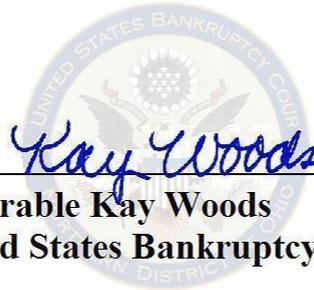


IT IS SO ORDERED.



Dated: March 02, 2007  
01:53:50 PM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

PHILLIP W. COURTNEY  
AND JANICE E. COURTNEY

Debtors.

\*\*\*\*\*

LABATE CHRYSLER, JEEP, DODGE,  
INC., et al.,

Plaintiffs,

vs.

PHILLIP W. COURTNEY, et al.,

Defendants.

CASE NUMBER 05-45085

ADVERSARY NUMBER 05-4268

THE HONORABLE KAY WOODS

\*\*\*\*\*

M E M O R A N D U M O P I N I O N  
(NOT INTENDED FOR NATIONAL PUBLICATION)

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The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than [www.ohnb.uscourts.gov](http://www.ohnb.uscourts.gov) is not the result of direct submission by this Court. The opinion is

available for electronic citation at [www.ohnb.uscourts.gov](http://www.ohnb.uscourts.gov) pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Plaintiffs' Motion for Reconsideration ("Motion for Reconsideration") filed on February 20, 2007 requesting the Court to reconsider its Memorandum Opinion and Order dated February 16, 2007 ("February 16 Order").<sup>1</sup> Attached to the Motion for Reconsideration is Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ("Opposition Memo"), which Plaintiffs filed on December 19, 2006 in the main bankruptcy case (Case No. 05-45085) of Debtors Phillip W. Courtney and Janice E. Courtney ("Debtors") rather than the instant adversary proceeding. Despite being sent notice of a corrective entry on December 20, 2006 that the Opposition Memo had been filed incorrectly, Plaintiffs did not remedy their mistake. As a consequence, this Court found that Plaintiffs had failed to respond to the Motion to Dismiss filed by Debtors on December 9, 2006.

Although the February 16 Order was based on the merits of the Motion to Dismiss and was not influenced by Plaintiffs' lack of response, this Court has reviewed and reconsidered the February 16 Order in light of the arguments raised by Plaintiffs in the

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<sup>1</sup>On February 26, 2007, Debtors filed Defendants' Response to Plaintiffs' Motion for Reconsideration ("Debtors' Response"). The Court has not considered Debtors' Response in drafting the instant opinion. A Motion for Reconsideration is essentially a motion pursuant to: (i) Federal Rule of Civil Procedure 59 (if filed within ten (10) days of entry of the order or judgment in question, as is the case here, or (ii) Rule 60 if filed after such ten-day period. A motion under Rule 59 is to be based on a manifest error of fact or law by the Court. Here, the error was on the part of Plaintiffs, rather than an alleged error by the Court. Nevertheless, the Court is considering the Plaintiffs' arguments in opposition to the Motion to Dismiss as if they had been timely and properly raised. Debtors would have no right to file a Reply to the Opposition Memo, without leave of the Court, which is why the Court has disregarded Debtors' Response.

Opposition Memo. For the following reasons, the Court declines to alter, amend, modify or vacate the February 16 Order, which remains in full force and effect.

Plaintiffs have supplemented the record by filing affidavits in support of the Opposition Memo and by quoting at length from deposition testimony despite the fact that such depositions have not been filed with the Court. It is not clear from the Opposition Memo when or in connection with what proceeding these depositions were taken. Accordingly, the Court has no way of knowing if the deponents were subject to cross examination by Debtors or if the Debtors were parties to the proceeding in which the depositions were taken. For purposes of Debtors' Motion to Dismiss, however, the Court must construe the Complaint in the light most favorable to Plaintiffs. As a consequence, although Plaintiffs have not moved for leave to amend their Complaint, the Court will deal with the affidavits and the allegations in the Opposition Memo as if they were new allegations in an amended complaint.

The Opposition Memo includes many allegations and facts that are not found in the Complaint. For example, the Complaint is silent about the date of the Purchase and Sale Agreement ("Agreement"), but the Affidavits of Rebecca Labate and Stephen E. Labate, which are identical in substance (collectively, "Affidavits"), provide the chronology of when the Agreement was signed and amended. (Affidavits, ¶¶ 1-5.) The Complaint is also devoid of any allegation of a debt Debtors owe to Plaintiffs, but the Affidavits set forth Plaintiffs' alleged losses. (Affidavits, ¶ 15.)

**I. Intentional and Malicious Injury to Person or Property**

**A. § 523(a)(6)**

The Opposition Memo and the Affidavits contain no new allegations concerning the alleged misrepresentations about the condition of the real property that was the subject of the commercial lease between Punxsutawney Land Company and Labate Real Estate. The Opposition Memo merely argues that Debtors violated O.R.C. § 1701.93 and that such violation provides the requisite intent to satisfy § 523(a)(6). Construing the allegations in favor of Plaintiffs for purposes of the Motion to Dismiss, the Court will deem the allegation that Plaintiffs incurred "\$27,259.63 for repairs to the dealership premises" (Affidavits, ¶ 15) as "injury to property" required by § 523(a)(6). Despite this liberal construction, Plaintiffs still fail to indicate what conduct by Debtors caused this injury or even what the injury was. Section 523(a)(6) requires that there be injury to a person or property caused by the intentional and malicious conduct of Debtors. Plaintiffs make only conclusory allegations to support this cause of action.

Plaintiffs also set forth other damages in their Affidavits, but these amounts all relate to "injecting [Plaintiffs'] own money into Labate Chrysler-Jeep-Dodge, Inc., the entity that ultimately purchased the assets of Tony Pesce [Chrysler-Dodge-Jeep, Inc.]" ("Tony Pesce") and "financial losses" for (i) repairs, (ii) shop equipment, tools, bins and office equipment, (iii) inventory, and (iv) operating expenses. (Affidavits, ¶ 15.) These financial losses do not constitute injury to person or property. Moreover, there are no allegations that such financial losses were the direct result of any intentional and malicious conduct by Debtors.

As a consequence, the decision of the Court with respect to the cause of action pursuant to 11 U.S.C. § 523(a)(6), as set forth in the February 16 Order, remains unchanged.

**II. Non-dischargeable Debt Based on False Statement  
Pursuant to 11 U.S.C. § 523(a)(2)(A) and (B)**

**A. 523(a)(2)(A)**

Plaintiffs fail to identify any statement, written or otherwise, not "respecting the . . . financial condition" of Tony Pesce made by either Debtor or their representatives (who are not even generally identified); as a consequence, they have failed to state a cause of action under § 523(a)(2)(A).

**B. § 523(a)(2)(B)**

In the Affidavits, Plaintiffs repeat the allegations that they "relied upon the financial statements of the dealership. . . ; the written representations made by Janice E. Courtney and Phillip W. Courtney, and/or their representatives, as to the profitability of the dealership and the compensation paid to the principals of the dealership, including Janice E. Courtney and Phillip W. Courtney[.]" (Affidavits, ¶ 9.) Furthermore, Plaintiffs argue that Debtors (either individually or collectively) provided the financial statements or caused the financial statements to be provided to them. Plaintiffs have not alleged that either one of the Debtors caused such financial statements to be made or published. As set forth in the February 16 Order, these allegations are insufficient to support a cause of action under § 523(a)(2)(B), which requires that the Debtors "cause[] to be made or published [financial statements] with the intent to deceive. . . ." (11 U.S.C. §523(a)(2)(B)(iv).)

**1. Janice E. Courtney (Mrs. Courtney)**

Plaintiffs allege that Mrs. Courtney was an officer and shareholder, as well as an executive or management employee of Tony Pesce. Debtors acknowledge that Mrs. Courtney was an officer and shareholder of Tony Pesce.

Debtors allege that Mrs. Courtney has violated O.R.C. § 1701.09 by providing false financial statements to them in the course of negotiating the sale of the dealership. Plaintiffs appear to argue that violation of the statute imposes strict liability on Mrs. Courtney because of her position as an officer of Tony Pesce, but the Ohio statute, as well as § 523(a)(2), requires an intent to deceive in order to impose liability. Plaintiffs fail to allege any facts to support an inference that Mrs. Courtney knew the financial statements were false and misleading, which is a necessary element in order to impose personal liability upon her. Plaintiffs further fail to allege that Mrs. Courtney made or published the false financial statements. Indeed, Plaintiffs appear to argue that Dennis Denoi, another officer and shareholder of Tony Pesce - not Mrs. Courtney - is the person who made or published the false financial statements. (Affidavits, ¶ 9.)

As a consequence, the Complaint, coupled with the Opposition Memo and the Affidavits, fail to provide a basis to find that Mrs. Courtney has personal liability for Plaintiffs' alleged injuries or that any debt relating to Plaintiffs' reliance on the financial statements is a nondischargeable debt of Mrs. Courtney.

## 2. Phillip W. Courtney (Mr. Courtney)

Plaintiffs' Affidavits allege that Mr. Courtney was informed by Kimberlie Talbert, the former office manager of Tony Pesce, that she had been instructed to "inflate the profits on the financial statements" by Dennis Denoi (who is not a defendant in this adversary proceeding). (Affidavits, ¶ 9.) Construing this allegation in favor of Plaintiffs, the Court finds that Plaintiffs have alleged that Mr. Courtney knew that the financial statements were false. From the allegation of knowledge, an inference can be drawn that Mr. Courtney intended to deceive Plaintiffs.

However, Plaintiffs fail to allege essential elements to prove that any debt relating to the false financial statements is a nondischargeable debt of Mr. Courtney. First, there is no allegation that Mr. Courtney made or published the financial statements; as set forth above, Plaintiffs argue that Dennis Denoi caused the false financial statements to be made or published. Second, Mr. Courtney was, at most, an employee of Tony Pesce; he was not an officer or director. Section 523(a)(2)(B)(ii) requires that the written statement be with respect to the "debtor's or an insider's financial condition." There is no dispute that the financial statements in question were for the Tony Pesce dealership and were not Mr. Courtney's personal financial statements. Therefore, there can only be liability if Tony Pesce is an "insider" of Mr. Courtney.

As Plaintiffs correctly note in the Opposition Memo, § 101(31) of the Bankruptcy Code defines the term "insider" for an individual as: "(i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which

the debtor is a director, officer, or a person in control." 11 U.S.C. § 101(31). The only possible part of this definition that would make Tony Pesce an "insider" of Mr. Courtney is subsection (iv). Recognizing that Mr. Courtney was neither an officer nor director of Tony Pesce, Plaintiffs postulate that he "became actively involved in the operations of the dealership of Tony Pesce . . . and, therefore, was a person in control." (Opposition Memo at 8.)

As the case cited by Plaintiffs makes clear, however, being in control means having a controlling ownership interest or other means of controlling the corporation.

It does not appear that a standard has been established for determining the degree to which a person must control a debtor before he is considered to be an insider. However, it does appear that the person or entity must have at least a controlling interest in the debtor, *Louisiana Industrial Coatings, Inc. V Pertuit (In re Louisiana Industrial Coatings, Inc.)*, 31 B.R. 688 (Bkcy. E.D. La 1983), or that the person must exercise sufficient authority over the debtor so as to unqualifiably (sic) dictate corporate policy and the disposition of corporate assets. See, *Bergquist v. First National Bank of St. Paul (In re American Lumber Co.)*, 5 B.R. 470 (D. Minn. 1980).

*Hunter v. Babcock (In re Babcock Dairy Co. of Ohio, Inc.)*, 70 B.R. 657, 660-61 (Bankr. N.D. Ohio 1986)(emphasis added).

The lion's share of courts interpreting the term "insider" have done so in the realm of preferential and fraudulent transfer law, not dischargeability law. Those courts have recognized that the statutory definition of the term is not exhaustive, and that an insider may be "any person or entity whose relationship with the debtor is sufficiently close so as to subject the relationship to

careful scrutiny." *Butler v. David Shaw, Inc.*, 72 F.3d 437, 443 (4th Cir. 1996)(quoting *In re Babcock Dairy Co.*, 70 B.R. at 666).

Case law interpreting the phrase "person in control" with respect to § 523(a)(2) actions is even more scarce, as most of the cases involve an individual debtor who is an officer or director of the corporation at issue. However, at least one bankruptcy court has considered the issue before this Court, that is, the extent of control necessary to be considered a "person in control" for the purposes of § 101(31), and has reached the same conclusion as courts interpreting the term with respect to preferential and fraudulent transfer law.

In *Fischer v. Avie Cohen (In re Cohen)*, 334 B.R. 392 (Bankr. N.D. Ill. 2005), the bankruptcy court held that, because the debtor controlled the daily operations of the corporation, the corporation was the debtor's insider. *Id.* at 398. The high level of control required by the *Cohen* Court is not only consistent with the interpretation of the term in the realm of preferential and fraudulent transfer law, but also with the definition of "control" provided in the Securities and Exchange Act of 1938, 17 C.F.R. § 240.12b-2<sup>2</sup>, and the Internal Revenue Code, 26 U.S.C. § 368<sup>3</sup>.

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<sup>2</sup>17 C.F.R. § 240.12b-2 reads, in its entirety:

The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

17 C.F.R. § 240.12b-2 (West 2007).

<sup>3</sup>26 U.S.C. § 368(b) reads, in pertinent part:

[T]he term "control" means the ownership of stock possessing at least 80 percent of the total combined voting power of all

Here, Plaintiffs' only allegations concerning Mr. Courtney are: (i) he was an executive or management employee (no title given); (ii) he "became actively involved in the operations of the dealership" (Opposition Memo at 8); (iii) he told Ms. Talbert that the dealership would have to be restructured or sold (*Id.*); and (iv) he "assured [Plaintiffs] that it was a great deal, and that he was in total control of the situation." (Affidavits, ¶ 12.) Taken together, these allegations are insufficient to establish that Mr. Courtney was "a person in control" of Tony Pesce. There are no allegations that Mr. Courtney dictated corporate policy or controlled the disposition of corporate assets. Plaintiffs only allege that Mr. Courtney oversaw the calculation of profits from car sales. The allegations set forth in the Opposition Memo do nothing to overcome the conclusion drawn by this Court in the February 16 Order that Mr. Courtney was merely an employee of Tony Pesce. Because Plaintiffs do not allege that Mr. Courtney exercised sufficient control over the corporate decision-making or assets at Tony Pesce, Tony Pesce is not an insider with respect to Mr. Courtney.

### **III. Conclusion**

After reviewing the Opposition Memo and the Affidavits, this Court finds that the Complaint (even as supplemented) fails to state a cause of action upon which relief can be granted. Accordingly, the February 16 Order remains the order of this Court.

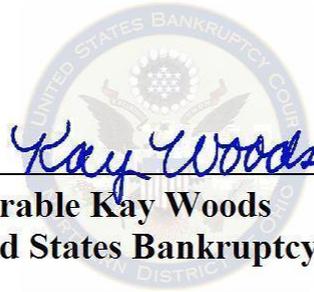
An appropriate Order will follow.

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classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation.

26 U.S.C. § 368 (West 2007).

IT IS SO ORDERED.



Dated: March 02, 2007  
01:53:50 PM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

PHILLIP W. COURTNEY  
AND JANICE E. COURTNEY

Debtors.

CASE NUMBER 05-45085

LABATE CHRYSLER, JEEP, DODGE,  
INC., et al.,

Plaintiffs,

ADVERSARY NUMBER 05-4268

vs.

PHILLIP W. COURTNEY, et al.,

Defendants.

THE HONORABLE KAY WOODS

ORDER

For the reasons set forth in this Court's Memorandum Opinion, the Motion for Reconsideration filed on behalf of Plaintiffs Labate Chrysler, Jeep, Dodge, Inc., Labate Real Estate, Ltd., Steven E. Labate, and Rebecca Labate is denied.