

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 matter is before the Court on the Motion of Packer Thomas and Phil Dennison for Judgment on the Pleadings ("Motion for Judgment") (Doc. # 157), filed on August 31, 2007, by Defendants Packer Thomas & Company ("Packer Thomas") and Phil Dennison ("Dennison") (collectively, "Movants").¹ Plaintiff Chapter 7 Trustee Richard Zellers ("Trustee") filed Opposition of Plaintiff Richard G. Zellers, Trustee, to Defendants' [sic] Packer Thomas and Phil Dennison Motion for Judgment on the Pleadings and Memorandum of Law in Support Thereof ("Trustee's Opposition") (Doc. # 169) on September 28, 2007. Plaintiff The Lamson & Sessions Co. ("Lamson") filed Plaintiff The Lamson & Session Co.'s Memorandum in Opposition to Motion of Packer Thomas and Phil Dennison for Judgment on the Pleadings ("Lamson's Memorandum") (Doc. # 172) on October 1, 2007.

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157.² Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. The following constitutes

¹The other Defendants in this case are William D. Mundinger Trust U/A 10/13/99, William D. Mundinger, William H. Peters Revocable Trust U/A 4/15/02, William H. Peters, Stanley W. Cosky, Karen A. Mundinger Revocable Trust, Karen A. Mundinger, Deanna V. Peters Revocable Trust, Deanna V. Peters (collectively, "Mundinger & Peters Defendants"), and James L. Messenger ("Messenger"), who collectively filed a motion to dismiss ("Motion to Dismiss") (Doc. # 139) on July 31, 2007. The Court entered Memorandum Opinion and Order dated March 31, 2008 (Doc. ## 203 and 204), which denied, in part, and granted, in part, the Motion to Dismiss.

²The Court analyzed in detail subject matter jurisdiction over each count in Order Determining Right to Jury Trial (Doc. # 193) entered on January 4, 2008, which is summarized in this Opinion on pages 24-25.

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 Opinion 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. William D. Munding ("Munding") and William H. Peters ("Peters") were directors of YSD and YSD's sole shareholders. 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.) 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 enumerated in the State Court Action.

On August 11, 2005, Trustee filed Trustee's Amended Motion for Order Substituting Trustee as Plaintiff ("Substitution Motion")³

³This 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

(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 (Doc. # 33) on October 24, 2005.

Trustee and Lamson filed separate amended complaints (Doc. ## 48 and 63) on November 30, 2005, and May 5, 2006, respectively. Subsequently, Trustee and Lamson (collectively "Plaintiffs") filed Third Amended Complaint (Doc. # 87) against all Mundinger & Peters Defendants on November 8, 2006. The Third Amended Complaint also added Counts VII-X and named Dennison and Packer Thomas as Defendants for the first time. Movants filed Answer of Packer Thomas and Phil Dennison to Plaintiffs' Third Amended Complaint (Doc. # 100) on December 14, 2006.

With leave of the Court, Plaintiffs filed Fourth Amended Complaint ("Complaint") (Doc. # 129) against all Defendants on June 21, 2007. This Complaint, which is the subject of the Motion for Judgment, 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 the Mundinger & Peters Defendants ("Count II");
3. Trustee's claim for fraudulent transfer (O.R.C. § 1336.05) against YSD and the Mundinger & Peters Defendants ("Count III");
4. Trustee's claim for breach of fiduciary duty against Mundinger, Peters, and Messenger ("Count IV");

Trustee on August 11, 2005.

5. Lamson's unjust enrichment claim against Mundinger and Peters ("Count V");
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 ("Count X").

Movants filed Answer of Packer Thomas and Phil Dennison to Plaintiffs' Fourth Amended Complaint (Doc. # 138) on July 31, 2007. The other Defendants filed six separate answers between August 1, 2007, and August 7, 2007 (Doc. ## 140-144, and 150.)

II. STANDARD FOR REVIEW

Judgment on the pleadings is governed by FED. R. CIV. P. 12(c), which is made applicable to this proceeding pursuant to FED. R. BANKR. P. 7012. Rule 12(c) provides, in pertinent part: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c) (Thomson/West 2008). In rendering judgment, the Court may consider the pleadings of both parties, including any exhibits attached to those pleadings, *Menifee v. Rexam, Inc.*, No. 3:04 CV 7522, 2005 U.S. Dist. LEXIS 19912, *6 (N.D. Ohio 2005), as well as "matters of public record, orders, [and] items appearing in the record of the case," *Teasdale v. Heck*, 499 F. Supp. 2d 967, 969 (S.D. Ohio 2007)

(citing *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)).

Judgment on the pleadings is proper when no material issue of fact exists and the moving party is entitled to judgment as a matter of law. *Paskvan v. Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991). In determining if a material issue of fact exists, the Court must construe the complaint in the light most favorable to the non-moving party, and take all well-pleaded material of the non-moving party as true. *Estill County Bd. of Educ. v. Zurich Ins. Co.*, 84 Fed. Appx. 516, 518 (6th Cir. 2003). "In contrast, all allegations of the moving party which have been denied by the non-moving party must be taken as false." *Menifee*, 2005 U.S. Dist. LEXIS 19912 at *4-5.

"[T]he standard for reviewing Rule 12(c) motions is often identical to that used for reviewing Rule 12(b)(6) motions." *McCullough v. Am. Gen. Ins.*, No. 3:06cv0732, 2007 U.S. Dist. LEXIS 69498, *4-5 (M.D. Tenn. 2007). "The Court may not grant such a motion . . . based upon a disbelief of a complaint's factual allegations, as the Court may neither weigh evidence nor evaluate the credibility of witnesses." *Id.* at *6. "The Court need not, however, accept conclusions of law or unwarranted inferences of fact." *Teasdale*, 499 F. Supp. 2d at 969 (citing *Perry v. Am. Tobacco Co., Inc.*, 324 F.3d 845, 848 (6th Cir. 2003)). Judgment on the pleadings may only be granted if the moving party is clearly entitled to judgment as a matter of law. *Paskvan*, 946 F.2d at 1235.

III. LEGAL ANALYSIS

Movants request that the Court dismiss Counts VIII, IX and X (collectively, "Three Counts") against them. The Motion asserts that the Three Counts are barred by a two-year statute of limitations.

(Motion for Judgment at 7-9.) Movants further assert that Count X fails to state a claim for which relief can be granted. (*Id.* at 13-15.) Movants also argue that Counts IX and X (collectively, "Trustee's Claims") are barred by the doctrine of *in pari delecto* (*Id.* at 9-13) and that Count VIII must be dismissed for lack of jurisdiction (*Id.* at 15-17). The Court will consider each of these arguments in turn.

A. Statute of Limitations for Trustee's Claims

Movants argue that all of causes of action against them "directly relatet o [sic] and arise f rom [sic] thea ssistance [sic] P acker [sic] Thomas allegedly provided to YSDI and its directors relative to the Shareholder Distributions[.]" (Motion for Judgment at 7.) Thus, Movants reason the Three Counts are all governed by the 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 2006).

Movants then assert that each of the Three Counts are time-barred by the two-year statute of limitations of 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 2006). Movants argue that because the "Shareholder Distributions were made

prior to April of 2003 and the claims against the defendants relating to these distributions were not asserted by the end of April 2005, all claims arising from these distributions are time barred and must be dismissed." (Motion for Judgment at 9.)

Movants' argument fails for two reasons. First, the plain language of § 1701.95 indicates that it only addresses liability incurred by corporate directors, not by accountants or other professional consultants to a corporation or its directors. Second, the Court finds that, despite Movants' bald assertion to the contrary, each of the Three Counts represents a valid and independent cause of action.

1. O.R.C. § 1701.95 Addresses Corporate Directors

O.R.C. § 1701.95 creates only a narrowly tailored cause of action by stating that "directors shall be jointly and severally liable to the corporation" for an enumerated list of specific acts involving payment of corporate dividends or distributions. Section 1701.95 does not address the potential liability of any other parties who might participate in such transactions. Furthermore, as Trustee notes, O.R.C. § 1701.95(A)(1) clearly anticipates that even corporate directors may incur liability beyond that imposed by this statute alone. Trustee cites *Bonacci v. Ohio Highway Express, Inc.*, 1992 WL 181682 (Ohio App. July 30, 1992) as an example.

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 not to partially dismiss plaintiffs' claims pursuant to the § 1701.95 statute of

limitations where plaintiffs claimed defendant director had transferred corporate assets for his own benefit) (internal citations omitted). There is nothing in the statutory language to indicate that every claim related to corporate distributions is governed solely by § 1701.95 and its two-year statute of limitations.

2. The Three Counts Are Not Disguised Unlawful Distributions

Second, in reviewing a complaint under FED. R. CIV. P. 12(c), the Court must construe the complaint in the light most favorable to the non-moving party, and take all well-pleaded material of the non-moving party as true. *Estill County Board of Ed.*, 84 Fed. Appx. at 518. Taking Plaintiffs' facts as alleged in the Complaint as true, 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. The Three Counts are not disguised unlawful dividend claims simply because Movants say they are; rather each represents a unique and independent cause of action.

Movants note that "[i]t is a well established tenant [sic] of statutory construction that a specific statute controls over a general one [sic]." (Motion for Judgment at 8.) Movants also assert that "[t]he Ohio Supreme Court has held that the actual nature or subject matter of the case, rather than the form in which the action has been pled, determines which statute of limitations applies." (*Id.*) In support of their argument, Movants cite *EC Terms of Years Trust v. United States*, 127 S. Ct. 1763 (2007) and *Lawyers Coop. Publ. Co. v. Muething*, 65 Ohio St. 3d 273 (1992). Both of these cases are

distinguishable from the instant case.⁴

In *EC Terms of Years Trust*, the Supreme Court held that a Trust, which had missed the statutory 9-month time limit for contesting an IRS levy, could not then pursue an administrative claim for a refund, where the latter process was governed by a 2 to 4 year limitations period. *EC Terms of Years Trust*, 127 S. Ct. at 1766. In so holding, the Court noted that “[t]he demand for greater haste when a third party contests a levy is no accident” because the IRS must “be advised promptly if [it] has seized property which does not belong to the taxpayer.” *Id.* Therefore, “Congress specifically tailored [the 9-month statute] to third party claims of wrongful levy . . . [because this short period is] essential to the Government’s tax collection.” *Id.* at 1767-68. This situation bears almost no resemblance to the present case, where Plaintiffs have pled multiple independent causes of action against various combinations of the twelve different defendants, based upon the varying roles each of these defendants is alleged to have played in the transactions at issue. No legislation has set specific and contrasting statutes of limitation to govern this situation.

Like *EC Terms of Years Trust*, *Muething* involved a singular area of law - products liability. Ohio plaintiffs can maintain three different causes of action in a products liability case: negligence, contract, and breach of implied warranty. *Muething*, 65 Ohio St. 3d at 276. However, not all three causes of action may be available to every plaintiff. *Id.* at 277. The *Muething* court found that it was

⁴Movants also cite *State of Ohio v. Taylor*, 113 Ohio St. 3d 297, 2007-Ohio-1950, 865 N.E.2d 37, which is even further removed from both the facts and the issue involved in the instant case. *Taylor* does not deal with statutes of limitation at all, but addresses a question about the criminal sentencing guidelines. *Taylor*, 113 Ohio St. 3d at ¶ 1.

"evident from the face of the [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 this case, however, has pled sufficient facts regarding the required elements of each of the Three Counts to withstand judgment on the pleadings.

In construing the allegations in the Complaint in the light most favorable to Plaintiffs, this Court is not persuaded that the Three Counts are disguised unlawful dividends claims. Movants assert these are all dividend causes of action, but the facts alleged establish otherwise.

a. Count VIII

Count VIII is Lamson's intentional interference with contract claim against Munding, Peters, Dennison, and Packer Thomas. "In order to recover for a claim of intentional interference with a contract, one must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995). "The four-year statute of limitations found in Ohio Rev. Code § 2305.09(D) applies to Plaintiffs' claim of tortious interference with contract." *Monfort Supply Co. v. Hamilton County Bd. of Zoning Appeals*, No. 1:04cv145, 2006 U.S. Dist. LEXIS 90072, *14 (S.D. Ohio 2006). "[T]he statute of limitations for a claim of tortious interference with contract is four years the limitations period for claims of tortious interference [in Ohio] begins to run when the events giving rise to the claim occur." *Koury v. City of Canton*, 221 Fed. Appx. 379, 386 (6th Cir. 2007).

Here, assuming all of Plaintiffs' allegations are true,

Lamson has addressed all of the elements of intentional interference with a contract. Lamson claims (1) it made two contracts with YSD: a purchase agreement and a settlement agreement (Complaint ¶ 93); (2) Movants knew of these contracts (*Id.*); and (3) Movants, together with Munding and Peters, intentionally procured the breach of these contracts (Complaint ¶ 94) (4) without justification (Complaint ¶ 95), (5) causing financial damage to Lamson (Complaint ¶ 99). While the exact timing of the events giving rise to the claim remains in dispute, no party has claimed a date earlier than April of 2003. Count VIII was filed as part of the Third Amended Complaint on November 8, 2006, well within the four-year statute of limitations period.

b. Count IX

Count IX is Trustee's claim against Dennison and Packer Thomas for professional negligence. "In order to recover in an action for professional negligence, a plaintiff has the burden of proving: (1) the standard of care within the profession; (2) the defendant's failure to adhere to the professional standards; and (3) that the defendant's failure to adhere to the professional standards proximately caused harm to the plaintiff." *Mortgage Lenders Network USA, Inc. v. Riggins*, 2006-Ohio-3292, 2006 Ohio App. LEXIS 3210, ¶ 19. "[G]eneral claims of professional negligence . . . are also governed by the four-year limitations period in R.C. 2305.09." *Investors REIT One v. Jacobs*, 546 N.E.2d 206, 209 (Ohio 1989) (applying O.R.C. § 2305.09(D) to a claim for accountant professional misconduct).

The Trustee, acting on behalf of Debtor, asserts that Dennison and Packer Thomas provided accounting services to Debtor during the relevant period. (Complaint ¶¶ 101-103.) The Complaint

further states that in providing these services, Movants "failed to adhere to the professional standards within their profession and were otherwise negligent in the discharge of their professional accounting services" to Debtor, damaging Debtor "in the amount of approximately \$5.7 million, the value of the Distributions." (Complaint ¶¶ 106-07.) Count IX has been sufficiently pled to withstand dismissal under Rule 12(c). Like Count VIII, Count IX was filed as part of the Third Amended Complaint on November 8, 2006, well within the four-year statute of limitations period.

c. Count X

Count X is Trustee's claim against Messenger, Dennison and Packer Thomas for aiding and abetting fraudulent transfers. 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) (Lexis 2007). It is unclear whether Ohio law recognizes an aiding and abetting cause of action.

In *Aetna Casualty and Surety Co. v. Leahey Constr. Co., Inc.*, 219 F.3d 519, 533 (6th Cir. 2000), the Sixth Circuit Court of Appeals 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 Casualty*. 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 acknowledged its previous holding in *Aetna Casualty*, but also noted that some lower courts in Ohio have stated, "Ohio does not recognize a claim for aiding and abetting common-law fraud." *Id.* (quoting *Federated Mgmt. Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 853 (Ohio App. 2000)).

The Ohio Appellate Courts are also divided on this issue. See, e.g., *Andonian v. A.C. & S., Inc.*, 647 N.E.2d 190, 191 (Ohio App. 1994) ("Ohio has not definitively adopted [§ 876(b)] and few Ohio cases have applied it. The Supreme Court of Ohio has never expressly approved Section 876; however, it has cited this section in two cases."). Two Fifth Appellate District courts noted that "the [*Aetna Casualty*] court found that under Ohio law a tort of civil aiding and abetting, as set forth by the Restatement (Second) of Torts, is a viable cause of action." *Kimble Mixer Co. v. Hall*, 2005-Ohio-794, 2005 Ohio App. LEXIS 762, ¶ 45; accord, *Harris v. Ambrozic*, 2004-Ohio-619, 2004 Ohio App. LEXIS 584, ¶ 30.⁵ In contrast, courts in both the Second and Tenth Appellate Districts have declined to recognize such

⁵Both of these opinions were entered after *Aetna*, which they cite, but before *Pavlovich*.

claims. "[A]iding and abetting common law fraud is not cognizable in [Ohio] law." *Collins v. National City Bank*, 2003-Ohio-6893, 2003 Ohio App. LEXIS 6230, ¶ 32. "Ohio does not recognize a claim for aiding and abetting common law fraud." *Federated Mgmt. Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 853 (Ohio App. 2000).

In light of the two lines of cases discussed above, at least two federal district courts in Ohio have denied motions to dismiss aiding and abetting claims because it "cannot be said conclusively that Ohio law does not recognize such a claim." *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 2006 U.S. Dist. LEXIS 72154, *9 (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, *11 (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.).

"[T]he standard for reviewing Rule 12(c) motions is often identical to that used for reviewing Rule 12(b)(6) motions." *McCullough*, 2007 U.S. Dist. LEXIS 69498 at *4-5. Given the current uncertainty regarding Ohio civil law on aiding and abetting claims, this Court permits Count X for aiding and abetting fraudulent transfers to go forward at this time.⁶

⁶Trustee argues by analogy from *Thornton v. Hardiman, Buchanan, Howland & Trivers*, 2005 WL 977819 (Ohio App. Apr. 28, 2005) that his claim for aiding abetting fraudulent transfers should be governed by the four-year statute of limitations in

B. Additional Defenses to Aiding and Abetting

In addition to asserting a statute of limitations defense, Movants also argue that the Complaint fails to assert "that Packer Thomas was aware that the contemplated [sic] transfers might be fraudulent, that [sic] Packer Thomas or Dennison knew that the director defendants could be acting in breach of a [sic] fiduciary duty, or that Packer Thomas knowingly assisted in the allegedly fraudulent activity." (Motion for Judgment at 13-14.)

Assuming, *arguendo*, that a civil cause of action for aiding and abetting fraudulent transfers is cognizable in Ohio law, Trustee would need to prove "two elements: (1) knowledge that the primary party's conduct is a breach of duty and (2) substantial assistance or encouragement to the primary party in carrying out the tortious act." *Aetna Casualty*, 219 F.3d at 533 (quoting *Andonian*, 647 N.E.2d at 191-92). "[A]n aider and abettor must have actual knowledge of the primary party's wrongdoing and . . . a general awareness of its role in the other's tortious conduct for liability to attach." *Aetna Casualty*, 219 F.3d at 534.

Movants cite *Krieger v. Gast*, 2000 WL 288422 (W.D. Mich. 2000) in support of the proposition that a claim for aiding and abetting a breach of fiduciary duty is subject to the FED. R. CIV. P. 9(b) pleading requirements. Rule 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b) (Thomson/West 2008). While *Krieger* does stand for this proposition, it goes on to note that the Sixth

§ 1336.09 applicable to fraudulent transfer actions. However, the Court need not address this argument in order to resolve the Rule 12(c) motion.

Circuit has also held that

the particularity requirement under Rule 9(b) must be "read in harmony" with the policy of Rule 8 of requiring only a "short and plain statement of the claim" in pleadings. The court observed that although a plaintiff is required to plead with greater specificity when fraud is alleged in the complaint, courts should not be "too exacting" and should "not demand clairvoyance from pleaders" in determining whether the requirements of Rule 9(b) have been met. Thus, so long as the plaintiff's allegations inform the defendant of the circumstances constituting the fraud with enough specificity to permit the defendant to respond to and defend the claim, the complaint should not be dismissed. This is especially true where facts relating to the plaintiff's claim are within the defendant's knowledge or control.

Krieger, 2000 WL 288442 at *4 (citing *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988) (internal citations omitted)).

Taking the allegations in the Complaint as true for the purposes of this opinion, Trustee has asserted that "[a]t all relevant times, Packer Thomas and Phil Dennison were retained by [Debtor] to provide professional accounting, auditing and other consulting services to [Debtor], including but not limited to accounting and professional advice relating to the propriety of the Distributions." (Complaint ¶ 49.) The Complaint also alleges that Packer Thomas and Dennison: (i) "provide[d] accounting and consulting services to Mr. Mundinger and Mr. Peters" (Complaint ¶ 50); and (ii) "advised Mr. Mundinger and Mr. Peters that YSDI could and should distribute the Athem [sic] Stock Proceeds to themselves" (Complaint ¶ 51) "in breach of [Mundinger and Peters'] fiduciary duty" (Complaint ¶ 106). As for the particulars of the alleged fraudulent transfers, paragraphs 30-41 of the Complaint describe the various distributions in considerable detail, including the names of the transfer participants, the

approximate dates of the transfers, the amounts distributed, and the sources of those amounts. Paragraphs 1-29 and 42-48 provide additional detail regarding the circumstances surrounding the transfers and the resulting financial harm to both Debtor and Lamson. Plaintiffs have pled sufficient facts to survive the Motion for Judgment.

C. In Pari Delecto Defense

Movants assert that they are entitled to judgment on the pleadings based on the affirmative defense of *in pari delicto*.

In pari delicto is an equitable defense that refers to the plaintiff's participation in the same wrongdoing as the defendant. It is short for "*in pari delicto potior est conditio defendentis*" which means that "where the wrong of both parties is equal, the position of the defendant is the stronger." In essence, it prevents one wrongdoer from recovering from another because each should bear the consequences of their wrongdoing without legal recourse against the other. "The doctrine is based on two premises: courts should not mediate between two wrongdoers, and denying judicial relief to a wrongdoer deters illegal conduct."

Liquidating Trustee v. Baker (In re Amcast Industrial Corp.), 365 B.R. 91, 123 (Bankr. S.D. Ohio 2007). Movants assert that the *in pari delicto* doctrine applies to a bankruptcy trustee who stands in the shoes of a corporate debtor, where the trustee seeks to recover for fraudulent acts committed by the corporation's officers or other agents, which are imputed to the corporation. (Motion for Judgment at 10.) Movants concede that there is an "adverse interest exception" to the *in pari delicto* defense: the defense does not apply where the corporation's agents acted in a manner adverse to the interests of the corporation. (Motion for Judgment at 11.) However, Movants then argue that "the 'adverse interest exception' is subject to a further [sole actor] exception that prevents the trustee from avoiding the

defense where, as here, the same shareholder/directors authorized the distributions to themselves." (*Id.*) Movants conclude, under the sole actor exception to the adverse interest exception, "in order to avoid application of the *in pari delicto* defense, [Trustee] must allege the existence of independent or innocent directors that could have taken steps to stop the wrongful conduct to avoid an application of the [sic] defense." (Motion for Judgment at 13.)

In response, Trustee makes the following arguments: (1) Count X is for aiding and abetting fraudulent transfers, not breach of fiduciary duty (Trustee's Opposition at 12); (2) Debtor was not equally responsible for Movants' violations because Trustee does not aver that "the officers and/or directors of [Debtor] provided false, misleading or inaccurate information" to Movants (*Id.* at 10); (3) the adverse interest exception applies in this case (*Id.* at 12); (4) where the adverse party "was aware of an agent's fraud and further participated in the commission of that fraud, the 'sole actor exception' did not apply and the 'adverse interest exception' controls[]" (*Id.* at 13 (alteration in original)); (5) the specific wrongdoing of any or all of the participants in the fraudulent transfers remains a disputed point of fact, so the Court may not rule as a matter of law that the sole actor exception applies here (*Id.*); and (6) granting judgment on the pleadings as a matter of law would be premature at this point in the litigation because "[t]here are substantial issues of fact relating to the actions/inactions of the officers, directors, and/or agents of [Debtor] that would need to be developed in order to warrant a finding by this Court consistent with [Movant's] claims that equal fault exists[]" (*Id.* at 11).

Both Movants and Trustee acknowledge the adverse interest

exception to the *in pari delicto* defense. "Under this exception, bad acts of an agent of the debtor will not be imputed to the debtor-corporation (and consequently, *in pari delicto* will not apply) if the agent acts on his own behalf and adversely to the corporation." *State Bank and Trust Co. v. Spaeth (In re Motorwerks, Inc.)*, 371 B.R. 281, 291 (Bankr. S.D. Ohio 2007). Both Trustee and Movants further acknowledge the existence - although they disagree as to the applicability - of a sole actor exception to the adverse interest exception. "[T]he adverse interest exception is, itself, subject to an exception where the sole owner or representative of the principal corporation participated in the fraudulent activities." *Id.*

However, there may be a further exception to the sole actor exception, although neither the Sixth Circuit nor the Ohio state courts appear to have directly addressed the question of this additional exception. "The Seventh Circuit has held, however, that the 'sole actor' exception may not apply where the adverse party was aware of the agent's fraud and even participated in it." *Baker O'Neal Holdings, Inc. v. Ernst & Young LLP*, No. 1:03-CV-0132-DFH, 2004 WL 771230, *7, n.2 (S.D. Ind. March 24, 2004) (quoting *Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992)).

None of the "sole actor" cases we could find allows the imputation of knowledge to the principal where the adverse party knew that the agent was acting adversely to his employer - where, indeed, the adverse party participated in the fraud. [Defendant's] argument implies that anyone who suborns the chief operating officer of a corporation has by virtue of that success purchased immunity from liability to the principal victim. We cannot believe that [state law] treats successful schemes as self-protecting.

Ash v. Georgia-Pacific Corp., 957 F.2d 432, 436 (7th Cir. 1992).

Furthermore, many courts have grown increasingly resistant

to allowing an equitable defense to produce inequitable results. It is true, as Movants note, that one bankruptcy court in this Circuit recently stated, "the Sixth Circuit has determined that *in pari delicto* is a defense that may be raised against a bankruptcy trustee to the extent that the defense could be raised against a debtor." *Motorwerks*, 371 B.R. at 291 (citing *Terlecky v. Hurd (In re Dublin Securities, Inc)*, 133 F.3d 377, 380-81 (6th Cir. 1997)). However, the *Motorwerks* court's statement regarding *in pari delicto* is dictum,⁷ and several other lower courts in the Sixth Circuit have distinguished *Dublin Securities* on the grounds that the *Dublin Securities* trustee expressly admitted the debtor corporation had actively participated in the fraud perpetrated against third parties.⁸ See, e.g., *DeNune v. Consol. Capital of N. Am., Inc.*, 288 F. Supp. 2d 844, 851 (N.D. Ohio 2003) (Refusing to apply the *in pari delicto* defense where the federal receiver plaintiff "has alleged a one-way transfer of funds: from [debtor corporation] to . . . the related defendants. [Debtor corporation] and its creditors are the victims of the alleged fraud, not its perpetrators or beneficiaries."); *Limor v. Buerger (In re Del-Met Corp.)*, 322 B.R. 781, 819 (Bankr. M.D. Tenn. 2005) ("In *Dublin Securities*, the plaintiff's admissions 'established conclusively that the debtors were at least as culpable as the defendants[.]' Here, as in *DeNune*, no similar conclusion is conceded or evident from the

⁷The *Moterwerks* court did not reach the *in pari delicto* argument because the *Moterwerks* trustee expressly based standing only on 11 U.S.C. § 544(a). In contrast, Trustee in the instant case has based his standing in 11 U.S.C. § 550, which encompasses actions brought under seven different provisions of the Bankruptcy Code, including § 544, but also including § 548, which allows a bankruptcy trustee to avoid fraudulent transfers.

⁸The Court notes that *Dublin Securities* was followed strictly in *Sec. Investor Prot. Corp. v. Munninghoff Lange & Co. (In re Donahue Sec., Inc. and S.G. Donahue & Co., Inc.)*, No. 01-1027, 2003 Bankr. LEXIS 964 (Bankr. S.D. Ohio July 21, 2003).

pleadings." (internal citation omitted) (alteration in original)).

In addition to distinguishing *Dublin Securities*, the courts in *DeNune*, *Del-Met*, and others reaching similar conclusions, emphasize the inequity of allowing the defense against a victim corporation once the offending directors have been removed. For example, both *DeNune* and *Del-Met* quote *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995): "[T]he defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *DeNune*, 288 F. Supp. 2d at 851; *Del-Met*, 322 B.R. 781 at 819.

Even in the context of a bankruptcy dispute, the imputation of wrongdoing to an innocent successor estate does not comport with the equitable doctrine of *in pari delicto*: "A receiver, like a bankruptcy trustee and unlike a normal successor in interest, does not voluntarily step into the shoes of the [debtor]; it is thrust into those shoes. It was neither a party to the original inequitable conduct nor is it in a position to take action prior to assuming the [debtor]'s assets to cure any associated defects. . . . In light of these considerations we conclude that the equities between a party asserting an equitable defense and a [debtor] are at such variance with the equities between a party and a receiver of the [debtor] that equitable defenses good against the [debtor] should not be available against the receiver. To hold otherwise would be to elevate form over substance--something courts sitting in equity traditionally will not do[.]"

Javitch v. Transamerica Occidental Life Ins. Co., 408 F. Supp. 2d 531, 537 (N.D. Ohio 2006) (quoting *F.D.I.C. v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) (alterations in original)). "The risk of a liberal application of *in pari delicto* is that tortfeasors preparing to defraud an entity could potentially immunize themselves from liability simply by enlisting the help of an executive in the victim-corporation. . . . Outside of a fraudulent conveyance scenario, the best case for not applying the *in pari delicto* defense is where the insider and the third-party tortfeasor were essentially acting as co-

conspirators." *Baker O'Neal Holdings*, 2004 WL 771230 at *10.

"[I]n *pari delicto* is an affirmative defense and generally dependent on the facts, and so often not an appropriate basis for dismissal." *Baker O'Neal Holdings*, 2004 WL 771230 at *9 (quoting *Knaeur v. Jonathan Roberts Fin. Group, Inc.*, 348 F.3d 230, 237 (7th Cir. 2003)). Here, Count IX - Trustee's claim for professional negligence - is akin to a professional malpractice claim. Given that, it is difficult to see how Debtor could be said to have "participated" in Movants' allegedly negligent conduct. The bankruptcy court in *Jones v. Hyatt Legal Servs. (In re Dow)*, 132 B.R. 853 (Bankr. S.D. Ohio 1991) recognized that while no Ohio court had addressed the issue of applying *in pari delicto* to a professional malpractice action, Ohio law "does recognize exceptions to the doctrine[.]" (*Id.* at 861.) The *Jones* court concluded, "[d]ue to the Court's inability to determine only from the complaint whether *in pari delicto* should bar the claim, the motion to dismiss cannot be granted on this ground." (*Id.*) The question of whether to apply the sole actor or other exception to Count X - the aiding and abetting claim - also turns upon specific disputed facts. This is similar to an issue presented in *Bondi v. Grant Thornton Int'l (In re Parmalat Sec. Litig.)*, 421 F. Supp. 2d 703, 715 (D.N.Y. 2006) ("Here, [plaintiff-trustee] alleges that [debtor's outside accountants] knew that the corrupt insiders were stealing from the company and participated, to some extent, in their cover-up. Accordingly, it is impossible to say, solely on the basis of the pleading, that the sole actor exception to the adverse agent rule applies.").

This Court finds that it cannot grant judgment on the pleadings with respect to either Count IX or X, given the numerous

questions of fact remaining as to the specific knowledge and actions taken by both Debtor's directors and their various professional advisors. Movants will have ample opportunity to present their equitable defense of *in pari delicto*. The Motion for Judgment is not well taken because it cannot be said that the allegations in the Complaint establish the defense as a matter of law.

D. Subject Matter Jurisdiction

Finally, Movants assert that this Bankruptcy Court lacks subject matter jurisdiction over Count VIII - Lamson's intentional interference claim - against Dennison and Packer Thomas. (Motion for Judgment at 15.) In the alternative, Movants state that the District Court should withdraw the order of reference because they are entitled to a jury trial on Count VIII, but they do not consent to the Bankruptcy Court's conducting such a trial. (Motion for Judgment at 17.) In support of their jurisdiction argument, Movants cite *Mich. Employment Sec. Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132 (6th Cir. 1991) and *In re Arrowmill Dev. Corp.*, 211 B.R. 497 (Bankr. N.J. 1997). (Motion for Judgment at 15-16.) In response, Lamson asserts that Count VIII falls within the Bankruptcy Court's 28 U.S.C. § 1334(b) "related to" jurisdiction, as defined in *Robinson v. Michigan Consol. Gas. Co.*, 918 F.2d 579 (6th Cir. 1990) and *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp)*, 86 F.3d 482 (6th Cir. 1996). (Lamson's Memorandum at 4-5.)

None of the cases cited address the specific issues presented by the circumstances of this case. This Court thoroughly addressed the issue of subject matter jurisdiction in its Order Determining Right to Jury Trial ("Jury Trial Order"), dated January

4, 2008, (Doc. # 193). The Court incorporates the Jury Trial Order into this Memorandum Opinion as if fully rewritten and will not repeat the findings of fact and conclusions of law therein that already represent the law of the case in this adversary proceeding. Trustee's two central claims - Counts II and III for fraudulent transfer - are core proceedings. Counts IV, VI, VII, and X are "related to" the bankruptcy case because their outcomes could increase the size of the bankruptcy estate. Lamson's claims, including Count VIII, are properly before the Court as ancillary claims to Trustee's claims.

The Jury Trial Order also concluded that Defendants are entitled to a jury trial on all Counts. Because all Defendants had previously stated that they do not consent to the Bankruptcy Court conducting a jury trial, the Jury Trial Order recommended that the District Court withdraw the reference of this Adversary Proceeding. As an alternative, in order to save the resources of the District Court and to utilize this Court's already existing familiarity with the main bankruptcy case, the District Court could withdraw the reference of the Adversary Proceeding for the purposes of conducting the jury trial, but direct this Court to handle all discovery, dispositive motions and other matters leading up to jury trial.

Subsequent to the Court's filing the Jury Trial Order, on January 31, 2008, all Defendants filed Joint Motion(s) [sic] 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, James L. Messenger, and Defendants Packer Thomas and Mr. Philip Dennison (Doc. # 201), which seeks withdrawal of the reference. The

District Court has not yet ruled on this Motion.

IV. CONCLUSION

Viewing the Fourth Amended Complaint in the light most favorable to Plaintiffs, the Court finds that the Motion for Judgment is not well taken. Accordingly, the Motion for Judgment on the Pleadings is hereby denied. An appropriate order will follow.

#

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby denies Defendants' Motion for Judgment on the Pleadings.

#