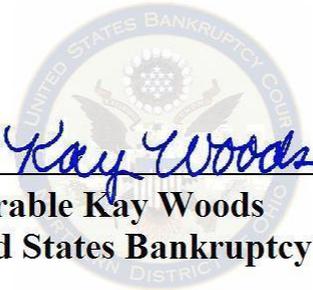


IT IS SO ORDERED.



Dated: July 11, 2007
03:25:06 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	CASE NUMBER 04-41352
	*	
Debtors.	*	
	*	

BUCKEYE RETIREMENT CO., LLC.,	*	
LTD.,	*	ADVERSARY NUMBER 06-4153
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

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

The following order is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The opinion is

available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Plaintiff's Motion to Dismiss Defendants' Amended Counterclaim ("Motion to Dismiss") (Adv. Proc. Doc. # 62) filed by plaintiff Buckeye Retirement Co., L.L.C., Ltd. ("Buckeye" or "Plaintiff") on April 4, 2007, which alleges that (i) Debtors lack standing to bring the Amended Counterclaim, (ii) the Amended Counterclaim does not raise an actual case or controversy and (iii) the Amended Counterclaim is an impermissible declaratory judgment action. On April 16, 2007, Debtors/Defendants Randall J. Hake and Mary Ann Hake ("Debtors" or "Defendants") filed Response in Opposition to Buckeye's Motion to Dismiss Defendants' Amended Counterclaim and Motion to Enter Judgment Upon Stipulation ("Debtors' Response" or "Motion for Judgment") (Adv. Proc. Doc. # 66). On April 23, 2007, Buckeye filed Plaintiff's Reply to Defendants' Response to Plaintiff's Motion to Dismiss Defendants' Amended Counterclaim ("Reply") (Adv. Proc. Doc. # 67). On April 26, 2007, Buckeye filed Plaintiff's Response to Defendants' Motion to Enter Judgment Upon Stipulation ("Buckeye's Response Regarding Stipulation") (Adv. Proc. Doc. # 73).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (C), (J), and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTS

A. Main Case

On March 25, 2004 ("Petition Date"), Debtors filed a voluntary petition pursuant to chapter 11 of title 11 of the United States Code. This case was converted to a case under chapter 7 on April 26, 2006.

Debtors filed a second amended disclosure statement (Main Case Doc. # 343) on February 22, 2006, which was approved by this Court pursuant to Order dated February 27, 2006 (Main Case Doc. # 348). To resolve one of Buckeye's objections to the original disclosure statement, Debtors included in the second amended disclosure statement information concerning Buckeye's offer to purchase all of Debtor's non-exempt assets for \$650,000.00 (the "Purchase Price"). In connection with Buckeye's offer to purchase, Buckeye and Debtors agreed to the following: (i) Debtors would convert their chapter 11 case to one under chapter 7; (ii) Debtors would sell and Buckeye would purchase all of Debtors' non-exempt assets for the Purchase Price; and (iii) Debtors would redeem certain household goods for \$7,130.00 and all jewelry for \$16,000.00, which amounts would be deducted from the Purchase Price (collectively, the "Purchase Agreement"). The Purchase Agreement was reduced to writing and signed by Buckeye and Debtors.

Subsequently, Buckeye informed the chapter 7 Trustee ("Trustee") that it would not follow through with the Purchase Agreement, because Debtors filed the Amended Counterclaim (Adv. Pro. Doc. # 52), which is the subject of Buckeye's Motion to Dismiss and which Buckeye claims is an effort to limit what Buckeye

offered to purchase. On March 26, 2007, Trustee filed Motion to Enforce the Sale of Substantially All Debtors' Non-Exempt Assets to Buckeye Retirement Company LLC, Ltd. or, in the Alternative, for the Award of Attorney's Fees Under 11 U.S.C. § 105 ("Motion to Enforce") (Main Case Doc. # 649). The Court held a hearing to consider the Motion to Enforce on April 25, 2007. On May 18, 2007, the Court issued Memorandum Opinion and Order granting the Motion to Enforce (Main Case Doc. ## 689 and 690). Buckeye filed Notice of Appeal to the Bankruptcy Appellate Panel ("BAP"), whereby Buckeye appealed the May 18, 2007 Order. (Main Case Doc. # 693.) Based upon the election of Debtors to have the appeal heard by the United States District Court, on June 13, 2007, the BAP transferred the appeal to the District Court.¹

B. Adversary Proceeding

On August 21, 2006, Buckeye filed Complaint Objecting to Discharge (11 U.S.C. §727 (sic))("Complaint") (Adv. Proc. Doc. # 1), which commenced the instant adversary proceeding. Defendants filed Answer on October 2, 2006.

On October 20, 2006, Buckeye filed Plaintiff's Motion to Withdraw the Reference. (Adv. Pro. Doc. # 12.) The Motion to Withdraw the Reference was heard by the Honorable Peter C. Economus, United States District Court Judge for the Northern District of Ohio at Youngstown. (Adv. Pro. Doc. # 19.) On April 27, 2007, Judge Economus denied the Motion to Withdraw the Reference. (Adv. Pro. Doc. # 77.)

¹ The appeal is currently before the Honorable Peter C. Economus, U.S. District Court Judge for the Northern District of Ohio at Youngstown (Case No. 07-1822).

On February 5, 2007, Defendants filed Motion for Leave to File Counterclaim Seeking Declaratory Judgment ("Motion for Leave") (Adv. Pro. Doc # 37). The Court conducted a hearing in Defendants' main bankruptcy case (Case No. 04-41352) on February 8, 2007, at which counsel for Defendants and counsel for Trustee were in attendance. During the course of that hearing, counsel for Trustee expressly stated that Trustee supported the Motion for Leave because the issues presented in such motion would need to be resolved in order to bring the bankruptcy case to conclusion. (Transcript of the February 8, 2007 hearing at 3-4.)

Based upon the contents of the Motion for Leave and Trustee's support for such motion, this Court determined that, consistent with FED. R. CIV. P. 15(a), leave should be freely granted. As a consequence, this Court entered the February 8, 2007 Order (Adv. Pro. Doc. # 38), which granted the Motion for Leave. On February 8, 2007, Debtors filed Counterclaim Seeking Declaratory Judgment ("Counterclaim") (Adv. Pro. Doc. # 39). The Counterclaim seeks a declaration from the Court that the following items do not constitute property of the bankruptcy estate: business interest with William Kerfoot; interest in Mauro Circle Limited Partnership; \$6,000.00 loan owed by Edward Hrosar; \$12,000.00 loan due from Bruce Berry; \$147,000.00 payment to Christopher Hake; Woodland Park Retirement Housing Limited Partnership; Hake Family Irrevocable Trust; Christopher R. Hake Irrevocable Trust; Mauro Circle Limited Partnership; Churchill Commons Corporation; Cynthia Corporation; and partnership or other interest in Eastgate Technology Park, Ltd., Newco Development Corporation, Northeast Printing Services, Inc., Founders Square, L.L.C. and HHH Construction Services, Inc.

(collectively "Disputed Interests")(Counterclaim at ¶¶ 5-6). Debtors prayed for this Court to determine that: (i) Debtors, the bankruptcy estate and Trustee did not have as of the Petition Date and currently do not have any rights, claims or interest - including equitable interest - in the Disputed Interests (*Id.*); and (ii) the Hake Family Irrevocable Trust is a valid spendthrift trust (¶¶ 6, 8). If the Disputed Interests are found not to be property of the bankruptcy estate, they did not need to be listed in Debtors' schedules and the Trustee does not have the right to sell such interests.

On February 20, 2007, Buckeye filed Motion to Reconsider and Alternative Motion to Dismiss Defendants' Counterclaim (Adv. Pro. Doc. # 41)("Motion for Reconsideration"). Buckeye asserted that (i) the Court improperly denied Buckeye the right to file a response to the Motion for Leave, (ii) Debtors lack standing to bring the Counterclaim, (iii) there is no actual case or controversy, (iv) Debtors failed to join an indispensable party, and (v) the Counterclaim is an impermissible declaratory judgment action. On February 23, 2007, the Court issued Order Denying Plaintiff's Motion for Reconsideration and Alternative Motion to Dismiss Defendants' Counterclaim and Providing Defendants with Twenty Days to Amend Counterclaim ("Order Denying Reconsideration")(Adv. Pro. Doc. # 44), which denied the Motion for Reconsideration and granted Debtors twenty days to amend the Counterclaim to include all necessary parties. Pursuant to the Order Denying Reconsideration, on March 7, 2007, Debtors filed Motion for Order Joining Trustee as Plaintiff. (Adv. Pro. Doc. # 48.) On March 14, 2007, the Court issued Order Granting Motion

for Order Joining Trustee as Plaintiff. (Adv. Pro. Doc. # 51.) Thereafter, on March 15, 2007, Debtors filed Amended Counterclaim Seeking Declaratory Judgment ("Amended Counterclaim") (Adv. Proc. Doc. # 52). With the exception of the addition of Trustee as a party, the Amended Counterclaim is identical to the original Counterclaim.

Additionally, on May 30, 2007, Trustee moved to consolidate *Mark Gleason, Chapter 7 Trustee v. Randall Joseph Hake, et al.* (Case No. 06-4172) with the instant adversary proceeding on the basis that both adversary proceedings object to Debtors' discharge on similar grounds. The Court conducted a hearing on the motion to consolidate on June 8, 2007. Counsel for Debtors, Trustee, and Buckeye were present at the hearing and represented that there was no opposition to the motion to consolidate. Hence, on June 12, 2007, the Court issued Order of Court, which consolidated Case No. 06-4172 with the instant adversary proceeding. (Adv. Proc. Doc. # 94.) After numerous extensions of time, Trustee, on June 19, 2007, filed Trustee's Answer to Defendants' Amended Counterclaim Seeking Declaratory Judgment ("Trustee's Answer") (Adv. Proc. Doc. # 99).

II. STANDARD FOR REVIEW

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6), which is incorporated into the Bankruptcy Rules pursuant to FED. R. BANKR. P. 7012.² The purpose of a motion to dismiss is to test whether a cognizable claim has been pled. Thus, the Court's task under Rule 12(b)(6) is

² The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

to determine the sufficiency, and not the merits, of the claim and whether plaintiffs are entitled to offer evidence to support the allegations stated in the claim. See *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236 (6th Cir. 1993); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

In determining whether to grant a motion to dismiss, the Court must analyze the claim. To withstand dismissal, the claim must provide: (i) the defendant with notice of the claim and (ii) "direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." See FED. R. CIV. P. 8(a); *Saltire Industrial, Inc v. Waller, Lansden, Dortch & Davis, PLLC*, ___F.3d___, 2007 WL 1745290 (6th Cir. 2007).

In determining the sufficiency of a claim, the Court must construe the allegations within the claim in the light most favorable to the non-moving party, accept the allegations set forth as averred, and resolve any ambiguities in favor of the non-moving party. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (2003). A Court, in determining a motion to dismiss, must presume that the factual allegations of the claim are true. "For the purposes of a motion to dismiss, the material allegations of the [claim] are taken as admitted." *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). "Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (citations omitted). Nevertheless, the Court is not required to accept sweeping unwarranted averments of fact or conclusions of law or unwarranted deduction. See *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), *Lewis v. ABC Bus. Servs., Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998).

Additionally, "[t]he [claim] need not specify all the particularities of the claim, and if the [claim] 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 a motion pursuant to Fed. R. Civ. P. 12(b)(6)." *Aldridge* 282 F. Supp. 2d at 803 (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d ed. 1990)). This is because FED. R. CIV. P. 12(b)(6) requires that a claim only be dismissed for failure to state a claim if it appears beyond doubt that the non-moving party cannot prove a set of facts to support a claim that would entitle the non-moving party to relief. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957).

III. ANALYSIS

A. Standing

Buckeye argues that Debtors lack standing to bring the Amended Counterclaim because "Trustee . . . owns property of the estate, not the Defendants." (Motion to Dismiss at 2.) Buckeye argues that "Defendants may be interested bystanders[,]" but they "do not have a personal stake in the outcome of any such dispute." (*Id.* at 3.) Debtors contend that they have standing to bring such action because the Disputed Interests are included within Buckeye's Complaint and the issue of whether Trustee can transfer these items has stalled the administration of the estate.

Buckeye previously raised the issue of lack of standing in the Motion for Reconsideration. The Order Denying Reconsideration dismissed the argument regarding standing for the following reason:

First, Defendants seek a declaratory judgment that certain claims and interests are not property of the estate. Buckeye alleges that Defendants lack standing because only the Trustee owns property of the estate. Defendants have standing to seek a determination whether these claims and interests are property of the estate. If such items are property of the estate, then they come under the Trustee's control, but this is not the case if they are not property of the estate.

(Order Denying Reconsideration at 4 (emphasis in original).) This Court's ruling continues to have validity, as set forth below.

Buckeye admits that the Disputed Interests set forth in the Amended Counterclaim are the same contested property and entity interests listed in ¶¶ 15-19 of the Complaint. (Motion to Dismiss at 7.) The Complaint specifically avers, in regards to the Disputed Interests, Debtors:

(i) "made a false oath by failing to disclose or accurately describe assets or provide other required information in their Schedules and Statement of financial affairs, including amendments, given under oath, including but not limited to . . ." (Complaint ¶ 15);

(ii) "made a false oath knowingly and fraudulently by stating false values for disclosed assets in their Schedules and Statement of Financial Affairs, including amendments. (sic) given under oath. (sic) including but not limited to . . ." (Complaint ¶ 16);

(iii) "made false oaths and stated false claims under oath for their liabilities in their Schedules and Statement of Financial Affairs, including amendments, but not limited to . . ." (Complaint ¶ 17);

(iv) "made other false oaths in their Statement of Financial Affairs, as amended, but not limited to . . ." (Complaint ¶ 18); and

(v) "made the following false statements under oath in their testimony on (sic) this Case . . ." (Complaint ¶ 19).

Since Buckeye seeks to deny Debtors a discharge on the grounds that they failed to disclose or adequately disclose the Disputed Interests,³ Debtors have standing to seek a determination from this Court whether such Disputed Interests constitute property of the bankruptcy estate.

Buckeye's reliance upon *Cohn v. Brown*, 161 Fed. Appx. 450 (6th Cir. 2005) to support its argument that Debtors lack standing is misplaced. Here, unlike in *Cohn*, Debtors have pointed to a "significant possibility of future harm" - *i.e.*, denial of discharge - that provides them with standing to pursue the Amended Counterclaim. *Id.* at 454. Consequently, Debtors have alleged sufficient facts to establish that they have standing to seek a declaration concerning ownership of the Disputed Interests, which directly impacts the relief Buckeye seeks in the Complaint.

B. Case or Controversy

Buckeye cites to several unpublished opinions to support its contention that Debtors have failed to establish that the Amended Counterclaim deals with a case or controversy. These cases, however, are not only distinguishable, they are inapposite. *Quintero v. McWherter*, 47 F.3d 1170 (6th Cir. 1995) deals with an appeal of a denial of a motion by certain prisoners for a

³ The only interests listed in the Amended Counterclaim that are not in the Complaint are: Churchill Commons Corporation and Cynthia Corporation. However, this does not nullify Debtors' standing to challenge these interests because Buckeye, by using the catch all phrase "but not limited to" in all of the pertinent averments, left open the question as to what other interests could be challenged. It appears that Buckeye has and is going to challenge the ownership of these entities. (See Amended Counterclaim ¶ 6.)

declaration to determine their rights under agreements between the governors of Kentucky and Tennessee providing for extradition in the case of first degree murder charges. The Court held that there was no case or controversy. These facts bear no relationship at all to the instant case.

Similarly, Buckeye cites *Federal Deposit Insurance Corp. v. Project Development Corp.*, 819 F.2d 289 (6th Cir. 1987), which deals with the propriety of denying a motion for leave to amend an answer. The Court held that, because the parties had settled the case and agreed that the contract was terminated, the issue of whether the contract had been breached was moot. The Court noted that it "may not render an advisory opinion [A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at **2. Unlike the *FDIC* case, the instant case is not moot - despite Buckeye's attempt to stipulate that the Disputed Interests are not property of the estate for purposes of the Purchase Agreement. As set forth below, Buckeye continues to argue that Debtors' failure to disclose or adequately disclose the Disputed Interests requires denial of their discharge.

Buckeye argues that the Amended Counterclaim does not create a case or controversy because (i) the Purchase Agreement is not finalized and, hence, is not binding, (ii) the Disputed Interests have been removed from the Purchase Agreement, (iii) Buckeye stipulates that the Disputed Interests are not property of the estate to which Trustee has a transferable interest and (iv) Debtors have failed to meet their burden in establishing a case or controversy. (Motion to Dismiss at 4-6; Reply at 3.) Debtors

counter that there is a case and controversy because, although Buckeye removed the Disputed Interests from one draft of the Purchase Agreement, Buckeye may attempt to reinsert the same Disputed Interests at a later date. Moreover, Debtors adopted Buckeye's stipulation and moved this Court for an order, based upon the "mutual stipulation," that Debtors do not have an ownership interest in the Disputed Interests.

Subsequent to Debtors' Motion for Judgment, which was based upon Buckeye's stipulation, Buckeye filed Buckeye's Response Regarding Stipulation, which allegedly sought to "clarify" Buckeye's prior stipulation. This document, however, only serves to obnubilate the meaning of the stipulation, which, as originally stated was without qualification. As a consequence, it is not at all clear what, if anything, Buckeye intended to accomplish with the stipulation.

The stipulation became an issue at the April 25, 2007 hearing on Trustee's Motion to Enforce. At the hearing, the Court questioned Buckeye about the stipulation; however, in response, Buckeye merely made circular arguments that convoluted the issue. In Buckeye's Response Regarding Stipulation, Buckeye appears to conflate the Disputed Interests with certain causes of action that Buckeye is pursuing in the Trumbull County [Ohio] Court of Common Pleas ("Avoidance Actions"). Buckeye's position is that the bankruptcy estate previously owned the right to pursue certain Avoidance Actions that involved such Disputed Interests, but that the Disputed Interests no longer belong to the bankruptcy estate. Buckeye's "stipulation" is now qualified that, because the two year statute of limitations in § 546 of the Bankruptcy Code has run, the

right to pursue the Avoidance Actions is no longer property of the estate and the Trustee has no right to pursue such Avoidance Actions.

How this argument squares with Buckeye's stipulation that the "Disputed Interests" in paragraphs 5 and 6 of the Amended Counterclaim are not property of the bankruptcy estate remains a mystery since Buckeye concedes that the Disputed Interests are not causes of action. (See Transcript of the April 25, 2007 hearing at 67-8.)

Buckeye premises its "clarification" on the Order issued by the Sixth Circuit BAP on August 23, 2006 ("BAP Order"), which provided for this Court to vacate a prior order that extended the automatic stay. Buckeye misapprehends both the substance and the import of the BAP Order. Buckeye's argument is premised upon the faulty impression that, in finding that Buckeye could pursue the Avoidance Actions for its own benefit as a result of the passage of time, the BAP made some kind of substantive ruling regarding the merits or appropriateness of Buckeye's ability to continue those Avoidance Actions. This is simply not the case. The BAP did not - and, indeed, could not - address the merits of the Avoidance Actions because only the limited issue of the stay order was before the BAP.

Based upon Buckeye's Response Regarding Stipulation, this Court cannot find that the case and controversy over the Disputed Interests is moot. Indeed, Buckeye's Response Regarding Stipulation demonstrates that a case and controversy does, indeed, exist. At most, Buckeye's stipulation moots only the dispute over whether the estate owns the Disputed Interests for purposes of the

Purchase Agreement. There continues to be a case and controversy because Buckeye maintains that Debtors' conduct regarding the Disputed Interests in their schedules and other "oaths" requires denial of discharge.

Both Buckeye and Debtors spend a great deal of time discussing the Purchase Agreement and Trustee's inability to finalize such agreement as the basis (or lack thereof) for establishing a case or controversy. This issue may, indeed, create a case and controversy.⁴ A real case and controversy, however, exists because "Buckeye's continued pursuit of its Complaint objecting to Debtors' discharge create[s] an imminent possibility of future harm that satisfies the injury in fact element required for standing in the context of declaratory judgments." (Debtors' Response at 6.) As Debtors state, "if it is found that Debtors did not have an ownership interest in the Disputed Interests at the time Debtors filed their petition for bankruptcy, . . . Debtors cannot be said to have failed to disclose and/or adequately describe the Disputed Interests as assets of the bankruptcy estate." (*Id.* at 7.)

Contrary to Buckeye's assertion, Debtors have not failed to meet their burden to establish a case or controversy. The standard for a motion to dismiss requires the Court to construe the allegations within the Amended Counterclaim in the light most favorable to Debtors, accept the allegations set forth as averred, and resolve any ambiguities in favor of the Debtors. Following this standard, Debtors' averments establish the existence of a case

⁴ Subsequent to filing the Motion to Dismiss, the Court issued Memorandum Opinion and Order (Main Case Doc. ## 689 and 690) granting Trustee's Motion to Enforce, which sought an order requiring Buckeye to perform its obligations under the Purchase Agreement. Buckeye has appealed this Order.

and controversy. The Amended Counterclaim sets forth allegations that constitute a case and controversy about whether the Disputed Interests were property of the bankruptcy estate on the Petition Date and, consequently, needed to be disclosed on Debtors' schedules.

C. Declaratory Judgment Action

Buckeye argues that the Amended Counterclaim is an "impermissible declaratory judgment action" because it (i) "is unnecessary and wasteful of judicial resources," (ii) "is an inappropriate attempt by Defendants to interfere with Buckeye's prosecution of the prior pending [Avoidance Actions], in derogation of the rights accorded to Buckeye by the Sixth Circuit BAP," (iii) "is an inappropriate attempt to limit the causes of action that Buckeye was to purchase" in the Purchase Agreement and (iv) Debtors have failed in their burden to show [the Amended Counterclaim] is appropriate." (Motion to Dismiss at 7-10.) Debtors refute Buckeye's arguments.

Buckeye argues that the Amended Counterclaim is, in large part, a "mirror image" of its Complaint. This Court disagrees. The Complaint requires the Court to determine whether Debtors (i) had the intent to hinder, delay or defraud a creditor; and/or (ii) whether Debtors transferred, removed, destroyed, mutilated or concealed property of the bankruptcy estate. The Court could rule on these issues without determining if all or some of the Disputed Interests constitute property of the bankruptcy estate. Only this Court (or the District Court, which has declined to withdraw the reference) can determine what constitutes property of the bankruptcy estate. Because the Amended Counterclaim is the only

process by which Debtors can be assured that such determination will be made, the Amended Counterclaim is not a waste of judicial resources.

Buckeye also argues that the Amended Counterclaim is an impermissible counterclaim in that it is an attempt to limit the rights accorded to it by the BAP. However, as set forth above and in this Court's Order dated May 18, 2007, Buckeye misconstrues the BAP Order. The BAP Order merely provided that, since the two-year period for the Trustee to pursue the Avoidance Actions had expired, Buckeye was no longer prohibited from pursuing such actions for its own benefit. The BAP Order did not confer upon Buckeye any rights or interest in property of the bankruptcy estate or any right to pursue causes of action against Debtors that continued to be subject to the automatic stay. As Buckeye conceded at the April 25, 2007 hearing, the Disputed Interests are not causes of action. As a consequence, Debtors' Amended Counterclaim cannot and does not constitute an "end run" around the BAP Order or otherwise limit the BAP Order.

Buckeye also argues that the Amended Counterclaim is impermissible to the extent it seeks to limit what Buckeye has offered to purchase in the Purchase Agreement. Buckeye offered to purchase all of the equitable interests in Debtors' estate, known or unknown, tangible or intangible, disclosed or undisclosed, discovered or undiscovered - without enumerating or listing what those interests are. Buckeye's offer to purchase did not (i) specify what items were included as property of the estate and (ii) was not conditioned upon any particular item being or remaining property of the bankruptcy estate. In the Amended Counterclaim,

Debtors merely seek a declaration about whether certain items constitute property of the estate. If all of the Disputed Interests constitute property of the bankruptcy estate, Buckeye's purchase rights will not be limited. Alternatively, if some or all of the Disputed Interests are not property of the bankruptcy estate, Buckeye's rights will likewise not be limited because Buckeye never conditioned its purchase offer and Buckeye can only purchase from Trustee that which is property of the estate.

Finally, Buckeye argues that Debtors failed to sustain their burden that the Amended Counterclaim is appropriate. In making this argument, however, Buckeye manipulates and misquotes the record.⁵ Buckeye argues that the Amended Counterclaim is "'not only worthless to [Defendants], it is seemingly worthless to the all the world.'" (Motion to Dismiss at 10 (*quoting Steel Co v. Citizens For A Better Environment*, 523 U.S. 83, 106 (1998).) Buckeye supports this argument by misquoting Debtors' counsel. Buckeye represents that, at the February 8, 2007 hearing, Debtors' counsel stated:

[T]he counterclaim that we filed . . . may not have been absolutely necessary. I suspect that the Court would have made a lot of findings eventually in the Buckeye objection to discharge proceeding that would address

⁵ Buckeye has been admonished for this type of conduct in the past. Judge Economus, in his Opinion Denying Withdrawal of Reference, scolded Buckeye for using selective and misleading quotations. Judge Economus states, "Although Buckeye attempts to cite the BAP opinion as evidence of Judge Woods' bias, the quote cited in Buckeye's memorandum is particularly selective and misleading. Buckeye cites the portion of the BAP's opinion, in which the court finds that, 'contrary to the bankruptcy court's observation, the Harp decision does provide support for Buckeye's position that Mr. Hake's earnings were property of the estate.' Buckeye fails to cite the very next sentence of the BAP opinion, in which the court upheld the bankruptcy court's imposition of sanctions." (Opinion Denying Withdrawal of Reference at 8 (emphasis in original).)

many of these issues, whether we filed a declaratory judgment action or not"

(Motion to Dismiss at 3.) Buckeye uses ellipsis to exclude the last part of the sentence, which reads "but to make sure that these items got addressed, we have [the Amended Counterclaim] pending."

(Transcript of February 8, 2007 hearing at 7.) When the record is viewed in its entirety, Buckeye's argument fails. Debtors' counsel merely acknowledged that he presumed that the Court would make a finding about whether the Disputed Interests were property of the estate since Buckeye alleges they were impermissibly excluded from Debtors' schedules; however, Debtors filed the Amended Counterclaim to ensure that this issue would be addressed by this Court.

In ruling on the Motion to Dismiss, the Court is required to construe the allegations in the Amended Counterclaim in the light most favorable to Defendants, accept the allegations as averred, and resolve any ambiguities in favor of the Defendants. Following this standard, this Court cannot dismiss Debtors' Amended Counterclaim on the basis that it states an impermissible declaratory judgment action.

IV. CONCLUSION

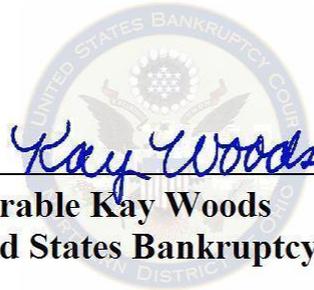
Debtors have averred sufficient facts to withstand Buckeye's Motion to Dismiss. Hence, Buckeye's Motion to Dismiss is denied. Additionally, based upon Buckeye's Response Regarding Stipulation, Debtors' Motion for Judgment Upon Stipulation is denied.

No party may file any further dispositive motion without leave of Court.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: July 11, 2007
03:25:06 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	CASE NUMBER 04-41352
	*	
Debtors.	*	
	*	
*****	*	
	*	
BUCKEYE RETIREMENT CO., LLC.,	*	
LTD.,	*	ADVERSARY NUMBER 06-4153
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

O R D E R

For the reasons set forth in this Court's Memorandum Opinion, this Court denies Plaintiff's Motion to Dismiss Defendants' Amended Counterclaim filed by plaintiff Buckeye Retirement Co., L.L.C., Ltd. ("Buckeye" or "Plaintiff") because Debtors Randall J. Hake and

Mary Ann Hake ("Debtors" or "Defendants") have averred sufficient facts to withstand Buckeye's Motion to Dismiss.

Additionally, Debtors' Motion to Enter Judgment Upon Stipulation is denied based upon Plaintiff's Response to Defendants' Motion to Enter Judgment Upon Stipulation.

No party may file any further dispositive motion without leave of Court.

IT IS SO ORDERED.

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