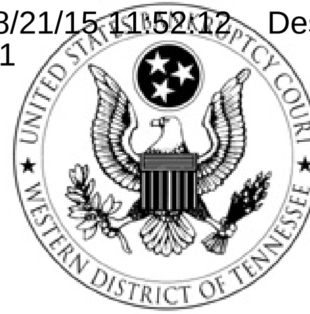
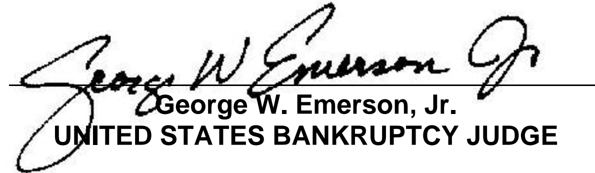


Dated: August 21, 2015
The following is SO ORDERED:



George W. Emerson, Jr.
UNITED STATES BANKRUPTCY JUDGE

THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re
ST. MICHAEL MOTOR EXPRESS, Case No. 08-11838-E
Debtor. Chapter 7

Marianna Williams, Trustee,
Plaintiff,
v. Adv. Proc. No. 13-05148

Flying J, Inc.,
FJ Management, Inc. d/b/a/ Flying J, Inc.,
Flying J Insurance Services, Inc., and/or its successor
The Buckner Company,
Transportation Alliance Bank, Inc.,
TAB Bank, Inc., TAB Bank, Inc. d/b/a
Transportation Alliance Leasing, LLC,
Stephen Parker,
Gresham & Associates, LLC,
Gresham & Associates, Inc.,
Gresham and Associates of Indiana, Inc.
Jagjit "J.J." Singh,
John Does A, B, and C and Jane Does A, B, and C
Defendants.

MEMORANDUM OPINION ON MOTIONS TO DISMISS AND TRUSTEE'S RESPONSE THERETO

These matters are before the Court on various motions to dismiss (collectively "Motions to Dismiss") this adversary proceeding and the Chapter 7 Trustee's response in opposition. The motions to dismiss were filed by Transportation Alliance Bank, Inc., Transportation Alliance Leasing, LLC, and Stephen Parker (the "TAB Defendants")(Adv. Proc. No. 13-05148, ECF No. 10), Flying J, Inc., FJ Management, Inc., Flying J Insurance Services, Inc., and the Buckner Company (the "Flying J Defendants")(Adv. Proc. No. 13-0514, ECF No. 12), Jagjit Singh ("Singh")(Adv. Proc. No. 13-05148, ECF No. 27), and Gresham & Associates, LLC, Gresham & Associates, Inc., and Gresham & Associates of Indiana, Inc. ("Gresham & Associates")(Adv. Proc. No. 13-05148, ECF No. 42), (all defendants are collectively referred to herein as "Defendants"). The Flying J Defendants also moved, alternatively, for summary judgment as to The Buckner Company pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure. The Chapter 7 Trustee, Marianna Williams, ("Trustee") filed a collective response in opposition to the four motions to dismiss (Adv. Proc. No. 13-05148, ECF No. 57).

The Court conducted a hearing on the motions and Trustee's response on June 23, 2015, after which it took the matters under advisement.[1]

I. JUDICIAL BACKGROUND

In June of 2012, Hon. G. Harvey Boswell, the bankruptcy judge originally presiding over this case, retired. This case was assigned to Hon. George W. Emerson, Jr., U.S. Bankruptcy Judge for the Western District of Tennessee, Western Division, on September 12, 2012, because another Judge had not been appointed in the Eastern Division upon Judge Boswell's retirement.

Following his appointment as U.S. Bankruptcy Judge for the Western District of Tennessee, Eastern Division, Hon. Jimmy L. Croom was assigned the case. Judge Croom recused himself, having

[1] At the hearing, counsel for Trustee orally moved to voluntarily dismiss the complaint as to Defendant Carolina Casualty Insurance Company. The Court granted the motion and an order was entered on the Court's docket dismissing Carolina Casualty Insurance Company, without prejudice, on June 29, 2015.

previously entered an appearance as U.S. Attorney representing the Internal Revenue Service during the pendency of the case prior to taking the bench as a U.S. Bankruptcy Judge in March, 2013. Following Judge Croom's recusal, the case was reassigned, again, to Hon. George W. Emerson, Jr.

II. PROCEDURAL BACKGROUND

On May 22, 2008, St. Michael Motor Express ("Debtor"), filed its voluntary Chapter 11 petition. Louis P. Saia, III ("Saia") was Debtor's sole shareholder, president, and chief executive officer. Debtor operated the business of St. Michael Motor Express as "debtor in possession" as defined by 11 U.S.C. § 1101, and was vested with all of the rights, powers, and duties of a debtor in possession as set forth in 11 U.S.C. § 1107. On September 19, 2008, Debtor timely filed its proposed Chapter 11 plan of reorganization and disclosure statement. The Court approved Debtor's disclosure statement on October 29, 2008, and initially set a hearing on confirmation of Debtor's proposed plan of reorganization on December 17, 2008. Several creditors filed objections to Debtor's plan of reorganization. For this reason, the Court continued the confirmation hearing several times throughout 2008 and 2009.

On September 22, 2009, Transportation Alliance Bank, Inc., and Transportation Alliance Leasing, LLC (collectively "TAB") filed an emergency motion for relief from the automatic stay ("Stay Relief Motion") in which TAB alleged that the liability insurance on the trucks Debtor was leasing from TAB had lapsed. TAB further alleged that Debtor continued to operate the trucks despite this lapse in insurance and that Debtor was two months in arrears on the lease payments for the trucks. TAB attached a document styled "Notice of Nonrenewal of Insurance," to the Stay Relief Motion. This notice was on letterhead belonging to Carolina Casualty Insurance Company and indicated that the "insurance producer" was Gresham and Associates of Indiana. The Notice of Nonrenewal of Insurance stated: "We will not renew this policy when it expires. Your insurance will cease on the Expiration Date shown above," and provided that September 20, 2009, was the date of expiration. The reason for nonrenewal

was stated as "Unfavorable Underwriting Factors - Unacceptable Loss History." (Case No. 08-11838, ECF No. 330-1).

TAB moved to set the hearing on the Stay Relief Motion on an expedited basis due to the potential of irreparable harm to TAB as a result of the nonrenewal of liability insurance. The Court granted TAB's motion to set the expedited hearing and scheduled a hearing on the Stay Relief Motion for the next day. At the hearing on September 23, 2009, counsel for TAB stated:

> I'm happy to report that we've reached agreement with the debtor under which TAB will provide funding under the accounts receivable agreement to temporarily bind liability insurance to get the trucks back to Jackson to be surrendered and to complete delivery of current freight loads. And also, we're going to provide the fuel to get the trucks back here and at which time they're going to be surrendered.

(Tr. of September 23, 2009, Hr'g at 4). The Court asked who would prepare the order and counsel for TAB stated that he would.

Counsel for Debtor then asked, "If your Honor, may I make a brief statement on the recording regarding that?" He then went on to state, "We have reached agreement. We will upload an order. It is important on Mr. [Saia]'s behalf for me to note that the debtor denied the allegations with respect to insurance, doesn't believe that they were appropriate or well taken but does agree with the relief under all the circumstances of the case." *Id.*[2]

Despite Saia's objections to the allegations regarding insurance, the consent order was signed by counsel for Debtor and entered with the Court. Saia did not appear in court for the hearing on the

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[2] "In deciding a Rule 12(b)(6) motion, the trial court may consider, in addition to the allegations in the complaint, 'other materials that are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice.'" *Local 295/Local 851 IBT Employer Grp. Pension Trust & Welfare Fund v. Fifth Third Bancorp,* 731 F. Supp. 2d 689, 702 (S.D. Ohio 2010)(citing *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.,* 413 F.3d 553, 560 (6th Cir. 2005). Given Trustee's allegations that multiple Defendants made "misleading, false and incomplete statements" in "open court" before the preceding judge on this case, the Court concludes it is appropriate to review the transcript to be completely advised as to the record of this case.

Stay Relief Motion because he was allegedly in Louisiana to borrow money from family members to use for payment of the insurance premium. (Compl. ¶ 68, Adv. Proc. No. 13-05148, ECF No.1).

The parties entered the consent order (hereinafter "Consent Order") with the Court on September 24, 2009. The terms of the order provided for terminating the automatic stay as to TAB, abandoning the leased trucks from the bankruptcy estate, and allowing TAB to advance the necessary funds to purchase insurance for the limited purpose of completing delivery of current freight loads and returning the trucks to Debtor's location in Jackson, Tennessee. The Consent Order further provided that Debtor would not resume operating the leased trucks until "such time as notice is provided by TAB that liability insurance coverage is secured and in effect." (Consent Order Terminating Automatic Stay and For Abandonment at 2, Bankr. Case No. 08-11838, ECF No. 334).

On September 30, 2009, the parties entered a consent order on the United State Trustee's motion to dismiss for failure to pay quarterly fees and/or file monthly operating reports. Pursuant to the terms of the order, Debtor had until October 6, 2009, to voluntarily convert the case to a case under Chapter 7. If Debtor failed to convert by the stated date, the consent order provided that the United States Trustee would enter an order converting the case. Debtor did not timely convert the case and, as a result, the United States Trustee entered an order converting the case on October 13, 2009. The parties subsequently amended the conversion order on October 16, 2009, to provide that Debtor's Chapter 11 schedules and other statements would be deemed their equivalent in the Chapter 7 case.

Confirmation of Debtor's Chapter 11 plan of reorganization was set for hearing on October 7, 2009. However, because the September 30, 2009, consent order provided for conversion of Debtor's case, the confirmation hearing became moot. On October 14, 2009, Marianna Williams was appointed as the Chapter 7 Trustee in the case. Debtor's Chapter 7 meeting of creditors was held on December 8, 2009, and on March 17, 2010, Trustee issued her report of no distribution. On April 6, 2010, the Court issued a final decree discharging Trustee and closing the case.

On September 11, 2012, the United States Trustee filed a motion to reopen the case to administer assets. The motion was granted without opposition and on October 18, 2012, Marianna Williams was reappointed as Chapter 7 Trustee. On October 18, 2013, Trustee filed an adversary complaint against the Defendants in which she alleged that these multiple Defendants committed several bad acts in their course of dealings with Debtor. These alleged bad acts include fraud on the debtor, fraud on the bankruptcy court, fraudulent transfers and/or conveyances, conversion, tortious conspiracy, and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Trustee is seeking various injunctions, compensatory and punitive damages, imposition of a resulting and/or constructive trust, avoidance of alleged fraudulent transfers and an accounting.[3]

During the hearing on the Motions to Dismiss currently pending before the Court, the parties clarified that the "transfer" which is the cornerstone of Trustee's complaint and which Trustee seeks to avoid, is the "transfer" by repossession of the leased trucks and trailers which took place following the entry of the Consent Order on September 24, 2009. The Consent Order provided for the termination of the automatic stay as to Debtor's interest in the trucks and trailers leased by Debtor as well as the abandonment of the leased trucks and trailers pursuant to 11 U.S.C. § 554(b). The parties do not dispute that the repossession of the leased trucks and trailers took place following entry of the Consent Order.

An order granting relief from the automatic stay is a final order. *Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.* (*In re Sun Valley Foods Co.*), 801 F.2d 186 (6th Cir. 1986). "Consent decrees, stipulations, and agreed judgments are routinely enforced as final orders in the United States Bankruptcy Courts." *Pollack v. F. D. I. C.* (*In re Monument Record Corp.*) 71 B.R. 853, 859 (Bankr. M.D. Tenn.

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[3] Plaintiff includes "constructive trust" and "accounting" in her causes of action section. These "causes of action," however, appear to be relief requested as a result of the other causes of action alleged as opposed to independent grounds for relief. The Court may decline to consider them for these reasons. *Orlowski v. Bates,* No.2:11-CV-01396-JPM-cgc, 2015 WL 1485980, * 6 at n. 1-2 (W.D. Tenn. March 31, 2015). The Court notes that Trustee's complaint is very similar to the complaint in the *Orlowski* case: many of the paragraphs are identical. These two complaints share similar deficiencies as set forth herein.

1987)(citations omitted). The Consent Order lifted the stay as to TAB to allow "TAB to proceed with repossession of the trucks or otherwise protect its interest in the leased trucks...." Further, the Consent Order abandoned the leased trucks from the estate pursuant to 11 U.S.C. § 554(b) and ultimately waived the provisions of Federal Rule of Bankruptcy Procedure 4001(a)(3), which would have otherwise stayed the effect of the order for ten days. (Consent Order Terminating Automatic Stay and For Abandonment at 2, Bankr. Case No. 08-11838, ECF No. 334).

Debtor's consent to relief from the stay as to the TAB parties and abandonment of the trucks binds Trustee to the terms of the Consent Order. "The trustee, as successor to the debtor in possession, is bound by his predecessor's authorized actions." *Paul v. Monts*, 906 F.2d 1468, 1473 (10th Cir. 1990)(citations omitted). *See also Terlecky v. Peoples Bank* (*In re Amerigraph, LLC*), 456 B.R. 349, 356 (Bankr. S.D. Ohio 2011)(recognizing that the acts of the debtor in possession generally bind a subsequently appointed trustee). The purpose of this general rule is to encourage creditors to deal with debtors in possession and better cooperate with a reorganizing debtor. *Id.* (citations omitted). "Creditors must be able to deal freely with debtors-in-possession, within the confines of the bankruptcy laws, without fear of retribution or reversal at the hands of a later appointed trustee." *Armstrong v. Norwest Bank, Minneapolis, N.A.*, 964 F.2d 797, 801 (8th Cir. 1992). An exception to this rule is where there is evidence of fraud or prejudice to the estate, which would warrant more scrutiny by the Court. *See In re Philadelphia Athletic Club, Inc.*, 17 B.R. 345, 347 (Bankr. Pa. 1982). Trustee has alleged that the Consent Order was procured by fraud. Neither Debtor nor Trustee timely appealed the Consent Order or sought its reconsideration pursuant to Federal Rule of Bankruptcy Procedure 9023.

Relief from a judgment that is not based on a clerical mistake or omission is brought pursuant to Federal Rule of Bankruptcy Procedure 9024 which makes Federal Rule of Civil Procedure 60(b) applicable in cases under the Code. The Rule provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civil P. 60(b).

Rule 60(c) provides that a motion based on Rule 60(b) "must be made within a reasonable time and for reasons (1)-(3), no more than a year after the entry of the judgment or order or the date of the proceeding." Further, Rule 60(d) provides that the rule "does not limit a court's power to entertain an independent action to relieve a party from a judgment, order or proceeding."

Trustee has not filed a motion for relief from the Consent Order as contemplated by Federal Rule of Bankruptcy Procedure 9024 within the one-year time period contemplated by Rule 60(c). The Court, however, can entertain this adversary proceeding as an independent action pursuant to Rule 60(d) based on the facts and circumstances alleged in this particular case, including allegations of fraud on the court. *See Barrett v. Sec'y of Health & Human Servs*., 840 F.2d 1259, 1263 (6th Cir. 1987).

> The "indispensable elements" of an independent action under Rule 60(d) are: (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Id.

Relief pursuant to Rule 60(d) is available only in cases "of unusual and exceptional circumstances," and is at the Court's discretion. *Id.* "Fraud on the court" is conduct: (1) on the part of an officer of the court; (2) that is directed to the judicial machinery itself; (3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; (4) that is a positive averment or is

concealment when one is under a duty to disclose; (5) that deceives the court. *Workman v. Bell* (*In re Workman*), 245 F.3d 849, 852 (6th Cir. 2001)(citations omitted). "Officer of the Court" can include counsel practicing before the court, a bankruptcy trustee, and a debtor in possession while performing the trustee's duties including fiduciary obligations while acting as representative of, and in the best interest of the estate. *Official Comm. of Unsecured Creditors v. Michelson* (*In re Michelson),* 141 B.R. 715, 727 (Bankr. E.D. Cal. 1992). Trustee has not alleged fraud on the part of an officer of the court. Furthermore, the Consent Order was signed by the Court and agreed to by Debtor.

Trustee has alleged that "Defendants repeated in open court the misleading, false and incomplete statements that were asserted in this motion." (Compl. ¶ 81, Adv. Proc No. 13-05148, ECF No.1). The Court has reviewed a transcript from the proceedings on September 23, 2009, and finds that this is not the case. In open court the parties announced that they had reached an agreement. Further, Saia's counsel specifically stated that he denied the allegations with respect to insurance.

Despite Saia's objection, the Consent Order was signed by counsel for Debtor and entered with the Court. Given Saia's misgivings at the time of the hearing, the Court concludes that he knew or should have known at that time that he had an appropriate remedy at law if the statements regarding the lapse of Debtor's liability insurance were untrue. "[A]n action for fraud on the court pursuant to Rule 60(b)'s savings clause is 'unavailable to a party whose situation is due to his own fault, neglect, or carelessness.'" *Shaffer v. City Nat'l Bank* (*In re NWFX, Inc.*) 384 B.R. 214, 220 (Bankr. W.D. Ark. 2008)(quoting *Winfield Assocs., Inc. v. Stonecipher*, 429 F. 2d 1087, 1090 (10th Cir. 1970)(also stating that relief based on fraud on the court is not available "if the complaining party 'has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action...to open, vacate, modify or otherwise obtain relief against, the judgment.'")(citation omitted)).

It is also important to note the posture of the case as reflected by the docket at the time of the Stay Relief Motion. On August 11, 2009, the IRS and Debtor entered into a consent order that resolved a

motion to dismiss filed by the IRS. This order required the Debtor to make adequate protection payments to the IRS for the Debtor's pre- and postpetition tax liability. The IRS also had a pending motion to allow an administrative claim which would have called for the immediate payment of $445,000 in postpetition federal taxes. The IRS had also filed an objection to confirmation of Debtor's proposed Chapter 11 plan of reorganization because the plan allegedly failed to properly account for the IRS' $1,346,315.12 claim, along with interest.

In addition to entering into the consent order with the IRS, Debtor also entered into a consent order with the United States Trustee which provided for conversion of the case. Given the status of the case at the time of the hearing on the Stay Relief Motion, coupled with the fact that Debtor had arranged for payment of the insurance deposit *with personal monies from family* (rather than funds generated from Debtor's operations) as well as the alleged two-month arrearage on the truck lease payments owed to TAB, there would have been a number of other plausible grounds for relief from the automatic stay, on September 23, 2009, in addition to Debtor's lack of liability insurance.

The Court cannot conclude that sufficient grounds exist to consider this an "independent action," under Federal Rule of Civil Procedure 60(d). Not only did Debtor fail to inquire further as to the status of the liability insurance, but he also failed to conduct a timely inquiry into the facts that were objectionable at the expedited hearing on the Stay Relief Motion. Had there been such an inquiry, the Debtor may have discovered there was an adequate remedy at law. Two of the "indispensable elements" for an independent action reviewing a prior judgment are not present in this case: absence of negligence on the part of the defendant and absence of an adequate remedy at law. However, in the interest of judicial economy, efficiency, and finality, the Court will go on to address the remainder of Trustee's claims in light of the Defendants' arguments that Trustee's claims are not sufficiently pleaded.

In ruling on a Rule 12(b)(6) motion to dismiss, a court may consider: (1) any documents attached to, incorporated by, or referred to in the pleadings; (2) documents attached to the motion to dismiss that

are referred to in the complaint and are central to the plaintiff's allegations, even if not explicitly incorporated by reference; (3) public records; and (4) matters of which the court may take judicial notice. *Whittiker v. Deutsche Bank Nat'l Trust Co.*, 605 F.Supp.2d 914, 924-25 (N.D.Ohio 2009). Judicial notice is proper as to facts "not subject to reasonable dispute" because they are either: (1) "generally known within the territorial jurisdiction of the trial court;" or (2) "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). *McKinney v. Bayer Corp.,* 744 F. Supp. 2d 733, 741 (N.D. Ohio, 2010).

III. JURISDICTION

28 U.S.C. § 157(a) allows a district court to refer "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." Pursuant to the Standing Order of Reference, Misc. Order No. 84-30, the District Court for the Western District of Tennessee has referred all bankruptcy cases and adversary proceedings to this Court. 28 U.S.C. § 157(d) allows a district court to "withdraw, in whole or in part, any case or proceeding referred under this Section, on its own motion or on timely motion of any party, for cause shown."

On July 29, 2014, the parties to this Adversary Proceeding filed a joint motion to withdraw the bankruptcy reference pursuant to 28 U.S.C. § 157(d) with the District Court for the Western District of Tennessee. Based upon the Supreme Court decisions in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) and *Executive Benefits Insurance Agency v. Arkison* (*In re Bellingham*), 134 S. Ct. 2165 (2014), the parties asserted that the bankruptcy court did not have jurisdiction to enter a final judgment on all of the causes of action asserted by Trustee in the adversary complaint. Because of this, the parties argued that the principle of judicial economy called for a withdrawal of the reference and adjudication of the entire Adversary Proceeding in the District Court. Although not explicitly offered as a basis for withdrawing the reference, the parties also stated that "[t]he Supreme Court has yet to address the issue of treatment

of a jury verdict on a non-core claim in a bankruptcy proceeding." (Joint Mot. To Withdraw the Reference at 2, Adv. Proc. No. 13-5148, ECF No. 72).

On December 31, 2014, the District Court denied the motion to withdraw the reference. Although the District Court acknowledged that Trustee's causes of action include core non-*Stern* claims, core *Stern*-claims, and non-core claims, it determined that this fact alone did not warrant withdrawal of the reference at this point in the proceedings. "In the Court's view, keeping the related claims together in one court–the bankruptcy court–serves judicial economy, conserves the parties' resources and should expedite the bankruptcy process." (Order Den. Mot. To Withdraw Bankruptcy Reference at 5, Adv. Proc. No. 13-5148, ECF No. 77). The fact that withdrawal of the reference may ultimately become necessary for purposes of conducting a jury trial in this matter did not alter the District Court's decision:

> The bankruptcy court's jurisdiction to enter final orders on core matters and proposed findings and conclusions on non-core issues does not evaporate in the face of a jury demand. Rather, the bankruptcy court may retain jurisdiction until it becomes clear whether a jury trial will actually be necessary. Permitting the bankruptcy court to conduct all pre-trial matters in the case does not deprive the parties of their right to a jury trial.

Id. at 6 (citing *In re Batt*, Civil Action No. 12-MC-009-C, 2012 WL 4324930 (W.D. Ky. Sept. 20, 2012); *Official Comm. Of Unsecured Creditors v. Energy Coal Res., Inc.,* (*In re Appalachian Fuels, LLC*), 472 B.R. 731 (E.D. Ky. 2012)); *see also Sigma Micro Corp. v. Healthcentral.com* (*In re Healthcentral.com*), 504 F.3d 775, 787 (9th Cir. 2007).

Subsequent to entry of the District Court's order, the Supreme Court issued its decision in *Wellness International Network, Ltd., v. Sharif*, 135 S. Ct. 1932 (2015). In that case, the Court determined that a bankruptcy court may hear and finally determine core *Stern*-claims as long as "the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge." *Id.* at 1939. Such consent may be express or implied as long as it is "knowing and voluntary." *Id.* at 1948. At the June 23, 2015, hearing on the Motions to Dismiss this adversary proceeding, all of the parties to this proceeding

consented to issuance of a final order by this Court. As such, it is unnecessary for this Court to determine the nature of each of Trustee's causes of action for purposes of this opinion. This memorandum opinion shall serve as the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

IV. ANALYSIS

A. THE PLEADING STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Pursuant to Federal Rule of Civil Procedure 8(a)(2), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7008(b), "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If, in the eyes of the defendant, the plaintiff has not satisfied this pleading requirement, the defendant may seek dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b). When considering a Rule 12(b)(6) motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff, accept the allegations of the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Tam Travel, Inc., v. Delta Airlines, Inc.* (*In re Travel Agent Comm'n Antitrust Litigation*), 583 F.3d 896, 903 (6th Cir. 2009). The court need not, however, "accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Id.* (internal citations and quotations omitted.) "[O]n a 12(b)(6) motion, the moving party bears the burden of demonstrating that the plaintiff failed to state a claim" for relief. *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (citation omitted).

In the case of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), the Supreme Court concluded that in the face of a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Two years later in the case of

Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009), the Supreme Court further explained this pleading requirement:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'... '[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not "show[n]" - "that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

Id. at 678-679 (citing *Twombly*, 550 U.S. at 556-57). "[T]o survive a [Rule 12(b)(6)] motion to dismiss, the complaint must contain either direct or inferential allegations respecting *all material elements* to sustain a recovery under some viable legal theory." *Id.*, 583 F.3d at 903(citation omitted) (emphasis added). Although the allegations as to each element of a claim need not be detailed, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

B. THE PLEADING STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 9(b)

Federal Rule of Civil Procedure 9(b), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7009, provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." This rule requires that the complaint "(1) specify the allegedly fraudulent statements; (2) identify the speaker; (3) plead when and where the statements were made; and (4) explain what made the statements fraudulent." *Republic Bank and Trust Co., v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 247 (6th Cir. 2012)(citation omitted). To survive a motion to dismiss under the Rule 9(b) standard, it is not enough to articulate general averments of fraud attributable to "defendants," but instead a claim must sufficiently identify which defendant made which

misrepresentation. The complaint must enable a particular defendant to determine with what it is charged. *See Hoover v. Langston Equip. Assocs., Inc.*, 958 F.2d 742 (6th Cir. 1992).

> Each individual must be apprised separately of the specific acts of which he is accused, especially in a case involving multiple defendants. The complaint, therefore, may not rely upon blanket references to acts or omissions by all of the 'defendants,' for each defendant named in the complaint is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which he individually stands charged.

Vennittilli v. Primerica, Inc., 943 F.Supp. 793, 798 (E.D. Mich. 1996).

"If Plaintiffs fail to allege facts in keeping with the particularity requirement of Rule 9(b), plaintiffs fail to state a claim under Rule 12(b)(6)." *Michigan v. McDonald Dairy Co.*, 905 F.Supp. 447, 450 (W.D. Mich. 1995)(citation omitted). However, the requirements of Rule 9 must also be read in harmony with the policy of Rule 8 (a)(2) which calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." *Burton Food Servs., Inc. v. Aseireh* (*In re Aseireh),* 526 B.R. 246, 249 (Bankr. N.D. Ohio 2015)(citing *Sanderson v. HCA - The Healthcare Co.*, 447 F.3d 873, 876 (6th Cir. 2006)).

C. THE STANDARDS APPLIED TO EACH CLAIM

COUNT I. A. FRAUD ON THE DEBTOR

Having reviewed the complaint, the Court concludes that the allegations contained within Count I.A. do not meet the specificity standard required by Federal Rule of Civil Procedure 9(b).

Trustee alleges that the statements, representations and activities of the Defendants defrauded Debtor by causing Debtor and individuals Louis Saia, III and Ann Saia to rely upon the misrepresentations to their detriment. Trustee references paragraphs 14, 28, 29, 31, 34-36, 38, 40-58, 60-82, 84-96 and 98-101. These alleged "representations" include such paragraphs as "On the 22nd day of May, 2008, Saint Michael Motor Express filed for Chapter 11 Bankruptcy reorganization and protection." (Compl. ¶ 53, Adv. Proc No. 13-05148, ECF No. 1), and "Pilot and Flying J merged and created Pilot Flying J on July 1, 2010." (Compl. ¶ 99, Adv. Proc. No. 13-05148, ECF No. 1). These

paragraphs, along with the majority of the other paragraphs referenced by Trustee, do not point the Court to an actual representation made by a specifically identified person or entity.

Trustee alleges that the referenced statements were false, intended to mislead and, more specifically, "cause the Debtor to waive defenses to the emergency motion and to mislead the Court in order to allow the Defendants to obtain title to the Debtor's assets through the fraudulent repossession, transfer and sale of assets; and to allow the Defendants to wrongfully, fraudulently, and illegally take the monies and properties of the Debtor to whom and about whom the representations were made." (Compl. ¶ 105, Adv. Proc No. 13-05148, ECF No.1). In paragraph 106, Trustee references the majority of the complaint, paragraph by paragraph, as "representations" that were made to Debtor.

Trustee alleges either intentional misrepresentation or fraudulent inducement on the part of some or all of the Defendants, through which Debtor was misled into not taking action to obtain liability insurance, which ultimately led to the repossession of Debtor's assets, failing to contest the Stay Relief Motion, agreeing to allow Debtor's properties to be repossessed, foregoing attempts to later obtain insurance, and allowing Defendants to take title to all of Debtor's assets. The Court notes that all of the alleged damages suffered by Debtor resulted from the events leading up to and following the emergency hearing on the Stay Relief Motion filed by TAB.

To recover for intentional misrepresentation, Trustee must prove:

> (1)[T]hat the defendant made a representation of a present or past fact; (2) that the representation was false when it was made; (3) that the representation involved a material fact; (4) that the defendant either knew that the representation was false or did not believe it to be true or that the defendant made the representation recklessly without knowing whether it was true or false; (5) that the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) that the plaintiff sustained damages as a result of the representation.

Thompson v. Bank of American, N.A., 773 F.3d 741, 751 (6th Cir. 2014)(citing *Hodge v. Craig*, 382 S.W.3d 325, 343 (Tenn. 2012)).

To recover for fraudulent inducement, Trustee must prove that the Defendants (1) made a false statement concerning a fact material to the transaction, (2) with knowledge of the statement's falsity or utter disregard for its truth, (3) with the intent of inducing reliance on the statement, (4) that the plaintiff reasonably relied on the statement, and (5) that this reliance resulted in an injury. *Id.* (citing *Baugh v. Novak,* 340 S.W. 3d 372, 388 (Tenn. 2011)).

Trustee's complaint alleges the following representations were made to Debtor or to the Debtor's representatives[4]:

> ***Paragraph 28****: Defendant Singh represented and sold the "Flying J Network" as a "one-stop shop" for all of the Debtor's trucking needs. Singh encouraged Saia to use the Flying J network to expand Debtor's business. Singh offered various services to Debtor including a line of credit, financing for Debtor's fleet, factoring and collection of Debtor's accounts receivable and furnishing insurance.*
>
> ***Paragraph 29****: Singh held himself out as being in control of and the decision maker for Flying J. Singh proposed financing 60 trucks and trailers.*
>
> ***Paragraph 34****: Singh was only able to approve financing of 45 trucks at one time, so he directed Debtor to sign altered documents and enter into the leases for the remaining 15 trucks using the St. Michael Hunting and Fishing name to avoid exceeding his authority. In all actions taken concerning the trucks, TAB Bank represented to the Court that all of these trucks were leased by St. Michael.*
>
> ***Paragraph 35****: On June 21, 2006, Defendant Stephen S. Parker advised Saia as to the type and amount of insurance required for Debtor's fleet and cargo.*

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[4] The Court has included the date of the alleged representation as well as the name of the specific Defendant who made the representation in the few instances where dates and individual Defendants were identified in the complaint.

Paragraph 40*: Singh sold the Debtor on the "one-stop shop" services and Flying J, acting through Singh, offered and committed to pay a standard fuel rebate/discount to the Debtor for fuel purchases made by Debtor's drivers.*

Paragraph 41*: When questioned by Debtor's officers, the amounts of the rebate owed were then misrepresented by Defendants and, although requested, no detailed accounting was provided.*

Paragraph 42*: At some point during the fall of 2007, the Defendants, acting through Singh and Parker, approached Saia and represented that Defendant Transportation Alliance Bank, Inc., could/would be able to better collect and handle Debtor's accounts receivable because of the strength and influence of the Flying J network. The individual Defendants represented that Transportation Alliance Bank, Inc.'s factoring and collection program would create an improvement in cash flow for Debtor, provide screening of potential customers, provide timely and aggressive collection of accounts and more effective collection of past due accounts, while reducing Debtor's administrative costs.*

Paragraph 44*: The Defendant Bank agreed to advance 90% of each account receivable and represented that if an account could not be collected within 90 days, that account receivable would be returned to Debtor for collection and the Defendant Bank would only then reverse the 90% it had earlier advanced. Defendants represented that Transportation Alliance Bank would actively and aggressively work to collect Debtor's accounts receivable.*

Paragraph 46*: When Debtor complained, Defendants, through Singh and Parker, represented that they had "reduced" the late fees to $100,000 but never provided any documentation or accounting as to the late fees.*

Paragraph 50*: Defendant TAB provided only confusing and undecipherable reports [to Debtor] with no back up documents.*

Paragraph 59*: On or about June 18, 2009, Debtor received notice that Carolina Casualty Insurance Company would not renew Debtor's liability insurance coverage for its fleet. Katie London advised Debtor of the notice but assured Saia that Flying J Insurance Services, Inc. would be able to place the insurance coverage with Carolina Casualty or another carrier.*[5]

Paragraph 60*: Katie London assured Saia that additional quotes for insurance would not be necessary because Flying J Insurance Services, Inc., would obtain the needed insurance.*

Paragraph 61*: Katie London advised Debtor that a quote had been obtained for Debtor and that coverage would be reissued upon receipt of specified assurances as to premium payment.*

Paragraph 63*: Carolina Casualty issued an offer quote to Debtor which was specifically represented to remain open until the expiration date of the then existing policy or until September 20, 2009, the policy's stated expiration date.*

Paragraph 66*: Katie London advised Saia that Debtor would be required to make a 20% deposit of the total premium amount.*

Paragraph 70*: On September 19, 2009, Saia was called on his cell phone by Stephen Parker and told that Debtor would not be insured by Carolina Casualty. Parker then informed Saia that TAB intended to file an emergency motion in Debtor's bankruptcy to request the court to allow the bank to take control of and repossess Debtor's fleet.*

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[5] Katie London is not a defendant in this adversary proceeding.

"According to Parker, acting as an agent of TAB and TAL, since [Debtor] did not have liability insurance coverage, [Debtor] was operating its fleet illegally."

Paragraph 71*: Katie London told Saia that she was not allowed to talk with him any further and that he would have to talk with Defendants Parker and Singh.*

Paragraph 73*: Defendants TAB and TAL, on September 22, 2009, filed an emergency motion in the Debtor's Chapter 11 proceedings. Defendants represented that they had received a copy of the June 18, 2009 "Notice of Nonrenewal of Insurance" for liability coverage on numerous trucks leased by the Debtor and that Debtor's fleet of tractor trailers was being operated "over-the-road" illegally because they did not have cargo and liability insurance.*

Paragraph 78*: At the same time Defendants were appearing in bankruptcy court to repossess Debtor's fleet based on false and known to be false statements by Defendants, Defendant Parker called Saia and told Saia that if he did not consent to the emergency motion, the Flying J network would be used to notify Debtor's drivers that they were driving uninsured.*

Paragraph 80*: TAB and TAL failed to disclose that Stephen Parker had instructed Katie London in August of 2009 to obtain renewal of the Debtor's insurance policy despite the notice of nonrenewal. Defendants failed to disclose that Katie London advised Debtor that the policy would be obtained. They failed to disclose that the application for renewal had been completed at Katie London's direction and that Carolina Casualty Company had agreed to renew coverage and that there had been an offer and acceptance of insurance coverage and that Debtor was actually in the process of paying the premium deposit when the Defendants were misleading the Court.*

Paragraph 81*: Defendants repeated in open court the misleading, false and incomplete statements that were asserted in the motion for relief from the automatic stay. Defendants failed to disclose to the Court their direct role in the scheme to prevent Debtor from obtaining coverage and the true facts concerning the status of Debtor's insurance coverage. Defendants provided false and misleading information to the Debtor and the bankruptcy Court.*

Paragraph 96*: Defendant Singh repeatedly represented to Debtor that he exercised complete control over Flying J Insurance Service, Inc., TAB and TAL and money and financial matters within the Flying J Network.*

(Compl., Adv. Proc. No. 13-05148, ECF No. 1).

TAB did, in fact, file the Stay Relief Motion in bankruptcy court. The documents attached to Trustee's complaint and to the Stay Relief Motion indicate that Debtor's insurance had lapsed. Trustee alleges that on October 22, 2009, Carolina Casualty Insurance Company issued a notice to "close" Debtor's coverage. Trustee concludes that the issuance of the notice to "close" proves that Debtor had liability insurance up until this date.

Other than the alleged conflicting documents provided to Debtor by Carolina Casualty Insurance Company, Trustee's claims allege a breach of contract between one or more of the Defendants and Debtor, yet Trustee brings no claims for breach of contract. Debtor believes that Flying J did not deliver on its factoring or collections program and that the accounting of the fuel discounts was so confusing that Debtor likely could not tell whether it received the contractual benefits to which it was entitled. None of these allegations is sufficient to state a claim for fraud.

Trustee alleges that Saia believed that the representations being made with regard to Debtor's insurance, i.e., that Debtor's insurance would lapse and not be renewed by Carolina Casualty Insurance Company, were contrary to what he had been told by Katie London. (Compl. ¶ 71, Adv. Proc. No. 13-

05148, ECF No. 1). Saia could not reasonably rely on statements that he believed were untrue. It surpasses all logic to understand why Saia would agree to the entry of the Consent Order based on a premise he believed to be untrue and to which he objected. However, the decision to consent to a termination of the automatic stay binds Trustee because Trustee has failed to allege facts sufficient to state a claim that the Consent Order was procured through fraud. *Paul v. Monts*, 906 F.2d 1468, 1473 (10th Cir. 1990)(citations omitted).

With regard to all other Defendants included in Count I.A., Trustee's fraud claims fail to meet the specificity requirement of Rule 9(b) by failing to identify which Defendant is accused of making which statement. Trustee's complaint is replete with references to statements generally made by "Defendants." "Statements attributed to groups of people without identifying any particular one - or the role that each individual played in the generation of the statement - fail to satisfy the heightened pleading requirements of Rule 9(b)." *Orlowski v. Bates*, No. 2:11-CV-01396-JPM-cgc, 2015 WL 1485980 *8, (March 31, 2015 W.D. Tenn. 2015)(citing *Rohland v. Syn-Fuel Assocs. 1982 Ltd. P'ship*, 879 F.Supp. 322, 334 (S.D.N.Y.1995))("As a general rule, a plaintiff claiming fraud must [ ] establish a connection between the fraudulent statements and each defendant so that each defendant receives notice of the nature of his participation in the alleged fraud."); *see also United States v. Mercy Health Sys. of Sw. Ohio*, 188 F.3d 510, 1999 WL 618018, at *9 (6th Cir. Aug. 5, 1999) (unpublished table decision) (Clay, J., concurring in part and dissenting in part) (noting that Rule 9(b) does not permit a plaintiff to allege fraud by indiscriminately grouping all of the individual defendants into one wrongdoing monolith)(citation and internal quotation marks omitted); *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F. 2d 1242, 1247 (2d Cir.1987) (Where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud).

Finally, and significantly, any fraud claims with regard to the failure of Debtor to obtain insurance due to reliance upon *any* of the Defendants' actions, representations, or omissions, must fail as being

time-barred because the statute of limitations for Trustee's claims is three years pursuant to Tennessee Code Annotated § 28-3-105 (governing actions for injuries to personal or real property and/or conversion). Even if Trustee's fraud claims were sufficiently pleaded, the claims would still fail as being barred by the statute of limitations. The Consent Order was entered with the Court on September 24, 2009. Any alleged misrepresentations which persuaded the Debtor to agree to the Consent Order would have had to occur prior to that time. This adversary proceeding was filed on October 18, 2013. The statute of limitations set forth in Tennessee Code Annotated § 28-3-105 had run as to these counts. 11 U.S.C. § 108 provides that if applicable nonbankruptcy law fixes a period within which the Debtor must commence an action, the appointed trustee must commence such action only before the *later* of the end of the period or two years after the order for relief. For Trustee, the later of these two periods ran on September 24, 2012.

The Court concludes that Count I.A. should be dismissed pursuant to Federal Rule of Civil Procedure 9(b).

COUNT I. B. FRAUD ON THE DEBTOR AND BANKRUPTCY COURT

Trustee alleges Defendants committed bankruptcy fraud and fraud in insolvency under 11 U.S.C. §§ 152, 153, and 157 and Tennessee Code Annotated § 39-14-117.[6] Bankruptcy courts that have faced bankruptcy crime claims have dismissed them for lack of jurisdiction. "Further, there are no cases suggesting that a private right to sue should be implied under this section." *Martin v. Citifinancial, Inc.*, 387 B.R. 307, 314 (Bankr. S.D. Ga. 2007)(citations omitted). *See also Heavrin v. Boeing Capital Corp.*, 246 F. Supp. 2d 728, 731 (W.D. Ky. 2003)(Bankruptcy Code is highly intricate and creates extensive rights for litigants so there is no reason to believe rights should be created where not expressed or clearly implied).

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[6] The "bankruptcy crimes" sections of the United States Code are 18 U.S.C. §§ 152, 153, and 157. The Court assumes the reference to "11 U.S.C." in Trustee's complaint is a typographical error.

Similarly, to determine if a Tennessee criminal statute creates a private cause of action, Tennessee state courts have also looked to statutory structure and legislative history. Factors to be considered include (1) whether the party bringing the cause of action is an intended beneficiary within the protection of the statute; (2) whether there is any indication of legislative intent; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislation. Ultimately, the burden is on Trustee to establish that a private right of action exists under the statute. *Brown v. Tenn. Title Loans, Inc.,* 328 S.W. 3d 850, 855-856 (Tenn. 2010)(citations omitted).

At the hearing on the Motions to Dismiss, Trustee conceded that the claims brought for bankruptcy fraud, mail fraud and wire fraud are not private causes of action but were rather included in Trustee's claims as predicate acts necessary to state a claim under the RICO statutes as discussed *infra*. As such, the Court will not consider these claims independently but notes that Trustee has not sufficiently established a private right of action under any of the criminal statutes mentioned in the complaint, including bankruptcy fraud and fraud in the insolvency, 18 U.S.C. §§ 152, 153, and 157, Tennessee Code Annotated § 39-14-117, 18 U.S.C. § 1343 (wire fraud), and 18 U.S.C. § 1341 (mail fraud). The Court considers these claims as predicate acts in conjunction with Trustee's RICO claims only, and not as separate claims. To the extent that Trustee alleges that she should be relieved from the Consent Order entered into prior to her appointment due to fraud on the court, as the Court has explained, Trustee has not alleged fraud on the part of an attorney or the debtor in possession or other wise alleged that a representation was made to the Court that was contrary to, or reckless, in the face of a known truth by *any* defendant. As such, the Court concludes that Count I.B. of Trustee's complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b).

COUNT I. C. FRAUDULENT TRANSFER AND FRAUDULENT CONVEYANCE

Trustee alleges that "[t]he actions of Defendants, acting individually and in concert with one another, to convert and hide assets of the Debtor estate amount to fraudulent transfers in violation of 11

U.S.C. § 548." (Comp. at ¶ 104 Adv. Proc. No. 13-5148, ECF No. 1). Trustee further claims that "the Trustee is entitled to void any such transfer and have this Court order the Defendants to return to the Trustee all properties, assets, trucks, trailers, monies, properties, or otherwise, that Defendants obtained through said fraudulent transfers to Plaintiff free of debt. *(Id.* at ¶ 114)[7]

The language of the statute is clear: 11 U.S.C. § 548 only applies to transfers made on or prior to the date of the filing of the petition. Trustee alleges that the transfer of Debtor's trucks and trailers occurred well after Debtor's Chapter 11 case was filed. There can be no doubt but that this particular transfer occurred post-petition and is therefore not subject to avoidance as a fraudulent transfer under 11 U.S.C. § 548. "Section 548 states the time period within which a transfer must occur if it is to be avoided. That time period is prior to the filing of the petition." *Hoffman v. Cheek* (*In re Meltzer*), 90 B.R. 21, 25 (D. Conn. 1988). The Court therefore dismisses Trustee's claims under 11 U.S.C. § 548 as Trustee can plead no set of facts which would allow the Court to grant Trustee any relief.

The only means for a trustee to recover estate property that a debtor voluntarily transfers after the bankruptcy filing is set forth in 11 U.S.C. § 549. *Slone v. Anderson* (*In re Anderson*), 511 B.R. 481, 496, 497 (Bankr. S.D. Ohio 2013), *aff'd* 510 B.R. 113 (B.A.P. 6th Cir. 2014). Section 549 allows a trustee to avoid a transfer of property of the estate that occurs after the commencement of the case and is not authorized by the court. Even if Trustee had pleaded a claim under 11 U.S.C. § 549, the transfers in this case were authorized by a Consent Order signed by the bankruptcy court such that § 549 would not apply. 11 U.S.C. § 549(d) also sets forth that an action to avoid a postpetition transfer of property cannot be brought after the earlier of (1) two years after date of the transfer or (2) after the case is closed or dismissed. Because the transfer occurred on or about September 24, 2009, any action to set aside the

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[7] Trustee might be attempting to claim that the transfer of the trucks and trailers is subject to *avoidance* by the Trustee under 11 U.S.C. § 544, however, that section only applies to pre-petition transfers. *Farmer v. Autorics, Inc.* (*In re Branam*), 247 B.R. 440, 444 (Bankr. E.D. Tenn. 2000)(citations omitted).

transfer should have been brought before the earlier of September 24, 2011, or April 6, 2010, when the Chapter 7 case was closed.

Trustee also alleges that "the actions and activities of the Defendants and each of them also amount to fraudulent conveyances under Tennessee Code Annotated § 66-3-101 *et seq*., and Tennessee Code Annotated § 66-3-301 *et seq*." (Compl. ¶ 115, Adv. Proc. No. 13-05148, ECF No. 1). Counsel for Trustee clarified at the hearing on the Motions to Dismiss that the transfer which Trustee alleges is a fraudulent conveyance was the transfer of Debtor's trucks and trailers to the TAB parties. This transfer took place pursuant to the Consent Order entered with the Court on September 24, 2009. This Consent Order was entered on the Court's docket and, upon her appointment as the Chapter 7 Trustee, Trustee knew or could have known of the existence of such transfer.

In Tennessee, the statute of limitations for suits to set aside fraudulent conveyances of personal property are subject to the same statute of limitations as suits for conversion of personal property, and the statute of limitations for conversion is three years from the accruing of the cause of action. *United Nat'l. Real Estate, Inc. v. Thompson*, 941 S.W.2d 58, 62 (Tenn. Ct. App. 1996)(citation omitted).

While Trustee claims that she is entitled to a tolling of the statute of limitations on the RICO claims contained in her complaint (Compl. ¶ 173, Adv. Proc No. 13-05148, ECF No. 1), she has not alleged that she is entitled to a tolling of any statutes of limitations on any other claims. Nor does Trustee claim that the presence of the Consent Order abandoning the trucks and tractors was somehow concealed from her through fraud. Trustee's claim for fraudulent conveyance under Tennessese Code Annotated § 66-3-101 is time-barred by the statute of limitations and will be dismissed.

Trustee has also brought a claim pursuant to Tennessee's version of the Uniform Fraudulent Transfer Act: Tennessee Code Annotated § 66-3-301 *et seq*. The statute of limitations for such claims is four years after the transfer is made or, if later, one year after the transfer or obligation was or could reasonably have been discovered by the claimant. Tenn. Code Ann. § 66-3-310. For the same reasons

Trustee's fraudulent conveyance claims are time-barred, the Court finds that Trustee's claim under the Uniform Fraudulent Transfer Act is likewise time barred by the statute of limitations and will be dismissed.

COUNT II. A. CONVERSION

"In order to establish conversion, the plaintiffs must show that 'the defendant...had an intent to exercise dominion and control over the property that is in fact inconsistent with the plaintiff[s'] rights, and [did] so.'" *Kinnard v. Shoney's, Inc.*, 100 F. Supp. 2d 781, 797-798 (M.D. Tenn. 2000)(citations omitted). In other words, "the elements of a conversion claim are '(1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights.'" *Am. Bank, FSB. v. Cornerstone Cmty. Bank*, 903 F. Supp. 2d 568, 578 (E.D. Tenn. 2012). Property may be converted in one of three ways: a person may personally dispossess another of tangible property, a person may dispossess another of tangible property through the active use of an agent, or under certain circumstances, a person who played no direct part in dispossessing another of property may nevertheless be liable for conversion for "receiving a chattel." *PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W. 3d 525, 553 (Tenn. Ct. App. 2012).

Further, "claims for the conversion of money are viable only when the money in question 'is specific and capable of identification or where there is a determinate sum that the defendant was entrusted to apply to a specific purpose.'" *Id.* (citation omitted).

Trustee's Count II. A. alleges, "The actions of the Defendants and each of them, jointly and severally, and acting in concert with one another, amount to a wrongful conversion of the properties and assets of the Debtor outright and by use of fraud and deceit." (Compl. ¶ 118, Adv. Proc. No. 13-05148, ECF No.1). Trustee cites to the previous 116 paragraphs of the complaint as factual support for her assertion that the Defendants committed conversion.

The only claim related to funds which may have belonged to Debtor or Debtor's estate that is stated in Trustee's complaint with sufficient specificity to identify both the amount of the funds and the named defendant, is found in Paragraph 84:

> *During this period, Saint Michael Motor Express had on deposit the prior year's escrow insurance premium in the amount of $37,438.20 with Gresham & Associates, Inc. and/or Gresham & Associates of Indiana and/or Gresham Associates, LLC, the agent and/or broker for Defendants Flying J Insurance Services, Inc. and Carolina Casualty Insurance Company. These funds were not returned to the Debtor, nor turned into the Trustee for the Debtor's bankruptcy estate as required, but were wrongfully converted by Defendants.*

Gresham & Associates responded to Trustee's allegations and stated that "Upon cancellation of the procured insurance policy, Gresham & Associates refunded the remaining escrow from the unearned premium of $37,438.20 to Flying J Insurance on behalf of and for the benefit of its client, St. Michael Motor Express, Inc." (Mem. In Supp. Of Mot. To Dismiss at 14, Adv. Proc No. 13-05148, ECF No. 42-1). Trustee has recited the necessary elements for a claim of conversion, however, every Defendant has responded that the statute of limitations for conversion has run on Trustee's conversion claim.

Despite the Defendants' challenge to Trustee's claim, Trustee has not sought to amend the complaint or clarified the conversion allegation to specify the date that the conversion occurred. Trustee's claim simply states that the conversion occurred "during this period" and this is factually insufficient for the Court to make any conclusions with regard to the date of the alleged conversion. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

While Trustee has made a formulaic recitation of the elements of a claim for conversion, Trustee has not stated sufficient factual allegations to determine whether Trustee is entitled to the relief requested. The Court dismisses Trustee's claim for conversion *without prejudice*.[8]

COUNT II B. RESULTING TRUST

"Resulting trusts are typically found where there is evidence that someone is 'holding' property that is in his or her name for the benefit of another, or where the beneficiary of the trust has paid money toward and/or worked toward property that is in someone else's name with the agreement that the property would become the beneficiary's property." *Queener v. Helton*, 119 S.W.3d 682, 686-687 (Tenn. Ct. App. 2003).

> A resulting trust arises from the nature of circumstances of consideration involved in a transaction whereby one person thereby becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and although there is an absence of fraud or constructive fraud.

Id. (citing *Rowlett v. Guthrie*, 867 S. W. 2d 732, 735 (Tenn. Ct. App. 1993). "Further there must be a showing that the beneficiary 'actually made payment or incurred an absolute obligation to pay, as part of the original transaction of purchase,' and subsequent conduct of the beneficiary that is independent of the original transaction will not raise a resulting trust." *Id*.

"In Tennessee, a constructive trust may be imposed where: (1) a person procures the legal title to property in violation of a duty to the actual owner; (2) the title to property is obtained by some

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[8]The statute of limitations for conversion is three years. *See* Tenn. Code Ann. § 28-3-105. 11 U.S.C. § 108 provides the time period by which Trustee must bring an action pursuant to applicable nonbankruptcy law. If Trustee's claim for conversion fails as being time-barred on its face, it would be subject to dismissal under 11 U.S.C. § 12(b)(6). *Cobb v. Tenn. Valley Authority*, 1 F. Supp. 3d 864, 870 (W.D. Tenn. 2014). If Trustee's conversion claim is time-barred, the claim could not withstand a renewed Rule 12(b)(6) motion and the claim's amendment would be futile. *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).

inequitable means; (3) a person makes use of some influence in order to obtain title on better terms than it otherwise would have been obtained; (4) a person acquires property with notice that someone else is entitled to its benefits." *Queener*, 119 S.W. 3d at 687 (citation omitted). Further, the entitlement to the remedy of constructive trust must be proved by clear and convincing evidence. *Story v. Lanier*, 166 S.W.3d 167, 185 (Tenn. Ct. App. 2004)(citing *Browder v. Hite*, 602 S.W.2d 489, 493 (Tenn. Ct. App. 1980)).

As stated in note 3, *supra,* Trustee's counts for "resulting trust" and "constructive trust" are not independent causes of action but are instead relief requested as a result of Trustee's claims for conversion, fraudulent transfer, and fraudulent conveyance. Because the Court has dismissed Trustee's claims for conversion, fraudulent transfer, and fraudulent conveyance, the Court concludes that Trustee is not entitled to the imposition of a resulting or constructive trust and Count II.B. should be dismissed.

COUNT III. ACCOUNTING

As an initial matter, Trustee's "Accounting" claim in Count III references 11 U.S.C. § 543(a) as authority for the Court to issue an injunction prohibiting the Defendants from disposing of any of Debtor's property assets or money. 11 U.S.C. § 543(a) provides that:

> A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

11 U.S.C. § 543(b)(2) further provides that "A custodian shall . . . (2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian."

11 U.S.C. § 101(11) defines "custodian" as:

> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title; (B) assignees under a general assignment for the benefit of the debtor's creditors; or (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the

> purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

Trustee has failed to explain how 11 U.S.C. § 543 applies to any of the Defendants or whether any of the Defendants is a "custodian" pursuant to (A), (B), or (C) of that section. Trustee is only entitled to an accounting by a "custodian." The cases pertaining to classification as a "custodian" make it clear that Trustee must allege that Defendants were holding assets of Debtor for the benefit of creditors or that Defendants were trustees, receivers, or agents who were authorized, appointed, or ordered to take possession of property of Debtor. *See In re Pride Foods, Inc.,* 22 B.R. 356, 358 (Bankr. D. Neb. 1982); *In re Cadmenton United Super, Inc.,* 140 B.R. 523, 525 (Bankr. W.D. Mo. 1992); *Skinner v. First Union Nat'l Bank (In re Skinner)*, 213 B.R. 335 (W.D. Tenn. 1997)*; Tese-Milner v. Moon (In re Moon)*, 385 B.R. 541 (Bankr. S.D.N.Y. 2008). The legislative history of the section makes this clear as well.

> "Custodian" is defined, to facilitate drafting, and means prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or a liquidator or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee.

Cadmention United Super, 140 B.R. at 525 (quoting H.Rep. No. 595, 95th Conf., 1st Sess. 310 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6267).

The Court finds that Trustee has failed to state a claim for an "accounting" by a "custodian" as set forth in 11 U.S.C. § 543 and concludes that Count III should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

COUNT IV. TORTIOUS CONSPIRACY

"An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff." *Trau-Med of Am., Inc.*

v. Allstate Ins. Co., 71 S.W. 3d 691, 703 (Tenn. 2002)(citations omitted). Civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy. *Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., LLC*, 461 F. Supp. 2d 629, 642 (M.D. Tenn. 2006). *See also, Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. 1983)('Since liability for civil conspiracy depends on the performance of some underlying tortious act, the conspiracy is not independently actionable; rather it is a means for establishing vicarious liability for the underlying tort.'); *Watson's Carpet and Floor Coverings, Inc., v. McCormick*, 247 S.W.3d 169, 179 (Tenn. Ct. App. 2007)(citation omitted)(a conspiracy is not actionable where the thing itself is privileged).

If a civil conspiracy claim sounds in fraud, the claim must meet the pleading requirements of Rule 9(b). *Orlowski v. Bates,* No. 2:11-cv-01396-JPM-cgc, 2015 WL 1485980 (W.D. Tenn. March 31, 2015) at *10 (citing *Borsellino v. Goldman Sachs Grp*., 477 F.3d 502, 507 (7th Cir. 2007)). Trustee's civil conspiracy claim alleges that "the acts of the Defendants...were either lawful acts taken for an unlawful purpose and/or unlawful acts taken in concert as part of a wrongful and unlawful scheme to wrongfully defraud, convert, and obtain Debtor's properties by fraudulent and unlawful means..." By alleging fraud as an integral part of the civil conspiracy claim, Trustee's civil conspiracy claim sounds in fraud. *Orlowski* at *11.

"The purpose of a conspiracy claim is to ensure that each conspirator may be held 'responsible for everything done by his confederate which the execution of the common design makes probable as a consequence'; in other words, each conspirator is liable for the damage caused by the other." *Freeman Mgmt Corp. v. Shurgard Storage Ctrs., LLC*, 461 F.Supp. 2d 629, 642 (M.D. Tenn. 2006)(citation omitted).

"A civil conspiracy ... is neither a punishable offense standing alone nor a wrong capable of supporting a cause of action by its own weight. Consequently, the procedural law applicable to the gravamen of the complaint applies to the civil conspiracy claim." *Swafford v. Memphis Individual*

Practice Ass'n, No. 02A01-9612-CV-00311, 1998 WL 281935 at *11-12 (Tenn. Ct. App. June 2, 1998)(giving as examples, personal injury one-year statute of limitations and personal injuries from tort of civil conspiracy having same statute of limitations; libel statute of limitations is one-year, therefore claim of civil conspiracy to libel is governed by same).

The statute of limitations for a conspiracy starts to run from the last overt act done in furtherance of the conspiracy. "...[*I*]*t is not when the result or the suffering is continued - not when the suffering is done, but when the act is done which causes the suffering*. It is the overt act causing the conspiracy that causes the damages and it is from this act that the statute begins to run and not from the suffering or the hurting as a result of the act." *Id.* at *12 (emphasis in the original).

If the underlying predicate tort claim fails, the conspiracy claim fails as well. *See Levy v. Franks*, 159 S. W. 3d 66, 82 (Tenn. Ct. App. 2004). "Conspiracy, standing alone, is not actionable where the underlying tort is not actionable." *Lane v. Becker*, 334 S.W.3d 756, 763 (Tenn. Ct. App. 2010). The Court has determined that all of the predicate state law tort claims alleged by Trustee should be dismissed and as such, Trustee's tortious conspiracy claim as set forth in Count IV must fail as well and will be dismissed.

Though not alleged in any of her claims for relief, in the body of the complaint Trustee alleges that all of the Defendant "entities" had no separate existence of their own but were merely alter egos of the Flying J network and were used to accomplish unlawful purposes including execution of a fraudulent scheme to defraud, obtain, and seize Debtor's assets and as such, the corporate veil of Flying J, Inc. should be pierced so that each Defendant is held jointly and severally liable for the fraudulent acts alleged by Trustee. (Compl. ¶ 88, Adv. Proc. No. 13-05148, ECF No.1).

The equitable remedy known as "piercing the corporate veil" allows a court to disregard the separate legal entity of a corporation upon a showing that it is a sham or dummy or where necessary to accomplish justice. *Hulsing Hotels Tenn., Inc. v. Steffner* (*In re Steffner*), 479 B.R. 746 (Bankr. E.D.

Tenn. 2012)(citation omitted). The remedy is to be applied with "great caution" and "the party wishing to pierce the corporate veil has the burden of presenting facts demonstrating that it is entitled to this equitable relief . . . the equities must substantially favor the party requesting the court to disregard the corporate status." *Id.* Fraud is a required element of an action to pierce a corporate veil in Tennessee and in order to survive a 12(b)(6) motion to dismiss, the Plaintiff must sufficiently allege that the corporate form was used to sanction a "fraud or similar injustice." *Southeast Tex. Inns, Inc. v. Prime Hospitality Corp.,* 462 F. 3d 666, 674 (6th Cir. 2006). Because the Trustee has failed to sufficiently plead fraud on the part of any Defendant or to plead a conspiracy to defraud among the Defendant entities, the Court concludes that Trustee has failed as a matter of law to state a claim to pierce Flying J, Inc.'s corporate veil.

COUNT V. CIVIL RICO A. CONDUCT OF THE SCHEME AND ENTERPRISE

Trustee's civil RICO claims must also meet the pleading requirements for Rule 9(b) for the same reasons that Trustee's tortious conspiracy claims must. "When the predicate act for a civil RICO claim would need to meet the requirements of Rule 9(b), the civil RICO claim itself must meet these same pleading requirements." *Orlowski* at *10. "The particularity requirements of Rule 9(b) apply to mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, when used as predicate acts for a RICO claim." *Id.* (citing *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.,* 48 F.3d 1066, 1069 (8th Cir. 1995)). If a predicate act is time-barred by a statute of limitations, the alleged predicate act cannot be used to support a RICO action. *See James v. McCoy,* 56 F. Supp. 2d 919, 940 (S.D. Ohio 1998).

In Trustee's Count V., A. and B., Trustee addresses her claims regarding the prepetition dealings between Debtor and the defendants. The gravamen of Trustee's RICO claims are that the Defendants' alleged activities amounted to a RICO enterprise for the purpose of creating, pursuing, and financing a scheme to obtain through illegal means, the business, properties, and assets of Debtor. (Compl. ¶ 136, Adv. Proc No. 13-05148 ECF No. 1).

Trustee's RICO claims include the following allegations, in addition to all of the previous allegations and claims of the complaint:

> ***Paragraph 137****: Defendants and each of them participated in the continuing and ongoing conspiracy to defraud the Debtor.*
>
> ***Paragraph 138****: The racketeering acts took place within ten years of each other and pose a threat of continuing if not abated.*
>
> ***Paragraph 140****: Defendants began the illegal scheme at some time period in or after 2006, and continue the scheme to the present, as of the filing of this Complaint.*
>
> ***Paragraph 141****: The various individuals and entities in the action engaged in mail, wire and bankruptcy fraud and also committed conversion and aided and abetted the other Defendants' unlawful conduct.*
>
> ***Paragraph 142****: Each wrongful act set forth in the complaint was a specific predicate act to carry out and accomplish the fraudulent scheme to obtain the Debtor's property through the purported "abandonment," to retain Debtor's accounts receivable and monies, escrow accounts, and to deprive the Debtor of its properties, assets and monies, without any compensation therefore.*
>
> ***Paragraphs 143-144****: Singh directed the enterprise and several John and Jane Doe defendants may play roles in the enterprise. Singh ranks at the top of the RICO enterprise and controlled the flow of money.*
>
> ***Paragraph 145****: Parker ranks below Singh but has acted to carry out the enterprise's unlawful purposes and collect money from Debtor to pass on to Singh and other Defendants in the Flying J network.*

Paragraph 146-147*: The Flying J network is a RICO enterprise. All of the Flying J entities and/or their successors as well as the TAB defendants are owned by Flying J, Inc., and controlled by Singh and Parker.*

Paragraph 149*: Defendants affirmatively represented to Debtor that it would receive the benefit of the "one stop shop" for trucking services through the RICO enterprise.*

Paragraph 152*: The goals and purpose of the Flying J RICO enterprise was to illegally obtain the monies, properties and assets of the Debtor for the use and benefit of the Defendants.*

Paragraph 155*: The Debtor's assets were commingled at Defendant's direction to pay the various Defendants.*

Paragraph 157*: The illegal scheme was carried out by U.S. Mail, check, money order and/or wire transfers and the internet.*

Paragraph 158*: Despite the promises made to Debtor, Defendants had no intention of fulfilling the "one stop shop" network promise, but intentionally manipulated the accounts and assets of Debtor within its control with the intention of repossessing its properties and taking over its accounts.*

Paragraph 160*: Defendants committed acts of wire fraud by use of telephone communications and email communications in furtherance of the unlawful scheme and made fraudulent misrepresentations over the telephone wires and via email.*

Paragraph 161*: Defendants used the U.S. mail in furtherance of the fraudulent, wrongful and unlawful scheme.*

Paragraph 163*: The transmission of documents and making communications through mail and interstate wires was for the purpose of inducing the Debtor to entrust*

its monies, accounts and properties to Defendants, securing Debtor's reliance, cooperation, and participation with Defendants. The communications were made as part of the scheme to defraud Debtor and conceal the truth from Debtor regarding Defendants' activities and the subject transactions.

Paragraph 167*: The Defendants' actions also amount to bankruptcy fraud and fraud in insolvency.*

Paragraph 170*: The Defendants engaged in the above-referenced multiple activities which adversely affected interstate commerce and by which they targeted multiple victims, including the Debtor's estate.*

(Compl., Adv. Proc. No. 13-05148, ECF No. 1).

The RICO Act provides, in relevant part,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c). Thus, to state a RICO claim, [Plaintiff] must plead the following elements: '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'

Moon v. Harrison Piping Supply, 465 F.3d 719, 723 (6th Cir. 2006)(citation omitted). Further, to establish a RICO violation under § 1962(c), a plaintiff must allege that the RICO enterprise engaged in a "pattern of racketeering activity" consisting of at least two predicate acts of racketeering activity occurring within a ten-year period. 18 U.S.C. § 1961(5). *Moon,* 465 F.3d at 723. Conspiracy to violate any subsection of 18 U.S.C. § 1962 is a separate RICO violation under § 1962(d). "The plaintiff in a civil RICO suit must show that a RICO predicate offense not only was a 'but for' cause of his injury, but was the proximate cause as well." *E. Sav. Bank, FSB v. Papageorge*, 31 F. Supp. 3d 1, 11-12 (D.C. 2014)(citing *Hemi Group, LLC v. New York*, 559 U.S. 1, 9, 130 S. Ct. 983, 989 (2010)). If a defendant in a private civil action, such as this one, is found to have violated RICO, that defendant is liable for treble damages, costs and attorneys fees pursuant to 18 U.S.C. § 1964(c).

"The pleading of two predicate acts may not be sufficient because [§] 1961(5) assumes that there is something to a RICO pattern *beyond* the predicate acts involved." *Moon,* 465 F.3d at 724 (citing *H.J., Inc. v. N. Bell Tel. Co.*, 492 U.S. 229, 238, 109 S.Ct. 2893 (1989)). "[T]he term pattern itself requires the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of continuity plus relationship which combines to produce a pattern." *Id.* (citations omitted).

To satisfy the "relatedness" prong, the predicate acts must possess "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* (citation omitted).

Further, the alleged predicate acts must have sufficient "continuity." This "is both a closed-ended and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition." *Id.*

"Continuity may be established at the pleading stage by alleging facts of either closed- or open-ended racketeering activity. A closed period of continuity may be demonstrated 'by proving a series of related predicates extending over a substantial period of time. . .Although there are no rigid rules regarding what amounts to 'a substantial period of time,' racketeering activity lasting only 'a few weeks or months and threatening no future criminal conduct' is insufficient." *Id; see* also *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994)(predicate acts over 17 months did not satisfy the closed period analysis); *Vild v. Visconti*, 956 F.2d 560, 569 (6th Cir. 1992)(predicate acts over six or seven months not sufficient under closed-period analysis).

Trustee has failed to sufficiently plead any of the underlying fraud claims in the complaint or to state a claim for conversion or any other state-law claim. Trustee has also failed to state a claim for mail fraud or bankruptcy fraud. The only remaining potential predicate acts are two cellular telephone calls upon which Trustee bases her claim for wire fraud. (Compl. ¶¶ 70 and 78, Adv. Proc. No. 13-05148, ECF No. 1). However, two telephone calls over a two-day period do not satisfy the requirement that the

acts extend over a "substantial period of time," even assuming the calls constitute racketeering activity. The complaint lacks facts which could establish a closed-ended period of racketeering activity.

The Court's analysis does not end there, however. "Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated." *H.J. Inc*., 492 U.S. at 242, 109 S.Ct. 2902, (citing S. Rep. No. 97-617 at 158). The open-ended continuity requirement turns on whether the plaintiff has "pleaded facts suggesting the threat of continued racketeering activities projecting into the future. In *H.J.*, the Supreme Court held that open-ended continuity could be pleaded through facts showing 'a distinct threat of long-term racketeering activity,' or by showing 'that the predicate acts or offenses are part of an ongoing entity's regular way of doing business.'" *Moon,* 465 F.3d at 727.

Trustee has also failed to plead facts that satisfy the open-ended continuity requirement. Trustee has failed to plead an ongoing threat of any kind or that any particular action on the part of the Defendants was part of their "regular way of doing business." Trustee has pleaded a single scheme, single victim and single injury. Other courts have found that such factors make it virtually impossible to state a RICO claim in those circumstances. *Id.* at 726 (citing *Edmondson & Gallagher v. Alban Towers Tenant Ass'n.*, 48 F.3d 1260, 1265 (D.C. 1995))(multiple predicate acts fail to show a pattern where the acts were really a single scheme to accomplish one discrete goal with no potential to extend to other persons or entities).

Because Trustee has failed to allege sufficient facts to plead the existence of a pattern of racketeering activity, the Court concludes that Trustee has failed to state a RICO claim and Count V.A. of Trustee's complaint should be dismissed pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6).

COUNT V. CIVIL RICO B. MAIL, WIRE, AND BANKRUPTCY FRAUD

In RICO cases in which the "predicate acts" are mail and wire fraud, the Plaintiffs must plead which defendant caused what to be mailed (or made which telephone call) and when and how each mailing (or telephone call) furthered the fraudulent scheme. *Gotham Print, Inc., v. American Speedy Printing Ctrs., Inc.* 863 F. Supp. 447, 458 (E. D. Mich. 1994).

> To satisfy Rule 9 when pleading predicate acts of main [sic] or wire fraud, the complaint must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made and (4) explain why the statements were fraudulent. Moreover, in providing a "scheme to defraud" under mail and wire fraud, the plaintiff must assert a plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, reputation or promises. Additionally, Plaintiff must show scienter; that the defendant acted with recklessness with respect to potentially misleading information.

Prater v. Livingston Ave. Child Care, No 2:14-CV-490, 2015 WL 1439322 at * 4 (S.D. Ohio March 27, 2015). Failure to meet the Rule 9(b) burden will cause the dismissal of a RICO claim for failure to plead the predicate acts. *Gotham Print,* 863 F. Supp. at 457. Mail fraud consists of a scheme to defraud along with the use of the mails in furtherance of that scheme. Wire fraud consists of a scheme to defraud and the use of wires in furtherance of the scheme instead of mail. To establish a scheme to defraud, a plaintiff must show a plan or course of action by which someone uses false, deceptive, or fraudulent pretenses or promises to deprive someone else of money. Scienter is also an essential element, whereby the Plaintiff must show that the defendant acted either with a specific intent to defraud or with recklessness with respect to potentially misleading information. *Heinrich v. Waiting Angels Adoption Servs,. Inc.*, 668 F.3d 393, 404 (6th Cir. 2012).

The following references were made by the Plaintiff with regard to mail fraud:

> ***Paragraph 90****: The Defendants, individually, collectively, and through the Flying J network enterprise, and/or association used the United States mail, internet, wire and telephone directed to and within the State of Tennessee and elsewhere in order to carry out the scheme to defraud.*

Paragraph 141*: The Defendants in this action are various individuals and entities who have, together and in combination, conspired to and perpetuated multiple violations of RICO, and engaged in fraud, including, but not limited to, mail, wire, and bankruptcy fraud as set forth hereinafter. Defendants also committed conversion, and aided and abetted the other Defendants' unlawful conduct.*

Paragraph 157*: The illegal scheme was carried out via US Mail by check, money order, and/or wire transfers and internet.*

Paragraph 161*: The Defendants used the United States mail in furtherance of the fraudulent, wrongful and unlawful scheme, in violation of 18 U.S.C. § 1341, each act of which constitutes a predicate act under 18 U.S.C. § 1962, and each of which was a direct and proximate cause of damages to the Debtor's estate.*

Paragraph 163*: The transmission of these documents and the making of these communications through the United States mails and interstate wires was for the purpose of, among other things, inducing Debtor to entrust its monies, accounts and properties to the Defendants, thereby securing debtor's total reliance on and continued cooperation and participation with Defendants. Thus the communications were made in connection with and for the purpose of executing a scheme to defraud Debtor and to conceal from Debtor the truth regarding the Defendants' activities and the subject transactions.*

Paragraph 165*: As described above, the Defendants, through their enterprise, knowingly, willfully, and intentionally communicated through methods of wire and mails, false and misleading information to Debtor.*

(Compl., Adv. Proc. No. 13-05148, ECF No. 1).

Trustee failed to allege that any specific communications were made via U.S. Mail. In fact, Trustee has failed to allege that *any* Defendant mailed *any* document whatsoever. Trustee has failed to

plead with particularity, or even plead a single act of mailing, fraudulent or otherwise. Each allegation of mail fraud is stated only in general terms and fails to describe any particular action taken by any particular Defendant. Accordingly, Trustee has failed to state a claim for civil RICO based on mail fraud as to any of the Defendants.

With regard to wire fraud, Trustee alleged two phone calls were made:

> ***Paragraph 70****: On or about September 19, 2009, Saia was called on his cell phone by Stephen Parker and told that St. Michael Motor Express, contrary to the representations made, would not be insured by Carolina Casualty Insurance Company. Knowing that Singh controlled the Defendant insurance agency and the Defendant bank, Saia demanded to speak with Singh. Saia's request was denied. Parker then informed Saia that the Defendant, Transportation Alliance Bank, Inc. intended to file an emergency motion in St. Michael's bankruptcy in Jackson, Tennessee to request the Court to allow the bank to take control of and repossess St. Michael's fleet. According to Parker, acting as an agent of Transportation Alliance Bank and Transportation Alliance Leasing, since St. Michael Motor Express did not have liability insurance coverage, St. Michael was operating its fleet illegally.*
>
> ***Paragraph 78****: At the same time Defendants were appearing before the Bankruptcy Court to repossess Debtor's fleet based on the false and known to be false statements by Defendants, Defendant Parker called Saia, who was in Louisiana, and told Saia that if he, as President and sole owner of St. Michael Motor Express, Inc. did not consent to the emergency motion and repossession of St. Michael's fleet of vehicles, the Flying J network would be used to notify Debtor's drivers that they were driving while uninsured. The drivers would then abandon the Debtor's trucks and cargo on the spot. Faced with this threat and in order to protect Debtor's customers, Saia then called his*

wife who, at the time, was attending the emergency motion hearing in Bankruptcy Court, and told her to instruct Debtor's counsel to consent to the motion.

(Compl., Adv. Proc. No. 13-5148, ECF No. 1).

Even assuming that these two cell phone calls were "predicate acts" sufficient to support a RICO claim, the two acts fall short of establishing the necessary "pattern" as required by 18 U.S.C. § 1961(5).

Plaintiffs' allegations concerning the phone calls concern two separate days immediately prior to a single bankruptcy court hearing. This time period is simply too short to constitute a closed period of continuity sufficient to state a RICO claim. "Moreover, by making no allegations concerning other individuals, entities or transactions, Plaintiffs cannot establish that there exists 'a distinct threat of long-term racketeering activity' or that such allegedly unlawful activity is 'part of [Defendants'] regular way of doing business.'" *Crehan v. Countrywide Bank, FSB,* No.1:11 CV 613, 2012 WL 4341049 at *9 (W. D. Mich. Feb. 15, 2012).

Trustee alleges that Stephen Parker was the Vice President of Commercial Loans at Transportation Alliance Bank, Inc., as well as as an officer, agent or representative of Transportation Alliance Leasing, LLC. The factual content of the first call, that Debtor's insurance was not going to be renewed, is supported by the Notice of Nonrenewal generated by Carolina Casualty Insurance Company. Further, Parker's notice to Debtor that TAB was going to file the Stay Relief Motion was true and did, in fact, happen. Trustee never alleged that Parker knew facts which negated the Notice of Nonrenewal or that he acted recklessly with the knowledge that the information was potentially misleading. In short, Trustee's RICO claim also fails for lack of any allegations regarding scienter on behalf of any of the Defendants.

Trustee never asserted that Parker knew that Debtor might have had insurance or knew that the insurance had been extended, renewed, or obtained. While Trustee alleges that Saia was in the process of borrowing money to pay for the down payment on a policy, Trustee never alleges that Saia, in fact,

obtained the monies or that they were paid to secure the policy. Except for informing Debtor what types of insurance that TAB and TAL required for the collateral which secured Debtor's obligations (Compl. ¶ 35, Adv. Proc. No. 13-05148, ECF No. 1), there are no allegations in the complaint that Parker had any knowledge of Debtor's actual insurance status except that it would not be renewed. Debtor's policy *was not renewed*, according to Trustee's own allegations. In paragraph 80, Trustee alleges that Parker instructed Katie London to obtain renewal of Debtor's insurance policy. Trustee never alleges Parker knew that such renewal was actually accomplished. There has been no indication that Parker knew anything other than the fact that Debtor's insurance was going to lapse on the date of the cancellation notice as set forth in paragraph 59 of the complaint.

Lack of insurance, especially when coupled with a failure to make payments on secured collateral, can show lack of adequate protection of the secured creditor's interest in collateral, and thus may be "cause" for terminating the automatic stay. *McCullough v. Horne* (*In re McCullough*) 495 B.R. 692, 696 (W.D.N.C. 2013). *See also In re Planned Sys., Inc.*, 78 B.R. 852, 860 (Bankr. S.D. Ohio 1987)(facts evincing lack of insurance coverage for collateral may entitle the movant to relief from the stay for "cause"). Filing a motion for relief from the automatic stay would be a reasonable, if not common, action for a secured creditor under the circumstances. Trustee has not pleaded facts which might show that Parker or any other Defendant had the necessary scienter to demonstrate a scheme to defraud.

With regard to bankruptcy fraud as a predicate act, Trustee has alleged:

> ***Paragraph 110***: *The actions of the Defendants, individually and acting in concert with one another as set forth above, amount to bankruptcy fraud and fraud in insolvency in violation of 11 U.S.C. §§ 152, 153 and 157 [sic] and T.C.A. § 39-14-117, given that Defendants have knowingly and fraudulently: (A) caused the transfer and conversion of property and the concealment of property and equity in property of the bankruptcy estate; (B) devised a scheme or artifice to defraud Debtor's estate and obtain trucks, trailers and*

equipment of the Debtor for below market value, by repossessing and thereby asserting legal title to property which Defendants, as a result of their representations, actually held such property in trust for the Trustee.[9]

(Compl. ¶ 110, Adv. Proc. No. 13-5148, ECF No. 1).

18 U.S.C. § 152 has nine separate subsections, each of which describe prohibited activity relating to a case under Title 11. Trustee has failed to state which separate subsection the Defendants have violated, but based on the allegations of Trustee's complaint, the Court can extrapolate potential violations as pleaded in the initial 101 paragraphs. To the extent that the Court has interpreted Trustee's allegations of "bankruptcy fraud" incorrectly, it is clear that Trustee has failed to plead the claim with sufficient specificity by failing to cite to a specific subsection that might apply to Trustee's allegations.

18 U.S.C. § 152(1) prohibits "knowingly and fraudulently concealing from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States trustee, any property belonging to the estate of the debtor. . ."

18 U.S.C. § 152(2) prohibits knowingly and fraudulently making a false oath or account;

18 U.S.C. § 152(3) prohibits making a false declaration, certificate, verification or statement under penalty of perjury;

18 U.S.C. § 152(4) prohibits knowingly and fraudulently presenting a proof of claim or using such claim;

18 U.S.C. § 152(5) prohibits knowingly and fraudulently receiving any material amount of property from a debtor after the filing of a case;

[9] See note 6 *supra*.

18 U.S.C. § 152(6) prohibits knowingly and fraudulently giving, offering, receiving, or attempting to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in a case;

18 U.S.C. § 152(7) states that "A person who in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 152(8) prohibits, before or in contemplation of filing a case, knowingly or fraudulently concealing destroying, mutilating, falsifying, or making a false entry in recorded information relating to the property or financial affairs of the Debtor;

18 U.S.C. § 152(9) prohibits, after the filing of a case, knowingly and fraudulently withholding from a custodian, trustee, marshal or other officer of the court or a United States Trustee entitled to its possession any recorded information relating to the property or financial affairs of the Debtor.

Trustee alleges that the Defendants knowingly and fraudulently transferred, converted and concealed property of the estate or property of Debtor. These allegations might pertain to either § 152(1) or 152(7). In addition to failing to specify which enumerated violation occurred, Trustee's allegations of bankruptcy fraud and fraud in insolvency fall woefully short of the requirements to plead fraud with the sufficiency required by Rule 9.

Trustee fails to name a specific defendant and paragraph 110(A) fails to identify the "property" or "equity in property of the bankruptcy estate" that was allegedly transferred or converted. The Court cannot conclude that there was, in fact, an injury suffered by the Plaintiff or which of the multiple Defendants committed such transfer or conversion. The Court has dismissed Trustee's claims for conversion and fraudulent transfers as being insufficiently pleaded and/or time-barred. Where the

predicate act is time-barred by a statute of limitations, the alleged predicate act cannot be used to support a RICO action. *See James v. McCoy,* 56 F. Supp. 2d 919, 940 (S.D. Ohio 1998). Further, because a claim for "bankruptcy fraud" sounds in fraud, the claim must meet the pleading requirements of Rule 9(b). *Orlowski v. Bates,* No. 2:11-cv-01396-JPM-cgc, 2015 WL 1485980 (W.D. Tenn. March 31, 2015) at *10 (citing *Borsellino*, 477 F.3d at 507).

Trustee further alleges that the Defendants violated 18 U.S.C. § 153. Section 153 only applies to persons who have access to property or documents belonging to an estate by virtue of the person's status as trustee, custodian, marshal, attorney or other officer of the court or as such person's agent. Trustee has failed to allege that *any* of the Defendants fall within the category of "trustee, custodian, marshal, attorney or other officer of the court" and failed to identify which of the multiple Defendants violated this particular section. Nothing in the pleadings or exhibits provided to the Court would support a conclusion that § 153 applies to any of the Defendants. The Court concludes, therefore, that Trustee's allegations as to this section must be dismissed.

Trustee alleges that the Defendants have violated 18 U.S.C. § 157 as well. Section 157 has three subsections describing prohibited activity. Because Trustee has failed to specify which subsection the Defendants allegedly violated, the Court will examine them all. Section 157 provides that:

> A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so, - (1) files a petition under title 11...(2) files a document in a proceeding under title 11...(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title, imprisoned not more than 5 years, or both.

In Paragraph 110(B), Trustee alleges that Defendants "devised a scheme or artifice to defraud Debtor's estate and obtain trucks, trailers and equipment of Debtor for below market value, by repossessing and, thereby asserting legal title to property which Defendants, as a result of their representations, actually held such property in trust for the Trustee."

18 U.S.C. § 157(1)-(3) contains three elements: 1) the existence of a scheme to defraud; 2) the filing of a petition or the filing of a document or the making of a false or fraudulent representation; and 3) for the purpose of executing or attempting to execute the scheme. *See United States v. DeSantis,* 237 F. 3d 607, 613 (6th Cir. 2001).

Trustee's claims of the existence of a scheme to defraud also fail for lack of specificity as required to plead a claim sounding in fraud. Further, Trustee's allegations with regard to fraud in insolvency under Tennessee Code Annotated § 39-14-117 likewise fail for failure to plead claims sounding in fraud with the required specificity.

The Trustee's RICO claims are similar to those alleged in *Craighead v. E.F. Hutton & Co., Inc*., 899 F.2d 485, 495 (6th Cir. 1990). There, the Court concluded that the plaintiff had failed to plead fraud with particularity and as a result, the plaintiff's RICO claim failed. "The plaintiffs' collection of conclusions and unrelated, unexplained events fails to set forth any instance of mail fraud, securities fraud, or any other fraud, with *any* particularity. As plaintiffs have failed to allege any predicate acts, there can be no pattern of racketeering." *Id.* Trustee has likewise failed to plead *any* fraud with *any* particularity. The Court concludes that Trustee has failed to state a claim for any of the underlying predicate acts of mail fraud, wire fraud, or bankruptcy fraud with the particularity required by Federal Rule of Civil Procedure 9(b) and, as such, Count V.B of Trustee's complaint will be dismissed.

V. EQUITABLE TOLLING

In Count V.C., Trustee states that she is entitled to a tolling of the statute of limitations with regard to her RICO claim because Defendants allegedly misrepresented and/or concealed from Debtor material facts concerning the transactions described in the complaint.

There is a four-year statute of limitations for filing a civil RICO complaint. *Rotella v. Wood,* 528 U.S. 549, 120 S. Ct. 1075 (2000). Defendants have argued that the four-year statute of limitations for civil RICO claims has run as to Trustee's claims. Once a defendant alleges that a statute of limitations

applies, the burden shifts to the Plaintiff to show that an exception to the statute of limitations exists. *Campbell v. Grand Trunk W.R.R. Co.,* 238 F.3d 772, 775 (6th Cir. 2001). However, when the face of a complaint makes it apparent that the time limit for bringing the claim has expired, plaintiff must affirmatively plead why the violations were not discovered earlier and why the statute should be tolled. *Auslender v. Energy Mgmt. Corp.,* 832 F.2d 354, 356 (6th Cir. 1987).

Assuming that Trustee had sufficiently pleaded her RICO claim, Trustee must also show an exception to the statute of limitations. There is an exception to this rule, however, where "a pattern remains obscure in the face of a [RICO] plaintiff's diligence in seeking to identify it." *Rotella,* 528 U.S. at 561, 120 S.Ct. 1084. As Debtor's counsel appeared in court to consent to the Stay Relief Motion, it was put on the record that the "Debtor denied the allegations with respect to insurance, doesn't believe that they were appropriate or well taken..." (Tr. of Sept. 23, 2009, Hr'g at 4). Debtor consented to the relief from the automatic stay despite Debtor's denials and objections. If Debtor had such misgivings regarding the allegations made to the Court about the status of Debtor's liability insurance, Trustee cannot now claim that Debtor was unaware that misrepresentations might have been made to either Debtor or the bankruptcy court at the time of the Stay Relief Motion.

It is apparent that Debtor took no further actions on his alleged objections to the Stay Relief Motion. Debtor's own actions as set forth in the complaint expose the lack of diligence on the part of Debtor and later Trustee in pursuing any civil RICO claims.

For the reasons set forth herein, Trustee's claim for equitable tolling also fails based on the complete lack of factual support for the conclusory and vague allegations of misrepresentation and concealment of "material facts concerning the transactions described in the complaint." (Compl. ¶ 173, Adv. Proc. No. 13-05148, ECF No. 1).

In the response in opposition to the Motions to Dismiss, Trustee alleges that the "false statements of material facts and misrepresentations made in open court as to the alleged absence of St. Michael's

insurance for its motor fleet" were not discovered by Trustee and Debtor's former owner until a third party subpoena was served on Carolina Casualty Insurance Company in July of 2011. The actual facts that were discovered in July of 2011, and which prompted Trustee to believe that a conspiracy was worked upon Debtor and Court, are obscured by vague assertions of "false statements" and "misrepresentations" in Trustee's response to the Motions to Dismiss. Trustee fails to state why the alleged RICO violations were not discovered earlier and as such, there are no facts alleged which would support Trustee's assertion that she is entitled to equitable tolling of her RICO claims.

As the Court has concluded, Trustee has failed to state any claim upon which the Court could find that there were material facts and misrepresentations made in connection with Debtor's insurance. There were no facts or representations made in open court in conjunction with the Consent Order. There was no testimony offered to the bankruptcy court at that time. The only statements made on the record were announcements through counsel. Even though Debtor's attorney represented to the Court that Debtor denied the allegations with regard to insurance, Debtor consented to the relief requested by TAB. Debtor was represented by counsel and if Debtor chose not to consent to the requested relief, Debtor had the opportunity to have an evidentiary hearing. Debtor's owner now appears to regret the decisions made with regard to the Stay Relief Motion, but the Court cannot conclude that any actions by any particular Defendants were fraudulent based on the complaint's conclusory allegations made against the entire multitude of Defendants.

Trustee's claim for equitable tolling fails to state a claim upon which the Court could grant Trustee such relief and will be dismissed.

VI. CONCLUSION

As set forth in this Memorandum Opinion, the Court finds that Trustee's complaint should be dismissed for the reasons set forth herein and the Defendants' Motions to Dismiss are hereby

GRANTED. The Flying J Defendants' alternative motion for summary judgment is now MOOT. A separate order will be entered accordingly.

cc: Plaintiff
Counsel for Plaintiff
All Defendants
Counsel for All Defendants