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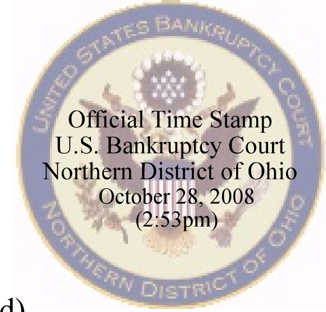
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 05-93363
	)	(Jointly Administered)
THE AUSTIN COMPANY, *et al.*,	)	
	)	Chapter 11
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
MARK A. ROBERTS as Liquidating Trustee of TAC LIQUIDATING TRUST, successor to THE AUSTIN COMPANY, *et al.,*	)	Adversary Proceeding No. 08-1130
Plaintiffs,	)	
v.	)	**MEMORANDUM OF OPINION**
AAC DESIGNERS BUILDERS, INC.,dba AUSTIN AECOM, *et al.*,	)	
Defendants.	)	

The Austin Company filed a voluntary petition for relief under chapter 11 of the bankruptcy code[1] on October 14, 2005. The plaintiff in this adversary proceeding is Mark A. Roberts, Liquidating Trustee of TAC Liquidating Trust, Successor to The Austin Company. He seeks judgment against AAC Designers Builders, Inc. (AAC) for avoidance and recovery of alleged fraudulent and preferential transfers, turnover of property of the estate, breach of contract,

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[1] This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic. All references to the bankruptcy code are to the version of Title 11, United States Code in effect prior to October 17, 2005.

unjust enrichment, and disallowance and equitable subordination of AAC's claims.[2] AAC moves to dismiss counts I through V of the complaint for failure to state a claim upon which relief can be granted under federal rule of civil procedure 12(b)(6). (Docket 24, 25). The plaintiff opposes the motion. (Docket 34).

For the reasons stated below, the court finds that (1) the allegations of counts I through V of the complaint are sufficient to state a claim upon which relief can be granted, with the exception of paragraph 56 in count II; and (2) the allegations in count II are not sufficient to state a claim for successor liability. The motion is, therefore, granted in part and denied in part.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (E), (F), (H) and (O).

FACTUAL ALLEGATIONS IN THE COMPLAINT

In 2004, the debtor encountered financial difficulty, and sought to sell portions of its business. In October 2004, the debtor entered into a letter-of-intent with AECOM Technology Corporation (AECOM Parent),[3] for a stock acquisition of the debtor's business. The letter contained a provision that the debtor not market its assets or negotiate with any third-parties for ninety days, giving AECOM Parent exclusive bid rights during this period.[4] Ultimately, the

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[2] Complaint, counts I through VIII and X through XII. (Docket 1). The claim against the other defendant, Austin-AECOM, is contained in count IX. Austin-AECOM did not join AAC in the instant motion.

[3] For the sake of clarity, the capitalized terms used here have the same definition as the capitalized terms in the complaint.

[4] Complaint ¶ 12-14.

debtor and AECOM Parent entered into an agreement (Asset Purchase Agreement) by which AAC—formed specifically for the contemplated transaction—acquired only certain of the debtor's assets (Purchased Assets). The Purchased Assets included the rights to certain projects estimated to produce approximately $80 million in revenue.[5] The plaintiff asserts that AECOM Parent reduced its bid during the exclusivity period and offered to purchase specific assets only, instead of the debtor's entire business,[6] thus "cherry-picking" the debtor's best assets at a reduced price.

The Asset Purchase Agreement called for a sale of the Purchased Assets to AECOM Parent for $6,500,000.00.[7] The Asset Purchase Agreement required AAC to assume certain liabilities; AAC was to receive $4,409,893.00 of the purchase price back after closing; AAC was to make payments representing the Post-Closing Adjustments to the debtor, and the debtor was to make certain Post-Closing Transfers.[8] The Asset Purchase Agreement also required that the debtor obtain fairness and solvency opinions.[9] The plaintiff asserts that these opinions were influenced by AECOM Parent's general counsel to give the appearance that the debtor was solvent and would be able to continue its business after the contemplated sale transaction,[10] when this was not true.

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[5] Complaint ¶ 23.

[6] Complaint ¶ 15.

[7] Complaint ¶ 16, 24.

[8] Complaint ¶ 24-25, 27-28.

[9] Complaint ¶ 17.

[10] Complaint ¶ 18-20.

The sale closed on or about January 21, 2005.[11] However, AAC allegedly failed to make the Post-Closing Adjustments, while the debtor made Post-Closing Transfers in the minimum amount of $8,947,422.71.[12] The plaintiff alleges that all of these events resulted in the debtor's valuable business assets being transferred to AAC, while the debtor was left only with unprofitable assets and substantial liabilities.[13]

Plaintiff's complaint sets forth allegations against AAC in eleven separate counts; however, AAC seeks dismissal of only counts I through V. Counts I and II allege that AAC was the recipient of fraudulent transfers from the debtor under 11 U.S.C. § 548, and under 11 U.S.C. § 544 and "potentially applicable state law,"[14] respectively. Count II has an alternative request for relief, seeking a declaration that AAC is the corporate successor to the debtor under "potentially applicable state law."[15] Count III alleges that the plaintiff is entitled to recover the value of the transfers alleged in counts I and II for the benefit of the bankruptcy estate under 11 U.S.C. § 550. Count IV seeks to avoid preferential transfers from the debtor to AAC under 11 U.S.C. § 547, and count V alleges that the value of the preferential transfers are recoverable by the plaintiff under 11 U.S.C. § 550.

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[11] Complaint ¶ 21.

[12] Complaint ¶ 27, 28.

[13] Complaint ¶ 29-30.

[14] Plaintiff asserts that the state law of California, Delaware, Illinois, Michigan, Ohio and Texas are "potentially applicable."

[15] Complaint ¶ 56.

POSITIONS OF THE PARTIES

AAC moves to dismiss the first five counts of the complaint based upon the plaintiff's alleged failure to state a claim upon which relief can be granted. Specifically, AAC asserts that the plaintiff failed to plead facts alleging that the debtor had any interest in the alleged preferential or fraudulent transfers. Further, AAC states plaintiff did not allege the preferential transfers were made on account of an antecedent debt. Finally, AAC seeks dismissal of count II because paragraph 56 of the complaint seeks a declaration of successor liability, which plaintiff has allegedly failed to properly plead.

Plaintiff's position is that the complaint meets the applicable pleading requirements, and the issues raised by AAC constitute requests for overly technical pleading. The plaintiff contends that it specifically alleged that the alleged preferential and fraudulent transfers constituted an interest of the debtor in property, and that the preferential transfers were made on account of an antecedent debt. Further, in his memorandum in opposition to the motion to dismiss, the plaintiff identifies Ohio law as controlling on the issue of successor liability, states that he relies on the Ohio fraud exception to the general rule that a successor is not liable for the debts of a transferring company, and states further that the elements of a claim for successor liability based upon fraud and the elements of a fraudulent transfer claim are essentially the same. He concludes that by pleading a cause of action for fraudulent transfer, he has also pleaded a cause of action for successor liability. Accordingly, the plaintiff contends the identified counts of the complaint are sufficient to apprise AAC of the claims against it, and that dismissal of the complaint is inappropriate.

DISCUSSION

A. Pleading Standards

Federal rule of civil procedure 12(b)(6) permits a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6) (made applicable here by federal rule of bankruptcy procedure 7012). "The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the complaint." *Ashiegbu v. Purviance*, 76 F.Supp.2d 824, 827 (S.D. Ohio 1998), *aff'd* 194 F.3d 1311 (6th Cir. 1999); *cert. denied*, 529 U.S. 1001, 120 S.Ct. 1287, 146 L.Ed.2d 215 (2000). A complaint need only contain a "short and plain statement of the claim showing the pleader is entitled to relief" to be sufficient. FED. R. CIV. P. 8(a)(2). In considering a rule 12(b)(6) motion, the court must "construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations in the complaint as true." *Ashiegbu*, 76 F.Supp.2d at 827-28 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 2136, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). "The court need not accept legal conclusions or unwarranted factual inferences as true. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) or *Power & Tel. Supply Co., Inc. v. SunTrust Banks, Inc.*, 447 F.3d 923, 930 (6th Cir. 2006).

A plaintiff must set forth the "'grounds' of his 'entitle[ment] to relief,'" which requires more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted). Instead, a complaint must contain enough factual allegations "to state a claim for relief that is plausible on its face." *Id.* at 1974. But, the complaint may contain inferential allegations to support a legal theory. *Eidson v. State of Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007) (citing *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)). The purpose of

requiring a plaintiff to provide the facts upon which a legal theory rests is to provide the defendant with "fair notice of what the . . . claim is[.]" *Bell Atlantic*, 127 S.Ct. at 1964. Therefore, if the complaint provides enough facts that make it possible—even if unlikely—for the plaintiff to recover, then the complaint is sufficient under rule 12(b)(6).

B. <u>The Debtor's Interest in the Transfers</u>

Bankruptcy code §§ 544, 547(b) and 548 permit trustees to avoid preferential and fraudulent transfers of the debtor's interest in property. Thus, a necessary element of both a preferential transfer claim and a fraudulent transfer claim is that the debtor had an interest in the property. AAC contends that the complaint does not sufficiently allege that the debtor had an interest in either the alleged preferential transfers (Preferential Transfers) or the alleged fraudulent transfers (Post-Closing Transfers, and transfers of Purchased Assets).

1. Counts I through III: Avoidance and Recovery of Fraudulent Transfers under 11 U.S.C. §§ 548, 544 and 550

For the plaintiff to recover the Purchased Assets and the Post-Closing Transfers from AAC, the transfers must have constituted an interest of the debtor in property. 11 U.S.C. § 548(a)(1). The contention that counts I and II of the complaint fail to allege that fact is the only element of a fraudulent transfer action challenged by AAC. The plaintiff's fraudulent transfer claims are based upon the sale of the Purchased Assets and conduct of the Post-Closing Transfers from the debtor to AAC under the Asset Purchase Agreement.[16] While the Asset Purchase Agreement was not attached to the complaint, the complaint identifies the debtor's "midwestern and southwestern offices and business, . . . management, employees, sales contacts, and customer

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[16] Complaint ¶ 34.

relationships" as part of the Purchased Assets.[17] In addition, the complaint identified the debtor's rights under a "backlog of construction and engineering projects" as part of the Purchased Assets acquired by AAC under the Asset Purchase Agreement.[18] Then, the complaint directly states that the Purchased Assets constitute an interest of the debtor in property.[19] Underlying the ability to contract for the sale of assets is the inferential assertion that the assets were owned by the debtor. Accordingly, the complaint sufficiently alleges that the Purchased Assets were an interest of the debtor in property.

Likewise, the Post-Closing Transfers are described in the complaint as payment of funds, in the minimum amount of $8,947,422.71, from the debtor to AAC as required by the Asset Purchase Agreement.[20] Again, implicit in the allegation that the debtor transferred the Post-Closing Transfers to AAC is the assertion that the debtor had control over and the authority to transfer the funds. Further, the debtor is alleged to have had an obligation to transfer the Purchased Assets and make the Post-Closing Transfers under the Asset Purchase Agreement. Based upon that contractual obligation, it is reasonable to infer that the debtor had control over, owned, and had the authority to make such transfers.

While AAC may contest the allegation that the Purchased Assets and the Post-Closing Transfers actually *were* property in which the debtor had an interest, the ability to so prove is not at issue in a motion to dismiss. Because rule 12(b)(6) only tests the sufficiency of the complaint, a plaintiff must only allege facts that, if proven, would entitle him to relief. The court finds the

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[17] Complaint ¶ 22.

[18] Complaint ¶ 23.

[19] Complaint ¶ 35.

[20] Complaint ¶ 28.

complaint does allege that the Purchased Assets and the Post-Closing Transfers are property in which the debtor had an interest before they were transferred.

Accordingly, the court finds that the allegations contained in counts I and II of the complaint are sufficient under the *Bell Atlantic* standard to apprise the defendant of the charges against it. Count III of the complaint merely seeks recovery of any transfers alleged in counts I and II by operation of 11 U.S.C. § 550, therefore, count III is dependent on counts I and II. The court having found that counts I and II are sufficient, count III is likewise sufficient to state a claim upon which relief can be granted. Therefore, AAC's motion to dismiss counts I through III of the complaint is denied.

2. Counts IV and V: Avoidance and Recovery of Preferential Transfers under 11 U.S.C. § 547(b).

AAC also attacks the sufficiency of counts IV and V of the complaint for failure to allege that the Preferential Transfers (1) constituted a transfer of the debtor's interest in property, and (2) were made for or on account of an antecedent debt owed by the debtor. Both of these are elements that must be pleaded to state a claim for relief under 11 U.S.C. § 547(b). *Yoppolo v. MBNA America Bank, N.A. (In re Dilworth)*, No. 07-8020, 2008 WL 649064, at * 3 (B.A.P. 6th Cir. Mar. 12, 2008) (citing *Ray v. Sec. Mut. Fin. Corp. (In re Arnett)*, 731 F.2d 358, 360 (6th Cir. 1984)). "[A] voidable preference necessarily depletes the debtor's estate." *McLemore v. Third Nat'l Bank in Nashville (In re Montgomery)*, 983 F.2d 1389, 1394 (6th Cir. 1993). Therefore, if the complaint states allegations that the Preferential Transfers depleted the debtor's estate, it is plausible for the plaintiff to recover under § 547(b).

The plaintiff's preferential transfer claim is based upon a portion of the Post-Closing Transfers, identified as the Preferential Transfers in paragraph 63 of the complaint. The

complaint alleges that the debtor made payments to AAC totaling at least $8,947,422.71 on or after January 21, 2005.[21] The date, amount, and check or wire number of five individual transfers are set forth in the complaint.[22] It is these five transfers that comprise the basis of the plaintiff's Preferential Transfer claims.[23] Like the Post-Closing Transfers and the Purchased Assets, the nference that the subject of the Preferential Transfers was property owned or controlled by the debtor arises from the allegations of the complaint.[24] That the debtor actually owned the funds that it contracted to and did eventually transfer does not amount to an unwarranted factual assertion in a preference action. *See Nordberg v. Sanchez (In re Chase & Sanborn Corp.)*, 813 F.2d 1177, 1181 (11th Cir. 1987). Further, the complaint specifically alleges that the transfers depleted the debtor's estate, because the assets remaining after the transfers were of little value

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[21] Complaint ¶ 21, 28, 34-35, 63.

[22] Complaint ¶ 63.

[23] AAC claims that "it is not enough for the Trustee to state that the debtor had an interest in property without explaining what that interest was or how it was acquired," *citing Slater v. Town of Albion (In re Albion Disposal, Inc.)*, 217 B.R. 394 (W.D.N.Y. 1997); *In re STFG, Inc.*, 2008 WL 1752135 (Bankr. S.D. Tex. Apr. 14, 2008) and *Golden, infra*. Motion to Dismiss at 5. These references are inaccurate. For example, the *STFG* case does not require a preferential transfer plaintiff to explain the alleged property interest or how it was acquired. In fact, *STFG* dealt with the debtor's allegations in its complaint that the foreclosing defendant creditor violated the automatic stay, and permitted dismissal of the complaint because the debtor did not allege that it owned the property in foreclosure. *STFG*, 2008 WL 1752135, at *3.

[24] Even if the cases cited by AAC regarding the requirements of pleading preferential transfers were binding on this court, which they are not, all the stated requirements of *Valley Media, Inc. v. Borders, Inc. (In re Valley Media, Inc.)*, 288 B.R. 189 (Bankr. D. Del. 2003), and its progeny, are satisfied in this case. The complaint alleges that the Preferential Transfers were made either by check or wire transfer pursuant to the Asset Purchase Agreement, identified by date and amount, and that each transfer was made from the debtor to AAC.

compared to the assets transferred.[25] Therefore, the court finds that the complaint sufficiently alleges that the Preferential Transfers were an interest of the debtor in property.

AAC also claims that the complaint fails to allege that the Preferential Transfers were made pursuant to a pre-existing debt owed by the debtor. However, the complaint alleges that the Preferential Transfers, as a sub-category of the Post-Closing Transfers, were made pursuant to the debtor's obligations under the Asset Purchase Agreement.[26] Under the Asset Purchase Agreement, the debtor contractually obligated itself to pay money to AAC; that is, the debtor incurred a debt to AAC. As the Asset Purchase Agreement was executed the January before the petition date, it was a pre-existing debt for which the debtor was obligated on the petition date. These allegations constitute more than a mere formulaic recitation that the Preferential Transfers were made "for or on account of an antecedent debt" under 11 U.S.C. § 547(b).

In addition, AAC has concentrated on paragraph 64 of the complaint, which alleges that the debtor had an interest in the funds transferred, "to the extent such payments were made from funds owned by [the debtor]," arguing that this prepositional phrase nullifies the sufficiency of the complaint. AAC supports its argument by comparing the allegations of paragraph 64 to the allegations made in *In re Golden Distributors, Ltd.*, 128 B.R. 342 (Bankr. S.D.N.Y. 1991), asserting that the complaint in that case was dismissed for the plaintiff's failure to adequately plead an interest in property, based on the inclusion of "to the extent" language. AAC's references to the *Golden* case, however, are inaccurate. While the *Golden* court did dismiss count I for failure to allege a valid property interest with which the defendants interfered, the "to the extent" language was only alleged in count II, dealing with damages. The court in *Golden*

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[25] Complaint ¶ 15, 30.

[26] Complaint ¶ 28.

dismissed count II of the complaint (not the entire complaint), which alleged that the defendant was liable "to the extent" of the plaintiff's damages, but alleged no facts upon which the damages were based. *Id*. at 346.

While the plaintiff will be required to prove that the debtor had some interest in the property transferred, plaintiff need not do so at this stage of the proceedings. The "to the extent" language is sufficient to allege that at least part of the Preferential Transfers constituted property in which the debtor had an interest. Requiring more would exceed the boundaries of rule 8(a) and the *Bell Atlantic* standard. As a result, the court finds that count IV of the complaint is sufficient to state a claim upon which relief can be granted. Count V being dependent on the sufficiency of count IV, it also survives rule 12(b)(6) scrutiny. Accordingly, AAC's motion to dismiss counts IV and V is denied.

C. **The Successor Liability Claim of Paragraph 56, Count II**

Count II is titled "Avoidance of Fraudulent Transfers Pursuant to 11 U.S.C. § 544(b) and Applicable State Law Against AAC." The court has already discussed all aspects of the challenge to count II except for the one raised against the last paragraph, number 56:

> 56. Alternatively, the Trustee requests that the Court award the Trustee declaratory relief declaring that AAC is a corporate successor to [the debtor] under the potentially applicable State Law, and that AAC is liable for all debts and obligations of [the debtor] as of the Closing Date of the Sale Transaction, which exceeded $60,000,000.00.

The allegations in count II relate to alleged fraudulent conveyances under the bankruptcy code and under the "potentially applicable law of California, Delaware, Illinois, Michigan, Ohio, and Texas." AAC argues that this allegation is insufficient to state a claim for successor liability, because the elements of such claims under the "potentially applicable state law" are not pleaded.

The plaintiff counters that paragraph 56 is sufficient to state a claim for successor liability under Ohio law because the allegations required to state that claim are essentially the same allegations required to state a claim for fraudulent transfer, all of which are properly pleaded in counts II and III.

Under Ohio law, "a corporation that purchases the assets of another corporation is not liable for the contractual liabilities of its predecessor corporation unless (1) the buyer expressly or impliedly agrees to assume such liability; (2) the transaction amounts to a de facto consolidation or merger; (3) the buyer corporation is merely a continuation of the seller corporation; or (4) the transaction is entered into fraudulently for the purpose of escaping liability." *Welco Industries, Inc. v. Applied Companies*, 67 Ohio St.3d 344, 347, 617 N.E.2d 1129, 1132 (1993). The plaintiff argues in its brief that it is relying on the fraud exception. The complaint itself, however, is the critical document at this stage of the proceeding, not the brief. The allegations of count II clearly speak to a fraudulent conveyance cause of action under federal and state law, not to a claim of successor liability based on fraud. This is consistent with paragraph 1 of the complaint, which states that "[t]he Trustee's claims against AAC include avoidance and recovery of constructive fraudulent transfers, avoidance and recovery of preferential transfers, breach of contract, unjust enrichment, . . . turnover, [and] disallowance and/or equitable subordination of AAC's claims." Count II does not allege that the debtor and AAC entered into the referenced transactions fraudulently for the purpose of escaping liability to the debtor's creditors. *See Per-Co, Ltd v. Great Lakes Factors, Inc.*, 509 F. Supp.2d 642, 653-54 (N.D. Ohio 2007). The defendants' motion to dismiss the alternative cause of action in paragraph 56 is, therefore, granted.

CONCLUSION

Counts I through V of the complaint are sufficient to state causes of action for fraudulent transfers under 11 U.S.C. §§ 544 and 548, preferential transfers under 11 U.S.C. § 547(b), and for the recovery of fraudulent and preferential transfers under 11 U.S.C. § 550. Paragraph 56 in count II does not, however, state a claim for successor liability under Ohio law. Therefore, AAC's motion to dismiss is (1) denied as to counts I through V, except for that part of count II that includes paragraph 56; and (2) granted as to paragraph 56.

A separate order will be issued reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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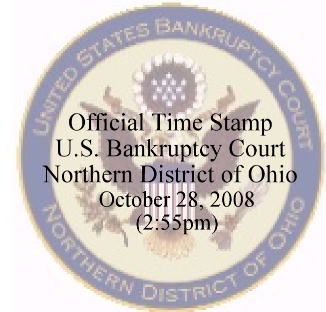

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	)	Chapter 11
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	)	Judge Pat E. Morgenstern-Clarren
	)	
MARK A. ROBERTS as Liquidating Trustee of TAC LIQUIDATING TRUST, successor to THE AUSTIN COMPANY, *et al.*,	)	Adversary Proceeding No. 08-1130
Plaintiffs,	)	
v.	)	**ORDER**
AAC DESIGNERS BUILDERS, INC.,dba AUSTIN AECOM, *et al.*,	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the motion of defendant AAC Designers Builders, Inc. to dismiss is (1) denied as to counts I through V of the complaint, except for that part of count II that includes paragraph 56; and (2) granted as to paragraph 56. (Docket 24).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge