

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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WILMINGTON, DE 19801
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January 21, 2004

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Plan Administrator for APF Co,
et al.

**Re: Joseph A. Pardo, Trustee of FPA Creditor Trust and Plan
Administrator for APF Co., et al. v. Foundation Health
Corporation, et al.
Adv. Proc. No. 00-806**

Dear Counsel:

This is with respect to the defendants' motion (Doc. # 19) to dismiss the amended complaint (Doc. # 15). I have reviewed the briefs in support of and in opposition to the motion, which briefing was completed on June 18, 2003. I will grant the motion, in part, as follows.

(1) First Count: Because this Count is based on (a) an apparently large number of transactions arising out of the "capitation" agreements between the Debtors and some of the defendants, and (b) the Court's "Revised Payor Orders" as to which the plaintiffs allege the defendants did not comply, I find that the First Count survives a Rule 12(b)(6) motion and therefore, the motion with respect to this Count will be denied.

(2) Second and Third Counts: These are fraudulent conveyance counts, based upon Bankruptcy Code §§ 548 and 544, covering "Transfers" arising out of the six 1996 transactions, the "November 1996 Transfers" and the "Settlement Transfers". I find that these Counts do not satisfy Rule 9(b). With respect to the six 1996 transactions and the "November 1996 Transfers", the complaint is long on generalities and short on specific factual items. For example, I note that with respect to each of the six 1996 transactions, the complaint alleges that the Debtors "made a number of payments" relative to particular note obligations and further that "other property" was transferred by the Debtors to the

defendants. (See complaint ¶¶ 38, 39, 46, 47, 54, 55, 62, 63, 71, 72, 92, 95, 103 and 104.) These allegations are insufficient. While it may require a significant amount of digging through the records of the Debtors, the plaintiffs cannot simply allude to "a number of payments" and "other property" transferred over a number of years. With respect to the "Settlement Transfers" arising out of the "Settlement Agreement", I find no meaningful discussion of the relationship of the Settlement Agreement to the prior seven transactions. In ¶ 106 of the complaint it is alleged that the "Settlement Transfers" are "transfers by the Debtors of assets to and for the benefit of some or all of the Defendants." What kind of assets and what are their values? Which of the defendants got what? When did the transfers occur and how were they effected and how were they related, if at all, to the prior seven transactions? Consequently, the Second Count and the Third Count will be dismissed, subject to the right of the plaintiffs to file a further amended complaint, which satisfies the pleading requirements, within 60 days from the date of this ruling.

(3) Fourth Count: This is a § 547 preference count with respect to "Settlement Transfers" and the specific transfers identified in Exhibit A attached to the complaint. The "Settlement Transfers" described in ¶ 105 of the complaint are simply insufficiently identified and not tied into any identified antecedent debts or to particular defendants. The transfers listed

in Exhibit A of the complaint are also inadequate for properly pleading preference counts. See Valley Media, Inc. v. Borders, Inc. (In re Valley Media, Inc.), 288 B.R. 189 (Bankr. D.Del. 2003). This Count will be dismissed, subject to the plaintiffs' right to file a properly pleaded amended complaint within 60 days.

(4) Fifth Count: The "Withheld Payments" obviously involve disputed amounts and a § 542 turnover complaint is not the appropriate basis for recovery. This Count will be dismissed.

(5) Sixth Count: While the facts regarding this § 553(b) setoff "insufficiency" are lacking, it seems to me that it would be premature to dismiss this Count pending the development of facts arising out of the First Count relating to the request for an accounting. Consequently, the motion will be denied with respect to this Count.

(6) Seventh Count: For the same reasons as set forth above with respect to the Fourth Count, this Count will also be dismissed. In addition, since this preference count is based upon "Prepetition Setoffs" and setoffs do not qualify as "transfers" for purposes of § 547, this Count will be dismissed. See In re Mass. Gas & Electric Light Supply Co., Inc., 200 B.R. 471 (Bankr. D. Mass. 1996).

(7) Eighth Count: This Count seeks recovery pursuant to § 549 of alleged unauthorized postpetition setoffs. For the same reasons as set forth above with respect to Seventh Count, this

Count will be dismissed. If the plaintiffs can identify transactions which qualify as "transfers," they can file a properly pleaded amended complaint as to this Count and the Seventh Count.

(8) Ninth Count: This Count seeks damages for the exercise of setoffs in violation of the § 362(a) stay order. The Count is sufficiently stated and I will deny the motion to dismiss with respect to it.

(9) Tenth Count: For the reasons recited above with respect to the Second and Third Counts, this Count will be dismissed, subject to the right of the plaintiffs to file a properly pleaded amended complaint with respect to it.

In closing, I make the following additional observations with respect to this adversary proceeding.

The defendants have raised a number of statute of limitations arguments. However, I find it difficult to access these defenses, particularly as to the Tenth Count, because of the amorphous nature of many of the amended complaint's allegations. Notwithstanding the addition of the "Settlement Transfers" and a number of minor factual allegations, the amended complaint is only a slight improvement over the original complaint in terms of specificity and clarity.

This adversary proceeding is over three and a half years old with little or no progress towards resolution, at least as reflected by the docket sheet. In that regard, I do not understand

why the docket sheet does not reflect any discovery activity since the February 19, 2003 scheduling order (Doc. # 18) shows a February 20, 2004 cut off date for fact discovery.

Enclosed herewith is an order being entered with respect to the above rulings.

Very truly yours,

Peter J. Walsh

PJW:ipm

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
APF Co., et. al.,)	Case No. 98-1596 (PJW)
)	Jointly Administered
Debtors.)	
<hr style="width: 35%; margin-left: 0;"/>		
)	
JOSEPH A. PARDO, Trustee of)	
FPA Creditor Trust, and PLAN)	
ADMINISTRATOR for APF Co.,)	
et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Adv. Proc. No. 00-806
)	
FOUNDATION HEALTH CORPORATION,)	
a Delaware corporation,)	
FOUNDATION HEALTH, A CALIFORNIA)	
HEALTH PLAN, a California)	
corporation, FOUNDATION HEALTH,)	
A SOUTH FLORIDA HEALTH PLAN,)	
INC., a Florida health)	
management organization, CARE-)	
FLORIDA HEALTH PLAN, INC., a)	
Florida health management)	
organization, INTERGROUP HEALTH)	
PLAN, INC., INTERGROUP PREPAID)	
HEALTH SERVICES OF ARIZONA,)	
INC., BARRY M. STRAUBE, M.D.,)	
an individual, STEVEN RAFFIN,)	
M.D., an individual, JAMES)	
BONNETTE, M.D., an individual,)	
ROSS HENDERSON, M.D., an)	
individual, and JONATHAN H.)	
SCHEFF, M.D., an individual,)	
)	
Defendants.)	

ORDER

For the reasons stated in the Court's Letter Opinion of this date, the defendants' motion (Doc. # 19) to dismiss the amended complaint (Doc. # 15) is GRANTED, IN PART, as follows:

(1) as to the First Count, the motion is denied;

(2) as to the Second and Third Counts, the motion is granted, subject to the right of the plaintiffs to file a properly pleaded amended complaint within 60 days from the date of this order;

(3) as to the Fourth Count, the motion is granted, subject to the right of the plaintiffs to file a properly pleaded amended complaint within 60 days from the date of this order;

(4) as to the Fifth Count, the motion is granted;

(5) as to the Sixth Count, the motion is denied;

(6) as to the Seventh Count, the motion is granted, subject to the right of the plaintiffs to file a properly pleaded amended complaint within 60 days from the date of this order;

(7) as to the Eighth Count, the motion is granted, subject to the right of the plaintiffs to file a properly pleaded amended complaint within 60 days from the date of this order;

(8) as to the Ninth Count, the motion is denied; and

(9) as to the Tenth Count, the motion is granted, subject to the right of the plaintiffs to file a properly pleaded amended complaint within 60 days from the date of this order.

Peter J. Walsh
United States Bankruptcy Judge

Dated: January 21, 2004

