**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

| | | |
|---|---|---|
| In re: | ) | Chapter 11 |
| | ) | |
| COACH AM GROUP HOLDINGS CORP., *et al.*, | ) | Case No. 12-10010 (KG) |
| | ) | (Jointly Administered) |
| Debtors. | ) | |
| | ) | |
| JAMES JACKSON, on behalf of himself and all others similarly situated, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Adv. Proc. No. 13-51197(KG) |
| | ) | |
| FENWAY PARTNERS, LLC and DOES 1-20, | ) | |
| | ) | |
| Defendants. | ) | **Re D.I. Nos. 3, 4, 5, 7, 8 & 9** |
| | ) | |
| FENWAY PARTNERS, LLC, | ) | |
| | ) | |
| Third-Party Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| COACH AM GROUP HOLDINGS CORP., *et al.*, | ) | |
| | ) | |
| Third-Party Defendants. | ) | |
| | ) | |

## MEMORANDUM OPINION[1]

The adversary proceeding before the Court found its way here from a California state

[1] "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 . . . ." Fed. R. Bankr. P. 7052(a)(3). Accordingly, the Court herein makes no findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

court by way of removal, transfer, and finally reference from the Delaware District Court to the Court.[2] It involves claims brought by plaintiff James Jackson ("Plaintiff"), a bus driver formerly employed by one of the Debtor operating companies, against Fenway Partners, LLC ("Fenway")[3] for alleged violations of state and federal laws governing overtime, inspections of buses and other bus operator related concerns. Plaintiff has brought the adversary proceeding on his own behalf and on behalf of others similarly situated.

The Amended Complaint contains allegations that Fenway violated the legal rights of Plaintiff and other bus operators under federal law, the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (the "FSLA"), the California Labor Code, California Business and Professions Code § 17200, *et seq.,* and California Industrial Welfare Commission Order No. 9-2001.

Fenway seeks dismissal on a number of grounds: failure to join a necessary party pursuant to Fed. R. Bankr. P. 7012(b)(7), failure to state a claim pursuant to Fed. R. Bankr. P. 7012(b)(6), and in the alternative for summary judgment, and misjoinder pursuant to Fed. R. Bankr. P. 7021.

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[2] The plaintiff initiated the case in the California Superior Court. The defendant removed the case to the Northern District of California, which then granted a motion to transfer venue of the case to our District Court. The District Court referred the case to the Court.

[3] Plaintiff dismissed the named individual defendants, leaving just Fenway.

The issues are relatively simple. The master fact is that Plaintiff's claim, if any, lies against the Debtors but the Plaintiff failed to file a proof of claim[4]. Instead, the Plaintiff has brought suit against Fenway, a distant entity, thereby passing the limit of plausibility. The legal standards which apply to motions to dismiss mandate dismissal.

## FACTS

It will be helpful to examine a corporate organization chart (the "Chart") of Debtors which also shows Fenway's relationship to Debtors. The Chart is attached as Appendix A.

Fenway is an investment advisor to a group of private investment funds, one of which is Fenway Partners Capital Fund, III LP ("Fenway Fund III"). Smart Decl. ¶4.[5] Fenway Fund III -- which is not a party to the adversary proceeding -- became a limited partner in Coach Am Group Holdings, LP ("Coach Holdings LP"). Smart Decl. ¶6. It was CUSA, FL, LLC, d/b/a Franciscan Lines, a subsidiary well down the corporate chain, that employed Plaintiff. Cejka Decl. ¶9[6].

Fenway Fund III had the right to nominate members of the board of directors of Coach America Holdings, Inc. ("CA Holdings"), the parent corporation of all of the Debtors. Cejka Decl. ¶13. However, to be clear, the Fenway Fund III directors did not participate in the management of the operations of CA Holdings or any of the Debtors. Smart Decl. ¶8.

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[4] The Court entered an order on February 10, 2012, setting April 2, 2012, as the date by which creditors were required to submit proofs of claim. (Bankr. D.I. 213)

[5] Declaration of Greg Smart, Managing Director of Fenway. Adv. D.I. 3, 4.

[6] Declaration of Brian E. Cejka, Chief Restructuring Officer of Debtors. Adv. D.I. 3, 4.

Neither Fenway Fund III, nor Fenway, had any involvement in nominating or appointing any board members of the operating subsidiaries, *i.e.*, the employers of Plaintiff and other bus operators. Cejka Decl. ¶14; Smart Decl. ¶10. Similarly, neither Fenway nor Fenway Fund III had authority to hire, supervise or discharge employees of the operating subsidiaries, or to determine the terms of their employment, including wages, hours, schedules or working conditions. Cejka Decl. ¶¶15-20; Smart Decl. ¶¶ 11, 13.

In the Amended Complaint, putting aside the alleged violations, the sole allegation that even remotely addresses Fenway's involvement in operations states:

> Plaintiff is informed and believes and thereon alleges that [Fenway was] acting as the agent, employee, partner, or servant ... and was acting within the course and scope of that relationship, and gave consent to, ratified and authorized the acts alleged herein....

Amended Complaint ¶9. The Amended Complaint does not contain a single allegation that Fenway was involved in the operations of the operating subsidiaries.

Plaintiff has augmented the Amended complaint with the Declaration of Timothy J. Wilson, Plaintiff's attorney, (the "Wilson Declaration'). Adv. D.I. 7. There, the Declarant quotes from material found on Fenway's website describing Fenway's philosophy and methods. The quoted language from the website includes the following:

- Working in partnership with management, Fenway seeks to leverage its accumulated experience, industry-specific knowledge and network of value-added resources to help businesses seek to enhance their performance and achieve their full potential."

- Immediately upon completing a transaction, a team of Fenway professionals begins working with company management to define the long-term value-creation strategy. We work closely with management teams to support decisions and initiatives that aim to create significant value. Typically, these action plans include investments intended to grow revenue, broaden and deepen the management team, pursue strategic acquisitions, reevaluate sourcing programs and improve productivity."

Fenway Partners works directly with management to develop and execute an aggressive, but achievable, business strategy that guides decision making.

Fenway assists by:

- Providing analytical skills and resources
- Leveraging accumulated knowledge from prior experience
- Bringing the functional expertise of external advisors to sharpen tactics and implement change"

Fenway Partners works with portfolio companies to:

- . . .help CEOs strengthen their organizations
- Surround management teams with what Fenway believes is proven, value-added functional expertise that can help them seek their objectives

- Invest in broadening and deepening the leadership organization, as required

. . . we focus on taking businesses to the next level of performance.

- We work to foster teamwork and to take full advantage of the combined knowledge and experience of our team and that of the managers of our portfolio companies to improve operations. . .

## STANDARD OF REVIEW

A thorough discussion of the Rule 12(b)(6) standard of review appears in a decision which the learned Judge Leonard P. Stark of our District Court authored. *St. Clair Intellectual Prop. Consultants, Inc. v. Samsung Elecs. Co. Ltd.*, 291 F.R.D. 75, 76 (D.Del. 2013).

> The sufficiency of pleadings for non-fraud cases is governed by Rule 8 of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." When presented with a Rule 12(b)(6) motion to dismiss for failure to state a claim, courts conduct a two-part analysis. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, courts separate the factual and legal elements of a claim, accepting "all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Id.* at 210-11. This first step requires courts to draw all reasonable inferences in favor of the non-moving party. *See Maio v. Aetna, Inc.*, 221 F.3d 472, 500 (3d Cir. 2000). However, the Court is not obligated to accept as true "bald assertions," *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997), "unsupported conclusions and unwarranted inferences," [**4] *Schuylkill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997), or allegations that are "self-evidently false," *Nami v. Fauver*, 82 F.3d 63, 69 (3d Cir. 1996).
>
> Second, courts determine "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Fowler*, 578 F.3d at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [*77] the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This is a context-specific determination, requiring the court "to draw on its judicial experience and common sense." *Id.* at 679. At bottom,

> "[t]he complaint must state enough facts to raise a reasonable expectation that discovery will reveal evidence of [each] necessary element" of a claim. *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 321 (3d Cir. 2008) (internal quotation marks omitted).
>
> "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum [**5] expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal quotation marks omitted). Finally, although a non-fraud claim need not be pled with particularity or specificity, that claim must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 555.

## DISCUSSION

The Court will review the bases upon which Fenway seeks dismissal, applying the standard of review above. Ultimately, however, the Court's decision to dismiss the case rests upon two salient considerations. First, the Amended Complaint does not contain sufficient, plausible facts upon which the Amended Complaint can survive. Second, the Plaintiff's claim that Fenway -- or, for that matter, any of the companies Fenway advises -- somehow controlled the employment related issues of which Plaintiff complains is highly implausible.[7] These non-debtor entities are investors, far removed from the day-to-day operations. Their investments are not in the operating entities. In fact, Fenway is an investment advisor, not even an investor. The Court, drawing on judicial experience and common sense (*St. Clair*,

[7] Although the other Fenway advisees are not defendants in this adversary proceeding, the Court is forecasting that its holding would apply equally to the related entities in order to avoid any further effort by Plaintiff to bring suit against them.

supra) cannot sustain Plaintiff's effort to hold Fenway liable.

1. Misjoinder[8]

Fenway has moved pursuant to Rule 12(b)(7) for failure to join the Debtors in their capacity as the employers, as necessary and indispensable parties. The Court agrees. The Debtors, and in particular the operating companies, employed Plaintiff and the other employees. The Smart Declaration and the Cejka Declaration establish that it was Debtors, not Fenway, whose alleged unlawful actions are the subject of the adversary proceeding. In addition, Fenway may have indemnification claims against Debtors. Under the circumstances and pursuant to Rule 19(a), Debtors' presence in the case is necessary if there is to be complete relief. It also appears that Debtors are indispensable parties as the primary, if not sole, participants in the alleged activities. *See*, *e.g.*, *Ethypharm S.A. France v. Bentley Pharm. Inc.*, 388 F.Supp. 2d 426, 431 (D.Del.2005). Unfortunately for Plaintiff, it is too late to add Debtors as parties because, as discussed above, the time to file clams has long passed and neither Fenway nor Plaintiff can add Debtors as a party against whom Fenway can cross claim. *See also*, Rule 19(b) and *Martinez v. E.I. DuPont de Nemours & Co.*, 2012 WL 6840578 (Del. Super. Dec. 5, 2012)(direct employer was an indispensable party).

Plaintiff's failure to file a claim against Debtors is fatal to his case. The adversary proceeding must be dismissed because not only is Fenway an improper party, but by failing

[8] The Court has looked beyond the Amended Complaint to the parties' declarations. In deciding Rule 12(b)(7) motions, courts may take into consideration evidence outside the pleadings. *Cephalon, Inc. v. Watson Pharm., Inc.*, 629 F. Supp. 2d 338, 346 (D.Del. 2009).

to proceed in a timely fashion against Debtors, particularly the operating entities who employed the Plaintiff and others similarly situated, Plaintiff has prejudiced Fenway. It is too late for Plaintiff to remedy its inaction.

2. Failure to State a Claim

Fenway has also moved for dismissal pursuant to Rule 12(b)(6). Its argument is that liability for any violation of the FLSA requires that the party be an "employer." The term "employer" is defined as including "any person acting directly or indirectly in the interest of an employer in a relation to an employee." 29 U.S.C. § 203(d). The definitive answer to whether Fenway should be considered an employer is most persuasively discussed and established in a decision by the Third Circuit Court of Appeals in *In re Enterprise Rent-a-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462 (3rd Cir. 2012). There, the Third Circuit analyzed FLSA cases and developed a test for determining whether a party could be held liable for "employment" under the FLSA. The test is:

> 1) the alleged employer's authority to hire and fire the relevant employees; 2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits and work schedules, including the rate and method of payment; 3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and 4) the alleged employer's actual control of employee records, such as payroll, insurance or taxes.

*Id.,* at 469.

In *Enterprise*, the alleged employer, Enterprise Holdings, Inc. ("Enterprise") was the sole stockholder in a car rental business. The businesses utilized a central human resources department, and denied overtime to a group of employees who then brought suit. The district court found that Enterprise merely made employment related suggestions and did not exercise sufficient control to be considered an employer. The district court found that Enterprise's operating subsidiaries had the right to ignore any suggestions. The district court also found that although three Enterprise directors also sat on the boards of all of the subsidiaries, it did not lead to a conclusion that Enterprise was exercising control. The reason: the district court found that Enterprise did not have the right to hire and fire or set rules, did not supervise employee performance did not maintain employment records and did not determine compensation or benefits. The Third Circuit affirmed. *Id.* at 466-71. The Amended Complaint, supplemented by the Wilson Declaration, does not contain any allegation that would satisfy the *Enterprise* test for employer status.

Plaintiff focuses primarily on the underlying dispute , the alleged unlawful acts. It is implausible that Fenway, the advisor to companies who invested in a remote parent company, exercised such control over employment matters that it can reasonably be held liable for employee complaints. Again, there are no facts in the Amended Complaint upon which to conclude otherwise. The Plaintiff's conclusory labeling of Fenway as "employer" is just not sufficient to defeat the motion to dismiss. *Chen v. Domino's Pizza, Inc.*, 2009 WL 3379946, at *4 (D.N.J. Oct. 16, 2009). *See also*, *Richards v. Advanced Accessory Sys., LLC*, 2010 WL

3906958 (E.D. Mich. Sept. 30, 2010)(private equity investment advisor company not liable for failure to comply with WARN Act because it was addressing its financial success and was not involved in day-to-day operations). What is clear from both Fenway's and Plaintiff's arguments is that Fenway is not in any way, shape or form an employer of the Debtors' employees. Fenway was not even an investor in Debtors – it advised an investor. One need only to look at the statements from Fenway's website to see clearly how far Plaintiff is trying to stretch the role of Fenway: from the plausible, a business advisor to investors in Debtors, to the wholly implausible, a manager of bus drivers.

Fenway made a number of other persuasive arguments in support of dismissal. One of those arguments is that the FLSA does not apply to these facts because the buses operated in interstate commerce and were therefore exempt from state and federal regulations. The Court will not address the exemption and other arguments given the Court's decision to dismiss based upon Rules 12)b)(6) and (7).

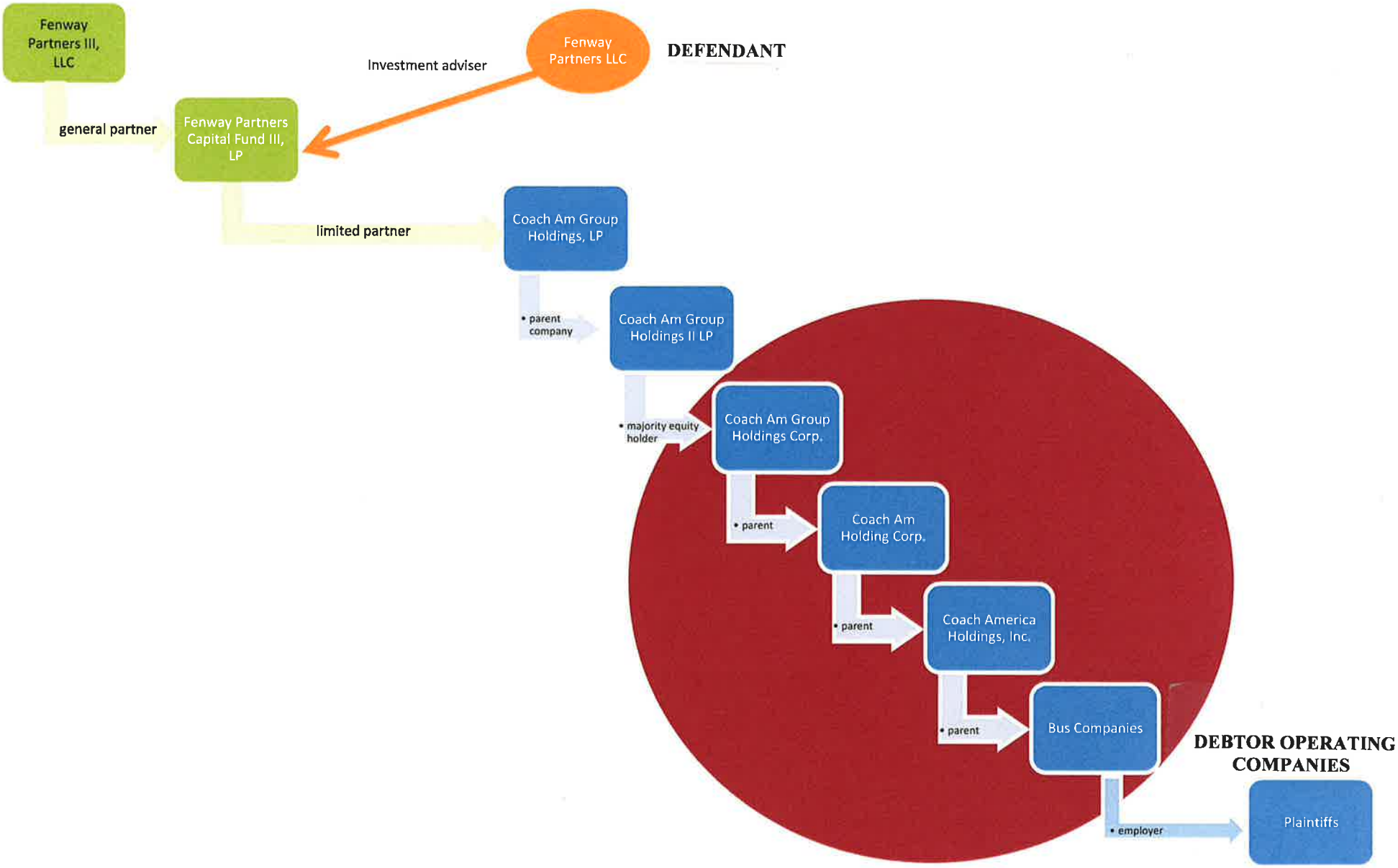
## CONCLUSION

For the foregoing reasons, the Court will dismiss the adversary proceeding. Order to follow.

Dated: October 23, 2013

KEVIN GROSS, U.S.B.J.

# APPENDIX A


Fenway Partners III, LLC
general partner
Fenway Partners Capital Fund III, LP
Investment adviser
Fenway Partners LLC
DEFENDANT
limited partner
Coach Am Group Holdings, LP
• parent company
Coach Am Group Holdings II LP
• majority equity holder
Coach Am Group Holdings Corp.
• parent
Coach Am Holding Corp.
• parent
Coach America Holdings, Inc.
• parent
Bus Companies
DEBTOR OPERATING COMPANIES
• employer
Plaintiffs

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| Third-Party Defendants. | ) | |

**ORDER**

In this adversary proceeding, Defendant Fenway Partners, LLC, has moved to dismiss the case on multiple grounds. The court has carefully considered the parties written submissions and oral arguments. For the reasons provided in the Memorandum Opinion of even date, the adversary proceeding is hereby dismissed.

Dated: October 23, 2013

KEVIN GROSS, U.S.B.J.