UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

IN RE:	Case No. 99-30485
CREATIVE ENTERTAINMENT, INC.	CHAPTER 7
RICHARD M. MITCHELL, Trustee in Bankruptcy for Creative Entertainment, Inc.	JUDGMENT ENTERED ON MAY 28 2003
Plaintiff,	Adversary No. 00-3114
v.	
BRAD LORING COOPER GREENBERG; LINDA GREENBERG; CREATIVE TALENT NETWORK, INC.; COOPER LICENSING, INC.; CLONTZ, CLONTZ & HUNTER, P.L.L.C.; and MICHAEL HUNTER,	
Defendants.	

ORDER

This matter was before this bankruptcy court for hearing on March 10, 2003, upon the following matters:

(1) Motion by Defendants Michael Hunter and Clontz, Clontz and Hunter, P.L.L.C. Pursuant to Rules 7012 and 12 to Dismiss Complaint of October 2, 2000;

(2) Motion of Defendants Michael Hunter and Clontz, Clontz and Hunter, P.L.L.C. Pursuant to 28 U.S.C. § 157(b)(3) of October 2, 2000;

(3) Motion of Defendants Michael Hunter and Clontz, Clontz and Hunter, P.L.L.C. Pursuant to Rules 7026, 26, 7026-1, and 9006 for Protective Order and Extension of Time of October 2, 2000;

(4) Motions of Defendants Greenberg, Creative Talent Network, Inc. and Cooper Licensing, Inc. for Non-Core Ruling with Respect to Particular Claims, Withdrawal of Bankruptcy Reference as to Such Claims, and Dismissal of All Claims of October 10, 2000;

(5) Trustee's Response in Opposition to Greenberg's Motion to Dismiss of June 14, 2001;

(6) Trustee's Response in Opposition to Hunter's Motion to Stay and Motions to Dismiss of June 14, 2001;

(7) Suggestion by Professional Defendants that Core Motion is Moot of June 18, 2001;

(8) Trustee's Supplemental Response to Defendant Hunter's Motions to Dismiss and Motion to Stay Discovery and Defendant Greenberg's Motion to Dismiss of June 21, 2001;

(9) Reply of Professional Defendants to Response of Plaintiff to the Dismissal Motion of June 25, 2001; and

(10) Reply of Professional Defendants to Response of Plaintiff to Motion for Protective Order of June 25, 2001 (the "Motions").

This adversary proceeding was originally filed in this bankruptcy court on May 25, 2001, but was subsequently withdrawn to U.S. District Court as per 28 U.S.C. §157(d). Thereafter, the District Court returned the matter to this forum for pretrial proceedings. See Order of September 18, 2002.

NOW HAVING HEARD these Motions, the undersigned finds and concludes as follows:

1. Creative Entertainment is a North Carolina corporation formed in 1981. During its long period of operations, Creative owned and licensed comedy clubs under the name of "The Comedy Zone." It also acted as agent for several comedians.

2. During this time, Kathy Kern ("Kern") was one of the Debtor's employees. In 1993, the Debtor terminated Kern from her employment in a dispute over commissions. Kern responded by filing

suit against the Debtor in North Carolina State Court, alleging violations of the North Carolina Wage and Hour Act and the U.S. Fair Labor Standards Act.[1] That action was tried in October 1996 and resulted in a judgment in Kern's favor and against her former employer in the amount of $33,303 plus costs and $42,756 in attorneys fees.

3. According to this Complaint, within days of that judgment being rendered, the Debtor's owner Brad Greenberg, formulated a scheme to shut down the Debtor and transfer its assets to two newly created successor corporations. These successor entities then hired the Debtor's employees and began to carry on the Debtor's business. Meanwhile, the Defendants appealed Kern's judgment, thereby delaying any recovery on her part.[2]

4. When Kern realized that the Debtor had dissipated its assets, she filed an involuntary bankruptcy case against the company on February 26, 1999. After a contested hearing, this Court entered relief against the Debtor and appointed Richard Mitchell as Chapter 7 Trustee for Creative.

5. On August 31, 2000, the Trustee filed this action, asserting eleven different claims for relief against the

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[1]The pending Motions are filed under Rule 12; therefore, the facts alleged in the Complaint are assumed to be true for present purposes.

[2]The appeal was unsuccessful, and upon remand to the North Carolina Superior Court, the Honorable Timothy Patti awarded Kern an additional $17,287.25 in attorneys fees relating to the appeal.

participants in the alleged scheme. These claims include state law causes such as civil conspiracy, alter ego and breaches of director duties; state law transfer avoidance claims[3]; as well as a Bankruptcy Code Section 542 turnover demand, as to any property which might be found to belong to the Debtor.

6. Named as defendants in this action are the Debtor's former sole director and shareholder, Brad Greenberg; Greenberg's wife, Linda Greenberg; and the two successor entities, Creative Talent Network, Inc. and Cooper Licensing, Inc. (collectively, the "Greenberg Defendants"). Also named are the Debtor's former attorneys, Michael Hunter, Esq. and his law firm, Clontz, Clontz & Hunter, P.L.L.C.(the "Professional Defendants"). The attorneys allegedly helped devise and implement the scheme to strip out the Debtor's assets.[4]

7. The Defendants have moved to dismiss this action, raising three general categories of defenses:

> (A) The Trustee lacks standing to bring these claims because they "belong" to creditors under North Carolina law;
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> (B) Even if a particular claim "belongs" to the Debtor rather than to its creditors, the actions complained of in this suit were approved by the corporation's director and sole shareholder and cannot be attacked by the Trustee; and

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[3]The Trustee did not assert bankruptcy avoidance claims under Section 548 and 550. Due the lengthy state appeal, the transfers in question occurred more than one year before bankruptcy and ostensibly outside of the one year federal reach back period.

[4]The Professional Defendants also represented the Greenberg Defendants while the events in question transpired.

(C) The causes of action are time barred.

A. The Trustee's Standing

8. The Defendants' suggestion that the Trustee lacks standing to sue involves one of the murkiest questions of bankruptcy law: Exactly what types of claims may be asserted against third parties by the bankruptcy trustee of a corporate debtor on behalf of its creditors?

9. Clearly, a trustee may sue on causes of action which "belong" to a debtor corporation.[5] These claims are property of the bankruptcy estate, and the trustee is charged with administering them for the benefit of creditors. *See* 11 U.S.C. §§ 541 and 704.

10. It is also certain that a trustee may seek to avoid transfers of a debtor's property, including preferences, fraudulent conveyances, and unauthorized transfers. *See* 11 U.S.C. §§ 501-560. Of these, Section 544 is particularly important in this case. This provision of the Bankruptcy Code gives the trustee the status of a hypothetical state law judgment or execution creditor, and as to real estate a bona fide purchaser for value. Armed with this status, the trustee is empowered to avoid transfers of a debtor's property which these types of creditors could set aside under state law. *See* 11 U.S.C. § 544.

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[5]The parties agree that whether a cause of action belongs to the Debtor or instead to individual creditors is a question of state law.

11. Between these principles, lies a large gray area where questions abound: Does the trustee have standing under section 544 to sue third parties on state law claims held by creditors of a corporate debtor? Does the trustee have the ability to sue third parties where the claim "belongs" to a corporate debtor under state law, but the recovery entirely benefits its creditors (rather than the now defunct debtor)? What result if the debtor was a participant in the actions which depleted its assets and thereby injured its creditors?

12. The answers to these questions are not self-evident, and the case law is contradictory, for two primary reasons. First, in bankruptcy, property rights, including who "owns" a cause of action and the remedies available to lien/execution creditors under section 544, are determined by applicable state law, which varies widely. See *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132 (4th Cir. 1988).

13. Second, courts disagree about the breadth and meaning of the Supreme Court's ruling in *Caplin v. Marine Midland Grace Trust Co.* of N.Y., 406 U.S. 416 (1972).

14. In *Caplin*, a case decided under the old Bankruptcy Act, a divided Supreme Court held that a bankruptcy trustee for a corporate debtor lacked standing to sue a third party indenture trustee on behalf of a class of debenture holders on theories of negligence and breach of fiduciary duty. *See Caplin* at 434.

15. *Caplin* was a difficult case. The alleged injuries to the debenture holders arose from common facts and affected all members of this creditor class. Thus, from a practical standpoint, the bankruptcy trustee was in a much better position to bring the suit on behalf of the creditor class than was each individual creditor.

16. From a legal perspective, as Justice Marshall noted, the issue was one which, while rarely presented to other courts, "had caused even the most able jurists to disagree." *See id.* at 421.

17. Ultimately, the *Caplin* majority concluded that the trustee lacked standing to sue the indenture trustee on behalf of debenture holders. This holding was based upon a straightforward statutory analysis. As the Court noted, Act Sections 567 and 587 gave the trustee the power to (1) assert causes of action belonging to the debtor and (2) exercise the powers of a receiver in equity. The claim brought by this trustee fell in neither category, so the Court concluded the trustee could not raise it. *See id.* at 428.

18. Despite its holding, the majority was cognizant that there may be good reasons to permit a bankruptcy trustee to bring claims on behalf of creditors. *See id.* at 434. However, the Caplin majority determined saw this as a legislative issue. The opinion concludes with an invitation to Congress to fix the standing problem if it deems it appropriate. *See id.*

19. Congress soon had its chance. In 1978, Congress enacted the Bankruptcy Code and in doing so redefined the trustee's powers

now found at sections 541 and 544. One of the changes considered was a subpart to section 544 that would have overruled *Caplin*. However, the provision was deleted shortly before the Code was enacted.[6]

20. Because Congress did not adopt legislation giving the bankruptcy trustee standing to bring suit for generalized injury to creditors, *Caplin* is still considered good law. However, there is broad disagreement among the Circuits as to how it should be construed.

21. Some Circuits interpret *Caplin* as prohibiting the bankruptcy trustee from asserting any claims on behalf of creditors. *See In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987); *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988); *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990).

22. Other Circuits read *Caplin* to preclude the trustee from raising only those claims which are personal to an individual creditor or personal to a class of creditors. If the claim is based on an injury to all creditors, these courts hold that it may be brought by the trustee. *See St. Paul Fire and Marine Ins. Co.*

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[6]The House bill would have given the trustee the ability to bring suits for generalized injury to all creditors. And although sections 541 and 544 as enacted differ from their Act analogs, the House variant was not adopted.

v. Pepsico, Inc., 884 F.2d 688 (2d Cir. 1989); *Koch Ref. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339 (7th Cir. 1987).[7]

23. The Fourth Circuit has not specifically addressed the issue of the trustee's standing to assert claims on behalf of creditors. However, it has ruled on a related issue. In *Steyr-Daimler-Puch of America Corp. v. Pappas*, 852 F.2d 132 (4th Cir. 1988), the Fourth Circuit held that if an alter ego claim belongs to the debtor corporation under state law, rather than to creditors, only the bankruptcy trustee can bring the action. An individual creditor lacks standing to assert such a claim even if the recovery would benefit only creditors of the now lifeless debtor. *See Steyr*, 852 F.2d at 136.

24. Since *Steyr*, the issue of trustee standing has been addressed three times in the Western District of North Carolina. First, the District Court tackled the question in *In re Miller*, 197 B.R. 810 (W.D.N.C. 1996). In *Miller*, the Chapter 7 Trustee for a corporate debtor sued the company's former attorney alleging fraud, unfair trade practices, and civil conspiracy. The attorney moved to dismiss, arguing that these claims belonged to creditors and, therefore, the Trustee lacked standing. The Trustee argued that he should be permitted to bring the action because doing so would benefit the debtor's creditors.

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[7]The Second Circuit appears to have ruled both ways on this issue. *See Shearson Lehman v. Wagoner*, 944 F.2d 114, 118-20 (2d Cir. 1991).

25. In its decision, the District Court reviewed *Caplin*, the legislative history to section 544, and the aforementioned Circuit decisions. However, Judge Potter distinguished his case from *Caplin* and the various circuit decisions and issued a narrow ruling addressing the issues presented by Miller's case.

26. Miller's Trustee did not argue that his causes of action were property of the bankruptcy estate. Judge Potter assumed they were not, making the *Steyr* decision inapplicable. *See id.* at 811, n.1.

27. Nor did Judge Potter find *Caplin* to be controlling. The issue in *Caplin* was whether a trustee could pursue a claim on behalf of a specific class of creditors rather than for the benefit of the estate as a whole. *Miller* presented a separate question: Could a trustee pursue claims which would benefit the body of creditors generally? *See id* at 814.

28. *Miller* was also distinguishable from the aforementioned Circuit decisions. For example, the issue in *Ozark Restaurant* was whether the trustee could pursue claims against an attorney under the applicable state law by virtue of the status conferred upon him by section 544. *Id.* at 815. Judge Potter found that this question was not presented in *Miller*. He noted that "[t]he Trustee has not even bothered to advance such a contention in this case, and therefore, the Court finds that he does not have standing to

advance the claims against [the defendant] under 11 U.S.C. § 544." *See id.*

29. Finally, Judge Potter held that the broad theories of trustee power represented by *Koch* and *St. Paul Fire* were inapplicable because the Trustee had not shown how his case fit within that rule. In other words, he had not demonstrated that his causes of action arose from injuries common to the creditors as a class.[8] *See id.* Consequently, Judge Potter considered the claims to be "personal" to particular creditors such that the trustee did not have standing to pursue them even under the broad holdings of *Koch* and *St. Paul Fire*. *See id.*

30. Ultimately, the trustee in *Miller* argued that § 544 empowers him to bring any cause of action that may inure to the benefit of creditors generally. The District Court decided the case solely on this basis and held that standing to sue can not be based upon simple benefit to a group of creditors, as that position is inconsistent with the statutory language and legislative intent of section 544. *See id.* at 814-815.

31. Since the *Miller* case was decided, this Court has also wrestled with the issue of the trustee's standing in *In re Mullins*, Case No. 98-50517, Adv. Proc. 00-5013, and *In re Rahab Trust & Mgmt. Co., Ltd.*, Case No. 01-32561, Adv. Proc. 01-3182. These

[8]Judge Potter expressed doubt regarding the validity of the law in Koch and St. Paul Fire because it advanced such a broad view of the Trustee's powers.

cases are similar to one another in several respects: (1) the Trustee asserted a conspiracy by the defendants and the debtor to defeat the claims of creditors; (2) the complaint asserted numerous state law claims under Section 544, including several of those pled in the current proceeding; and (3) the defendants moved to dismiss, arguing a lack of standing by the Trustee.

32. In *Mullins*, a case decided under Virginia state law, this Court denied the defendants motions to dismiss. The Trustee was held to have standing because: (1) his "conspiracy to defraud creditors" claim was no more than a Virginia state law fraudulent conveyance claim; and (2) under state law, the alter ego claim belonged to the debtor corporation and, hence, the Trustee could assert it under section 541. *See* Order of April 24, 2001, Adv. Proc. 00-5013.

33. In *Rahab*, a corporation had allegedly been used by its principals to defraud investors and creditors through a Ponzi scheme. The Complaint in *Rahab* differed in several respects from that in *Mullins*. For example, the controlling state law was North Carolina rather than Virginia law. In addition, the Trustee did not plead alter ego or transfer avoidance claims as did the Trustee in Mullins. In *Rahab*, all of the Trustee's causes of action were of the sort typically asserted by creditors under state law, including conspiracy to defraud creditors, civil fraud, and unfair and deceptive trade practices.

34. Because of these differences, this Court partially granted the defendants' motions to dismiss in *Rahab*. As a matter of public policy, the Court acknowledged there were advantages to allowing the trustee of a bankrupt corporation to pursue "general" creditor claims for the good of the creditor body.[9] However, in view of *Caplin, Miller,* and the legislative history to section 544, this Court did not believe current law gave the Trustee this power. Ultimately, the undersigned dismissed the causes of action for fraud, civil conspiracy, and unfair and deceptive trade practices because it appeared they belonged to creditors under North Carolina state law.[10]

35. In the final analysis, under current law it would appear that the bankruptcy trustee of a corporate debtor can assert only those causes of action which: (1) belong to the debtor corporation; (2) seek to avoid transfers of a debtor's property under Chapter 5 of Title 11; or (3) seek to avoid transfers that are avoidable under applicable state law pursuant to 11 U.S.C. § 544. Otherwise,

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[9]Having the trustee assert general creditor claims for the benefit of all creditors furthers judicial economy and avoids many problems associated with individual creditors suing separately such as the "race to the courthouse" by similarly situated creditors; the potential conflicts between individual creditor recovery efforts and those of the bankruptcy estate such as bringing section 541 and 544 causes of action against the same defendants for the same injuries; potential double liability to the defendants; and the prospect of inconsistent verdicts.

[10]As noted below, this is not entirely correct.

bankruptcy trustees lack standing to assert the claims of creditors, even when those claims are general to all creditors.

B. Harm to the Debtor and The Doctrine of In Pari Delicto

36. Additionally, the Defendants seek dismissal of those pled causes of action which legally belong to the Debtor. Their reasoning is twofold. First, they contend that while theoretically these claims belong to the debtor corporation, practically they are being asserted for creditors. The Debtor corporation consented to the transfers in question, and consequently has been rendered a lifeless husk. Therefore, the Trustee is really asserting these claims for the benefit of creditors. Second, they argue that because the Debtor's sole owner and director approved and participated in the Debtor transferring its assets to newly created successor corporations, the Debtor was a participant in the actions that harmed it and its creditors. This defense is known as the *in pari delicto* defense. It precludes "an action based on a fraudulent, illegal, or immoral transaction to which the plaintiff was a party." *See Skinner v. E.F. Hutton & Co., Inc.*, 70 N.C.App. 517, 519, 320 S.E.2d 424, 426 (1984).

37. This Court finds that these arguments to be without merit. *Steyr* clearly holds that a bankruptcy trustee may assert a corporate debtor's causes of action, for the benefit of creditors. *See Steyr*, 852 F.2d at 135. It could not be otherwise in bankruptcy. In a Chapter 7 case, the corporation is dead for all

intents and purposes. Therefore, all asset liquidations, be they of tangible property or instead causes of action, are for the benefit of creditors. To say that the trustee is acting for creditors in such cases simply acknowledges a reality of bankruptcy and debtor creditor law which gives creditors a higher distribution priority in a debtor corporation's assets than owners.

38. The Defendants suggest that the result should be different in this case because Kern is the only creditor of this debtor. Again, this Court disagrees. The current dispute is raised by motions to dismiss a complaint under Rule 12. At this point in this civil proceeding, the factual averments of the Complaint are assumed to be true. Just how many creditors are owed money by Creative Entertainment is a matter beyond the Complaint. Therefore, an argument that presumes the answer to this question cannot be the predicate for dismissal. Even if it could be, the claims and schedules filed in the bankruptcy case to date reflect the existence of more than one creditor.

39. However, the exact number of Creative Entertainment's creditors appears to be irrelevant. Many bankruptcy cases involve a single debt or a single filed claim. In fact, the Supreme Court has upheld confirmation of a Chapter 13 plan where the only "debt" was a single, discharged and, therefore, nonrecourse residential mortgage. *See Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). And no provision of the Bankruptcy

Code limits the Trustee's powers due to the number of creditors in a case, although it may be a factor in whether a case should lie at all.

40. Nor does the doctrine of *in pari delicto* apply in this situation. This argument was made and rejected in the case of *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995). In *Scholes*, a federal court appointed a receiver for an individual named Douglas and a series of corporations which he owned and operated in a Ponzi scheme. The receiver then sued Douglas' ex-wife, and other third parties who had received transfers of the corporations' assets. The defendants moved to dismiss, arguing both lack of standing by the receiver and the doctrine of *in pari delicto*.

41. Specifically, the *Scholes* defendants argued that the receiver was not really suing on behalf of Douglas' corporations but, instead, on behalf of the investors and creditors of the businesses. Their underlying premise was that a receiver does not have standing to sue on behalf of the creditors of a corporation in receivership. *See id.* at 753. Additionally, the defendants maintained that since the corporations were participants in the transfers, their receiver was prohibited by the doctrine of *in pari delicto* from attacking the transfers and the beneficiaries of the same. *See id.* at 754.

42. The District Court disagreed, granted summary judgment in favor of the receiver, and the defendants appealed. The Seventh

Circuit Court of Appeals affirmed, holding both that the receiver had standing and that the doctrine of *in pari delicto* did not apply. *See id.*

43. In that opinion, Judge Posner found that the receiver had standing to sue, by analogizing the receiver to a bankruptcy trustee who employs 11 U.S.C. §§ 541 and 544 to sue persons who have received transfers of a corporation's assets to the detriment of its creditors. *See id.* In that situation, the trustee has standing to redress harm to the corporation. *See id.*

44. Judge Posner recognized the practical reality that the corporations in question were dominated by Douglas, their director and shareholder. *See id.* Legally, however, the companies were separate legal entities with independent rights and duties. *See id.* As such, when Douglas diverted their assets for improper purposes, he injured the corporations. *See id.*

45. Under Illinois law, Douglas, as sole shareholder, could lawfully have ratified diversions of corporate assets for noncorporate purposes but only if creditors were not harmed by the diversions. *See id.* As the Seventh Circuit noted, "[i]t was not within the power of the shareholders to legalize this waste to the detriment of others." *See id.* (quoting *McCandless v. Furlaud*, 296 U.S. 140, 160, 56 S.Ct. 41, 47, 80 L.Ed. 121 (1935)).

46. And although they were injured by Douglas, the Circuit recognized that the corporations were in no position to complain of

his acts because they were controlled by him and because of "their deep, their utter, complicity in Douglas's fraud." *See id.*

47. However, the Scholes Court concluded that the general rule that the maker of a fraudulent conveyance and those in privity with him are bound by the action, did not apply here because the receiver had replaced Douglas, and thereby "removed the wrongdoer from the scene." *See id.* As Judge Posner noted:

> The corporations were no more Douglas's evil zombies. Freed from his spell they became entitled to the return of the moneys--for the benefit not of Douglas but of innocent investors--that Douglas had made the corporations divert to unauthorized purposes. *McCandless v. Furlaud, supra*, 296 U.S. at 159-61, 56 S.Ct. at 47; *Texas & Pacific Ry. v. Pottorff*, 291 U.S. 245, 260-61, 54 S.Ct. 416, 420, 78 L.Ed. 777 (1934); *Southmark Corp. v. Cagan*, 999 F.2d 216, 222 (7th Cir.1993)....
>
> Put differently, the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated. *McCandless v. Furlaud, supra*, 296 U.S. at 160, 56 S.Ct. at 47.

See id. at 754-755.

48. Finally, the Seventh Circuit found that the receiver had standing to sue notwithstanding the fact that any recovery would ultimately go to creditors of the company. Judge Posner noted that the fact "[t]hat the return would benefit the limited partners is just to say that anything that helps a corporation helps those who have claims against its assets. The important thing is that the limited partners were not complicit in Douglas's fraud; they were its victims." *See id.* at 754.

49. The same reasoning applies in this bankruptcy case. Assuming the Trustee is correct, Greenberg and those in league with him stripped Creative Entertainment of its assets in the face of Kern's claim. In turn, these transfers not only left Creative without the ability to operate, they insured that it could not pay its existing debts.

50. Under North Carolina law, directors run the corporation for the benefit of shareholders, and do not owe a fiduciary duty to creditors, with one limited exception. *See Whitley v. Carolina Clinic, Inc.*, 118 N.C. App. 523, 526, 455 S.E. 2d 896, 899 (1995). When a corporation undertakes activities that are tantamount to a winding up or dissolution of the business, a fiduciary duty arises in favor of creditors. *See id.* at 528, 455 S.E.2d at 900.

51. Moreover, as in Illinois, North Carolina law provides that an insolvent corporation may not make distributions to equity in derogation of its creditors. *See* N.C.G.S. § 55-6-40. A director "who votes for or assents to a distribution made in violation of G.S. 55-6-40 or the articles of incorporation is personally liable to the corporation .... " *See* N.C.G.S. § 55-8-33.

52. If the Trustee is correct, and for present purposes the Court must assume that he is, then Creative Entertainment was the "evil zombie" of Greenberg. Therefore, under the reasoning of *Steyr* and *Scholes*, the bankruptcy Trustee may assert claims for damage to

the Debtor corporation, even if the Debtor "permitted" the dissipation of assets, and even if the recovery ultimately inures to its creditors.

C. Statute of Limitations

53. In their motions to dismiss, the Defendants also argue that the Plaintiff's causes of action are time barred.[11] The transfers in question occurred in late 1996. The bankruptcy case was filed in February, 1999, and this suit was filed on August 31, 2000. Because most North Carolina causes of action have a three year statute of limitations period (See NCGS 1-52), the Defendants contend they are time barred.

54. They are not. Where the Trustee has standing to assert a cause of action, the applicable statutes of limitation were extended by operation of law. Only those causes of action for which the Trustee lacks standing are time barred.

55. Code Section 108 extends the statute of limitations for causes of action which belong to the Debtor under state law. Specifically, section 108 provides that:

> (a) If applicable nonbankruptcy law ... fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of--

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[11] At hearing, the Defendants conceded this argument in part given this Court's ruling in *Rahab*, but reserved the right to argue on appeal that *Rahab* was decided incorrectly. Because this is a recommended ruling with a *de novo* review, this Court includes its reasoning on this point for the District Court's consideration.

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

(2) two years after the order for relief.

See 11 U.S.C. § 108(a).

56. Similarly, Section 546(a) extends the state law limitations period for Section 544 state law avoidance claims. Section 546(a) provides that:

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee ... ; or

(2) the time the case is closed or dismissed.

See 11 U.S.C. § 546(a).

57. No one suggests that any of these claims were time barred at the time Creative Entertainment was placed in bankruptcy. Since the Trustee filed this Complaint within two years of the entry of the order for relief, he has timely filed any claims which he has standing to bring.

D. Core/Related to Distinction

58. The distinction between the "core" and "related to" issues, as defined by 28 U.S.C. § 157, was raised by the Defendants early on in this proceeding. This distinction was, for most purposes, mooted by the withdrawal of this case to the District

Court for trial. However, this Court notes below its conclusions regarding the "core" and "related to" issues as they pertain to each cause of action, for the benefit of any higher court reviewing this decision.

E. Application to Pending Causes of Action

59. Now finally against this backdrop, this Court considers whether the Trustee has standing to bring the specific causes of action pled in this Complaint.:

Count 1 - Civil Conspiracy v. All Defendants

60. As held in *Rahab*, this cause of action belongs to the Debtor's creditors. Therefore, the Trustee lacks standing to pursue it. *See* Order Denying Motions to Dismiss and Directing Trustee/Plaintiff to Amend Complaint of March 4, 2002, Case No. 01-32561, Adv. Proc. 01-3182. This Count is **DISMISSED.**

Count 2 - Fraudulent Conveyance v. the Greenberg Defendants

61. The Plaintiff's second claim for relief is a North Carolina state law avoidance claim pursuant to N.C.G.S. § 39-23.1 *et seq.* Creditors may bring this claim against the Debtor corporation as an avoidance action under state law. However, the Trustee also has standing to bring this claim under Section 544. The statute of limitations for this claim was extended under Code Section 546 and has not expired.

62. Because this claim is a state law cause which existed at the time of bankruptcy, it is not a core claim. *See In re Apex*

Express Corporation, 190 F.3d 624 (4th Cir. 1999). However, because it could have an effect on this bankruptcy estate, it is a "related to" matter. *See* 28 U.S.C. § 157(b)(2)(H); *See also A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986). As to this particular claim, the motions to Dismiss are **DENIED**.

Count 3 - Unlawful Corporate Distributions/Avoidance of the Transfers (N.C.G.S. 55-6-40(c) v. Brad Greenberg)

63. Pursuant to N.C.G.S. 55-6-40(c), the Trustee contends that the asset transfers to the Defendants were invalid and recoverable under Section 544(b). That state statute speaks to the power of corporate directors to declare dividends. Subsection (c) is a limitation on that power, and invalidates distributions to shareholders if they would render the corporation unable to pay its debts or would cause the corporation to become balance sheet insolvent. We assume for present purposes that the transfers in question were dividends paid to a shareholder (Greenberg).

64. There is no case law in North Carolina delineating who has standing to sue a shareholder under this provision. However, dividends are transfers of corporate property. Since the statute declares such distributions to be "invalid," it would appear that the bankruptcy trustee would have standing to sue, under two alternate grounds: (1) as an effort to recover property under Section 541, if the transfer is legally void, or (2) if it had legal effect, as a transfer avoidance under Section 544. In either case, the statute of limitations was extended by operation of Code

Section 546 and, therefore, has not expired. This is a "core" matter. As to this particular claim, the motions to Dismiss are **DENIED**.

Count 4 - Unlawful Corporate Distributions/Director Liability (N.C.G.S. § 55-8-33(a)) v. Brad Greenberg

65. This cause of action belongs to the corporation under North Carolina law and may be maintained by its bankruptcy Trustee. *See Underwood v. Stafford*, 270 N.C. 700, 155 S.E. 2d 211 (1967). The statute of limitations for this claim was extended by section 108 due to the bankruptcy filing and has not expired.

66. While this cause of action is a claim against a director of the Debtor relating to his official duties, it is one that existed at state law prior to the bankruptcy. Therefore, it is not a core matter. *See In re Systems Engineering & Energy Management Associates, Inc.*, 252 B.R. 635 (Bankr. E.D.Va. 2000). However, because it could have an effect on the Debtor's estate, it is "related to" this case. *See* 28 U.S.C. § 157(b)(2)(H); *See also A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986). As to this particular claim, the motions to Dismiss are **DENIED**.

Count 5- Instrumentality & Alter Ego v. Brad Greenberg

67. Under North Carolina law, alter ego claims are owned by a corporation, rather than its creditors. *See Holcomb v. Pilot Freight Carriers*, 120 B.R. 35 (M.D.N.C. 1990). Therefore, the

Trustee may assert this claim. The statute of limitations was extended by section 108 and has not expired. Finally, as a claim which asserts an interest in property of the estate, this is a core matter which the Trustee may pursue. *See* 28 U.S.C. § 157(b)(2)(E). As to this particular claim, the motions to Dismiss are **DENIED**.

Count 6 - Breach of Fiduciary Duty to Debtor Corporation v. Brad Greenberg

68. *Rahab*, it was assumed by both the parties and the undersigned that a North Carolina state law cause of action for breach of fiduciary duty by a director was a creditor's action. Therefore, it was held that such a cause could not be asserted by the Trustee. However, on further review this assumption appears erroneous. As noted, under *Whitley*, directors of a beleaguered corporation owe a fiduciary duty to both the business and its creditors. *See Whitley*, 118 N.C. App. at 526, 455 S.E.2d at 899 (1995). And while the Trustee lacks standing to assert this cause of action standing in the shoes of a creditor, he could do so as the corporation, under the holdings of *Scholes* and *Steyr*. As a claim belonging to the Debtor, the statute of limitations was extended pursuant to section 108(a). Finally, because this cause of action relates to a prepetition, state law claim, it is a non-core but "related to" proceeding. As to this particular claim, the motions to Dismiss are **DENIED**.

Count 7 - Mere Continuation/Successor Liability v. Greenberg Defendants

69. Clearly, a creditor may assert successor liability claims. However, whether the receiver (or trustee) of a denuded corporation also possesses standing to bring such a claim is apparently a question of first impression under North Carolina law. Such a claim is substantially similar to an alter ego claim because it seeks to recover assets of a corporation and to make these available to satisfy creditor claims. It would therefore appear that the corporation's legal successor could assert such a claim. It therefore lies with a trustee under Section 541. See *In re Keene Corp.*, 164 B.R. 844, 853(Bankr. S.D. N.Y. 1994).

70. As such, the statute of limitations was extended under section 108(a) and has not expired. Finally, because this claim relates to an interest of the estate in property, this is a core proceeding. As to this particular claim, the motions to Dismiss are **DENIED**.

Count 8 - Unfair and Deceptive Trade Practices v. All Defendants but Hunter

71. As held in *Rahab*, under North Carolina law, this cause of action lies exclusively with creditors. Hence, the Trustee lacks standing to assert the same. It is, therefore, **DISMISSED**.

Count 9 - Breach of Fiduciary Duty/Violation of N.C.G.S. § 84-13 v. Professional Defendants

72. This state statute, aimed here at the Professional Defendants, makes an attorney who commits any fraudulent practice liable for double damages to the party injured. One can safely

assume that this would include a client corporation as well as its creditors. Thus, as the debtor's legal successor, the bankruptcy trustee would have standing to sue.

73. The statute of limitations for this claim was extended by section 108 due to the bankruptcy filing and has not expired. This claim by a corporation against its former counsel existed at state law prior to the bankruptcy. It is not a core matter. However, because it could have an effect on the Debtor's estate, it is "related to" this case. As to this particular claim, the motions to Dismiss are **DENIED**.

Count 10 - Section 542 Demand for an Accounting v. All Defendants

74. This claim is brought pursuant to 11 U.S.C. § 542 and is one which belongs to the Estate. Therefore, it may be maintained by the Trustee. The two year statute of limitations provided for in section 546 applies to this claim, and it has not expired. Finally, this is a core proceeding under 28 U.S.C. § 157(E) & (O). As to this particular claim, the motions to Dismiss are **DENIED**.

Count 11 - Rule 65 Preliminary Injunction v. All Defendants

75. A preliminary injunction is a remedy rather than an independent cause of action. However, it exists under Fed. R. Civ. P. 65 and Fed. R. Bankr. P. 7065. Therefore, it may be maintainable by the Trustee and is not subject to any lapsed statute of limitations, except where the underlying cause of

action would be time barred. As to this particular claim, the motions to Dismiss are **DENIED**.

BASED ON these conclusions, the undersigned **ORDERS** as follows:

1. The Defendants' Motions to Dismiss are **ALLOWED IN PART AND DENIED IN PART**. They are **GRANTED** as to Counts 1 and 8 and these causes of action are dismissed from this proceeding. The motions are Denied as to Counts 2-7 and 9-11, and these causes shall remain open, as to the specific defendants identified in the preceding captions.

2. The Core/NonCore status of the causes of action are determined as stated above.

3. Any remaining motions are **DENIED**.

This the 27th day of May, 2003.

United States Bankruptcy Judge