

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:) Chapter 11
)
FRUEHAUF TRAILER CORPORATION,) Case No. 96-01563 (PJW)
et al.)
)
Debtors.)
_____)
)
CHRISS W. STREET, as Former)
Trustee of the End of the Road)
Trust,)
)
Plaintiff,)
)
v.) Adv. Proc. No. 08-50295 (PJW)
)
DANIEL W. HARROW, as Successor)
Trustee of the End of the Road)
Trust,)
)
Defendant.)

MEMORANDUM OPINION

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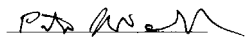
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Successor Trustee of the
End of the Road Trust

Dated: July 15, 2011

WALSH, J 

This opinion is with respect to Chriss W. Street's Second Amended Motion for Leave to File an Amended Complaint. (Doc. #39.) For the reasons discussed below, I will deny the motion.

Background

Fruehauf Trailer Corporation and related entities filed for bankruptcy protection on October 7, 1996. The Court confirmed a Plan of Reorganization on September 17, 1998, pursuant to which all assets of the debtors were conveyed to the End of the Road Trust (the "Trust") for liquidation on behalf of the Trust beneficiaries. Chriss Street was confirmed as the trustee and served in that capacity until August 2005, when Street resigned and Daniel Harrow succeeded him ("Harrow" or "Successor Trustee").

On July 12, 2007, Street filed a complaint (the "Original Complaint") against Harrow and Does 1 - 25 in the Orange County Superior Court of California. The Original Complaint concerns the failure of the Trust to procure an insurance policy from Arch Specialty Insurance Company ("Arch"). According to Street, the Arch policy would have indemnified him against legal costs related to his tenure as trustee.

The case was removed to federal court, where Harrow filed an answer denying all material allegations. In late 2007, the case was transferred to the District Court for the District of Delaware

and then referred to this Court as a core proceeding on November 20, 2008.

The case lay dormant until July 12, 2010, when Street filed an "Amended Complaint." (Doc. # 11.) On July 20, 2010, Street filed a "Second Amended Complaint." (Doc. # 13.) The Court struck these purported amended complaints, because Street had filed them without Harrow's consent and without Court approval, in violation of Rule 15 of the Federal Rules of Civil Procedure. (Doc. # 23.)

Street filed three identical motions to amend the Original Complaint, on September 8, 14, and 24, 2010, pursuant to Rule 15. (Doc. # 25, 28, 39.) Street appended a proposed amended complaint (the "Proposed Amended Complaint") to these motions.¹

Whereas the Original Complaint focuses solely on the Arch insurance policy, the Proposed Amended Complaint also focuses on the Trust's failure to pay Street's compensation from his service as trustee and on the Trust's distribution of assets. The Proposed Amended Complaint alleges that, after Street's resignation, Harrow and sixteen other defendants - including the Trust's financial advisors and lawyers - all conspired (i) to prevent the Trust from securing the Arch insurance policy which would have indemnified Street and from paying Street's compensation and (ii) to prevent

¹The Court ordered the Proposed Amended Complaint sealed because it contained confidential information. (Doc. # 47.)

Street from purchasing the Trust's last remaining asset. Thus, the Proposed Amended Complaint focuses on (i) Street's alleged right to indemnification, had the Arch insurance policy been in place, (ii) Street's compensation still owing from the Trust, and (iii) the distribution of Trust assets after Harrow became the trustee. All three of these topics have been the subjects of prior litigation during this bankruptcy proceeding, as described below.

Asset Distribution

By late 2003, the Trust's last major asset was American Trailer Industries, Inc. ("ATII"), which was the parent company of Fruehauf de Mexico ("FdM"), a trailer manufacturing and sales operation located near Mexico City. Street had marketed FdM for sale, but no transaction was closed.

After resigning as trustee in August 2005, Street offered to buy ATII for \$7 million. Harrow did not pursue this offer. Instead, he decided to distribute the Trust's assets to the Trust beneficiaries (the "Asset Distribution"). The minority beneficiaries would receive a cash distribution; the majority would receive shares of ATII. On December 16, 2006, the Court held a hearing concerning Harrow's motion to extend the term of the Trust in order to effectuate the Asset Distribution. Street objected, arguing that Harrow had rejected his purchase offer due to a conflict of interest. At the conclusion of that hearing, the Court

indicated that the Trust should notify Street before closing any transaction.

At a hearing on March 26, 2007, Street's counsel acknowledged that Street was not a Trust beneficiary and, therefore, lacked standing to argue that the Asset Distribution was unfair to the minority Trust beneficiaries. Street's concern was that the Asset Distribution would leave the Trust with insufficient funds to satisfy his indemnification claims. The hearing was continued until May 9, 2007 to allow the Trust to submit a valuation analysis of FdM.

At the May 9, 2007 hearing, the Court heard testimony concerning the Asset Distribution. The Court granted Harrow's request for an order permitting the Asset Distribution because the Trust Agreement provided Harrow with broad discretion concerning the administration of the Trust and provided that any specific actions of the Trust administration "will be approved by the Court if no beneficial interest holder objects to such motion within the time specified by the applicable bankruptcy rule." (Case No. 96-01563, Doc. # 1948, May 9, 2007 Tr. 67:11-14 (quoting Section 8.2 of the Trust Agreement).) The Court noted that no beneficial interest holder had objected, and so it would approve Harrow's motion, consistent with the Trust Agreement.

The Court found that the evidence "clearly supports a conclusion that this transaction [the Asset Distribution] is in the

best interest of the Trust and the beneficiaries of the Trust.” (Id. at 69:1-3.) The Court also found that the Asset Distribution would not stand in the way of Street’s indemnification claim, as he could still pursue his claim against ATII and the Trust, which would have sufficient remaining funds to satisfy potential indemnification claims. The Court further noted that, until Street had established a claim for indemnification, the Court would not direct the Successor Trustee regarding the disposition of Trust funds.

California Bankruptcy Court: Indemnification and Compensation

Harrow, as Successor Trustee, commenced an adversary proceeding in this Court against Street on February 2, 2007 based on Street’s conduct during his tenure as trustee. That case was transferred to the bankruptcy court for the Central District of California (the “California Court”). Harrow alleged six causes of action for breach of fiduciary duties, one count for breach of the liquidating trust agreement, one count for equitable forfeiture of compensation, and one count based on fraud. Street counterclaimed that he is “entitled to indemnity for his costs and expenses, including attorney[]’s fees incurred in connection with the Trustee’s investigation and this action,” “on any claim on which he prevails on the merits or otherwise,” and “on any claim which Plaintiffs are unable to meet their burden of showing that Street’s actions on which the claim was based are grossly negligent.”

(Answer and Affirmative Defenses to Second Amended Complaint, Adv. No. 08-01865, Doc #25 at 19-20 (Bankr. C.D. Ca. Aug. 20, 2009).)

The California Court held a trial and determined that Street had breached his fiduciary duties and the Trust Agreement, awarding the Trust \$7,068,765 in damages. The California Court also ruled that Street had received compensation in excess of that authorized under his employment agreements.

The California Court also ruled against Street's counterclaim for indemnification, finding that Street's gross negligence and willful misconduct made him ineligible for indemnification:

The Trust Agreement permits indemnification of Defendant unless he engaged in acts of gross negligence or willful misconduct This Court finds Defendant's conduct described above falls within the gross negligence and willful misconduct exceptions contained in the indemnification provision.

(Harrow v. Street (In re Fruehauf Trailer Corp.), Adv. No. 08-01865RN, Case No. 96-1563 through 96-1572, slip op. at 18, (Bankr. C.D. Ca., March 5, 2010)) (affirmed by Case No. 10-cv-02312-DDP, C.D. Ca. May 23, 2011).

The Present Adversary Proceeding

Street's Original Complaint was eleven pages long and asserted five counts against Harrow and 25 unidentified individuals and entities. The Proposed Amended Complaint is 126 pages and

asserts twenty-two² causes of action against Harrow and 16 other defendants (the "Defendants"): eight counts of fraud, four counts of intentional/negligent interference with a business/economic relationship, two counts of breach of contract, seven counts of conspiracy, and one count of spoliation.

Discussion

Federal Rule of Civil Procedure 15, made applicable here under Federal Rule of Bankruptcy Procedure 7015, provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave" and that "[t]he court should freely give leave when justice so requires."

Leave to amend should liberally be granted to "ensure[] that a particular claim will be decided on the merits rather than on technicalities." Dole v. Arco Chem. Co., 921 F.2d 484, 486-87 (3d Cir. 1990). Nonetheless, a court may deny leave to amend because of "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" Id., at 487 (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)).

"Futility of amendment occurs when the complaint, as amended, does not state a claim upon which relief can be granted."

²The Proposed Amended Complaint contains two Count VII's. This opinion will refer to the first as VIIa and the second as VIIb.

Koken v. GPC Int'l, Inc., 443 F.Supp.2d 631, 634 (D. Del. 2006). The standard for determining futility of amendment is the same standard applied in determining legal sufficiency under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Johnson v. Geico Cas. Co., 673 F.Supp. 2d 244, 248 (D. Del. 2009). "If the proposed amendment is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend." Id. (internal quotation marks omitted).

As discussed in detail below, the Proposed Amended Complaint fails to state a claim upon which relief may be granted. The Proposed Amended Complaint (i) fails to meet the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and (ii) alleges causes of action that are time-barred. In addition, twenty of the twenty-two counts suffers further defects.

Pleading Fraud with Particularity

Counts III-VIII and XV allege fraud. Federal Rule of Civil Procedure 9(b), incorporated by Bankruptcy Rule 7009, "requires that in 'all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'" Haskell v. Goldman, Sachs & Co. (In re Genesis Health Ventures, Inc.), 355 B.R. 438, 454 (Bankr. D. Del. 2006). The purpose of this particularity requirement is "to 'give[] defendants notice of the claims against them, provide[] an increased measure of protection for their reputations, and reduce[]

the number of frivolous suits brought solely to extract settlements.'" Id. at 454-55 (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1418 (3d Cir. 1997)).

"When a plaintiff alleges fraud against multiple defendants, Rule 9(b) requires that the plaintiff separately plead the allegedly fraudulent acts of each defendant. Generalized allegations against a group of defendants are deficient under Rule 9(b) in that they fail to apprise the defendants of the precise misconduct of which they are accused." Id. at 455 (internal citations omitted).

Here, the Proposed Amended Complaint does not separately plead the allegedly fraudulent acts of the Defendants. In the twenty-two counts of the Proposed Amended Complaint, the Defendants are grouped together as "Defendants" over 100 times. In the eight fraud counts, the Defendants are grouped together over 50 times. The following example from Count III highlights the problem with this group pleading. Count III alleges fraud against the following fourteen Defendants:

Trust Advisory Committee; Davidson Kempner Capital Management LLC; M.H. Davidson; Thomas Lennox Kempner Sr.; Thomas Lennox Kempner Jr.; Mariner Investment Group LLC as Survivor; Ali Mojdehi; Baker & McKenzie LLP; Avram Friedman; Mark Weissman; Chris Gephardt; Daniel Harrow; Libra Securities Holding, LLC and Anastasia Dolan.

(Proposed Amended Complaint, p. 100.) It makes the following allegations against these Defendants, collectively:

593. Defendants conspired together to intentionally represent to the Plaintiff the Trust would pay the Plaintiff's salary through the end of his term on October 27, 2005, plus Plaintiff's "Percentage Fee" when due as provided for in the Fruehauf Plan of Reorganization. ¶ 28.

594. The representations made by Defendants, and each of the[m], were false and Defendants, and each of them, had no reasonable grounds for believing them to be true. The facts were the Defendants had already instructed Brad to not pay Plaintiff his severance. ¶91.

595. The representations made by Defendants, and each of them, were false and Defendants, and each of them, had no reasonable grounds for believing them to be true. Defendants had already discussed with Brad Scher not paying the Plaintiff. ¶92.

596. At the time Defendants, and each of them, made the aforementioned representations, Plaintiff reasonably relied upon the representation ¶93-95.

597. Defendants intended to defraud Plaintiff.

Paragraphs 93-95 plead the underlying factual background supporting this allegation:

93. On July 20, 2005, the TAC [Trust Advisory Committee] members[] asked [t]he Plaintiff to voluntarily resign as Trustee in exchange for paying him severance through his contract ending October 27, 2005[.]

94. On or about August 2005, the Plaintiff voluntarily resigned as Trustee, subject to payment of severance through October 27, 2005 and Percentage Fee, and Davidson Kempner and Mariner[], as members of the Trust Advisory Committee[,] appointed Harrow as Successor Trustee.

95. On or about February 16, 2006 the severance check from the Successor Trustee to Plaintiff bounced: "Insufficient Funds[.]"

The fraud allegations in Count III pertain to actions of the Trust Advisory Committee members. The fourteen Defendants are not all

members of the Trust Advisory Committee. For instance, Baker & McKenzie LLP is not a member, but it is named as a Defendant in this count. Nothing in the factual allegations tie Baker & McKenzie to the allegedly fraudulent representations made to Street. By "group-pleading," Street's Proposed Amended Complaint fails to provide the individual Defendants proper notice of the allegations made against them.

This group-pleading may be excused when the necessary information lies in the hands of the defendants. In re Genesis Health Ventures, Inc., 355 B.R. at 455 (citing Weiner v. Quaker Oats Co., 129 F.3d 310, 319 (3d Cir. 1997)). Here, however, the fraud allegations stem from representations made to Street personally. Accordingly, it cannot be said that Street lacks knowledge of who made these representations to him.

Because Street's Proposed Amended Complaint fails to plead fraud with particularity, the eight counts for fraud fail to state a claim. The Court will, therefore, deny Street's motion for leave to amend as to these counts.

Statute of Limitations

The second ground for denying the motion for leave to amend is that the claims therein are time-barred. It is undisputed that Delaware's statutes of limitations apply to Street's claims. (Doc. #46, p. 18.) Street seeks to assert a variety of fraud, breach of contract, tortious interference, and conspiracy claims

against Harrow and the sixteen new Defendants. According to Street's Proposed Amended Complaint, each of these counts is based on conduct that allegedly occurred between 2003 and March of 2007. (Doc. # 25 at 15-42, 60-62, 72-77.) The latest act pled in the Proposed Amended Complaint took place in March of 2007 - well outside the three-year and one-year limitations periods prescribed by Delaware law. (See id. at 74.)

Street contends the claims are not time barred because (a) his Proposed Amended Complaint should relate back to the date of his Original Complaint and (b) the statute of limitations should be tolled.

Rule 15 provides that an amendment to a pleading relates back to the date of the original pleading if the following three conditions have all been met:

1) the amendment asserts a claim that arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in the initial pleading; 2) the newly named party received such notice of the institution of the action within the period specified in Rule 4(m) (i.e., 120 days of the filing of the complaint), so that the party will not be prejudiced in maintaining a defense on the merits; 3) the newly named party knew or should have known that the action would have been brought against it, but for a mistake concerning the newly named party's identity.

Johnson v. Geico Cas. Co., 673 F.Supp.2d at 249; Fed. R. Civ. P. 15(c) (1) (C).

Street's Proposed Amended Complaint asserts many claims that did not arise out of the same conduct, transaction, or

occurrence as set out in the Original Complaint. The Original Complaint arose out of the Trust's failure to procure the Arch insurance policy. The Proposed Amended Complaint adds claims that arise from other conduct, including the Trust's failure to pay Street's compensation and the Trust's Asset Distribution.

For those claims that did arise out of the same conduct, namely the Trust's failure to procure the Arch insurance policy, these claims add sixteen new Defendants. Street offers no evidence whatsoever that these new Defendants knew, or should have known, that Street intended to name them as defendants.

Accordingly, Street's Proposed Amended Complaint does not relate back to the filing date of his Original Complaint.

Street further contends that Delaware's statute of limitations for his claims should be equitably tolled. He argues that the statute of limitations did not begin to run until he recently discovered the alleged unlawful acts. (Doc. #46, p. 18.)

As the party seeking to toll the limitations period, Street "bear[s] the burden of pleading specific facts to demonstrate that the statute of limitations was, in fact, tolled." In re Dean Witter Partnership Litig., 1998 Del. Ch. LEXIS 133, * 23 (Del. Ch. Ct. July 17, 1998). Street, however, has failed to plead specific facts concerning when he discovered which facts. His general assertion that he did not know relevant facts for any of his causes of action until March 2010 is overly broad and

unsupported. In striking the purported amended complaints, this Court advised Street as follows: "If Plaintiff seeks leave of this Court to file an amended complaint, I bring to his attention that the motion must comply with Bankruptcy Rule 7007 which requires the movant to state with particularity the grounds for seeking that relief." (Doc. # 22.) Despite this advice, Street blithely asserts that the additional information regarding the Defendants' conduct was "recently" brought to his attention. This does not satisfy the Rule.

The following section of this opinion examines additional fatal defects undermining each of twenty of the twenty-two counts in the Proposed Amended Complaint.³ For each of these counts, which allege breach of contract, fraud, tortious interference with a contract, and conspiracy, Delaware law provides the governing law consistent with the Trust Agreement's choice of law selection:

THIS AGREEMENT SHALL BE IN ALL RESPECTS GOVERNED BY AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE, EXCLUSIVE OF ITS LAWS RELATING TO CONFLICTS OF LAWS.

³The two counts not discussed below are Counts XV and XVI. Count XV, alleging that Defendants fraudulently represented they would "provide a defense to each and every action taken by Plaintiff during his tenure as Trustee of the End of the Road Trust," fails for only the reasons in the preceding two sections, namely, failure to comply with Rule 9(b)'s pleading requirements and for being time-barred. Count XVI, alleging intentional interference with an economic relationship, fails because it is time-barred.

(Doc. #1949, Ex. A.⁴) Because the causes of action all arise out of rights, duties, and obligations created by the Trust Agreement, the Court will apply the Trust Agreement's choice of law. See *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1048 (Del Ch. 2006).

Street's Right to Bid on Trust Assets

Counts I, II, IV, V, VIIa, VIIb, and VIII all pertain to Street's failed bid to purchase ATII, and these counts assert causes of action on various theories.

Counts I and II of the Proposed Amended Complaint allege intentional and negligent interference with Street's prospective business relationship. Street alleges that he had a prospective economic relationship with ATII and/or FdM, as he had attempted to acquire those companies.

As an initial matter, the claim for negligent interference fails as a matter of law, as Delaware does not recognize a cause of action for negligent interference with business or economic relations. *Insur. Co. of N. Am. v.*

⁴Similarly, the Debtor's Amended Plan of Reorganization, dated July 28, 1998, contains a similar provision:

12.4 Governing Law. Except to the extent the Bankruptcy Code, the Bankruptcy Rules or the Delaware General Corporation Law are applicable, the rights and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with the laws of the State of Delaware, without giving effect to the principles of conflicts of law thereof.

Waterhouse, 424 A.2d 675, 678 (Del. Super. Ct. 1980) (citing Restatement (Second) Torts, § 766(c) (1979)).

As to the claim for intentional interference, under Delaware law a plaintiff must establish the following elements to set forth a prima facie case: "(1) the reasonable probability of a business opportunity; (2) intentional interference; (3) proximate causation; and (4) damages." Wilco AG v. Packaging Techs. & Inspection LLC, 615 F.Supp.2d 320, 325 (D. Del. 2009).

Street has failed to establish the first element, as there was no reasonable probability of a business opportunity. Street submitted an offer to buy the Trust assets, and the Successor Trustee declined to consider it. As the Court stated at its May 9, 2007 hearing, the Successor Trustee had broad discretion in deciding how to administer the Trust's assets, and only Trust beneficiaries had standing to object. Street was not a Trust beneficiary and, therefore, has no grounds to object. Not only has Street failed to plead the existence of a "reasonable probability of a business opportunity," but Street is incapable of doing so. Accordingly, Street cannot state a claim for intentional interference with a business relationship.

Count IV, V, VIIa, VIIb, and VIII all assert that Defendants' fraudulent misrepresentations prevented Street from acquiring the Trust assets. Count IV alleges fraud concerning the Defendants' misrepresentation that Street would be allowed to buy

the Trust assets from the Trust, and Counts V and VIII both allege fraud concerning Defendants' misrepresentations that the Defendants would not close any transactions without informing the Plaintiff and returning to Court. These claims fail as a matter of law and fact. First, Street had no right to purchase the assets. He was allowed to submit a bid, but the Successor Trustee had no obligation to pursue a sale to Street. As a factual matter, whether or not Street received notice, he appeared the May 9, 2007 hearing regarding the Asset Distribution and presented argument through his counsel. These three counts do not, and cannot, state a claim upon which relief may be granted.

Count VIIa and VIIb allege that the Defendants made fraudulent representations concerning the Asset Distribution. Count VIIa alleges that the Defendants presented a false Verified Valuation Analysis of FdM submitted to the Court for the May 9, 2007 hearing. Count VIIb alleges that the Defendants made misrepresentations that the Asset Distribution was superior to the a sale of FdM. To the extent Street alleges that the Defendants did not act in the best interests of the Trust, Street lacks standing to pursue causes of actions on behalf of Trust beneficiaries, as discussed above. Street's counsel acknowledged at the hearings concerning the Asset Distribution that Street's only interest related to the Asset Distribution was whether the Trust would retain sufficient funds to satisfy his indemnification

claims. The Court has already determined, however, that the Asset Distribution would not impair Street's potential indemnification claims.

Street contends that the Court's findings at these Asset Distribution hearings should not have preclusive effect because of Street's newly discovered evidence of fraud concerning the valuation of FdM: "the combination of fraudulent concealment through spoliation and newly discovered evidence meets the grounds for res judicata relief under 'Rule 60(b) Relief from Final Judgment, Order, or Proceeding'." (Doc. #46, 20-21.) Even accepting Street's fraud argument concerning the Asset Distribution, Street has no interest in the Trust and therefore lacks standing to challenge the Asset Distribution. As discussed above, to the extent Street alleges a valid cause of action based on the Asset Distribution, those causes of action would belong to the Trust beneficiaries, not to Street.

Arch Insurance Policy

Counts XIV, XV, XVI, and XVII deal with the Arch insurance policy.

Count XIV alleges breach of contract, as follows:

685. Defendants, and each of them, knew that pursuant to the policy of insurance issued by Arch, both Arch and Defendants, and each of them, had a duty and obligation to provide a defense for Plaintiff against the Department of Labor subpoena. . . . Pursuant to the policy of fiduciary liability insurance issued by Arch, Defendants, and each of them, had a duty to provide accurate and truthful information to Arch. ¶ 96-131.

687. Defendants, and each of them, breached said agreement by failing to provide all necessary and appropriate information in a truthful and accurate manner to Arch so as to allow Arch to conclude that it had a duty to provide a defense to Plaintiff in regard to the Department of Labor subpoena and subsequent related actions. ¶107.

Street's contention is that he would have been a third-party beneficiary to the Arch policy with the Trust but that, due to the Defendants' allegedly incomplete and dishonest application for insurance, Arch declined to provide coverage for the Trust. These allegations do not support a finding of a breach of contract, as Street has failed to establish the existence of a contract, a breach of a contractual obligation, or resultant damages. See VLIW Tech., LLC v. Hewlett Packard Co., 840 A.2d 606, 612 (Del. 2003) ("In order to survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff.").

Count XVII alleges negligent interference with Street's economic relationship with Arch. As discussed above, Delaware law does not recognize such a cause of action.

Compensation

Counts III, VI, and XIX concern Street's compensation allegedly due from his tenure as trustee. Count III alleges that

Defendants fraudulently misrepresented that they would pay Street's salary through the end of his term plus a Percentage Fee as provided in the Fruehauf Plan of Reorganization. Count XIX alleges breach of contract concerning the Trust's failure to pay the Percentage Fee. This issue has been foreclosed by the California Court decision which found that, during Street's tenure as trustee, Street paid himself in excess of that permitted under by the Disclosure Statement, the Plan of Reorganization, and the Trust Agreement. Accordingly, Street can assert no claim for additional compensation.

Spoliation

Count XXI alleges that "Defendants conspired to commit intentional spoliation of evidence to conceal from Plaintiff their violations of law in furtherance of a conspiracy to prevent the Plaintiff from acquiring the evidence necessary to prove Defendants defrauded Plaintiff from enjoying the benefits of acquiring American Trailer Industries, Inc. to make profits." (Proposed Amended Complaint, ¶ 728.)

Spoliation is an evidentiary rule in which, if a party intentionally or recklessly destroys evidence, the court will give the jury an adverse inference instruction. Sears, Roebuck and Co. v. Midcap, 893 A.2d 542, 550 (Del. 2006). When evidence is intentionally destroyed, "[i]t is the duty of a court . . . to adopt a view of the facts as unfavorable to the wrongdoer as the

known circumstances will reasonably admit.'" Id. at 548 (quoting Equitable Trust Co. v. Gallagher, 102 A.2d 538, 541 (Del. 1954).

Spoliation is not an independent cause of action. Lucas v. Christiana Skating Center, Ltd., 722 A.2d 1247, 1250 (Del. Super. 1998) ("The Court finds that jury instructions as to permissible inferences provide adequate protection for a plaintiff and, thus, it refuses to recognize independent torts of negligent or intentional spoliation of evidence.") Therefore, Count XXI does not assert a recognized cause of action.

Conspiracy

Counts IX, X, XI, XII, XIII, XVIII, and XX allege conspiracy. A claim for civil conspiracy under Delaware law "requires a plaintiff to show (1) a combination of two or more persons, (2) an unlawful act done to further the conspiracy, and (3) damages." Eames v. Nationwide Mut. Ins. Co., 412 F.Supp.2d 431, 438 (D. Del. 2006) (citing Nicolet, Inc. v. Nutt, 525 A.2d 146, 149-50 (Del. 1987)). "Such a claim is not an independent cause of action, and thus, a civil conspiracy claim must be predicated upon an underlying wrong." Id. (internal quotation marks omitted).

Street's conspiracy counts fail because he has no valid underlying claims. Since all the other counts in the Proposed Amended Complaint are deficient, Street cannot pursue his

conspiracy claims. See id. at 439 (dismissing conspiracy count because all underlying claims had been dismissed).

Conclusion

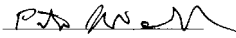
Because all twenty-two counts contained in Street's Proposed Amended Complaint fail to state a claim upon which relief may be granted, the Court will deny Street's motion for leave to amend the Original Complaint.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
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FRUEHAUF TRAILER CORPORATION, et al.)	Case No. 96-01563 (PJW)
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Debtors.)	
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CHRISS W. STREET, as Former Trustee of the End of the Road Trust,)	
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DANIEL W. HARROW, as Successor Trustee of the End of the Road Trust,)	
)	
Defendant.)	

ORDER

For the reasons set forth in the Court's memorandum opinion of this date, Chriss W. Street's Second Amended Motion for Leave to File an Amended Complaint (Doc. # 39) is **denied**.



Peter J. Walsh
United States Bankruptcy Judge

Dated: July 15, 2011