Dated: March 09, 2016
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:

SAINT MICHAEL MOTOR EXPRESS, Case No. 08-11838-E

Debtor. Chapter 7

ORDER DENYING MOTION TO REOPEN

This matter is before the Court on motion of Saint Michael Motor Express ("Debtor/Corporation") to reopen this Chapter 7 Case for the sole purpose of filing a motion for relief from this Court's Memorandum Opinion and Order, entered in Adversary Proceeding No. 13-05148, on August 21, 2015. A joint objection to the motion to reopen was filed in the main bankruptcy case (Chapter 7 Case No. 08-11838) by Flying J, Inc., FJ Management, Inc. d/b/a Flying J, Inc., Flying J Insurance Services, Inc. or its successor, the Buckner Company, Transportation Alliance Bank, Inc., Transportation Alliance Leasing, LLC, Jagjit "J.J." Singh, and Stephen Parker (the "Defendants") to which Debtor/Corporation has now replied. A joint objection to the motion

to reopen the Adversary Proceeding has also been filed by the Defendants, with a separate response in opposition to the motion to reopen having been filed by Gresham & Associates, LLC, Gresham & Associates, Inc., and Gresham & Associates of Indiana, Inc. (the "Gresham & Associates Defendants"). Debtor/Corporation has also filed a reply to the joint objection in the Adversary Proceeding. Debtor/Corporation attached the proposed motion for relief from judgment to the motion to reopen. The motion for relief from judgment also contained Exhibit D, the affidavit of Louis P. Saia, III, ("Mr. Saia") Debtor/Corporation's sole-shareholder, president and chief executive officer. Mr. Saia is not the Debtor in this case and was not a party to the Adversary Proceeding.

The Court previously set forth the procedural history of Debtor/Corporation's bankruptcy case, which ultimately culminated with the conversion of Debtor/Corporation's Chapter 11 case to a case under Chapter 7 on October 13, 2009. (*See* Mem. Op. at 3-5, Adv. Proc. No. 13-05148, ECF No.84). Unfortunately, since that time Debtor/Corporation's Chapter 7 case has been reopened twice (once in error) and reclosed twice and now Debtor/Corporation seeks to reopen the case yet again.

Briefly, the Court will explain the previous two reincarnations of this no-asset Chapter 7 case:

On September 11, 2012, the United States Trustee filed a motion to reopen this case, appoint a Chapter 7 Trustee "to administer assets," and defer the reopening fee. The motion was set for a hearing, was unopposed, and the case was reopened by order entered on October 16, 2012. Chapter 7 Trustee Marianna Williams ("Trustee") was reappointed and, on October 18, 2013, the Trustee filed suit against the Defendants alleging fraud on the Debtor/Corporation, fraud on the bankruptcy court, fraudulent transfers and/or conveyances, conversion, tortious conspiracy, and violations of

the Racketeer Influenced and Corrupt Organizations Act ("RICO"). (Complaint, Adv. Proc. No. 13-05148, ECF No. 1).

The Defendants filed motions to dismiss the Trustee's complaint, which were responded to by counsel for the Trustee and, after the issues were fully briefed and oral arguments were heard, this Court dismissed the Adversary Proceeding in its entirety by the Memorandum Opinion and Order that were entered on the Court's docket on August 21, 2015. The Court's decision was based on the Plaintiff's failure to plead several counts with the required specificity, Plaintiff's failure to state claims upon which the Court could grant relief, and Plaintiff's failure to bring several of the counts within the requisite statute of limitations.

The Trustee did not appeal the Court's Memorandum Opinion and Order. On September 21, 2015, the Trustee entered a report of no distribution requesting to be discharged from further duties as Trustee. On October 7, 2015, Adversary Proceeding No. 13-05148 was closed and on October 9, 2015, Chapter 7 Bankruptcy Case No. 08-11838 was closed.

On October 25, 2015, Debtor/Corporation herein, by counsel of record, filed a motion to reopen this Chapter 7 Case, No. 08-11838, and uploaded an order granting the motion to reopen, which was inadvertently signed and docketed on October 29, 2015, without having been set for a hearing or otherwise providing notice and an opportunity for creditors or interested parties to object. On November 10, 2015, the Court entered an order vacating the order reopening the case and subsequently set the motion to reopen for a hearing and set a deadline for interested parties to respond to the motion. On November 10, 2015, immediately prior to the entry of the Court's order vacating the order reopening the case in error, the Chapter 7 Trustee filed a notice of proposed abandonment of any interest the estate might have in Adversary Proceeding No. 13-05148. The

notice of proposed abandonment also indicated that interested parties had fifteen (15) days to object to the proposed abandonment.

On November 24, 2015, several of the Defendants filed a joint response to the Trustee's notice of proposed abandonment, which was then voided by the bankruptcy clerk because the case was in a closed status at the time of the filing of the joint response. The Defendants apparently anticipated this because in their joint response they indicated that they objected to the notice on the basis that they did not have a proper opportunity to respond because the notice was docketed to a case that was opened in error and then closed.

The Court conducted a telephonic pre-trial conference on Debtor/Corporation's motions to reopen on January 26, 2016, at which time the parties agreed that the motion and responses had been fully briefed and the Court took these matters under advisement.

"The decision on a motion to reopen is committed to the sound discretion of the trial court . . .," *Smyth v. Edamerica, Inc*. (*In re Smyth*), 470 B.R. 459, 461 (B.A.P. 6th Cir. 2012). "Section 350(b) provides that a bankruptcy court, in its discretion, may reopen a bankruptcy case to provide relief to the debtor or for other cause. 11 U.S.C. § 350(b). A bankruptcy case should not be reopened if doing so is futile." *Id*. at 462, citing *In re Jenkins*, 330 B.R. 625, 628 (Bankr. E.D. Tenn. 2005 and *Zirnhelt v. Madaj* (*In re Madaj*)149 F.3d 467, 472 (6th Cir. 1998). The burden of establishing "cause" is on the movant. 2 Hon. Barry Russell, *Bankruptcy Evidence Manual* §301:43 (West 2015-2016 ed.) *See also* multiple cases cited therein. The Bankruptcy Code does not define "cause" to reopen a case.

> The court may consider numerous factors including equitable concerns and ought to emphasize substance over technical considerations. *In re Easley-Brooks,* 487 B.R. 400, 406-07 (Bankr.

> S.D.N.Y. 2013)(citing *In re Emmerling*, 223 B.R. 860, 864 (B.A.P. 2d Cir. 1997). Factors to consider include: (1) the length of time the case was closed; (2) whether a nonbankruptcy forum has jurisdiction to determine the issue which is the basis for reopening the case; (3) whether prior litigation in the bankruptcy court determined that a state court would be the appropriate forum; (4) whether any parties would suffer prejudice should the court grant or deny the motion to reopen; (5) the extent of the benefit to the debtor by reopening; and (6) whether it is clear at the outset that no relief would be forthcoming to the debtor by granting the motion to reopen.

In re Wilson, 492 B.R. 691 (Bankr. S.D.N.Y. 2013). Here, as in the *Wilson* case, the last factor is particularly applicable. As set forth below, the Court finds that Debtor/Corporation lacks standing to bring the motion for relief from judgment and, even if Debtor/Corporation had standing, Debtor/Corporation should have timely filed a Notice of Appeal and has given the Court no reason which would justify such failure. Debtor/Corporation could not properly bring a motion for relief from judgment in this instance and reopening this case to allow Debtor/Corporation to bring a motion for relief from judgment would be futile.

The Court's initial inquiry is whether or not Debtor/Corporation has standing to bring the motion in the first instance.

> Standing is a jurisdictional issue. *In re Troutman Enterprises, Inc*., 286 F.3d 359, 364 (6th Cir. 2002). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975). Standing is a "qualifying hurdle that [a plaintiff] must satisfy even if raised sua sponte by the court." *Community First Bank v. Nat'l Credit Union Admin*., 41 F.3d 1050, 1053 (6th Cir. 1994); *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1988)(issues of standing can be raised by this Court sua sponte because standing is "always a "threshold inquir[y]").

Wilhoite v. Suntrust Bank et al. (*In re Wilhoite*), 11-06339; 13-90362; 2014 WL 505171 (Bankr.

M.D. Tenn. Feb. 7, 2014). Further, standing is a jurisdictional bar and every federal court has an independent obligation to satisfy itself of its own jurisdiction and may not entertain an action over which jurisdiction is lacking. *Id*. (citations omitted).

Debtor/Corporation asserts that the "cause of action dismissed by the [Memorandum Opinion and Order] Judgment reverted to the Debtor." (Mot. to Reopen at 1, 08-11838, ECF No. 416). The Court has examined role of the Trustee and the statutory prerequisites for effective abandonment and has determined that the cause of action did not revert to the Debtor/Corporation.

The Trustee is the only party with authority to bring a Rule 60 motion for relief from judgment. Promptly after the filing of the petition, which constitutes the order for relief pursuant to 11 U.S.C. § 301, a trustee is appointed. *See* 11 U.S.C. § 701. After appointment, one of the many duties of the trustee is to collect and reduce to money the property of the estate and thereafter close the estate as will serve the best interests of parties in interest. *See* 11 U.S.C. § 704(1). "When a debtor files for Chapter 7, 'all legal or equitable interests of the debtor in property as of the commencement of the case' are given to the estate. *See* 11 U.S.C. § 541 (2006). Once the bankruptcy trustee is appointed, she becomes the sole representative of the estate, she is the one with the pecuniary interests, and she alone has the 'capacity to sue and be sued,' including filing an appeal on behalf of the estate. *See* 11 U.S.C. § 323." *Khan v. Regions Bank* (*In re Khan*); 3:12-00025, 2012 WL 5381444 at * 2 (E.D. Tenn. Oct. 31, 2012).

There are, however, two narrow exceptions that provide limited standing to a Chapter 7 Debtor: if an appeal would result in a surplus, or if the appeal would affect the terms of a discharge. A Debtor has the burden to point to concrete evidence that either exception applies. *Id*. (citations omitted). Neither exception has been argued by Debtor/Corporation. Debtor/Corporation has not

asserted that there would be a surplus if Debtor/Corporation asserts claims belonging to the estate. Debtor/Corporation has not asserted that the claims would have any effect on the estate whatsoever.

Further, Debtor/Corporation is not entitled to the Chapter 7 discharge that is available to individual debtors. 11 U.S.C. § 727(a)(1) states that "The court shall grant the debtor a discharge, unless (1) the debtor is not an individual." See *N.L.R.B. v. Better Bldg Supply Corp.*, 837 F.2d 377 (9th Cir. 1988); *Kramer v. Cash Link Systems*, 652 F.3d 840, 841 (8th Cir. 2011)("A corporation is not entitled to a discharge of its debts in a Chapter 7 proceeding.") Thus, the second possible narrow exception to the Trustee's exclusive standing does not apply.

In addition to the standing prerequisite, the process of abandonment by a Trustee, while not complex, has certain requirements which must have been met in order for Debtor/Corporation to acquire whatever rights the Trustee had in the adversary proceeding.

11 U.S.C. § 554 provides:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate and that is of inconsequential value and benefit to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
>
> (d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

"Section 554 of the Bankruptcy Code provides a mechanism by which the bankruptcy trustee

may abandon property if it is not needed by the estate and its retention serves no purpose in effectuating the goals of the Bankruptcy Code." 5 *Collier on Bankruptcy* ¶ 554.01 at 554-3 (Lawrence P. King, ed., 16th ed. rev. 2013). Abandonment under § 554(a) or (b) occurs only after notice and a hearing. Automatic abandonment under § 554(c) occurs only if property is scheduled, not otherwise administered and the case is closed. Finally, as set forth in §554(d), property that is not abandoned, either after notice and a hearing or at the close of the case, remains property of the estate. *Id.*

Debtor/Corporation's argument that the cause of action has now reverted to Debtor/Corporation fails. There was never an opportunity for any objecting party to respond or for a hearing, rendering the Trustee's notice of abandonment ineffective under § 554(a) and (b).

> Property abandoned under § 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed. *Moses*, 606 F.3d at 795 (quotations and alterations omitted). But such an abandonment is possible only "[a]fter notice and a hearing." § 554(a). The purpose of the notice is to provide "an opportunity for any potential oppo[nent] to the abandonment of such property to file objections and be heard by the Court." *First Carolina Fin. Corp. v. Trustee of Estate of Caron (In re Caron)*, 50 B.R. 27, 30 (Bankr. N.D. Ga. 1984). Federal Rule of Bankruptcy Procedure 6007 implements § 554 . . .

Cook v. Wells Fargo Bank, N.A. (*In re Cook*), No. 12-2100, 2013 WL 1297590 (10th Cir. April 2, 2013)(holding that the right to object to abandonment and seek a hearing are the crucial elements of § 554 and Rule 6007). Federal Rule of Bankruptcy Procedure 6007(a) and (b) state:

> (a) Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustee, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 14 days of the mailing of the

> notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct. (b) A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

The Trustee's purported notice of abandonment in this case did not provide an opportunity to object and request a hearing because it was entered during the brief period of time when Debtor/Corporation's case had been opened in error and, immediately after the entry of the notice, Debtor/Corporation's case was re-closed. As such, any rights to the dismissed Adversary Proceeding, No. 13-05148, have not been abandoned by the Trustee and Debtor/Corporation lacks standing to pursue the cause of action. *See Auday v. Wet Seal Retail, Inc.,* 698 F.3d 902 (6th Cir. 2012).

The cause of action was not abandoned to Debtor/Corporation by operation of law under 11 U.S.C. § 554(c) because the lawsuit was never scheduled. Property that is not properly scheduled remains property of the estate in perpetuity. *Darrah v. Franklin Credit*, (*In re Darrah*), 337 B.R. 313, 316 (Bankr. N.D. Ohio 2005).[1] The cause of action that Debtor/Corporation now seeks to revive was never included in Debtor/Corporation's schedules and was thus not abandoned pursuant to § 554(c) and instead remains property of the estate pursuant to § 554(d).

The Court could end its analysis here due to Debtor/Corporation's lack of standing but,

[1] Pursuant to the amended order converting case to chapter 7 (amended as to satisfying filing requirements only), Debtor/Corporation's Chapter 11 lists, inventories, schedules, statement of financial affairs and matrix were deemed to be the same filed documents in the Debtor/Corporation's Chapter 7 case. Further, the Debtor/Corporation had the right and obligation to make any necessary amendments within 15 days after the entry of the amended order converting case. (Case No. 08-11838; ECF No. 350; Oct. 16, 2009). Debtor/Corporation's Chapter 11 petition did not list a cause of action against any of these defendants in its schedules or statement of financial affairs and has never amended its schedules to do so.

because of the litigious history of this case, will explain why reopening the case would be an exercise in futility which the Court should not allow. *Zirnhelt v. Madaj* (*In re Madaj*) 149 F.3d 467, 472 (6th Cir. 1998). "[T]here must be some potential relief that is available to a movant in a reopened case. Otherwise, reopening a case is pointless and the motion should be denied." *In re Stahl*, 10-30951, 2014 WL 1329551 (Bankr. N.D. Ohio, April 2, 2014).

The Trustee's filing of the notice of abandonment does not effect the Court's decision to deny the motion to reopen herein. The Court notes that the Trustee caused her Report of No Distribution to be filed after the expiration of the time to appeal the Court's Memorandum Opinion and Order. In her report, the Trustee indicated that there was no property available for distribution and, importantly, that the estate of Debtor/Corporation had been *fully administered*. The Trustee's report reflected the status of the adversary proceeding, i.e., that it had been fully administered and had no value whatsoever to the estate. A final order had been entered in the adversary proceeding and the Trustee decided that there were no grounds to appeal the Court's order. As the estate's sole representative, the Trustee was the only party who could make the decision not to appeal the judgment in the Adversary Proceeding just as the Trustee was the only party who could have properly brought a Rule 60(b) motion for relief from that judgment. The Trustee did not file an appeal and the Trustee did not file such motion.

The Trustee's notice of abandonment was filed after the Debtor/Corporation had filed the instant motion to reopen. The notice of abandonment clarified the Trustee's position with regard to the final disposition of the adversary proceeding: it had been fully administered and was of no value to the estate whatsoever. As a practical matter, the notice of abandonment was unnecessary. As the Code makes clear, § 554 was meant to provide for the abandonment of assets that were *not*

otherwise administered. The adversary proceeding which the Trustee abandoned in this case *had been fully administered*. The Trustee's Report of No Distribution reflected that the property had been fully administered and property that has been fully administered does not need to be abandoned, making the Trustee's notice of abandonment completely superfluous.

Debtor/Corporation is seeking to reopen the case for the sole purpose of filing a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024. Rule 60(b) provides: "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.

[R]elief under Rule 60(b) is "circumscribed by public policy favoring finality of judgments and termination of litigation." *Waifersong Ltd., Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). This is especially true in application of subsection (6) of Rule 60(b), which applies "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Olle v. Henry & Wright Corp*., 910 F.2d 357, 365 (6th Cir. 1990); *See also Liljeberg v. Health Services Acquisition Corp*., 486 U.S. 847, 863-64, 108 S.Ct. 2194, 100 L.Ed. 2d 855 (1988). This is because "almost every conceivable ground for relief is covered" under the other subsections of Rule 60(b). *Olle*, 910 F.2d at 365; *See also Hopper v. Euclid Manor*

Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989). Consequently, courts must apply Rule 60(b)(6) relief only in unusual and extreme situations where principles of equity *mandate* relief." *Olle*, 910 F.2d at 365 (emphasis in original).

Debtor/Corporation herein is not entitled to relief from the judgment in question. As other courts have noted, the plan language of Rule 60(b) only entitles a party or its legal representative to relief from a final judgment or order.

> Rule 60(b) allows a court to relieve "a party" or "a party's legal representative" from a final judgment or order. . . The plain language of Rule 60(b) only allows relief to be given to "a party" to the litigation. *Edmonson v. United States Steel Corp.*, 659 F. 2d 582, 585 (5th Cir. 1981)(Clark, J., concurring)("Normally, a non-party has no right under Rule 60(b) to bring an independent action to modify a consent decree agreed upon by the parties, when no such relief is sought by any of the parties themselves."); *Smith v. Mo. Pac. R.R. Co.*, 615 F.2d 682, 685(5th Cir. 1980)(affirming a district court's determination that Rule 60(b) may not be used by a nonparty to attack a final judgment where the nonparty failed to timely intervene); *Houston Gen.*, 193 F.3d at 839 (noting that a non-party's Rule 60 motion to vacate the underlying judgment was rendered moot when its Rule 24 motion for intervention was denied); *United States v. 8136 Dobson St.*, 125 F.3d 1076, 1082 (7th Cir. 1997)("Rule 60 confines the relief it offers to parties, or a party's legal representative. . . "); *Popovich v. United States, 661 F. Supp 944, 951* (C.D. Cal. 1987)("Courts have been quite strict in construing Rule 60(b) and have limited relief under it to those who are unquestionably parties.")

Ericsson Inc. v. InterDigital Communications Corp., 418 F.3d 1217, 1224 (D.C. Cir. 2005). Debtor/Corporation asserts that because it was a party in interest in the bankruptcy proceeding and bears the ultimate burden of the allegedly unconscionable judgment, it has the necessary standing to bring a Rule 60(b)(6) motion to set aside the judgment entered in Adversary Proceeding No. 13-05148.

Debtor/Corporation is confusing bankruptcy "case," a term of art in bankruptcy practice,

with "adversary proceeding," a separate type of legal action altogether. "A case in bankruptcy is the proceeding involving the liquidation or reorganization of a debtor or the adjustment of the debtor's debts. . . The case is to be distinguished from the adversary proceeding, Bankr. R. 7001, and from the contested matter, Bankr. R. 9014, both of which arise in the case under the Bankruptcy Code. . ." (*DuVoisin v. Coker*) *In re Southern Indus. Banking Corp.*, 189 B.R. 697, 702 (E.D. Tenn. 1992). Debtor/Corporation cites no legal authority for the proposition that being a party in interest in a bankruptcy case confers standing on an entity to also request relief from a judgment in a separately filed adversary proceeding, or why the Court should make an exception to the obvious language of Rule 60(b).[2] To the extent that Debtor/Corporation is asserting that it has standing as a "party in interest" because the cause of action is an asset of the estate, "a debtor is a 'party in interest' and has standing to object to a sale of the assets, or otherwise participate in litigation surrounding the assets of the estate, only if there could be a surplus after all creditors' claims are paid." *60 East 80th Street Equities, Inc. v. Sapir* (*In re 60 East 80th Street Equities, Inc.*) 218 F.3d 109 (2d Cir. 2000)(citations omitted). Debtor/Corporation has made no assertions whatsoever of a surplus being available after all creditors' claims are paid.

[2] In the infancy of Adversary Proceeding No. 13-05148, the Court scheduled a telephonic status conference on Tuesday, February 11, 2014, among all of the defendants in the Adversary Proceeding and contacted counsel for Debtor/Corporation and counsel for the proper Plaintiff, the Chapter 7 Trustee. Counsel for Debtor/Corporation declined to participate and indicated by e-mail to the Court on February 10, 2014, that Debtor/Corporation would not have independent counsel going forward, even going so far as to offer to withdraw from representing Debtor/Corporation if the Court or participating counsel believed it was necessary. The Court did not include Debtor/Corporation or Debtor/Corporation's counsel in any further conferences based on this statement. Debtor/Corporation and counsel for Debtor/Corporation continued to receive all notices generated by the clerk's office, however, because Debtor/Corporation's counsel did not file any papers with the Court indicating withdrawal from representation of Debtor/Corporation.

There can be no doubt that the Trustee was the proper party to bring the complaint at the time it was filed.

> Property of a debtor's estate includes all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a)(1). "The commencement of the case" is the moment the debtor files for bankruptcy. *Koch Ref. v. Farmers Union Cent. Exch., Inc.* 831 F.2d 1339, 1343 (7th Cir. 1987). And it is "well established that the interests of the debtor in property" include "causes of action." *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988). A debtor's appointed trustee has the exclusive right to assert the debtor's claim. *Schertz-Cibolo-Universal City, Indep. Sch. Dist. v. Wright* (*In re Educators Group Health Trust*), 25 F.3d 1281, 1284 (5th Cir. 1994).

Honigman v. Comerica Bank et al., (*In re Van Dresser Corp.*), 128 F.3d 945, 947 (6th Cir. 1997).

If Debtor/Corporation was a party to the Adversary Proceeding, Debtor/Corporation could have timely filed an appeal from the Court's Memorandum Opinion and has not explained its failure to do so. Debtor/Corporation asserts that Mr. Saia did not learn that the Court had issued its Memorandum Opinion until September 18, 2015. The Court's Memorandum Opinion was issued on August 21, 2015. The motion to reopen was filed on October 26, 2015. Notice of the docketing of the Court's Memorandum Opinion, order granting the motions to dismiss and the notice of judgment, along with copies of each document, were timely served on counsel for Debtor/Corporation. It is inapposite to now assert that Debtor/Corporation did not have notice of the Court's dismissal of the case in time to appeal the Court's order if it was a party to the Adversary Proceeding.

Debtor/Corporation's motion alleges that the Court's judgment was the result of either misrepresentation, fraud, or legal error. However, Rule 60(b)(6) is only applied in circumstances *not* covered by the first five grounds for relief and only in exceptional or extraordinary

circumstances. "As [the Sixth Circuit Court of Appeals] noted in *Pierce v. United Mine Workers of America Welfare*, 770 F.2d 449, 451 (6th Cir. 1985), cert. denied, 474 U.S. 1104, 106 S.Ct. 890, 88 L.Ed.2d 925 (1986), Rule 60(b)(6) should be used only in exceptional or extraordinary circumstances and 'can be used only as a residual clause in cases which are not covered under the first five subsections of Rule 60(b).'" *Miller v. Owsianowski* (*In re Salem Mortgage Company*), 791 F.2d 456, 459 (6th Cir. 1986).

Debtor/Corporation asserts that the Court's judgment was "influenced by the misrepresentations of the Defendants" (Motion for Relief from Judgment at 2; Adv. Proc. No. 13-05148, ECF No. 90-1). Debtor/Corporation also asserts that it faces extraordinary circumstances and hardship. *Id.* at 6.[3] The Court notes that while Debtor/Corporation necessarily faced financial hardships (as demonstrated by its need to attempt to reorganize under Chapter 11), Debtor/Corporation's Chapter 11 case was converted to a case under Chapter 7 and subsequently closed. Debtor/Corporation's case remained closed from April 6, 2010, when the final decree was filed, until October 18, 2012, when the order reopening the case was entered, after notice and a hearing. Debtor/Corporation has not explained what extraordinary circumstances and hardship exist for Debtor/Corporation more than two years after its Chapter 7 case was closed.

[3] Debtor/Corporation's Chapter 7 was initially closed on April 6, 2010, upon entry of the Court's final decree (Chapter 7 Case No. 08-11838, ECF No.382). Debtor/Corporation alleges no current facts or circumstances which lead the Court to believe that Debtor/Corporation is now facing extraordinary hardship, to the extent that Debtor/Corporation is not defunct. Debtor/Corporation alleges Mr. Saia faces a large judgment on his personal guaranty which grows larger by the day. The Court has recently become aware that Mr. Saia is the plaintiff in a lawsuit currently before the District Court for the Western District of Tennessee against these same Defendants. That lawsuit, currently pending, shares many identical claims with the Trustee's Adversary Proceeding which resulted in the Court's Memorandum Opinion.

Debtor/Corporation also alleges that the Court erred in not finding that the statute of limitations was equitably tolled on all of its claims, that Debtor/Corporation timely brought its breach of contract claims and should have been allowed to amend them, and that Debtor/Corporation's complaint was actually properly brought as a Rule 60(d) action. All of these "mistakes" alleged by Debtor/Corporation are arguably errors of law and could have been raised on appeal. "Rule 60(b), however, is no substitute for appeal, see e.g. *Williams v. Sahli,* 292 F.2d 249, 251 (6th Cir. 1961). . . For an alleged mistake invoking a fundamental misconception of the law, as opposed to those of an obvious nature involving little more than clerical error, the orderly process of appeal is far more appropriate as a remedy. . .the 'reasonable time' limitation for filing a 60(b) motion is viewed, under these circumstances, as having expired after the time for appeal has run." *In re Morrison,* 26 B.R. 57, 61 (Bankr. N.D. Ohio 1982)(citations omitted)(holding that failing to timely prosecute an appeal, except in unusual circumstances, cannot be remedied through a Rule 60(b)(6) motion).

Debtor/Corporation did not allege any circumstances which caused the failure to timely appeal the Court's order, unusual or otherwise. Debtor/Corporation has not alleged new allegations or any new claim which the Court finds so extraordinary as to warrant relief from the Court's Memorandum Opinion as contemplated by Rule 60(b)(6).

Mr. Saia, however, has been sued on his guaranty, as he repeatedly asserts in the self-serving affidavit attached to Debtor/Corporation's motion to reopen. "I and my mother, Ann Saia, were targeted by the defendants' scheme and I have suffered monetary injuries of over $2.8 million on an $800,000 line of credit." Affidavit of Louis P. Saia, III at 9, ¶ 46; Chapter 7 Case No. 08-11838, ECF No. 416-5.

More specifically, he alleges:

> On August 27, 2014, the Utah Court ruled that I was liable for breach of contract and on November 20, 2014, awarded TAB Bank damages in the amount of $1.2 million against me, on my personal guarantee of the same $800,000 line of credit. Ms. Ann Saia had already settled with TAB Bank on the guaranty for the same $800,000 line of credit in an amount of over one million dollars. Furthermore, and despite being contrary to TAB's original pleading and amended pleadings, the Court awarded TAB Bank with pre and post judgment interest at the rate of 30% per annum on the Guaranty regarding the $800,000 line of credit and pre and post judgment interest at the rate of 28.8% per annum on the A/R agreement deficiency. Currently, interest is accruing at approximately $60,000 per month. The court also awarded TAB Bank future attorney's fees in connection with the collection and execution of said judgment.

Id. at 10-11, ¶50. Mr. Saia also states "TAB Defendants continue to harass and enter new Courts of different jurisdictions to enter this fraudulently obtained judgment." *Id*. at 11, ¶ 54. It is apparent to the Court that Debtor/Corporation's sole shareholder, Mr. Saia, is hoping to benefit by allowing this case to be reopened so that he can make another attempt to re-litigate the consent order entered more than six years ago in Debtor/Corporation's Chapter 11 Case and which led to the deficiency judgment obtained against Mr. Saia by the Defendants.

While Mr. Saia has made it clear that he believes reopening Debtor/Corporation's bankruptcy case would be in his best interest, Debtor/Corporation has failed to allege that reopening the case would benefit the estate in any way. As stated earlier, the Debtor/Corporation's case was converted to a Chapter 7 in which Debtor/Corporation will not receive a discharge. There has been no allegation that a surplus might remain after Debtor/Corporation's many creditors were paid in full from any potential recovery from the Trustee's dismissed cause of action. Further, if the Trustee had abandoned the estate's interest in the cause of action, this Court's jurisdiction over such suit might be tenuous, at best. This Court's jurisdiction over Debtor/Corporation's cause of action would have

to be "related to" a case under Title 11 because claims such as "lender liability, common law fraud, securities fraud, and RICO claims against [the defendants] are not ones which 'arise in' a title 11 case because they could arise in cases other than bankruptcy proceedings." *In re McKenzie*, 471 B.R. 884, 896 (Bankr. E.D. Tenn. 2012)(*aff'd* 716 F.3d 404, 6th Cir. 2013) citing *Sanders Confectionary Products, Inc. v. Heller Financial, Inc.,* 973 F.2d 474, 483 (6th Cir. 1992). "[T]he usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Id*. at 897, citing *Lindsey v. O'Brien, Tanksi, Tanzer and Young Health Care Providers* (*In re Dow Corning Corp.*), 86 F.3d 482, 492 (6th Cir. 1996). Debtor/Corporation has not alleged what effect, if any, the suit would have on the estate if the main bankruptcy case and adversary proceeding are reopened to allow Debtor/Corporation to pursue these non-bankruptcy causes of action.

Debtor/Corporation lacks standing to pursue the Trustee's claims and so this motion is procedurally defective from the outset. Even if Debtor/Corporation had standing, Debtor/Corporation offers no reason for its failure to timely appeal the Court's Memorandum Opinion. Further, if Debtor/Corporation had standing to pursue whatever assets remain in this case, Debtor/Corporation would have to assert circumstances much more egregious and extraordinary for this Court to reopen Debtor/Corporation's Chapter 7 case to allow Debtor/Corporation to file a motion for relief from judgment. While Debtor/Corporation asserts that the Court's Memorandum Opinion is a judgment whose effects are unreasonably excessive to Debtor/Corporation, the only effects of the judgment that were asserted in Debtor/Corporation's motion were the judgment's effects on Debtor/Corporation's sole shareholder and his mother.

The cause of action which Debtor/Corporation seeks to revive was not abandoned but was fully administered by the Trustee. Debtor/Corporation lacks standing to pursue it now, even if the suit could somehow be revived now that the time for appeal has run. The motion before the Court appears to be merely the latest maneuver in a dispute between two non-debtor parties: Mr. Saia and the Defendants. The Court's consideration of the underlying dispute would not benefit Debtor/Corporation's estate or its creditors and as such, there is no equitable basis for reopening this case. *See In re HBLS, L.P.*, 468 B.R. 634, 639 (Bankr. S.D.N.Y. 2012).

Debtor/Corporation's motion to reopen Chapter 7 Case No. 08-11838 is hereby DENIED. Debtor/Corporation's motion to reopen Adversary Proceeding No. 13-05148 is also DENIED.

IT IS SO ORDERED.

cc: Plaintiff
Attorneys for Plaintiff
Defendants
Attorneys for Defendants
Debtor
Attorneys for Debtor