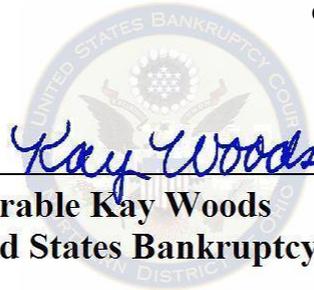


IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	CASE NUMBER 07-42525
WILLIAM ALLEN STONEMAN and	*	
ROCHELLE RENEE STONEMAN,	*	
	*	CHAPTER 12
	*	
Debtors.	*	
	*	

	*	
WILLIAM ALLEN STONEMAN and	*	
ROCHELLE RENEE STONEMAN,	*	
	*	ADVERSARY NUMBER 08-4050
	*	
Plaintiffs,	*	
	*	
vs.	*	HONORABLE KAY WOODS
	*	
HUNTINGTON NATIONAL BANK,	*	
et al.,	*	
	*	
Defendants.	*	
	*	

MEMORANDUM OPINION REGARDING MOTION OF CATTLEMEN INVESTORS, LLC
FOR AN ORDER, PURSUANT TO BANKRUPTCY RULE 7012, (I) DISMISSING
COUNT ONE, COUNT TWO, COUNT FIVE, COUNT SIX AND COUNT SEVEN OF THE
COMPLAINT BY DEBTORS TO DETERMINE THE VALIDITY, PRIORITY AND
EXTENT OF LIENS, ENCUMBRANCES AND CLAIMS TO REAL ESTATE, FARM
EQUIPMENT AND LIVESTOCK OF DEBTORS OR (II) DIRECTING PLAINTIFFS TO
FILE A MORE DEFINITE STATEMENT
Not for National Publication

The following Memorandum Opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov 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).

Before the Court is Motion of Cattlemen Investors, LLC for an Order, Pursuant to Bankruptcy Rule 7012, (I) Dismissing Count One, Count Two, Count Five, Count Six and Count Seven of the Complaint by Debtor to Determine the Validity, Priority and Extent of Liens, Encumbrances and Claims to Real Estate, Farm Equipment and Livestock of Debtors or (II) Directing Plaintiffs to File a More Definite Statement ("Motion to Dismiss") (Doc. # 6), filed by Cattlemen Investors, LLC ("Cattlemen") on March 14, 2008.

On April 8, 2008, Debtors William and Rochelle Stoneman ("Debtors") filed Debtor's Response to Motion of Cattlemen Investors, LLC for an Order, Pursuant to Bankruptcy Rule 7012, (I) Dismissing Count One, Count Two, Count Five, Count Six and Count Seven of the Complaint by Debtor to Determine the Validity, Priority and Extent of Liens, Encumbrances and Claims to Real Estate, Farm Equipment and Livestock of Debtors or (II) Directing Plaintiffs to File a More Definite Statement ("Response") (Doc. # 16). On April 8, 2008, without requesting leave of the Court, as required by the

Adversary Case Management Initial Order issued on March 3, 2008, Cattlemen filed Reply to Debtors' Response to Motion of Cattlemen Investors, LLC for an Order, Pursuant to Bankruptcy Rule 7012, (I) Dismissing Count One, Count Two, Count Five, Count Six and Count Seven of the Complaint by Debtor to Determine the Validity, Priority and Extent of Liens, Encumbrances and Claims to Real Estate, Farm Equipment and Livestock of Debtors or (II) Directing Plaintiffs to File a More Definite Statement ("Reply") (Doc. # 17).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. 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).¹ 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

¹In *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.

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. Tenn. June 11, 2007) ("While a complaint 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.").

II. ANALYSIS

A. First and Second Counts

Debtors filed Complaint by Debtor [sic] to Determine the Validity, Priority and Extent of Liens, Encumbrances and Claims to Real Estate. [sic] Farm Equipment and Livestock of Debtors ("Complaint") on February 29, 2008. The First and Second Counts of the Complaint, consisting of paragraphs 1-67, are styled "Preliminary Allegations Equitable Subordination Real Estate," and "Preliminary Allegations Equipment, Machinery and Livestock," respectively. These two counts set forth background information regarding Debtors' ownership of: (i) real property located at 135 West Third, West Farmington, Ohio ("Debtors' Farm") and 155 West Third, West Farmington, Ohio ("Debtors' Residence"), and (ii) certain machinery, equipment, personal property, and livestock. In

addition, the First and Second Counts enumerate the mortgages and liens encumbering Debtors' real and personal property.

As such, Cattlemen may be correct that the First and Second Counts are not, strictly speaking, "counts" as that term is defined because they fail to set forth a claim against Cattlemen. However, these two sections narrate facts that state a claim, and, thus, come within at least one definition of the word "count" in legal usage.¹ Debtors point out that the First and Second Counts are labeled "Preliminary Allegations," and argue that "[b]ecause of the voluminous nature of the security interest [sic] upon Debtors' real estate, equipment, personal property and livestock, Debtors have structured and organized their complaint to efficiently set forth the creditors interest [sic]. The structure of Plaintiffs' Complaint is not grounds to dismiss the same." (Response, ¶ 14.)

Paragraphs 1-67 should not be dismissed merely because they are labeled as the First and Second Counts. To do so would elevate form over substance.

"The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action."

Foman v. Davis, 371 U.S. 178, 181-82 (1962) (citations omitted).

¹Black's Law Dictionary provides more than one definition of "count." One such definition is: "In pleading, to declare or state; to narrate the facts that state a claim." BLACK'S LAW DICTIONARY 376 (8th ed. 2004).

Neither the First or Second Count state a specific cause of action against Cattlemen or any other defendant. The Court regards these counts for what they are - factual allegations upon which Debtors base their other alleged causes of action. Cattlemen states that it has moved to dismiss rather than strike Debtors' first two counts. (Reply, ¶ 5.) However, it is unclear what effect dismissal of the First and Second Counts would have if not to eliminate them from the Complaint. Since the paragraphs of these counts are "realleged" in each succeeding count, it appears that Cattlemen is trying to remove the factual underpinning of each succeeding count merely because Debtors' counsel labeled the factual background of the Complaint as "Counts." Cattlemen has provided no legal or equitable basis for the Court to take such action. Accordingly, there is no reason to either dismiss or strike either or both of the First and Second Counts.

B. Fifth Count

The Fifth Count seeks a determination that "the claim[] of . . . Cattlemen Investors . . . secured by [its] third mortgage lien[] against the Stoneman Residence ha[s] a secured value of Zero (\$0.00) [sic] and [is] unsecured . . . as provided for in 11 U.S.C. 506(a) [sic]." Section 506(a)(1) provides, in its entirety, that:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is

an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506 (Lexis 2008). In order to determine the secured status of a claim, the Complaint must allege the value of the property and any liens. Cattlemen claims that the Fifth Count fails to state a claim "because Plaintiff has failed to allege or otherwise assert that the value of [the] Stoneman Residence is such that the value of Cattlemen's interest therein is \$0.00." (Mot. to Dismiss, ¶ 16.)

The Complaint alleges that the value of Debtors' Residence, pursuant to the Trumbull County Auditor, is \$306,500.00 and that it is encumbered by a first mortgage in the amount of \$333,000.00. (Compl., ¶¶ 9, 13, 79, Ex. B.) Accepting the allegations of the Complaint as true, Cattlemen's lien is wholly unsecured. Cattlemen's argument, that "[a] tax valuation . . . is not a valid basis to value property under section 506(a) of the Bankruptcy Code" (Mot. to Dismiss, ¶ 17) merely disputes the value of Debtors' Residence. As discussed above, in deciding the Motion to Dismiss this Court must accept the allegations of the Complaint as true. *Directv, Inc.*, 487 F.3d at 476. Accordingly, Debtors have pled sufficient facts to state a plausible cause of action against Cattlemen. The Motion to Dismiss as to the Fifth Count is,

therefore, not well taken and will be denied.

C. Sixth Count

Cattlemen makes several arguments regarding dismissal of the Sixth Count, the first of which merely constitutes a factual dispute because Cattlemen alleges that its lien is a mortgage lien rather than a judgment lien. Debtors allege that Cattlemen holds a judgment lien against Debtors' Residence (Compl., ¶¶ 38, 87, 90) which, pursuant to § 522(f), impairs Debtors' exemptions in Debtors' Farm and Residence.² (See Compl., ¶ 90.) Cattlemen argues that its lien "against the Stoneman Residence is not a 'judicial lien' but exists pursuant to a properly recorded mortgage and, therefore, cannot be avoided under section 522(f) of the Bankruptcy Code." (Mot. to Dismiss, ¶ 18.) Cattlemen's first argument constitutes a factual dispute rather than a deficiency in pleading. Because the Court must accept the factual allegations of the Complaint as true in deciding the Motion to Dismiss, this argument for dismissal of the Sixth Count is not well taken.

Cattlemen's second argument in favor of dismissing the Sixth Count is that "to the extent that there are judicial liens on the Stoneman Residence, such liens do not impair the Debtors' exemption as the Debtors' [sic] have no interest in the Stoneman Residence to exempt." (Mot. to Dismiss, ¶ 18.) It is generally

²"[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is-(A) a judicial lien[.]" 11 U.S.C. 522(f) (Lexis 2008).

accepted in this district that a debtor may avoid a judicial lien that impairs an exemption on property in which the debtor lacks any equity. *In re Lusk*, 80 B.R. 428 (Bankr. N.D. Ohio 1987); see also *In re Richardson*, 55 B.R. 526 (Bankr. N.D. Ohio 1985); and 4 ALAN N. RESNICK AND HENRY J. SOMMER, COLLIER ON BANKRUPTCY § 522.11[3] (15th ed. rev. 2008) (the legislative commentary to § 522 indicates that Congress specifically anticipated this situation and intended this result). *But see In re Sanglier*, 124 B.R. 511, 514 n6 (Bankr. E.D. Mich. 1991) ("Some courts have held that a debtor need not have equity in his property in order to avail himself of § 522(f). . . . [W]e believe that this conclusion is incorrect.").

Cattlemen's argument constitutes a defense to the Sixth Count, but provides no basis for dismissal. Accordingly, the Motion to Dismiss as to the Sixth Count will be denied.

D. Seventh Count

Debtors seek in the Seventh Count to equitably subordinate Cattlemen's liens on Debtors' Farm, Debtors' Residence, and Debtors' equipment and machinery. (Compl., ¶¶ 91-98.) Cattlemen argues that the Seventh Count:

fails to state a claim upon which relief can be granted because: (a) [Debtors] have failed to allege any basis to conclude that Cattlemen is an "insider" under the Bankruptcy Code; (b) [Debtors] have failed to allege any basis for equitable subordination under the Bankruptcy Code; and (c) the validity and priority of Cattlemen's security interest in the Equipment and Crops was determined by the Final Cash Collateral Order [issued November 28, 2007 (Doc. # 64)].

(Mot. to Dismiss, ¶ 10.)

The Bankruptcy Code does not provide for subordination of liens; rather, 11 U.S.C. § 510(c) provides for the equitable subordination of certain claims. Section 510(c) provides that "the Court may . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim" 11 U.S.C. § 510(c)(1) (Lexis 2008). An action for equitable subordination does not challenge the existence or validity of the underlying debt, but rather challenges the priority of that debt based upon the creditor's inequitable conduct.

[The Sixth Circuit Court of Appeals] has adopted a three-part standard for establishing equitable subordination: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

Bayer Corp. v. Mascotech, Inc. (In re Autostyle Plastics, Inc.), 269 F.3d 726, 744 (6th Cir. 2001) (citing *First National Bank of Barnesville v. Rafoth (In re Baker & Getty Financial Services, Inc.)*, 974 F.2d 712 (6th Cir. 1992)). Satisfaction of the three-part test does not require a court to grant equitable subordination, but leaves the decision whether to grant such claim to the court's discretion. *In re Autostyle Plastics, Inc.*, 269 F.3d at 744. Equitable subordination is an unusual remedy that should only be applied in limited circumstances. *Id.* at 745.

The Court could find only one case mentioning equitable subordination of liens, as opposed to claims. In *Official Committee of Unsecured Creditors of Grand Eagle Companies, Inc. v. Asea Brown Boveri, Inc.*, 313 B.R. 219 (N.D. Ohio 2004), despite referring to the cause of action as one seeking to equitably subordinate "the liens of the Pre-Petition Lenders[,]" the Court's analysis focused on subordination of claims pursuant to 11 U.S.C. § 510(c)(1). *Id.* at 228-29 (emphasis added).

Here, the Complaint seeks a determination of the validity, priority and extent of liens against Debtors' Residence and Farm. It is not clear whether Debtors intend for the Seventh Count to state a cause of action for equitable subordination of Cattlemen's claim or equitable subordination of Cattlemen's lien.

If sufficiently pled, whether Cattlemen's relationship with Debtors qualifies Cattlemen as an insider, and thereby subjects its actions to greater scrutiny, would be a factual dispute, not appropriately resolved through the Motion to Dismiss. Notwithstanding, the Complaint alleges a nebulous connection between Skoda Minotti, Cattlemen, and Debtors,³ and is completely bereft of allegations of the specific harm to other creditors resulting from Cattlemen's alleged control of the Debtors and its purchase of the

³The Response attempts to further clarify the allegations of the Complaint, specifying that Cattlemen, through its "member" Pat Carney acting "analogous to [Debtors'] chief financial officer": (i) influenced Debtors to sell equipment to repay the Key Bank debt after Cattlemen had purchased that debt, and (ii) "exercised control over the Stonemens [sic] regarding various business and financial decisions, tactics and strategies." (Resp., ¶¶ 17, 19.)

Key Bank debt. Pleading only that Cattlemen purchased the secured debt of Key Bank, whether or not Cattlemen was an insider of Debtor at the time, is not sufficient to state a cause of action for equitable subordination. However, given the lack of clarity in the Seventh Count, the Court is hesitant to say that Debtors have not pled a plausible cause of action therein. Accordingly, the Court will grant the alternative relief sought by Cattlemen in the Motion to Dismiss and provide Debtors with the opportunity to amend the Complaint to plead sufficient facts to allege all of the required elements of equitable subordination.

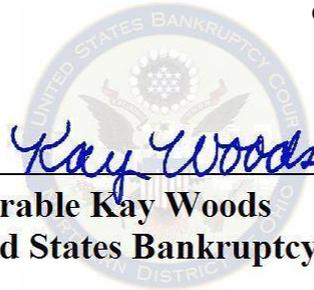
III. CONCLUSION

Pursuant to the foregoing analysis, Cattlemen's Motion to Dismiss is denied; however, the alternative relief requested is granted as to the Seventh Count of the Complaint only. Accordingly, Debtors shall have two weeks, or until June 25, 2008, to amend the Seventh Count of the Complaint. Cattlemen shall have two weeks from the date an Amended Complaint is served to serve an Answer.

An appropriate order will follow.

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IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	CASE NUMBER 07-42525
WILLIAM ALLEN STONEMAN and	*	
ROCHELLE RENEE STONEMAN,	*	
	*	CHAPTER 12
	*	
Debtors.	*	
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*****	*	
WILLIAM ALLEN STONEMAN and	*	
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	*	ADVERSARY NUMBER 08-4050
Plaintiffs,	*	
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vs.	*	HONORABLE KAY WOODS
	*	
HUNTINGTON NATIONAL BANK,	*	
et al.,	*	
	*	
Defendants.	*	
	*	

ORDER DENYING MOTION TO DISMISS AND GRANTING LEAVE TO AMEND THE SEVENTH COUNT OF THE COMPLAINT

For the reasons set forth in the Court's Memorandum Opinion entered this date, Defendant Cattlemen Investors LLC's Motion to

Dismiss Counts One, Two, Five, Six, and Seven of Debtors' Complaint is denied. However, alternative relief is granted, as follows: Debtors are granted two weeks, or until June 25, 2008, to amend the Seventh Count of the Complaint. Cattlemen's shall have two weeks from the date an Amended Complaint is served to serve its Answer.

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