

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE:)

ROBERT W. McLEAN)

Debtor)

ROBERT H. WALDSCHMIDT,)
TRUSTEE)

Plaintiff)

vs.)

SHARON CHEESEBREW)
CHARLES E. COFFEY)
CAROLYN JONES COOK)
ANNA LEE H DAVENPORT)
ANGELA BELL DICKENS)
JAMES E. DILL)
MARLENE A. DILL)
BIRDIE ANN DONNELL)
JAMES HAYNES)
SONYA HAYNES)
CYNTHIA C. JOHNSON)
BEVERLY R. JONES)
ESTATE OF BB KERR)
REBECCA LUSCINSKI)
ELISE MCKNIGHT)
SUZANNE C. MIELKE)
MYERS PARSONS)
HARRIET A. PATTERSON)
CHARLES PERUZZI)
MARY PERUZZI)
T COY PORTER)
FANAJO PORTER)
JONATHAN QUINN)
BETTY S. RAPPEL EYE)
CORNELIA RIDDLE)
DORA RIVERS)
GARY TAYLOR)
GLENDA TAYLOR)

Defendants)

CASE NO. 07-05054-GP3-7

ADV. PROC. NO.

Action to Avoid Fraudulent Conveyances
to Avoid Preferential Transfers
to Disallow and/or Subordinate Claims

COMPLAINT TO AVOID TRANSFERS
AND TO DISALLOW CLAIMS

Comes now the Trustee in the above-captioned matter, and files this action against the above-captioned Defendants, to avoid transfers under 11 U.S.C. §548, §544(b), T.C.A. §66-3-305, and/or 11 U.S.C. §547, to disallow or subordinate claims under 11 U.S.C. §502(d) and/or

§510©, and would state as follows:

BACKGROUND

1. An involuntary petition was filed against the Robert W. McLean (“Debtor”) on July 19, 2007, and an Order of Relief was entered on August 16, 2007.

2. The Plaintiff (“Trustee”) was appointed as Interim Trustee on July 24, 2007, and is currently serving as Trustee for the bankruptcy estate.

3. Prior to 2002, the Debtor had engaged in “day-trading” whereby he would “borrow” funds from various individuals, and place those funds in various stock-trading accounts, whereby he would buy and sell stocks, on a daily basis, in an effort to accumulate profits.

4. The Debtor’s operation involved receiving funds from individuals or other legal entities, and the execution of Promissory Notes, made payable to the “lender”, usually for a one year term, and at interest rates well above prime, in some cases 20%.

5. The treatment of these Promissory Notes varied between lenders, whereby either (1) the Note would be paid in full at the end of the year, (2) the Note would be “rolled-over” with a new Note executed by the Debtor, including the interest from the prior year as part of the new principal for the new Note, (3) interest would be paid, either monthly, or in one payment at the end of the year, and the principal amount would be “rolled-over” into a new Note. (Variations on these scenarios occurred whereby portions of principal or interest would be paid prior to the end of the year for the Note.)

6. Sometime prior to the year 1997, the Debtor began losing money in his day-trading operation, and the likelihood of generating sufficient profits from that enterprise to re-pay all of his obligations ceased.

7. From 1997 (and perhaps well before 1997), the Debtor continued borrowing money from “lenders”, with the knowledge that he would not be able to pay those loans from his day-trading operations.

8. At least from 1997 forward, the Debtor was operating a “Ponzi” scheme, whereby he would use the funds he borrowed from one lender to re-pay portions of interest or principal to prior lenders (hopefully to “roll-over” most of the indebtedness to preserve his cash flow.)

9. Sometime in 2002, the Debtor essentially ceased all day-trading operations, and, although there were some accounts open at four different brokerage firms, the net funds in those accounts amounts to a negligible balance.

10. From 2002, until the filing of the bankruptcy petition, almost none of funds from the new loans from lenders were deposited or “invested” with any brokerage firm; instead, said funds were deposited into one of several bank accounts maintained by the Debtor, and used to re-pay prior loans, to pay for living expenses, and to pay for other activities, including generous donations and the several residences.

11. From 2002, until the filing of the bankruptcy petition, the Debtor actually had no earned income; his sole source of cash flow was from new loans from lenders. (The Debtor did earn a nominal amount of interest from some balances at banking institutions during that time.)

12. From 2002, until the filing of the bankruptcy petition, the Debtor operated his Ponzi scheme, with no ability to ever re-pay the obligations, and with no efforts to “earn” income.

13. The Debtor never actually “defaulted” on any of the loans, and kept his Ponzi scheme operating, until Spring, 2007, at which time certain lenders requested/demanded payment under their Notes, and the Debtor was unable to make the required payments.

14. Even after the first defaulted loans in the Spring of 2007, the Debtor still continued to borrow new money from lenders, in an attempt to cure defaults from prior loans, and to continue his Ponzi enterprise.

15. From 2002, until the filing of the bankruptcy petition, the Debtor was insolvent at all times, with his liabilities under the Notes far exceeding any value of his combined assets.

THE DEFENDANTS

16. Each of the Defendants captioned above were “lenders” who were involved in the lending of money to the Debtor, and who received funds back from the Debtor between July 19, 2003 and July 19, 2007 (four years prior to the filing of the petition)

17. The Notes to each of the Defendants provided for interest to accrue at a different rates, usually over ten percent (10%) per annum.

18. The Defendants received payments on their Notes, and each year the principal was “paid” through the execution of new Promissory Notes, with any outstanding interest either being included in the new Note, or paid through a cash payment to said Defendant.

19. A breakdown of payments made to each Defendant (within the various Counts to this Complaint) is attached as Exhibit 1 to this complaint.

20. Each of the Defendants became participants (regardless of whether they had knowledge) of the Debtor’s overall Ponzi scheme, and the funds borrowed from each of the Defendants were used by the Debtor to continue and extend this “enterprise”, and the payments

made from the Debtor to each Defendant were used to maintain the appearance of legitimacy of the enterprise.

COUNT ONE

FRAUDULENT CONVEYANCE WITH ACTUAL FRAUD - ALL PAYMENTS

21. All of the preceding allegations in this complaint are hereby incorporated.

22. At all times during the four years prior to the filing of the petition, there were actual creditors of the Debtor in existence, who held and still hold unsecured claims allowable under 11 U.S.C. §502, such that the Trustee can assert state avoidance rights under 11 U.S.C. §544(b)(1).

23. In a Ponzi scheme, all payments made by the Debtor to the participants/lenders are deemed to have been made “with actual intent to defraud creditors” within the meaning of 11 U.S.C. §548 and T.C.A. §66-3-305.

24. All payments made to the Defendants within the four years prior to the filing of the petition were fraudulent conveyances, subject to avoidance and recovery by the Trustee under 11 U.S.C. §550.

COUNT TWO

FRAUDULENT CONVEYANCE WITH ACTUAL FRAUD - ALL INTEREST PAYMENTS

25. All of the preceding allegations in this complaint are hereby incorporated.

26. In a Ponzi scheme, the participants/lenders cannot retain any “false profits” from the Ponzi enterprise.

27. The Debtor would “pay” off a loan, by and through the payment of interest and/or the execution of a new note, which “paid” the prior loan in full.

28. The interest received was treated as income (profit) by the lender, and constitutes “false profits”.

29. To the extent that Exhibit 1 lists a total amount of interest payments to a Defendant, all of these “interest” payments can be recovered under 11 U.S.C. §548 and T.C.A. §66-3-305.

COUNT THREE

FRAUDULENT CONVEYANCE WITH ACTUAL FRAUD - PROFIT

30. All of the preceding allegations in this complaint are hereby incorporated.

31. For certain Defendants, the cumulative sum of all payments to a particular lender (going back 15-20 years in some cases) exceeds the principal total of all loans made to Debtor.

32. In such cases, the excess of such payments again constitutes “false profits”, which

are subject to avoidance - to the extent that payments were made within the last 4 years.

33. To the extent that Exhibit 1 lists an amount of excess for any Defendant, then that “excess” can be recovered under 11 U.S.C. §548 and T.C.A. §66-3-305.

COUNT FOUR

CONSTRUCTIVE FRAUDULENT CONVEYANCE - INTEREST AND PROFIT

34. All of the preceding allegations in this complaint are hereby incorporated.

35. All of the payments sought to be avoided under Counts Two and Three are also avoidable under the “constructive” fraudulent conveyance statutes in 11 U.S.C. §548 and T.C.A. §66-3-305.

36. The Debtor made the payments, while insolvent, and did not receive fair consideration for said payments.

37. To the extent that the Trustee does not recover under Counts Two or Three, the corresponding amounts listed in Exhibit 1 can still be recovered as constructive fraudulent conveyances under 11 U.S.C. §548 and T.C.A. §66-3-305.

COUNT FIVE

RECOVERY OF INTEREST IN EXCESS OF USURY LAWS

38. All of the preceding allegations in this complaint are hereby incorporated.

39. Most of the Promissory Notes executed by the Debtor and delivered to the Defendants provided for the payment of interest on the loan, at the rates exceeding 20% per annum.

40. Under T.C.A. §47-14-103, the maximum effective rate of interest which can be charged on any transaction is 10%.

41. Under T.C.A. §47-14-111, interest in any amount in excess of the usury laws can be recovered.

42. Under T.C.A. §47-14-114, the collection of usury is a Class A misdemeanor.

43. Most of the Defendants received payments from the Debtor, constituting payments of interest which exceeded 10%.

44. The collection of interest by the Defendants violates Tennessee usury laws, and all excess interest can be recovered by the Trustee.

COUNT SIX

PREFERENCE PAYMENTS

45. All of the preceding allegations in this complaint are hereby incorporated.

46. Many Defendants received payments (either for principal or interest, or both) within the 90 days prior to the filing of the petition. (See Exhibit 1)

47. The Debtor was insolvent during the 90 day period prior to the filing of the petition, and all such payments to creditors are preferential transfers under 11 U.S.C. §547, subject to being recovered by the Trustee under 11 U.S.C. §550.

48. To the extent that Exhibit 1 lists an amount received by any Defendant within 90 days prior to the petition, and to the extent that those payments have not already been avoided under the previous Counts to this complaint, then all of those payments can be recovered under 11 U.S.C. §547.

COUNT SEVEN

DISALLOWANCE OF CLAIMS

49. All of the preceding allegations in this complaint are hereby incorporated.

50. Many of the Defendants have asserted claims in this bankruptcy proceeding.

51. If a claim has been asserted by any of the Defendants herein, the amount of the claim (as filed by the Defendant) is included in Exhibit 1.

52. Under 11 U.S.C. §502(d), if any Defendant has received funds which are avoidable by the Trustee under §544, 547, 548, or 549, then the claim of said Defendant must be disallowed, unless and until all avoidable transfers have been paid back to the bankruptcy estate.

53. The Defendants have not returned all avoidable transfers to the estate.

54. Each claim asserted by each Defendant should be disallowed as a claim in the bankruptcy proceeding, under §502(d), and not entitled to any distribution from the estate.

COUNT EIGHT

SUBORDINATION OF CLAIMS

55. All of the preceding allegations in this complaint are hereby incorporated.

56. Under §510, the Court can subordinate claims for equitable reasons.

57. Some lenders, including the Defendants herein, have received payments from Debtor, whereas other Lenders have not.

58. The Court should balance the equities, in part, by providing for complete or partial subordination of the claims of the Defendants, depending on the circumstances of each claim.

COUNT NINE

CALCULATION OF CLAIMS (IF ALLOWED) WITHOUT ACCRUAL OF INTEREST

59. All of the preceding allegations in this complaint are hereby incorporated.

60. If any claim of any of the Defendants is allowed, that claim must be limited to a number calculated by the total money loaned, minus the cumulative total of all payments (interest or principal) received over the duration of the relationship.

61. All claims must be computed and allowed (after consideration of §502(d)) without any accumulation of interest, and all payments received by each claimant/Defendant should be applied directly against principal.

62. The total principal loan by each Defendant, less the amounts received by each Defendant, is set forth in Exhibit 1.

63. If the Defendants become entitled to a claim in this case, it should be computed accordingly.

PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That process issue against the above-captioned Defendants, and that they be required to appear and defend this action.

2. That the Court find that the Debtor operated an illegal Ponzi scheme, at all times relevant to this proceeding.

3. That the Court find that all payments made by the Debtor to the Defendants (within four years prior to the filing of the petition) were made with actual intent to hinder, delay and defraud creditors.

4. That the Court determine that all of the payments (principal or interest) to the Defendants (within four years prior to the filing of the petition) are fraudulent conveyances, under 11 U.S.C. §548, and/or §544(b) and T.C.A. §66-3-305.

5. In the alternative, that the Court determine that all payments of Interest (within four years prior to the filing of the petition) are fraudulent conveyances, under 11 U.S.C. §548, and/or §544(b) and T.C.A. §66-3-305.

6. In the alternative, that the Court determine that the accumulated Profits, for any Defendants who realized a profit, are fraudulent conveyances, under 11 U.S.C. §548, and/or §544(b) and T.C.A. §66-3-305.

7. That the Court determine that all of the payments (principal or interest) to the Defendants (within ninety days prior to the filing of the petition) are preferential transfers, under 11 U.S.C. §547.

8. That the Court avoid all of the fraudulent conveyances and preferences, determined

above.

9. That the Court order the Defendants to pay to the Trustee the amount of all avoided transfers.
10. That the Court award the Trustee a judgment against the Defendants, in the amount of the avoided transfers, plus interest from the date the payments were made.
11. That the Court find that all Notes, and all interest payments made to the Defendants, in excess of 10%, violated Tennessee usury laws.
12. That the Court award the Trustee a judgment against the Defendants in the amount of all interest received, in excess of the 10% allowable under Tennessee law.
13. That the Court disallow the claims of each of the Defendants under 11 U.S.C. §502(d), unless and until all avoided transfers are re-paid to the Trustee.
14. That the Court subordinate the claims of each of the Defendants under 11 U.S.C. §510c.
15. That, in the event that any claims are allowed, said claims should be computed and limited as set forth in Count Nine above.
16. For such other and further relief as is appropriate.

RESPECTFULLY SUBMITTED,

/s/ Samuel K. Crocker

SAMUEL K. CROCKER
CROCKER & NIARHOS

Suite 2720

611 Commerce Street

Nashville, TN 37203

615/726-3322 Fax: 615-726-6330

skctrustee@aol.com

/s/ Robert H. Waldschmidt

ROBERT H. WALDSCHMIDT #4657

HOWELL & FISHER, PLLC

300 James Robertson Parkway

Nashville, TN 37201-1107

615/244-3370 Fax: 615-259-2179

rhwaldschmidt@aol.com

ATTORNEYS FOR
ROBERT H. WALDSCHMIDT, TRUSTEE

McLean

<u>Proofs of Claim</u> # <u>Claim</u>	<u>Claim Amount</u>	<u>Avoidance Amount</u>	<u>Preference Amount</u>
10 Sharon Cheesebrew	\$450,000.00	\$ 204,250.00	\$ 8,625.00
130 Charles E. Coffey	\$3,012,619.81	\$ 1,754,999.94	\$ 99,166.66
53 Carolyn Jones Cook	\$200,000.00	\$ 80,000.00	\$ 7,500.00
97-100 Anna Lee H Dvenport	\$366,004.00	\$ 53,342.00	\$ 6,750.00
18 Angela Bell Dickens	\$552,552.00	\$ 333,110.00	\$ 8,430.00
45 James E or Marlene A Dill	\$100,000.00	\$ 21,050.00	\$ 2,625.00
112-113 Birdie Ann Donnell	\$965,036.55	\$ 630,011.66	\$ 8,105.00
125-127 James & Sonya Haynes	\$2,414,212.07	\$ 2,928,208.21	\$ 75,554.00
133 Cynthia C. Johnson	\$383,786.69	\$ 210,832.00	\$ 19,166.66
36 Beverly R. Jones	\$230,000.00	\$ 77,625.00	\$ 5,750.00
87 Estate of BB Kerr	\$1,500,000.00	\$ 393,282.00	\$ 20,000.00
123-124 Rebecca Luscinski	\$605,398.22	\$ 246,825.42	\$ 5,000.00
32 Elise McKnight	\$525,000.00	\$ 126,437.00	\$ 14,875.00
134 Suzanne C. Mielke	\$383,786.69	\$ 210,832.00	\$ 19,166.66
67-68 Myers Parsons	\$367,096.35	\$ 108,580.52	\$ 4,583.33
72 Harriet A. Patterson	\$300,000.00	\$ 123,425.00	\$ 5,250.00
77 Charles A Peruzzi	\$48,159.34	\$ 1,000.00	
78 Mary Peruzzi	\$55,467.12	\$ 13,750.00	\$ 1,375.00
7 T Coy and Fanajo Porter	\$380,000.00	\$ 153,640.00	\$ 3,340.00
1 Jonathan Quinn	\$715,002.00	\$ 435,735.00	\$ 19,200.00
4 & 9 Betty S Rappleye	\$20,000.00	\$ 8,050.00	\$ 175.00
2 Cornelia Riddle	\$130,000.00	\$ 23,100.00	\$ 1,400.00
5 Dora Rivers	\$65,000.00	\$ 63,309.00	\$ 11,275.00
118-120 Gary & Glenda Taylor	\$607,000.00	\$ 148,500.00	\$ 14,000.00