



IT IS ORDERED as set forth below:

Date: August 22, 2012

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	:	Case No. 10-60738-MGD
	:	
SECURE BUILDOUT, LLC,	:	Chapter 7
	:	
Debtor.	:	Judge Diehl
	:	
EDWIN K. PALMER, CHAPTER 7	:	
TRUSTEE,	:	Adversary Proceeding
	:	
Plaintiff,	:	No. 12-05063-MGD
	:	
v.	:	
	:	
AMERICAN BODYWORKS, INC., A	:	
GEORGIA CORPORATION,	:	
RAYMOND JAMES GROOVER, JR.,	:	
CHARLES SPENCER, CHAD K. REED,	:	
JAMES C. BUSCH, DAVID CLONTS,	:	
MICHAEL RAMATOWSKI, AND	:	
CHARLES ROBERT PARRISH, JR.,	:	
	:	
Defendants.	:	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO

DISMISS, AND GRANTING PLAINTIFF LEAVE TO AMEND THE COMPLAINT

This adversary proceeding is before the Court on the Motion to Dismiss filed by Defendants American Bodyworks, Inc., Chad K. Reed, and James C. Busch. (Docket No. 12). Reed and Busch seek dismissal of all Claims for Relief in the First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). American Bodyworks, Inc. seeks dismissal of the Second, Third, Fifth, Sixth, and Seventh Claims in the First Amended Complaint.¹ For the reasons stated below, the Motion to Dismiss is granted in part and denied in part. The Trustee is granted leave to amend the First Amended Complaint.

BACKGROUND

Secure Buildout, LLC (“Debtor”) filed a petition under Chapter 7 of the Bankruptcy Code on January 8, 2010. Edwin K. Palmer was appointed the interim Chapter 7 Trustee (“Trustee”) that same day and became the permanent trustee following the § 341 meeting of creditors. The Trustee initiated this adversary proceeding on January 26, 2012 by filing a complaint asserting various state-law claims and claims under 11 U.S.C. §§ 542(b), 544, and 548. The named Defendants are American Bodyworks, Inc. (“ABW”), Raymond James Groover, Jr., Charles Spencer, Chad K. Reed, James C. Busch, David Clonts, Michael Ramatowski, and Charles Robert Parrish, Jr. (“Defendants”). The Trustee and Ramatowski stipulated to Ramatowski’s dismissal as a defendant. (Docket No. 40). ABW, Busch, and Reed filed a first Motion to Dismiss the Complaint; ABW seeks to dismiss the Second and Third Claims and Reed and Busch seek to dismiss all Claims. (Docket No. 4). ABW also filed an Answer to the Complaint. (Docket No. 6). The Trustee filed a response

¹ As discussed below, the First Amended Complaint includes, in the same order, the First, Second, and Third claims in the original Complaint.

to the first Motion to Dismiss. (Docket No. 20). On March 15, 2012, the Trustee filed a First Amended Complaint (“Amended Complaint”) as a matter of right under Federal Rule of Civil Procedure 15(a). ABW, Reed, and Busch filed a Motion to Dismiss the Amended Complaint (“Motion to Dismiss”). (Docket No. 29). ABW also filed an Answer (“Second Answer”) to the Amended Complaint. (Docket No. 31). The Trustee filed a response to the Motion to Dismiss. (Docket No. 37).

The Amended Complaint asserts the following material facts. During 2006 to 2009, ABW operated as a franchisor of health clubs. Groover, Parish, Spencer, Reed, Busch, Clonts, and Ramatowski were shareholders and/or officers and/or directors of ABW or an ABW affiliate. ABW’s obligations to its franchisees included providing proprietary hardware and software business systems and security systems developed by ABW. Initially, ABW provided these goods and services through in-house personnel, but eventually ABW had to use outside vendors. To reduce costs, Grover, Spencer, Reed, Busch, Clonts, Ramatowski, and Parrish organized Debtor in April 2008 for the sole purpose of fulfilling ABW’s obligations to ABW’s franchisees. Groover, Parish, Spencer, Busch, and Reed were members of Debtor and Groover was named the manager. Additionally, Groover, Parish, Spencer, Busch, and Reed all acted as a managing members of Debtor. The Defendants did not adequately capitalize Debtor at its formation.

Thereafter, Debtor delivered and installed proprietary business and security systems to ABW’s franchisees. Debtor shared the same office space, equipment, and employees with ABW, and used ABW funds to operate and to pay some of Debtor’s vendor accounts. Defendants caused Debtor to purchase goods and services on credit to confer benefits to ABW by installing the security systems to ABW’s franchisees. At no time did ABW disclose to third parties that Debtor was

performing the services and delivering the goods that it appeared ABW was performing and delivering. Nor did Defendants cause Debtor to enter into written agreements with the ABW franchisees. ABW and Debtor never entered into any written agreement for Debtor's supply of goods and services on behalf of ABW to ABW's franchisees. Within a year of formation, Debtor ceased its business operations with insufficient assets to satisfy the claims of its creditors.

The Defendants sold ABW to a third party in October 2009 without paying the debts ABW owed to Debtor. In April 2010, Defendants prepared, back-dated, and signed organizational documents for Debtor. Before this time, Defendants had not formally organized Debtor, had not complied with corporate formalities, and did not conduct formal manager or member meetings separate and apart from the meetings of ABW.

On these facts, the Trustee's initial Complaint asserted three claims for relief. The First Claim seeks recovery on an account under 11 U.S.C. § 542(b). The Second Claim seeks to pierce the corporate veil of Debtor in order to render the individual defendants liable for the claims of creditors in this case. The Third Claim asserts "common law fraud" but references causes of action under 11 U.S.C. § 544 and § 548. The Amended Complaint includes these three claims in the same order and adds four more claims. The Fourth Claim seeks to hold Defendants liable for defrauding Debtor. The Fifth Claim seeks to recover damages for breach of fiduciary duties owed to Debtor. The Sixth Claim seeks to recover damages for breaching fiduciary duties owed to Debtor to preserve Debtor's estate for its creditors upon Debtor's insolvency. The Seventh Claim seeks to recover damages for unjust enrichment.

STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure, applicable to this Court pursuant to

Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, permits a defendant in an adversary proceeding to move for dismissal when a plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6); FED. BANKR. P. 7012(b). A pleading fails to state a claim if no recognizable legal theory supports recovery under the facts alleged. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2002); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). When making this determination, the Court must accept as true the complaint's factual allegations. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1271 (11th Cir. 2006). The complaint must contain "sufficient factual matter. . .to 'state a claim to relief that is plausible on its face. 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "Threadbare recitals of the elements of a cause action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

The motion to dismiss standard is heightened here on the allegations of fraud. Rule 9(b) requires that pleadings alleging fraud "must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). With fraudulent misrepresentations, this involves identifying the precise statements made in documents or oral representations, the time, place, and maker of the statements, the content of the statements, and what the defendant obtained by committing the fraud. *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001). Pleadings based on information and belief are generally impermissible except when "the requisite factual information is peculiarly within the defendant's knowledge or control." *In re Rockefeller Ctr.*

Prop. Inc. Sec. Litig., 311 F.3d 198, 216 (3d Cir. 2002); *see also Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1310 (11th Cir. 2002). This case is such an exception because a bankruptcy trustee, on behalf of a debtor's estate, has sued third party insiders for defrauding a debtor. Courts apply Rule 9(b) less stringently in this situation. *Marwil v. Oncale (In re Life Fund 5.1 LLC)*, 2010 WL 2650024, *3-*4 (Bankr. N.D. Ill. June 30, 2010); *U.S. Trust Co. v. Raritan River Steel Co. (In re Am. Spring Bed Mfg. Co.)*, 153 B.R. 365, 374 (Bankr. D. Mass. 1993). Consequently, the Court will take into account here the Trustee's special status in suing these defendants. Yet the Trustee is not absolved of pleading sufficient specific facts to support a strong inference of fraud. *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990).

DISCUSSION

A. The Statute of Limitations

The Court will address the sufficiency or deficiency of each claim for relief in turn. Before addressing each claim for relief, however, it is necessary to address the statute of limitations defense asserted by ABW, Reed, and Busch. Here, ABW, Reed, and Busch seek to dismiss several of the claims for relief on the basis that these claims are state law claims that must be brought under 11 U.S.C. § 544. Section 544 allows a trustee to step into the shoes of an unsecured creditor with an allowed bankruptcy claim and assert a state law cause of action that the unsecured creditor could assert. *Westgate Vacation Villas, Ltd. v. Tabas (In re Int'l Pharmacy & Discount II, Inc.)*, 443 F.3d 767, 770 (11th Cir. 2005). But 11 U.S.C. § 546 provides that a claim under § 544 must be brought before the later of (1) two years after the filing of the bankruptcy case or (2) one year after the appointment or election of the first trustee under 11 U.S.C. § 702 or 11 U.S.C. § 1104. Here, Debtor's case was filed January 8, 2010, and the Chapter 7 Trustee was appointed that same day.

The deadline for bringing an action under § 544 is therefore January 8, 2012. The Trustee's Complaint was first filed on January 26, 2012.

The Trustee responds that (1) Defendants failed to assert the statute of limitations in their answer, thereby waiving that defense; (2) the statute of limitations in § 546 was equitably tolled; and (3) the statute of limitations in § 546 does not apply. With respect to the failure to assert the defense, only ABW has thus far filed an answer. (Docket No. 6). ABW failed to raise the statute of limitations in the answer. Nonetheless, ABW's Motion to Dismiss was filed the same day as the answer, and the statute of limitations was raised in the Motion to Dismiss. (Docket No. 5). While the statute of limitations is an affirmative defense that should technically be plead in an answer, a claim can be dismissed on a Rule 12(b)(6) motion if "it is apparent from the face of the complaint that the claim is time-barred." *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845-46 (11th Cir. 2004) (citations omitted); *AVCO Corp. v. Precision Air Parts, Inc.*, 676 F.2d 494, 495 (11th Cir. 1982). Here, the Motion to Dismiss specifically pleads the statute of limitations in ABW's first response pleading. This is not unfair surprise; the Trustee was able to adequately and timely respond. Hence, the Trustee is not prejudiced, and the defense should not be waived. *See, e.g., Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015-16 (11th Cir. 1997); *Robinson v. Johnson*, 313 F.3d 128, 135-36 (3d Cir. 2002).

With respect to equitable tolling, the facts do not support this argument. Although the Trustee does not say when he discovered the causes of action, it is clear that the Trustee failed to perform a simple action: move this Court to extend the time for filing an avoidance action. The Court can enlarge the time limitation in § 546. *IBT Int'l v. Northern (In re Int'l Admin. Serv.)*, 408 F.3d 689, 699 (11th Cir. 2005). This is not a case where the Trustee has alleged that he discovered

causes of action after the actions were already time-barred; instead, the Trustee apparently learned of the causes of action sometime well before January 8, 2012. The Trustee has plead no facts to suggest that he encountered obstacles in timely moving to extend the time to file an avoidance action. Without more, this Court declines to equitably toll the statute.

Although the Trustee's first two arguments on the statute of limitations fail, the Court agrees that § 546 is inapplicable here to most claims. Under the trustee's avoidance powers, a trustee can bring a state-law cause of action belonging to unsecured creditors in accordance with § 544(b). But a trustee also may bring additional claims that belonged to the debtor prior to bankruptcy. This is because a debtor's interests in causes of action held prior to bankruptcy become estate property. 11 U.S.C. § 541. The bankruptcy trustee then succeeds to these causes of action and is authorized to pursue them. 11 U.S.C. § 704(a)(1) (the trustee shall "collect and reduce to money the property of the estate"); *Miller v. Shallowford Community Hosp. Inc.*, 767 F.2d 1556 (11th Cir. 1985). These actions can include a debtor's alter ego and veil-piercing actions against its own officers and directors for mismanagement. *In re iPCS, Inc.*, 297 B.R. 283, 287 (Bankr. N.D. Ga. 2003); *Moore v. Kumer (In re Adam Furniture Industr. Inc.)*, 191 B.R. 249, 255-57 (Bankr. S.D. Ga. 1996). Although veil-piercing actions are normally brought by creditors, these actions can also be brought by the corporation itself in certain jurisdictions. Georgia law allows a corporation to pierce its own veil to hold the corporation's principals liable for the entirety of the corporations debts. *Baillie Lumber Co. v. Thompson*, 279 Ga. 288, 292 (2005). Hence, a veil-piercing claim against a Georgia debtor's principals is a claim belonging to the estate, and a bankruptcy trustee can seek to pierce a Georgia debtor's own corporate veil to hold the debtor's principals liable for the debtor's debts. *Baillie Lumber Co. v. Thompson (In re Icarus Holding, LLC)*, 391 F.3d 1315 (11th Cir. 2004);

Baillie Lumber Co. v. Thompson, 413 F.3d 1293 (11th Cir. 2005).

In conclusion, the Trustee here can bring a veil-piercing claim on behalf of Debtor against Debtor's principals. And the Trustee can bring any other claims belonging to the Debtor against the Defendants. Because these claims belong to the bankruptcy estate, the Trustee does not have to step into the shoes of an unsecured creditor under § 544, and the statute of limitations in § 546 is inapplicable. The Trustee has asserted in the Third Claim for Relief, however, that he seeks to proceed under O.C.G.A. § 14-2-640, 11 U.S.C. § 544, and 11 U.S.C. § 548. To the extent the Trustee seeks to proceed under § 544 or § 548, the Third Claim is time-barred. But the Trustee can seek to assert the state law causes of action referenced in the Third Claim without proceeding under § 544 so long as the Trustee amends the Third Claim to accurately and sufficiently state a claim for relief, as discussed below.

B. The Claims for Relief

1. First Claim for Relief

The First Claim asserts a claim on account — i.e., a claim to recover amounts owed for goods and services Debtor provided to ABW. The Amended Complaint alleges that Debtor delivered and installed proprietary business and security systems to ABW or its franchisees (thereby satisfying ABW's obligations) and that ABW never made payment to Debtor for these goods and services. The Trustee has therefore stated a sufficient claim for relief as to ABW. The Trustee has also stated a sufficient claim for relief as to Busch and Reed, who are principals of Debtor, because the Trustee has sufficiently stated a claim to pierce Debtor's corporate veil, as discussed below.

2. Second Claim for Relief

The Second Claim asserts that all the Defendants are liable because Debtor's corporate veil

should be pierced. Piercing of the corporate veil is applied to “remedy injustices which arise where a party has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetuate fraud or evade contractual or tort responsibility.” *Brunswick Mfg. Co. v. Sizemore*, 183 Ga. App. 482, 483-84 (1987). (quoting *Hogan v. Mayer & Aldermen of Savannah*, 171 Ga. App. 671, 673 (1984)). This is a fact specific-determination that must be made on a case by case basis. *Id.* To pierce the corporate veil under Georgia law, a plaintiff must show that “the owner abused the corporate form by disregarding the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records, or control.” *Scott Bros. v. Warren*, 261 Ga. App. 285, 287-88 (2003) (citations omitted). Georgia courts have pierced corporate veils when an owner depletes the assets of one company to fund other business enterprises. *Pope v. Professional Funding Corp.*, 221 Ga. App. 552, 553-54 (1996); *Brunswick Mfg.*, 183 Ga. App. at 483-84.

Here, the Trustee has alleged sufficient facts to state a claim for relief. While the factual allegations are short on detail, taken as a whole, they are sufficient to allow an inference of liability. The Amended Complaint alleges Defendants formed Debtor to supply goods and services to ABW’s franchisees, thereby fulfilling ABW’s own obligations to its franchisees. Moreover, the Amended Complaint alleges that Defendants never executed formal organization documents for Debtor until April 2010, and never conducted formal manager or member meetings for Debtor separate and apart from the meetings of ABW. Additionally, the Amended Complaint alleges that Debtor shared the same office space, equipment, and employees with ABW, and used ABW funds to operate and to pay some of Debtor’s vendor accounts; that Defendants caused Debtor to purchase goods and services on credit for the purpose of installing the security systems to ABW’s franchisees; and that

ABW and the Defendants did not disclose to the franchisees – by entering into contracts or otherwise – that Debtor, not ABW, was supplying the services and goods. Finally, the allegation that Defendants sold ABW in October 2009 without paying the debts ABW owed to Debtor adds to the inference of liability.

In total, the Trustee has alleged sufficient facts to allow an inference of liability. While this Court might normally require greater factual detail, the Court takes into account the Trustee's disadvantaged position here. Because the Trustee represents Debtor's estate and did not deal directly with insider Defendants, the Defendants necessarily have greater knowledge of the factual circumstances. The Trustee has stated a sufficient claim for piercing Debtor's corporate veil, and the Motion to Dismiss is denied as to this claim.

3. Third Claim for Relief

The Third Claim – entitled “common law fraud as to creditors” – seeks to recover damages from Defendants to fund unpaid liabilities of the Debtor. The Trustee references three statutory causes of action: O.C.G.A. § 14-2-640, 11 U.S.C. § 544, and 11 U.S.C. § 548. As an initial matter, these statutory causes of action are not common law causes of action, making the Third Claim confusing. Next, at no point does the Trustee lay out the elements of a claim under these sections and attempt to show how these causes of action relate to the facts. Nor does the Trustee otherwise describe the transactions or transfers the Trustee seeks to hold Defendants liable for, and which Defendants are liable for which transactions or transfers. Because the Trustee seeks to avoid transfers under § 544 and § 548, the Trustee is required to allege specific transfers, to whom they were made, when, and for how much. While the Trustee is in a disadvantaged position in that the Defendants are more likely to have this knowledge, the Trustee cannot assert claims without some

attempt to describe the facts entitling him to relief. Additionally, and most damagingly, claims under § 544 and § 548 are time-barred. Thus, further discussion of claims under § 544 or § 548 is unnecessary, and the Motion to Dismiss is granted as to these claims.

With respect to O.C.G.A. § 14-2-640, the Trustee alleged that “Defendant” (apparently ABW) sold all of its assets to another business, without satisfying the claims of Debtor. By receiving a distribution from the sale of ABW without first paying ABW’s liabilities, the Trustee asserts that “Defendants” (presumably all defendants; the Trustee does not specify) are liable to the extent of the distributions. No where does the Trustee allege, however, when the distributions were made, or that ABW was insolvent under the tests contained in O.C.G.A. § 14-2-640. Such broad and sweeping generalizations, with no attempt to point to or specify the distributions or exact defendants, fails to state a claim for relief. Consequently, the Motion to Dismiss is granted as to the Third Claim. The Trustee is granted leave to amend to the Third Claim, except as to causes of action under 11 U.S.C. § 544 or § 548.

4. Fourth Claim for Relief

The Fourth Claim – entitled “Common Law Fraud as to Debtor” – seeks to recover damages for fraud. The Trustee asserts under this claim that Defendants induced Debtor to provide goods and services to ABW without intending at that time to pay or reimburse Debtor for these goods and services; in reasonable reliance, Debtor incurred obligations with its own vendors to provide goods and services to ABW; Debtor was unable to pay its own vendors without receiving payment from ABW; Debtor’s vendors have sued Debtor, causing it to incur damages. This claim sets out the elements of common law fraud in Georgia. The elements are a misrepresentation by defendant; that defendant knew to be false; that defendant made with the intention and purpose to deceive the

plaintiff; the plaintiff justifiably relied on the misrepresentation; and the plaintiff sustained an alleged loss or damages as the proximate result of the misrepresentation. *Greenwald v. Odom*, 314 Ga. App. 46, 52 (2012) (citations omitted). While intent may be alleged generally on a fraud claim, the plaintiff must allege specifically when, where, by whom, and what the misrepresentation was, and what the defendants gained by the misrepresentation. *Brooks v. Blue Cross and Blue Shield of Fla.*, 116 F.3d 1364, 1371 (11th Cir. 1997). Additionally, the plaintiff must allege what each defendant's participation was in the fraud; the defendants cannot simply be lumped together. *Id.* at 1381.

Here, the Trustee's Amended Complaint is deficient on the common law fraud claim. Taken as a whole, the factual allegations are sufficient generally to plead intent. But the Trustee pleads no particular facts about the content of the misrepresentations, which defendants made them, or when. Further, the Defendants are lumped together, and separate allegations as to each Defendant are not made. While the Court is mindful of the less stringent standard under Rule 9(b) that applies when a bankruptcy trustee sues an insider, the Court cannot decline to dismiss a claim that is utterly lacking in particularized facts. As the claim stands, the Defendants have not received fair notice as to the fraud claims made against each of them. *Id.* Consequently, the Motion to Dismiss is granted as to the Fourth Claim for Relief. The Trustee is granted leave to amend this claim.

5. Fifth Claim for Relief

The Fifth Claim is for breach of fiduciary duty. The Trustee asserts that Defendants, as managing members of the Debtor, owed fiduciary duties to the Debtor, and that Defendants violated these duties by causing Debtor to incur debts without providing Debtor with sufficient operating capital to sustain these debts. Because the "Defendants" are not specifically named, it is unclear which Defendants the Trustee is referring to. If the Trustee intends ABW as a Defendant on the Fifth

Claim, then the Amended Complaint fails to allege facts showing that ABW owed Debtor a fiduciary duty. ABW is not alleged to be a managing member or officer of Debtor, and it is unclear how ABW owes Debtor a fiduciary duty simply because the two entities share the same owners or officers. *See ULQ, LLC v. Meder*, 293 Ga. App. 176,180-82 (2008).

As to the other Defendants in this adversary proceeding, the Complaint alleges that Groover, Parish, Spencer, Busch, and Reed were members of Debtor and that Groover was the manager. But the Complaint also alleges that these individuals *acted* as a managing members of Debtor. In Georgia, members of a manager-managed LLC do not owe fiduciary duties to the LLC. *ULQ*, 293 Ga. App. at 184-85. Reed and Busch seek dismissal on the basis that the Amended Complaint fails to allege facts showing they acted as a managing members. The Court agrees. Simply stating that Reed and Busch acted as managing members, without providing any particular facts in support, is insufficient to state a claim for breach of fiduciary duty. Additionally, the Amended Complaint fails to state any particular facts showing that a breach occurred; that “Defendants undercapitalized Debtor with the intent to avoid the Debtor’s future obligations” does not pass muster under Rule 12(b)(6). Some specific facts must be plead that allow the Court to infer a breach, other than the conclusory allegation that Debtor was undercapitalized.

The Motion to Dismiss is therefore granted as to Fifth Claim for Relief. The Trustee is granted leave to amend this claim.

6. Sixth Claim for Relief

The Sixth Claim asserts that Defendants breached a fiduciary duty to Debtor to act for the benefit of Debtor’s creditors when Debtor became insolvent. The Amended Complaint is also deficient on this claim. As stated above, the Amended Complaint fails to show that ABW, Reed,

or Busch owed fiduciary duties to Debtor. Further, although Georgia law addresses liability for preferential transfers of Debtor's assets to insiders or to places out of reach from creditors, it is not clear what fiduciary duties, if any, Defendants would owe creditors upon Debtor's insolvency. *See, e.g. Randall & Neder Lumber Co. v. Randall*, 202 Ga. App. 497, 499 (1992) (stating that officers and directors can be liable for preferential transfers of corporate assets to themselves when the corporation is insolvent, but not discussing a fiduciary duty owed to creditors). Finally, if a duty did exist, there are no allegations stating when the breaches of the duties occurred, when Debtor became or was insolvent, and that these breaches occurred during insolvency.

The Motion to Dismiss is granted as to the Sixth Claim for Relief, but the Trustee is granted leave to amend this claim.

7. Seventh Claim for Relief

The Seventh Claim is for unjust enrichment. The Amended Complaint states that Defendants undertook a course of conduct that caused the Debtor to incur debts and obligations for the benefit of Defendants; that Defendants were enriched to the detriment of Debtor; and that this caused damages to Debtor. In Georgia, unjust enrichment is a cause of action existing when there is no legal contract between two parties, but where one party conferred a benefit on the other party, and the benefitted party ought to equitably compensate the conferring party for the benefit. *Jones v. White*, 311 GA. App. 822, 827-28 (2011). Unjust enrichment is premised on the “‘principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received.’” *Id.* (quoting *Scott v. Mamari Corp.*, 242 Ga. App. 455, 458 (2000)).

The Amended Complaint sufficiently alleges facts to allow an inference of liability on unjust

enrichment. According to the Amended Complaint, Groover, Parish, Spencer, Busch, and Reed used Debtor to confer a benefit on ABW and the other defendants—namely, the performance of ABW’s obligations to ABW’s franchisees. This benefit enriched ABW, whose expenses were reduced, and eventually enriched the individual Defendants, who sold their interests in (a now more profitable ABW) to a third party. Debtor was in turn harmed, as it incurred debts and obligations in the performance of this work without ever receiving its due payment from ABW. These facts, assumed by the Court to be true, give rise to an inference of liability on a theory of unjust enrichment. Consequently, the Motion to Dismiss is denied as to the Seventh Claim.

CONCLUSION

In conclusion, the Motion to Dismiss is denied on the First, Second, and Seventh Claims for Relief. The Motion to Dismiss is granted on the Third, Fourth, Fifth, and Sixth Claims for Relief, but the Trustee is granted leave to amend these claims to allege specific facts in support of the above referenced claims. Accordingly, it is

ORDERED that Defendant’s Motion to Dismiss is **GRANTED in part and DENIED in part**, as set forth above. It is further

ORDERED that the Trustee shall have 21 days from the date of entry of this Order to file an amended complaint with respect to the claims on which Defendants’ Motion to Dismiss was granted. Failure to file an amendment as to these claims shall act as a dismissal of those claims. It is further

ORDERED that Defendants shall file an answer within 14 days of the filing of an amended complaint by the Trustee. If the Trustee does not file an amended complaint, Defendants Reed and Busch shall file an answer within 30 days of the date of entry of this Order. It is further

ORDERED that a **status conference** will be held on this adversary proceeding on **SEPTEMBER 27, 2012** at 10:45 a.m. in Courtroom 1201, United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia 30303.

The Clerk of Court shall serve a copy of this order on Plaintiff, Defendants, and their respective counsel.

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