

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 matter is before the Court on the Joint Motion to Dismiss of Defendants William D. Munding Trust U/A 10/13/99, William D. Munding, William H. Peters Revocable Trust U/A 4/15/02, William H. Peters, Stanley W. Cosky, Karen A. Munding Revocable Trust, Karen A. Munding, Deanna V. Peters Revocable Trust, Deanna V. Peters, and James L. Messenger ("Motion to Dismiss") (Doc. # 139) filed on July 31, 2007, by Defendants William D. Munding ("Munding"), William H. Peters ("Peters"), William D. Munding Trust ("Munding Trust"), William H. Peters Revocable Trust ("Peters Trust"), Stanley W. Cosky ("Cosky"), Karen A. Munding ("Mrs. Munding"), Karen A. Munding Revocable Trust ("Mrs. Munding Trust"), Deanna V. Peters ("Mrs. Peters"), Deanna V. Peters Revocable Trust ("Mrs. Peters Trust"), and James L. Messenger ("Messenger") (collectively, "Movants").

Plaintiff The Lamson & Sessions Co. ("Lamson") filed Plaintiff The Lamson & Sessions Co.'s Memorandum in Opposition to Motion to Dismiss ("Lamson's Response") (Doc. # 152) on August 13, 2007, and Plaintiff Chapter 7 Trustee Richard Zellers ("Trustee") filed Opposition of Plaintiff Richard G. Zellers, Trustee, to Defendants' Joint Motion to Dismiss and Memorandum of Law in Support Thereof ("Trustee's Response") (Doc. # 158) on August 31, 2007.

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157.¹ Venue in this Court is proper pursuant

¹The Court analyzed in detail subject matter jurisdiction over each count in Order Determining Right to Jury Trial (Doc. # 193) filed on January 4, 2008.

to 28 U.S.C. §§ 1391(b), 1408, and 1409. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

In addition to the facts listed below, this Order incorporates by reference the facts detailed in Memorandum Opinion Denying Motion to Dismiss, entered on October 5, 2005, in the main case from which this Adversary Proceeding has arisen (Case # 05-43771, Doc. # 62).

YSD Industries ("YSD" or "Debtor") filed a chapter 7 voluntary petition on June 26, 2005. On June 28, 2005, Debtor filed Notice of Removal of State Court Civil Action to Bankruptcy Court (Doc. # 1), which commenced this Adversary Proceeding. The State Court Action ("State Court Action"), filed by Lamson in the Court of Common Pleas of Cuyahoga County, Ohio, on July 9, 2004, against Debtor, Munding, and Peters, sets forth six counts: (i) breach of contract against Debtor, (ii) breach of contract against Munding and Peters, (iii) fraudulent transfer in violation of Ohio Revised Code ("O.R.C.") § 1336.04, (iv) fraudulent transfer in violation of O.R.C. § 1336.05, (v) breach of fiduciary duty, and (vi) unjust enrichment. (Doc. # 2.) At all relevant times, Munding and Peters were directors of YSD and YSD's sole shareholders.

On July 5, 2005, Debtor filed Answer of Defendant YSD Industries, Inc. - Jury Demand Endorsed Hereon (Doc. # 12), which had been previously filed in the Court of Common Pleas of Cuyahoga County, Ohio, in response to the State Court Action. On July 5, 2005, Lamson filed with this Court a copy of the State Court Action Amended

Complaint (Doc. # 13), which sets forth the same six counts listed above.

On August 11, 2005, Trustee filed Trustee's Amended Motion for Order Substituting Trustee as Plaintiff ("Substitution Motion")² (Doc. # 25) with respect to Counts II, III, IV, V, and VI of the Amended Complaint. Subsequent to the October 19, 2005, hearing on this issue, this Court issued Memorandum Opinion Granting in Part [as to Counts III, IV, and V] and Denying in Part [as to Counts II and VI] Trustee's Amended Motion for Order Substituting Trustee as Plaintiff ("Substitution Order") (Doc. # 33) on October 24, 2005.³

Trustee filed Amended Complaint (Doc. # 48) against Debtor, Munding, and Peters on November 30, 2005. Munding and Peters filed Separate Answer of Defendants William Munding and William Peters (Doc. # 54) on January 26, 2006.

Lamson filed Second Amended Complaint of Plaintiff The Lamson & Sessions Co. (Doc. # 63) on May 5, 2006, against Munding and Peters, who filed Separate Answer of Defendants William Munding and William Peters (Doc. # 66) on May 24, 2006.

Trustee and Lamson (collectively "Plaintiffs") filed Third Amended Complaint (Doc. # 87) against all Defendants,⁴ except Messenger, on November 8, 2006. The Third Amended Complaint contained

²This definition incorporates both the Trustee's Motion for Order Substituting Trustee as Plaintiff (Doc. # 19), filed by Trustee on July 5, 2005, and Trustee's Amended Motion for Order Substituting Trustee as Plaintiff (Doc. # 25), filed by Trustee on August 11, 2005.

³Munding and Peters filed a Notice of Appeal of the Substitution Order. The Sixth Circuit Bankruptcy Appellate Panel dismissed the appeal for lack of jurisdiction on January 13, 2006. (Doc. # 52.)

⁴The Third Amended Complaint added as Defendants Packer Thomas and Company ("Packer Thomas") and Phil Dennison ("Dennison"), neither of which are parties to the Motion to Dismiss.

ten counts. The named Defendants filed six separate Answers to Plaintiffs' Third Amended Complaint on December 14, 2006 (Doc. ## 100-105.)

Trustee filed Motion for Leave to File Amended Complaint ("Motion to Amend") (Doc. # 124) on May 23, 2007. Movants, except Messenger,⁵ filed Objection and Brief in Opposition to Motion for Leave to File [Fourth] Amended Complaint (Doc. # 127) on June 15, 2007. On June 20, 2007, the Court held a Hearing on the Motion to Amend, which was granted on June 20, 2007.

Plaintiffs filed Fourth Amended Complaint ("Complaint") (Doc. # 129) against all Defendants on June 21, 2007. This Complaint is the subject of the Motion to Dismiss and sets forth the following ten counts:

1. Lamson's breach of contract claim against Mundinger and Peters based on alter ego ("Count I");
2. Trustee's claim for fraudulent transfer (O.R.C. § 1336.04) against Mundinger, Peters, Cosky, Mundinger Trust, Mrs. Mundinger, Mrs. Mundinger Trust, Peters Trust, Mrs. Peters, and Mrs. Peters Trust ("Count II");
3. Trustee's claim for fraudulent transfer (O.R.C. § 1336.05) against YSD, Mundinger, Peters, Cosky, Mundinger Trust, Mrs. Mundinger, Mrs. Mundinger Trust, Peters Trust, Mrs. Peters, and Mrs. Peters Trust ("Count III");
4. Trustee's claim for breach of fiduciary duty against Mundinger, Peters, and Messenger ("Count IV");
5. Lamson's unjust enrichment claim against Mundinger and Peters ("Count V");

⁵Messenger was not a named defendant until the Fourth Amended Complaint.

6. Trustee's unjust enrichment claim against Mundinger and Peters ("Count VI");
7. Trustee's claim for unlawful dividends against Mundinger, Messenger, and Peters ("Count VII");
8. Lamson's claim for intentional interference with contract against Mundinger, Peters, Dennison, and Packer Thomas ("Count VIII");
9. Trustee's claim for professional negligence against Dennison and Packer Thomas ("Count IX"); and
10. Trustee's claim for aiding and abetting fraudulent transfers against Dennison, Messenger, and Packer Thomas.

Defendants filed seven separate answers between July 31, 2007, and August 7, 2007 (Doc. ## 138, 140-144, and 150.)

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) to test whether a cognizable claim has been pled in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint. To withstand dismissal, the complaint must (i) provide a short and plain statement of the claim that shows the plaintiff is entitled to relief, (ii) give the defendant fair notice of the claim, and (iii) state the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

FED. R. CIV. P. 12(b)(6), which is applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.

1955, 1974 (2007).⁶ The Court of Appeals for the Sixth Circuit noted:

[in *Twombly*, t]he Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. . . . The Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."

Association of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007) (citations omitted) (second alteration in original). See also, *Nicholson v. Countrywide Home Loans*, No. 1:07-CV-3288, 2008 U.S. Dist. LEXIS 20714, *6 (N.D. Ohio March 17, 2008) ("Accordingly, the claims set forth in a complaint must be plausible, rather than conceivable." (citing *Twombly*, 127 S. Ct. at 1974)); *Boling v. Correctional Medical Services*, No. 07-11752, 2007 U.S. Dist. LEXIS 80479, *8-9 (E.D. Mich. Oct. 31, 2007) (Noting *Twombly* "is consistent with the holdings of several prior Sixth Circuit opinions. . . . [that a complaint] 'must contain either direct or inferential allegations regarding all the material elements' [and be more than] 'a statement of facts that merely creates a suspicion that the pleader might have a right of action.'" (citations omitted)); and *Reid v. Purkey*, No. 2:06-CV-40, 2007 U.S. Dist. LEXIS 42761, *4-5 (E.D.

⁶In *Twombly*, the Supreme Court held that the following language from *Conley* had earned its retirement: "a complaint should not be dismissed for failure to state a claim 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. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S. Ct. at 1969.

Tenn. June 11, 2007) ("While a complain [sic] need not contain detailed factual allegations, a pleader has a duty . . . to supply, at a minimum, the necessary facts and grounds which will support his right to relief." (citing *Twombly*, 127 S. Ct. at 1964-65)).

In determining the sufficiency of a complaint, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). "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 (W.D. Tenn. 2003) (citing 5A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1356 (1990)).

However, "the [c]ourt is not required to accept 'sweeping unwarranted averments of fact,'" *Official Comm. of Unsecured Creditors v. Austin Fin. Servs., 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 *Power & Tel. Supply Co., Inc. v. Suntrust Banks, Inc.*, 447 F.3d 923, 930 (6th Cir. 2006) ("The court need not accept legal conclusions or unwarranted factual inferences as true.").

III. LEGAL ANALYSIS

The Motion to Dismiss argues that Counts II, III, IV, VI, VII, and X - all of the Trustee's claims against Movants - are barred by a two-year statute of limitations. (Motion to Dismiss at 5.) Movants also assert that Count IV - Trustee's claim for breach of fiduciary duty against Munding, Peters, and Messenger - and Count X - Trustee's claim against Messenger for aiding and abetting fraudulent transfers - both fail to state a claim. (*Id.* at 2.) Finally, the Motion to Dismiss requests that the Court dismiss Count V - Lamson's unjust enrichment claim against Munding and Peters. (*Id.*) The Court will address each of these requests in turn.

In addition to responding to Movants' specific arguments, Trustee asserts that the Motion to Dismiss is rendered moot by Movants' filing of their separate answers to the Fourth Amended Complaint.⁷ (Trustee's Response at 5.) Trustee cites *Brisk v. City of Miami Beach*, 709 F. Supp. 1146 (S.D. Fla. 1989) in support of his argument. The defendants in *Brisk* filed a motion to dismiss for failure to state a claim. The *Brisk* court construed the motion to dismiss as a motion for judgment on the pleadings, reasoning that "[o]nce the defendants filed their answer, it became procedurally impossible for the Court to rule on the motion to dismiss" based on

⁷Trustee also argues that this Court previously addressed the statute of limitations issue in granting Trustee's Motion to Amend, despite objections by the Movants. (See *supra* p. 5.) However, in granting Plaintiffs leave to amend the Complaint, the Court stated that "it is not at all clear to me based upon what I know at this moment that the amendment would be futile [because of the statute of limitations]." (Hearing Transcript at 37 (emphasis added).) However, the Court also noted the argument might be appropriately addressed "later upon a motion to dismiss or a motion for summary judgment[.]" *Id.* As the Court foresaw, this case is now in different posture than it was at the Hearing on the Motion to Amend. Therefore, the Court will consider afresh the statute of limitations question.

one line of cases⁸ interpreting FED. R. CIV. P. 12(b). *Brisk*, 709 F. Supp. at 1147. However, the *Brisk* court also noted the existence of "a line of cases suggesting that courts should allow the contemporaneous filing of a motion to dismiss and an answer if the grounds for the motion are also raised as affirmative defenses."⁹ *Id.*

Lower courts in the Sixth Circuit follow the "line of cases" that reach the opposite conclusion from the *Brisk* court.

First, motions to dismiss following a responsive pleading are allowed when the defenses raised in the motion were included in the answer. In the replies to the counterclaims, filed [previously], the plaintiff alleged that the counterclaims failed to state claims upon which relief can be granted and that this court lacks jurisdiction over the subject matter of the counterclaims. It is on these bases that plaintiff moves for dismissal of the counterclaims. Consequently, the motion to dismiss after the filing of responsive pleading is proper. Second, a motion to dismiss may be made at any time if the motion is based upon a defense of "failure to state a claim upon which relief can be granted" or lack of subject-matter jurisdiction.

Sorin v. Board of Education, 464 F. Supp. 50, 51-52 (N.D. Ohio 1978) (citations omitted). "While normally a party must file a Rule 12(b)(2) motion before filing an answer, or simultaneously with the filing of the responsive pleading, 'courts have allowed untimely motions if the defense has been previously included in the answer.'" *Braun Constr. Servs., Inc. v. Richard's Restoration, Inc.*, No. 3:05-

⁸The *Brisk* court cited: *Republic Steel Corp. v. Pennsylvania Eng. Corp.*, 785 F.2d 174, 182 (7th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *Paul v. McGhee*, 577 F. Supp. 460, 462 (E.D. Tenn. 1983); *Angleton v. Pierce*, 574 F. Supp. 719, 723 n. 1 (D.N.J. 1983). *Brisk*, 709 F. Supp. at 1147.

⁹The *Brisk* court noted: *Beary v. West Pub. Co.*, 763 F.2d 66, 68 (2d. Cir. 1985); *Zebrowski v. Denckla*, 630 F. Supp. 1307, 1308 n. 1 (E.D.N.Y. 1986); *Martin v. Delaware Law School*, 625 F. Supp. 1288, 1296 n. 4 (D. Del. 1985); *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 398, 413 (E.D.Pa. 1981). *Brisk*, 709 F. Supp. at 1147.

cv-129, 2006 U.S. Dist. LEXIS 1630, *4 (E.D. Tenn. January 11, 2006) (quoting 5C WRIGHT & MILLER, *supra* p. 8, at § 1361 (2004)); *Stein v. Kent State University Board of Trustees*, 994 F.Supp. 898, 902 (N.D. Ohio 1998). See also, *Glover v. Elliott*, No. 1:07-cv-648, 2007 U.S. Dist. LEXIS 73605, *6 (W.D. Mich. Oct. 2, 2007) (Denying motion to strike affirmative defense of failure to state a claim upon which relief can be granted because "Rule 12 allows this defense to be raised in an answer, . . . and further provides that this defense is essentially never waived, as it may be asserted as late as trial[.]")

Here, the Motion to Dismiss is grounded in the Rule 12(b)(6) defense of "failure to state a claim upon which relief can be granted," as well as the affirmative defense that the statute of limitations has expired, which is enumerated in FED. R. CIV. P. Rule 8(c)(1). (Motion to Dismiss at 2.) Movants listed these two affirmative defenses in each of their separate answers to the Fourth Amended Complaint (Doc. ## 140, 141, 142, 143, 144, and 150.) Defendants Mundinger and Peters included these affirmative defenses in the first answer filed in this Adversary Proceeding (Doc. # 54 ¶¶ 63 and 73), and YSD included them in its answer to the State Court Action (Doc. # 12 ¶¶ 53 and 62.) Therefore, the Court overrules Trustee's Objection to the extent it is based on the grounds of untimeliness.

A. Statute of Limitations for Trustee's Claims

Movants argue that all of Trustee's causes of action against them - Counts II, III, IV, VI, VII, and X (collectively, "Six Counts") - are based on "the approval of 'dividends or distributions' to or on behalf of shareholders of YSDI by the three directors of the corporation," Mundinger, Peters, and Messenger. (Motion to Dismiss

at 5.) Thus, Movants contend that the Six Counts are all governed by O.R.C. § 1701.95(A)(1), which provides in part:

In addition to any other liabilities imposed by law upon directors of a corporation and except as provided in division (B) of this section, directors shall be jointly and severally liable to the corporation as provided in division (A)(2) of this section if they vote for or assent to any of the following:

(a) The payment of a dividend or distribution, the making of a distribution of assets to shareholders, or the purchase or redemption of the corporation's own shares, contrary in any such case to law or the articles;

O.R.C. § 1701.95(A)(1) (LexisNexis 2007) (emphasis added).

Movants then assert that all Six Counts are time-barred by the two-year statute of limitations in O.R.C. § 1701.95(F), which states that "[n]o action shall be brought by or on behalf of a corporation upon any cause of action arising under division (A)(1)(a) or (b) of this section at any time after two years from the day on which the violation occurs." O.R.C. § 1701.95(F) (LexisNexis 2007). Movants argue that the statute of limitations has expired because "any claims based upon unlawful dividends or distributions to YSDI shareholders had to have been filed no later than on or before two years from April 3, 2003, or on or before April 3, 2005." (Motion to Dismiss at 9-10.) Movants note that Trustee first brought a claim for unlawful dividends in the Third Amended Complaint, which was filed November 8, 2006. Finally, Movants reason that "since all of the Trustee's claims are in actuality claims for unlawful dividends and distributions to YSDI's shareholders, they are all time-barred by Ohio Rev. Code §1701.95(F)." (Motion to Dismiss at 10.)

Movants' argument fails for three reasons. First, the Court

finds that, contrary to Movants' bald assertion, each of the Six Counts represents a valid and independent cause of action. Second, FED. R. CIV. P. 15(c) allows new claims to relate back to the original pleading when all claims arise out of the same set of facts. Third, it is not apparent from the face of the Complaint that the statute of limitations has run for any of the counts. The Court will address each of these points in order.

1. The Six Counts Are Not Disguised Unlawful Distributions

First, in reviewing a complaint under FED. R. CIV. P. 12(b)(6), the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Treesh*, 487 F.3d at 476. Taking Trustee's facts as alleged in the Complaint, each count states the cause of action it purports to state. Each claim establishes the elements necessary for the given cause of action, and the Ohio Revised Code establishes a specific statute of limitations for each given cause of action. Counts II, III, IV, and VI (collectively, "Four Counts")¹⁰ are not disguised unlawful dividend claims simply because Movants say they are; rather, each count represents a unique and independent cause of action.

Movants assert that "Ohio and federal courts recognize that the statute of limitations applicable in an action is based on the substance or actual nature of the claim, not the form in which it is pleaded[.]" (Motion to Dismiss at 10.) In support of their arguments, Movants cite several cases including *Rehkoph v. REMS, Inc.*, 40 Fed.

¹⁰Counts VII and X will be discussed separately later in this Opinion.

Appx. 126 (6th Cir. 2002);¹¹ *Lawyers Cooperative Publ. Co. v. Muething*, 65 Ohio St. 3d 273 (1992); *Kegg v. Mansfield*, 2001 Ohio App. LEXIS 2035; *Breno v. Mentor*, 2003-Ohio-4051, 2003 Ohio App. LEXIS 3610; *Stanley v. John H. Rion & Assocs.*, 2001-Ohio-1353, 2001 Ohio App. LEXIS 4223; and *Goldberg v. Cohen*, 2002-Ohio-3012, 2002 Ohio App. LEXIS 3021. These cases are all distinguishable from the instant case.

Goldberg and *Kegg* both involved fraud in connection with the sale of securities, which has a shorter statute of limitations, pursuant to O.R.C. § 1707.43, than common-law fraud. As the *Goldberg* court explained, “[i]n general, claims based on common-law fraud are governed by the four year statute of limitations set forth in R.C. 2305.09. However, the Ohio General Assembly has carved out an exception applicable to allegations of fraud predicated upon a sale made in violation of R.C. Chapter 1707.” *Goldberg*, 2002 Ohio App. LEXIS 3021 at *P11. In contrast, as quoted above, O.R.C. § 1701.95 expressly allows for “other liabilities imposed by law[.]” O.R.C. § 1701.95(A)(1) (LexisNexis 2007).

Lawyers Cooperative Publishing Co. also involved a particular area of Ohio law - products liability. Ohio plaintiffs can maintain three different causes of action in a products liability case: negligence, contract, and breach of implied warranty. *Lawyers Cooperative*, 65 Ohio St. 3d at 276. However, not all three causes of action may be available to every plaintiff. *Id.* at 277. The *Lawyers Cooperative* court found that it was “evident from the face of the

¹¹In *Rehkoph*, the Sixth Circuit Court of Appeals agreed with plaintiff’s argument that the action sounded in contract rather than tort and applied the longer statute of limitations. *Rehkoph*, 40 Fed. Appx. at 129.

[claim] that the causes of action do not look to the Uniform Commercial Code but instead apply negligence standards to the facts alleged." *Id.* at 276. Trustee in the instant case, however, has pled sufficient facts regarding the required elements of each of the Four Counts to withstand dismissal.

Courts in the remaining two cases cited by Movants applied a shorter specific statute of limitations instead of a longer generalized statute of limitations, based on the specific context of each case. The *Breno* plaintiff brought parallel claims for defamation and emotional distress. Ohio appellate courts have held that "although a claim for emotional distress is recognized as a separate tort under Ohio law, if the claim sounds in defamation, it is subject to the one-year statute of limitations for defamation." *Breno*, 2003 Ohio App. LEXIS at *P12. The "general negligence" claim brought in *Stanley* was governed by the statute of limitations for legal malpractice because "any duty to [plaintiff] that [defendant] was alleged to have breached had to have been rooted in their attorney-client relationship." *Stanley*, 2001 Ohio App. LEXIS 4223 at *4.

Construing the allegations in the Fourth Amended Complaint in the light most favorable to Plaintiffs compels this Court to find that the Four Counts are not disguised unlawful dividends claims. Although Movants assert these are all dividend causes of action, the facts alleged establish otherwise.

As Trustee notes, O.R.C. § 1701.95(A)(1) clearly anticipates that corporate directors may incur liability beyond that imposed by this statute alone. Trustee cites *Bonacci v. Ohio Highway Express, Inc.*, No. 60825, 1992 WL 181682 (Ohio App. 8 Dist. July 30, 1992) as an example of such additional liability.

It is clear from plain language of 1701.95 that it does not encompass fraud or conversion. . . . The scope of R.C. 1701.95(A) is limited to loans, dividends or distributions of Corporate assets. "In addition to" that statutory framework, R.C. 2305.09 provides a four year limitation of actions for fraud and conversion of corporate assets[.]

Bonnacci, at *5 (Affirming the trial court's decision denying partial dismissal of plaintiffs' claims, pursuant to the § 1701.95 statute of limitations, where plaintiffs claimed defendant director had transferred corporate assets for his own benefit) (citation omitted).

Similarly, in this proceeding, Counts II and III plead sufficient facts to aver that the named Defendants participated in fraudulent transfers, which causes of action are governed by O.R.C. § 1336.04 and § 1336.05 respectively. These two statutes allow courts, under specified circumstances, to deem fraudulent and set aside a debtor's transfers that obstruct collection efforts. Specifically, O.R.C. § 1336.04(A) states:

(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor;

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

(a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;

(b) The debtor intended to incur, or believed or reasonably should have believed

that he would incur, debts beyond his ability to pay as they became due.

O.R.C. § 1336.04 (LexisNexis 2007). O.R.C. § 1336.05(A) states:

(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

O.R.C. § 1336.05 (LexisNexis 2007). Fraudulent transfer causes of action may be brought against either transferors or transferees. In the instant case, Trustee is expressly bringing these actions against Movants as transferees, not as officers, shareholders, or directors of YSD. (Trustee's Response at 9.)

Movants argue that "the specific statute of limitations controls over any other, general statute of limitations" (Motion to Dismiss at 11.) O.R.C. § 1336.04(A) and § 1336.05(A) are encompassed within the specific four-year statute of limitations in O.R.C. § 1336.09(A) and (B).

A claim for relief with respect to a transfer or an obligation that is fraudulent under section 1336.04 or 1336.05 of the Revised Code is extinguished unless an action is brought in accordance with one of the following:

(A) If the transfer or obligation is fraudulent under division (A)(1) of section 1336.04 of the Revised Code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or reasonably could have been discovered by the claimant;

(B) If the transfer or obligation is fraudulent under division (A)(2) of section 1336.04 or division (A) of section 1336.05 of the Revised Code, within four years after the

transfer was made or the obligation was incurred;

O.R.C. § 1336.09 (LexisNexis 2007). Counts II and III were filed against all Movants no later than November 8, 2006 (Third Amended Complaint), which is within the four-year statute of limitations. Movants, as transferees, may not escape liability under the fraudulent transfer statutes' four-year statute of limitations solely because the transferees are also directors or fiduciaries. See, e.g., *James v. McCoy*, 56 F. Supp. 2d 919, 931-32 (S.D. Ohio 1998), where the creditor/plaintiff brought, *inter alia*, claims for both fraudulent conveyance and illegal distribution of assets, based on the same act of defendant directors. In considering the statute of limitations defenses, the court expressly applied the O.R.C. § 1336.09 four-year statute of limitations for the fraudulent conveyance claims.¹²

Count IV, for breach of fiduciary duty against Mundinger, Peters and Messenger, is, like the fraudulent transfer claims, a cause of action separate from the unlawful dividends claim. "In Ohio, it is a well established principle that directors and officers have a fiduciary relationship and position of trust with respect to the corporation they serve." *Liquidating Trustee v. Baker (In re Amcast)*, 365 B.R. 91, 103 (Bankr. S.D. Ohio 2007). The nature of this fiduciary duty has been codified at O.R.C. § 1701.59, which provides, in pertinent part:

(B) A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in

¹²None of the cases cited by Movants in support of their argument involve simultaneous claims brought under both O.R.C. § 1701.95 and §§ 1336.04 or 1336.05. In fact, none of their cited cases actually involve any of these three statutes.

a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.

. . .

(D) A director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation. Nothing contained in this division affects the liability of directors under section 1701.95 of the Revised Code or limits relief available under section 1701.60 of the Revised Code. This division does not apply if, and only to the extent that, at the time of a director's act or omission that is the subject of complaint, the articles or the regulations of the corporation state by specific reference to this division that the provisions of this division do not apply to the corporation.

O.R.C. § 1701.59 (LexisNexis 2007) (emphasis added). The plain language of the statute indicates a separate liability under §§ 1701.59 and 1701.95.

The Court is persuaded by case law cited by Trustee that the four-year statute of limitations for torts in O.R.C. § 2305.09(D) should be applied to a cause of action arising under §§ 1701.59. Trustee cites *Kondrat v. Morris*, 692 N.E.2d 246 (Ohio Ct. App. 1997), which applied the § 2305.09(D) four-year statute of limitations to a breach of fiduciary duty in the context of a sale of securities. *Kondrat*, 692 N.E. at 251. The *Kondrat* court cited *Crosby v. Bream*, which noted that the Ohio Supreme Court held that a minority shareholder could bring a direct cause of action against the majority shareholders for breach of fiduciary duty, and that a "breach of this

type of fiduciary duty constitutes a tort, which is subject to the four-year statute of limitations under R.C. 2305.09." *Crosby v. Bream*, 615 N.E.2d 294, 299-300 (Ohio Ct. App. 1992) (citing *Crosby v. Bream*, 548 N.E.2d 217, 220-222 (Ohio 1989)). Furthermore, the *Amcast* court allowed a liquidating trustee to bring a claim against directors for breach of fiduciary duty to the corporation based on distributions of assets made to the acting Chairman of the Board of Directors more than two years before the adversary proceeding was filed.¹³ *Amcast*, 365 B.R. at 110-11. Movants fail to cite any case where a breach of fiduciary duty was found to be a disguised O.R.C. § 1701.95 claim.

Count VI, which is Trustee's claim for unjust enrichment, also stands as an independent cause of action.

Unjust enrichment occurs when a defendant possesses and retains money or a benefit which belongs to a plaintiff in justice and equity. The theory behind the cause of action is no one should "be allowed to profit or enrich himself inequitably at another's expense, but should be required to make restitution of . . . property . . . received . . . where it is just and equitable that such restitution should be made."

Southard v. United States, No. 2:05-cv-416, 2007 U.S. Dist. LEXIS 60957, *14 (S.D. Ohio Aug. 20, 2007) (citations omitted) (alterations in original). Ohio imposes a six-year statute of limitation for unjust enrichment claims in O.R.C. § 2305.07. *Arctic Express, Inc. v. Del Monte Fresh Produce NA, Inc.*, 366 B.R. 786, 790 (S.D. Ohio 2007); *Calcol v. SIG Simonazzi, S.p.A.*, No. 1:05-CV-000863, 2006 U.S. Dist. LEXIS 18770, *3-4 (N.D. Ohio 2006).

¹³The *Amcast* Trustee initiated the adversary proceeding on December 28, 2005, citing as proof of the breach of fiduciary duty a "pension plan amendment" in 2001 and payments to the Chairman in January and September of 2003. *Amcast*, 365 B.R. at 100-101.

2. Rule 15(c) Permits New Claims to Relate Back

The second reason Movant's statute of limitations argument fails is that FED. R. CIV. P. 15(c)(2) allows an amended pleading to relate back to the filing date of the original pleading "'when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading' even though the statute of limitations might have run on a new claim." *Watkins & Son Pet Supplies v. The Iams Co.*, 107 F. Supp. 2d 883, 897 (S.D. Ohio 1999) (quoting FED. R. CIV. P. 15(c)(2)).

When an amended complaint adds a new claim, the court should not focus on the legal theory of the action in resolving whether that complaint should relate back, pursuant to Fed. R. Civ. P. 15(c)(2), to the original complaint. Rather, the . . . court should analyze the original and amended complaints "to determine whether they share a common core of operative facts sufficient to impart fair notice of the transaction, occurrence, or conduct called into question." . . . "The test under Rule 15(c) [for] whether a sufficient factual nexus exists to permit relation back is whether 'the evidence with respect to the second set of allegations could have been introduced under the original complaint, liberally construed.'" Furthermore, the court should consider whether the defendant had notice of the claim now being asserted.

Watkins, 107 F. Supp. 2d at 897 (citations omitted) (second alteration in original). See also, *Williams v. Northcut & Edwards, P.C.*, No. C-3-16-103, 1999 U.S. Dist. LEXIS 12980, *5-6 (S.D. Ohio July 7, 1999) ("Under [Rule 15(c)], a claim [based on a new cause of action] could relate back to the filing of the initial Complaint and, therefore, such a claim would not be barred by the statute of limitations."); and

Brandt v. Gerardo (In re Gerardo Leasing, Inc.), 173 B.R. 379, 389 (Bankr. N.D. Ill. 1994) ("It has thus been well established that an amended complaint will relate back, notwithstanding the bar of the statute of limitations, if it merely adds a new legal ground for relief" based on the same factual basis as the original claims.).

"The most important factor in determining whether to allow an amended complaint to relate back to the date of the original filing is whether the original complaint provided the defendant with sufficient notice of what must be defended against in the amended pleading." *Gerardo Leasing*, 173 B.R. at 388. Here, both Trustee and Defendants agree that all of Trustee's claims are based on the same conduct, occurrences and transactions (Motion to Dismiss at 9; Trustee's Response at 18), which the Trustee characterizes as "a wrongful and improper transfer of assets" (Complaint ¶ 1) and Defendants as "dividends or distributions" (Motion to Dismiss at 5). The facts of the Complaint largely parallel the facts laid out in the State Court Action. Therefore, the State Court Action provided Munding, Peters, and Messenger with "sufficient notice" of the conduct they must defend.¹⁴ Count VII of the Complaint merely adds a new legal ground of relief, which relates back to the State Court Action, filed within the O.R.C. § 1701.95 statute of limitations.

Furthermore, the Trustee was substituted for Lamson as

¹⁴Munding and Peters together with YSDI, were the original Defendants in the State Court Action, filed July 9, 2004. While the State Court Action did not name Messenger as a defendant, he was "a director of YSDI, an attorney for YSDI, and an attorney for Mr. Munding and Mr. Peters" during the relevant period. (Separate Answer of James L. Messenger, as Director, Doc. # 150, ¶ 6.)

Plaintiff¹⁵ which means that a version of the present Counts II, III, and IV¹⁶ were all filed before the April 3, 2005, "deadline" proposed by Movants, even if, *arguendo*, those claims were all essentially unlawful dividend claims. FED. R. CIV. P. 17(a), which is applicable to this Adversary Proceeding through FED. R. BANKR. P. 7017, directs that every "action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17 (LexisNexis 2007). The Trustee, as "a party authorized by statute," may sue in his own name, under Rule 17(a)(1)(G). *Id.* Rule 17(a)(3), the Rule's relation-back provision, provides in pertinent part, "[a]fter . . . substitution, the action proceeds as if it had been originally commenced by the real party in interest." *Id.* Where, as here, the original plaintiff had standing to file an action, "Trustee is not obliged to file his claim *de novo*. Rather, he may substitute into the present proceeding Rule 17(a)'s relation-back provision then eliminates any statute of limitations problem That the Trustee [may] now [be] time-barred from filing a new complaint, therefore, is irrelevant." *Tate v. Snap-On Tools Corp.*, No. 90-C-4436, 1997 U.S. Dist. LEXIS 1485, *17 (N.D. Ill. February 10, 1997).

3. Rule 12(b)(6) Focus is the Face of the Complaint

Finally, Trustee argues that Count VII, for unlawful dividends, was sufficiently pled in light of the standard for

¹⁵The Trustee represents "the estate and the creditors as a whole," not solely Lamson. (Substitution Order at unnumbered 4.)

¹⁶See *infra* p. 29, for a separate analysis of Count V, which was also included in the State Court Action.

reviewing a 12(b)(6) motion. "The statute of limitations defense 'may be raised on a motion to dismiss under Rule 12(b)(6) when it is apparent from the face of the complaint that the time limit for bringing the claim has passed." *Korn v. Paul Revere Life Ins. Co.*, 238 Fed. Appx. 109, 111 (6th Cir. 2007), quoting *Hoover v. Langston Equip. Assoc., Inc.*, 958 F.2d 742, 744 (6th Cir. 1992) (emphasis added). "The purpose behind . . . a Civ. R. 12(B) [sic] motion to dismiss based upon the statute of limitations is to avoid the unnecessary delay involved in raising the bar of the statute in a responsive pleading when it is clear on the face of a complaint that the cause of action is barred." *Hughes v. Robinson Mem'l Portage County Hosp.*, 474 N.E.2d 638, 640 (Ohio Ct. App. 1984).

Trustee argues that, in the present case, it is not clear from the face of the complaint that a claim under O.R.C. § 1701.95 would be time-barred because the actual date of the statutory violation is unknown. Under § 108(a)¹⁷ of the Bankruptcy Code, if the statute of limitations has not yet run as of the Petition Date, Trustee has "the longer of the original period or two years after the order for relief" to bring the cause of action. *Meiburger v. Ocwen Federal Bank, FSB, (In re Marshall, Jr.)*, 307 B.R. 517, 519 (Bankr.

¹⁷Section 108(a) in its entirety states -

If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

11 U.S.C. § 108 (LexisNexis 2007).

E.D. Va. 2003). If, as Trustee asserts, the Directors' vote authorizing the distribution was back dated, there is a factual dispute as to the § 1701.95 accrual date, and the Motion to Dismiss is not well taken.

B. Breach of Fiduciary Duty

Count IV of the Complaint charges Mundinger, Peters, and Messenger ("YSD's Directors") with violating their fiduciary duty to YSD and to its creditors. Movants request that the Court dismiss Count IV for failure to state a claim, to the extent it asserts that YSD's Directors breached their fiduciary duty to YSD's creditors.¹⁸ (Motion to Dismiss at 19.) Trustee counters that, in Count IV, he is representing the interests of YSD. (Trustee's Response at 13.)

As discussed, *supra* pp. 18-19, O.R.C. § 1701.59 codifies the fiduciary duty of Ohio corporate directors. Section 1701.59(E) states that in determining the best interests of the corporation, a director "shall consider the interests of the corporation's shareholders and, in the director's discretion, may consider any of the following: (1) the interests of the corporation's employees, suppliers, creditors and customers[.]" O.R.C. § 1701.59(E) (LexisNexis 2007) (emphasis added). Under the statute, corporate directors owe no fiduciary duty to the corporation's creditors. "The permissive language of the statute forecloses the contention that the directors' duty to the corporation's creditors is fiduciary in nature." *Washington Penn Plastic Co., Inc. v. Creative Engineered Polymer Prods., LLC.*, No.

¹⁸Movants also request that Count X be dismissed on the same grounds. Count X will be discussed in the next section of this Opinion.

5:06CV1224, 2007 U.S. Dist. LEXIS 64212, *6 (N.D. Ohio August 30, 2007). To the extent Count IV asserts YSD's Directors breached their fiduciary duty to YSD's creditors, it is dismissed.

However, the Trustee may still bring his claim against YSD's Directors on behalf of YSD. A bankruptcy trustee may represent the interests of a debtor corporation against its directors for breach of fiduciary duty. See, e.g., *Amcast*, 365 B.R. at 110-111 ("Based upon its foregoing analysis of Ohio law pertaining to the fiduciary obligations of officers and directors, the court concludes that the Liquidating Trustee's Complaint states a claim against the directors and officers for breach of fiduciary duty to [the debtor corporation]."); and *Yoder v. T.E.L. Leasing, Inc. (In re Suburban Motor Freight, Inc.)*, 124 B.R. 984, 1003-04 (Bankr. S.D. Ohio 1990) (Allowing bankruptcy trustee to bring a claim for breach of fiduciary duty against the debtor corporation's directors). To the extent Count IV asserts YSD's Directors breached their fiduciary duty to YSD, the Motion to Dismiss is denied.

C. Aiding and Abetting

Movants request that Count X, for aiding and abetting fraudulent transfers, be dismissed against Messenger. Movants first characterize the fraudulent transfers as breaches of fiduciary duty and then argue that Messenger could not aid and abet YSD's Directors in breaching their fiduciary duty because he was a YSD Director at the time of the alleged breach. Movants also question whether Ohio law recognizes an aiding and abetting cause of action.

Aiding and abetting as a civil cause of action is defined in

Restatement (Second) of Torts § 876: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself[.]" RESTATEMENT (SECOND) OF TORTS § 876(b) (LexisNexis 2007).

Trustee cites *Aetna Casualty and Surety Co. v. Leahey Constr. Co., Inc.*, 219 F.3d 519, 533 (6th Cir. 2000), where the Court of Appeals for the Sixth Circuit observed that, while the Ohio Supreme Court had never expressly adopted Restatement (Second) of Torts § 876(b), it had applied it in *Great Central Ins. Co. v. Tobias*, 524 N.E. 168 (Ohio 1988). The *Aetna Casualty* court interpreted *Tobias* to "implicitly indicat[e] that [the Ohio Supreme Court] considered civil aiding and abetting a viable cause of action," although the *Tobias* court found that the plaintiff there could not show the requisite elements of the cause of action. *Aetna Casualty*, 219 F.3d at 533 (quoting *Tobias*, 524 N.E. 2d at 172).

However, the Sixth Circuit appears to have subsequently stepped back from its position in *Aetna*. In *Pavlovich v. National City Bank*, 435 F.3d 560, 570 (6th Cir. 2006), the court held that the plaintiff's aiding and abetting claim "must fail because Ohio law is unsettled whether this cause of action exists and, regardless [plaintiff] cannot establish a prima facie case." The *Pavlovich* court recognized its previous holding in *Aetna*, but also noted that some lower courts in Ohio have stated, "Ohio does not recognize a claim for aiding and abetting common-law fraud." *Pavlovich*, 435 F.3d at 570

(quoting *Federated Mgmt. Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 853 (Ohio Ct. App. 2000)).

In light of the cases discussed above, at least two federal district courts in the Northern District of Ohio have denied motions to dismiss aiding and abetting claims because it is unclear whether Ohio law recognizes such a claim: *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, No. 3:02-CV-1378, 2006 U.S. Dist. LEXIS 72154, *29 (S.D. Ohio Oct. 3, 2006) ("Given the uncertainty in the case law, the Court declines to dismiss the aiding and abetting claims on a motion to dismiss. It cannot be said conclusively that Ohio law does not recognize such a claim."); *Wuliger v. Liberty Bank, N.A.*, 2004 U.S. Dist. LEXIS 27353, *33 (N.D. Ohio March 4, 2004) (Denying the Motion to Dismiss because "at this juncture of the proceedings, it cannot be demonstrated beyond a doubt that the plaintiff can prove no set of facts which would entitle it to relief[,] " if true that the Defendant knew or should have known that the primary party was engaged in wrongdoing and assisted him.).

Accepting as true Trustee's allegations that Messenger acted in his capacity as counsel to Mundinger and Peters (and not in his capacity as a YSD director) for purposes of deciding the Motion to Dismiss this claim, this Court permits Count X for aiding and abetting Mundinger and Peters in breach of their fiduciary duty to YSD to go forward at this time.

D. Lamson's Unjust Enrichment Claim

Finally, Movants request that the Court dismiss Count V (Motion to Dismiss at 2.) However, as Lamson notes in its Response,

Movants fail to advance any arguments to support this request. In fact, after simply listing Count V along with the other counts for which it requests dismissal, the Motion to Dismiss never mentions Count V again. When Lamson sought clarification on this point, Movants' counsel e-mailed in response:

The Motion does refer to Count V, but the Memo does not really address Count V. To the extent (if any) Count V is based on fiduciary duty to Lamson as a creditor, we are seeking dismissal. If Count V is not based on such (which is difficult to tell), then we would not seek relief as to Count V in the pending motion. If Count V has as bases a fiduciary duty to creditors and an alternative basis or bases, then the motion would only apply to the fiduciary duty to creditors basis. This probably does not help you much, but the complaint is not clear, at least to me.

(Lamson's Response, Ex. A.)

Count V is Lamson's unjust enrichment claim against Mundinger and Peters. Unjust enrichment is an equitable remedy. In Ohio,

an action for unjust enrichment may be made "when a party retains money or benefits which in justice and equity belong to another." In order to assert a claim of unjust enrichment, the movant must establish the following elements: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant had knowledge of the benefit; and (3) the defendant retained the benefit under circumstances where it would be unjust for him to retain that benefit without payment.

Javitch v. Transamerica Occidental Life Ins. Co., 408 F. Supp. 2d 531, 538 (N.D. Ohio 2006) (citations omitted). Fiduciary duty is not an element of an unjust enrichment claim.

Construing the Complaint in the light most favorable to Lamson, and accepting the allegations as true, Count V is supported

by sufficient facts to survive Movants' 12(b)(6) challenge. Lamson asserts that (i) it made "payments to Anthem during the time of Lamson's ownership of YSDI [that] resulted in value and benefit to YSDI and/or Munding and Peters upon Anthem's demutualization (Complaint ¶ 79); (ii) such actions were taken "at the request of Munding and Peters and for their direct benefit" (Complaint ¶ 78); and (iii) "[u]nder the circumstances, it would be unjust for Munding and Peters to retain benefits they received from or due to Lamson" (Complaint ¶ 80.)

Given that Lamson has pled facts in support of its *prima facie* case while Movants have failed to proffer any argument as to why Count V should be dismissed, the Motion to Dismiss as to Count V is denied.

IV. CONCLUSION

Viewing the Fourth Amended Complaint in the light most favorable to Plaintiffs, it would be premature to dismiss any of the counts other than Count IV to the extent it asserts or may assert YSD's Directors breached their fiduciary duty to YSD's creditors. Accordingly, Debtor's Motion to Dismiss is hereby granted in part, and denied in part. An appropriate order will follow.

#

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby orders: Defendants' Motion to Dismiss is (i) granted as to Count IV to the extent Count IV asserts YSD's Directors breached their fiduciary duty to YSD's creditors, but denied to the extent it asserts YSD's Directors breached their fiduciary duty to Debtor; and (ii) denied as to Counts II, III, V, VI, VII, and X.

#