in § 101(31). That section provides as follows:

> "insider" includes –
> . . . .
> (B) if the debtor is a corporation –
> (i) director;
> (ii) officer of the debtor;
> (iii) person in control of the debtor;
> (iv) partnership in which the debtor is a general partner;
> (v) general partner of the debtor; or
> (vi) relative of a general partner, director, officer, or person in control of the debtor.

11 U.S.C. § 101(31)(B). However, the use of the term "includes" in § 101(31) is not limiting, *see* 11U.S.C. § 102(3), and the definition in that section "is intended to be illustrative rather than exhaustive." *In re Krehl*, 86 F.3d 737, 741 (7th Cir. 1996). In addition to the individuals and entities named, "the term also encompasses anyone with 'a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor.'" *Id.*; *Rieser v. Milford (In re Chari)*, 276 B.R. 206, 212 (Bankr. S.D. Ohio 2002). Plaintiff's complaint alleges not only that Defendant was corporate counsel but that he acted as an advisor and had a personal relationship with Davis, Faulkner, CCC, and Debtors and knew of, and aided and/or participated in the various fraudulent schemes involving Debtors. [Doc. #1, Complaint, ¶¶ 21, 23, 28, 37, 38, 52]. The working relationship with Debtors, their officers/directors, and their parent company alleged in the complaint are sufficient under the statutory definition of "insider" to survive Defendant's motion to dismiss.

Defendant also contends that the complaint fails to allege all elements of a preferential transfer in that there is no allegations that Defendant is a creditor of debtor and no allegations regarding the nature and

amount of antecedent debt or that debtor was insolvent when one or more of the transfers was actually made. The court disagrees and finds each element is sufficiently alleged so as to give fair notice of Plaintiff's claim.

Specifically, Plaintiff alleges that CCC was not an operating entity and was insolvent but was used as a conduit for a network of subsidiaries and other related entities that was largely, if not completely, supported financially by funds from Debtor's operations. [*Id.* ¶ 15, 19]. Plaintiff further alleges that Defendant advanced money to CCC in 2002 and/or 2003 in order to permit CCC to transfer the money to Debtors so that false minimum net capital requirement reports could be submitted by Debtors and that after the reports were completed, the money was re-transferred to CCC and to Defendant. [*Id.* ¶ 23, 24]. These allegations are adequate in alleging that Defendant is a creditor of Debtors. To the extent that CCC was used merely as a conduit for the transfer of funds to and from Debtors, a debtor/creditor relationship existed between Defendant and Debtors. *See Stover v. Fulkerson (In re Bruening)*, 113 F.3d 838, 842 (8th Cir. 1997) (Debtor's prepetition payment to his wholly owned nondebtor company, which then paid creditor, was voidable preference because corporation was mere conduit for payment); *Billings v. Key Bank of Utah (In re Granada, Inc.),* 156 B.R. 303, 307 (D. Utah 1990) (explaining that a trustee may argue in an action to recover a preference that an intermediary served as nothing more than a conduit of funds).

Defendant relies on *Valley Media, Inc. v. Borders, Inc. (In re Valley Media, Inc.)*, 288 B.R. 189, 192 (Bankr. D. Del. 2003), in arguing that the complaint fails to state a claim for preferential transfers because there are no allegations of the nature and amount of antecedent debt. In *Valley Media*, the original complaint contained an estimate of the total amount of preferential transfers and otherwise quoted the statutory language without providing any other information. Noting that merely quoting statutory language is insufficient, the court relied on an earlier unpublished decision and ruled that, to survive a Rule 12(b)(6) motion, a preference claim must identify the nature and amount of each antecedent debt and, with respect to each transfer, identify the date, names of debtor/transferor and transferee and the amount of the transfer. *Id.* at 192.

While the court agrees that merely quoting the statutory language is insufficient, Plaintiff has specifically alleged the nature of the antecedent debt, i.e., funds transferred in 2002 and/or 2003 by Defendant in order to permit Debtors to submit false minimum net capital requirement reports, and has specifically identified the date, transferor, transferee and amount of each alleged preferential transfer. Nevertheless, Defendant argues that dismissal is required because the amount of the antecedent debt is not

specifically stated in the complaint. The court disagrees. The Federal Rules of Bankruptcy Procedure do not impose a heightened pleading standard on preference claims. *Family Golf Centers, Inc. v. Acushnet Co. (In re Randall's Island Family Golf Centers, Inc.)*, 290 B.R. 55, 65 (Bankr. S.D.N.Y. 2003). Instead, the complaint must simply provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 664 (6th Cir. 2005); *see also* Fed. R. Civ. P. 8(a); Fed. R. Bankr. P. 7008 . "'The liberal notice pleading of [Federal Rule of Civil Procedure] 8(a), . . . was adopted to focus litigation on the merits of a claim,' and relies on discovery and summary judgment motions to identify the disputed facts and eliminate unmeritorious claims." *Family Golf Centers, Inc.*, 290 B.R. at 64 (citations omitted). The court finds that the complaint in this case sufficiently apprises Defendant of both the preference claim and the grounds upon which Plaintiff relies in support of the claim. The fact that it does not quantify the amount of the advances from Defendant does not warrant dismissal at the pleading stage of the action.

Finally, Defendant argues that the complaint fails to allege that one or more of the transfers were actually made while Debtors were insolvent. In fact, the complaint alleges that "[s]ome or all of the Transfers were made while the Debtors and/or CCC were insolvent." This assertion alleges both more and less than what is required to be proven in order to prevail on the preference claim. Since proof that Debtors *or* CCC were insolvent would be insufficient to prevail on the preference claim, such an assertion alleges less than what is required to survive a Rule 12(b)(6) motion. And since Plaintiff need only prove that Debtors were insolvent at the time of the transfers, alleging that Debtors *and* CCC were insolvent alleges more than what is necessary. Nevertheless, a claim may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Golden*, 404 F.3d at 959. Proving that Debtors and CCC were insolvent at the time that some or all of the transfers were made is consistent with the allegations and would entitle Plaintiff to relief if all other elements of his preference claim are proved.

II. Avoidance of Fraudulent Transfers

In counts three through seven, Plaintiff seeks recovery of alleged fraudulent transfers under both § 548 of the Bankruptcy Code and state law, made applicable to this proceeding by § 544(b).[2] The required

[2] Section 544(b) provides that "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title." 11 U.S.C. § 544(b)(1).

elements of a fraudulent transfer claim set forth in § 548 are as follows:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> > (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> >
> > (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> >
> > (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> >
> > (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> >
> > (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

Defendant first presents an argument also presented with respect to Plaintiff's preference claim. He contends that Plaintiff cannot recover on a fraudulent transfer claim under § 548 since that section permits avoidance of transfers made "within one year before the date of the filing of the petition" and no bankruptcy petition has been filed by Debtors. For the reasons already discussed above, this argument has no merit.

Because the elements of the state law claims mirror those brought under § 548, the court will discuss them in tandem with respect to Defendant's remaining arguments. Defendant argues that Plaintiff's fraudulent transfer claims must be dismissed because they are not pled with particularity as required under Federal Rule Civil Procedure 9(b), made applicable to this proceeding by Rule 7009 of the Federal Rules of Bankruptcy Procedure. Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Specifically, Defendant argues that the complaint fails to allege (1) any specific fraudulent act of Defendant, (2) with respect to counts three and four, that any particular transfer was made within the one-year fraudulent transfer period set forth in § 548, (3) with respect to counts three and five, the fraudulent nature of the transfer and that any particular transfer was made with the requisite intent. Defendant further argues that the complaint alleges transfers in exchange

for reasonably equivalent value by alleging that the loans to CCC were promptly repaid and, therefore, that there is no cause of action for fraudulent transfers.

With respect to Defendant's last argument, it is true that an element of Plaintiff's constructive fraudulent transfer claims in counts four, six and seven is that Debtors received less than a reasonably equivalent value in exchange for the transfer. *See* 11 U.S..C. § 548(a)(1)(B); Ohio Rev. Code §§ 1336.04(A)(2), 1336.05(A). However, a party may "state as many separate claims or defenses as the party has regardless of consistency. . . ." Fed. R. Civ. P. 8(e)(2); Fed. R. Bankr. P. 7008. Although the allegations of repayment of a loan may not be consistent with the fraudulent conveyance claims, they are consistent with Plaintiff's preference claims. Because a plaintiff is not limited to pleading only one theory of recovery but may plead in the alternative, Defendant's argument is not a basis for dismissal of the fraudulent conveyance claims.

The court addresses Defendant's Rule 9 arguments in the order set forth above. Under § 548(a)(1)(A) and Ohio Revised Code § 1336.04(A), Plaintiff need only plead and prove Debtors' intent to defraud. There is no pleading requirement of fraud on the part of the transferee, as Defendant suggests. *See Rieser v. Milford (In re Chari)*, 276 B.R. 206, 213 (Bankr. S.D. Ohio 2002). Thus, Plaintiff's failure to plead fraud on the part of Defendant with particularity is not a basis for dismissal under Rule 12(b)(6).

Next, the court finds Plaintiff has adequately alleged the required element of a fraudulent transfer under § 548 that each of the challenged transfers were made "within one-year before the date of filing of the petition." Although Plaintiff's allegations in counts three and four that "[s]ome or all of the Transfers were made on or within one year before the filing date of the petition," do not satisfy the particularity required by Rule 9, those counts also specifically incorporate by reference the previous allegations in the complaint. [Doc. #1, Complaint, ¶¶ 91-92, 95-96]. The paragraphs of the complaint that were incorporated by reference include an allegation that a complaint and application for protective decree was filed by SIPC against Debtors on August 25, 2003, which, as discussed above, is considered the date of filing the petition as contemplated in § 548, as well as allegations specifically setting forth the dates between August 26, 2002, and February 18, 2003, of each challenged transfer. [*Id.* ¶¶ 1, 65-76]. These allegations state with sufficient particularity that all of the transfers occurred within the specified one-year period.

Defendant also argues that Plaintiff alleges an intent to defraud but fails to describe it, and cites *Brandt v. Am. Nat'l Bank & Trust Co. of Chicago (In re Foos)*, 188 B.R. 239 (Bankr. N.D. Ill. 1995). In *Brandt*, the Trustee alleged that payments on loans and the granting of security for a loan were fraudulent

transfers and that each transfer "was made by the Debtor with the actual intent to hinder, delay or defraud the investors in his Ponzi scheme." *Id.* at 244. There were no allegations, however, that the transfers were part of, or in furtherance of, the Ponzi scheme. Thus, the court found that the Trustee had failed to allege circumstances of fraud with the particularity required by Rule 9(b). *Id.*

In this case, Plaintiff alleges with particularity four fraudulent schemes – the minimum net capital requirements compliance scheme, Davis' fraud regarding the sale of securities, Davis' Ponzi scheme, and the scheme relating to the 2002 NASD inquiry. There are no allegations relating any payments to Defendant with respect to the last three schemes alleged. *See General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079-80 (7th Cir. 1997) (requiring a description of the events surrounding the transferor's conveyance for the purpose of defrauding creditors); *Sharp Int'l Corp. v. State Street Bank and Trust Co. (In re Sharp Int'l Corp.)*, 302 B.R. 760, 784 (E.D.N.Y. 2003) (finding plaintiff had failed to allege circumstances that suggest the conveyance was made with fraudulent intent). But Plaintiff does allege that Defendant had knowledge of and participated in the minimum net capital requirements compliance scheme and received payments in connection with this scheme. These allegations, incorporated by reference in counts three and five, satisfy the requirement under Rule 9(b) that the circumstances constituting fraud be pled with particularity.

Debtor also argues with respect to counts three and five that Plaintiff fails to allege that any particular transfer was made with the requisite intent to defraud and, thus, those counts do not meet the pleading requirement of Rule 9(b). In both counts three and five, Plaintiff alleges that "[s]ome or all of the Transfers were voluntarily or involuntarily made with the intent to hinder, delay, and defraud the Debtors' estates and their creditors." [Doc. # 1, Complaint ¶¶ 93, 101]. "'The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him [or her] to prepare an informed pleading responsive to the specific allegations of fraud.'" *Equal Justice Found. v. Deutsche Bank Trust Co. Am.,* 412 F. Supp. 2d 790, 797 (S.D. Ohio 2005) (quoting *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n,* 176 F.3d 315, 322 (6th Cir.1999)). Plaintiff's failure to identify the particular transfers that he claims constitutes fraudulent transfers does not meet the heightened standard required under Rule 9(b). The court will, therefore, dismiss counts three and five but will grant Plaintiff leave to amend the complaint within twenty-eight days. *See* Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(a) (providing that leave to amend "shall be freely given when justice so requires").

III. Violations of the Ohio Securities Act

In count eight of the complaint, Plaintiff alleges that Davis and Faulkner, "with the aid and participation of Defendant," engaged in various activities relating to the sale of securities that violated the Ohio Securities Act, Ohio Revised Code § 1707.01 *et seq.* The Ohio Securities Act provides in pertinent part:

> [E]very sale or contract for sale made in violation of Chapter 1707 of the Revised Code is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

Ohio Rev. Code § 1707.43(A). However, § 1707.431(A) excludes "[a]ny attorney . . . whose performance is incidental to the practice of the person's profession" from being deemed to have effected, participated in, or aided the seller in an unlawful sale of securities.

Defendant argues that count eight fails to state a claim since, as alleged in the complaint, he served as general counsel and/or was specifically retained as counsel for Debtors and CCC and, as such, he is exempted from liability under § 1707.43. However, not every attorney is exempted from liability. Under § 1707.431(A), only those attorneys whose performance is incidental to the practice of their profession are exempt. In count eight, Plaintiff not only alleges that Defendant aided and participated in sales that violated Chapter 1707 but that his "acts and omissions were not incidental to the performance [of] Defendant's professional obligations." [Doc. #1, Complaint ¶ 118, 120]. These allegations are sufficient to survive Defendant's motion to dismiss.

IV. Jurisdictional Argument

Defendant also argues that this court "does not have jurisdiction over the state fraud claims" and that "[s]ince the remaining state law claims are not core proceedings and are not related to the bankruptcy estate, this court does not have subject matter jurisdiction nor personal jurisdiction over [Defendant]." [Doc. # 13, Motion to Dismiss, p. 8-9]. Defendant's argument is without merit.

"The source of the bankruptcy court's jurisdiction is 28 U.S.C. §§ 1334 and 157." *Resorts Int'l Fin., Inc. v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 161 (quoting *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296, 303 (5th Cir. 2002);

Refrigerant Reclamation Corp. of Am. v. Todack (In re Refrigerant Reclamation Corp. of Am.), 186 B.R. 78, 80 (Bankr. M.D. Tenn. 1995). Pursuant to 28 U.S.C. § 1334, the district courts have jurisdiction over "cases under title 11," and proceedings "arising under," "arising in a case under," or "related to a case under" title 11. 28 U.S.C. § 1334(a) and (b). The district courts routinely refer this jurisdiction over bankruptcy cases and proceedings to the bankruptcy courts. *See* 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio.

A proceeding "arises under" title 11 if the cause of action is created by a provision of title 11. *See Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co., Inc.),* 930 F.2d 1132, 1144 (6th Cir. 1991). Plaintiff's fraudulent transfer claims based on Ohio law are claims over which this court has jurisdiction as they arise under title 11. The Bankruptcy Code creates a cause of action for avoidance of any transfer of an interest of the debtor in property that is voidable under applicable law, including state fraudulent transfer statutes, by a creditor holding an allowable unsecured claim. 11 U.S.C. § 544(b)(1).

Plaintiff's claims under the Ohio Securities Act, to the extent they are property of the estate as a result of assignments to Plaintiff by purchasers as alleged in the complaint, are at least "related to" the liquidation proceeding.[3] The seminal definition of "related" proceedings under § 1334(b) was articulated by the Third Circuit Court of Appeals in *Pacor, Inc. v. Higgins (In re Pacor)*, 743 F.2d 984 (3d Cir. 1984). Under the *Pacor* definition, a matter is "related to" the underlying bankruptcy case if "*the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy*." *Id*. at 994 (emphasis in original). The Sixth Circuit has adopted and applied the *Pacor* definition in numerous decisions. *See, e.g., Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 489 (6th Cir. 1996); *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 482 (6th Cir. 1992); *In re Wolverine Radio Co.*, 930 F.2d at 1142; *Robinson v. Mich. Consol. Gas Co.*, 918 F.2d 579, 584 (6th Cir. 1990). Any recovery by Plaintiff on the Ohio Securities Act claims will augment the existing estate he is administering, making them "related to" the liquidation proceeding under the *Pacor* test.

Defendant finally argues that none of the state law claims involve core proceedings that a bankruptcy judge may hear and determine. To the contrary, under 28 U.S.C. § 157(b), core proceedings

---

[3]The court does not construe Defendant's motion as challenging Plaintiff's standing to assert the Ohio Securities Act claims.

include proceedings to determine, avoid or recover fraudulent conveyances. 28 U.S.C. § 157(b)(2)(H). The court agrees that the Ohio Securities Act claims do not appear to be core proceedings. That finding does not necessitate dismissal under rule 12(b)(6). Rather, a bankruptcy judge is still permitted to hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11, but must submit proposed findings of fact and conclusions of law to the district court.[4]

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Defendant's Motion to Dismiss [Doc. # 13] be, and hereby is, **GRANTED** as to the fraudulent transfer claims of counts three and five and **DENIED** in all other respects; and

IT IS FURTHER ORDERED that Plaintiff is granted twenty-eight days from the date of this order to amend counts three and five of the Complaint.

---

[4]Defendant has also appended a jury demand to his motion to dismiss. That is likewise not a Rule 12(b)(6) dismissal issue. Bankruptcy judges are permitted to conduct jury trials only with the consent of the parties. 28 U.S.C. § 157(e). In any event, it is premature to address the impact of a jury demand until the complaint has been amended, Defendant has answered an amended complaint and asserted a jury demand, there is a finding that there is a right to trial by jury on some or all of the claims asserted and the issue of the parties' consent has then been addressed.