**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF MICHIGAN**
**BAY CITY**

IN RE: Kevin W. Kulek

Chapter 7 Petition
16-21030-dob
Honorable Daniel Opperman

_____/
RANDALL L. FRANK, TRUSTEE,
Plaintiff/Counter-Defendant,

Adversary Case Number
17-02002-dob
Honorable Daniel Opperman

V

PAUL B. MALETICH
VIRTUAPIN CABINETS, INC.,
Defendants/Counter-Plaintiffs.
_____/

Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
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_____/

**DEFENDANTS MOTION TO DISMISS**

Defendants respectfully request that this Court dismiss the Counter-Plaintiffs' Complaint in its entirety. Defendant brings this Motion under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), as incorporated into bankruptcy proceedings by Fed. R. Bankr. P. 7012, and rely on the facts, arguments, and law stated in the accompanying Memorandum in Support. Concurrence in the relief requested was sought on June 23, 2017, but it was denied.

/s/ Keith M. Nathanson_____/
Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
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**PROPOSED ORDER GRANTING DEFENDANTS MOTION TO DISMISS**

This matter having come before this Honorable Court upon Defendants Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) as incorporated into bankruptcy proceedings by

Fed.R.Bank.P. 7012, Counter-Defendant having filed a memorandum of law in support of the motion, and the Court being otherwise duly advised:

IT IS HEREBY ORDERED THAT:

a. The instant matter is hereby dismissed pursuant to F.R.Civ.P. 12(b) with prejudice;
b. Counter-Defendant is hereby granted costs and attorney fees pursuant to 28 U.S.C. §1927 in the amount of $_____;
c. Defendants are hereby enjoined from filing a further suit pursuant to 11 U.S.C. §105(a);

_____

United States Bankruptcy Court Judge

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## NOTICE OF MOTION TO DISMISS

Plaintiff, Randall L. Frank, Trustee has filed papers with the court to dismiss the counterclaim.

**Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)**

If you do not want the court grant the motion to dismiss, or if you want the court to consider your views on the motion, within 14 days, you or your attorney must:

1. File with the court a written response or an answer, explaining your position at:[1]

**United States Bankruptcy Court**
111 First Street, Bay City, MI 48708

If you mail your response to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above. All attorneys are required to file pleadings electronically.

You must also send a copy to:

Keith M. Nathanson, Special Litigation Counsel to Randall L. Frank, Trustee
2745 Pontiac Lake Road, Waterford, MI 48328

2. If a response or answer is timely filed and served, the clerk will schedule a hearing on the motion and you will be served with a notice of the date, time and location of the hearing.

**If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.**

Date: July 10, 2017 Signature /s/ Keith M. Nathanson, P41633

Keith M. Nathanson, P41633
2745 Pontiac Lake Road
Waterford, MI 48328
(248) 436-4833
kn@nathanson-law.com

1 Response or answer must comply with F. R. Civ. P. 8(b), (c) and (e)

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**MEMORANDUM IN SUPPORT OF COUNTER-DEFENDANTS MOTION TO DISMISS**

## I. INTRODUCTION

Defendants submit this memorandum in support of the Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) as incorporated into bankruptcy proceedings by Fed.R.Bank.P. 7012.

As discussed below, Counter-Plaintiffs cannot bring the causes of action as enumerated in their Counterclaim against Defendants which stem only from statements made in an application for default judgment and brief filed incident to the instant adversary complaint.

Concurrence was sought on June 23, 2017 from opposing counsel and was denied. A conference was held by phone on July 10, 2017 and concurrence was denied.

## II. STATEMENT OF ISSUES PRESENTED

1. **Defendants cannot not bring a suit against Counter-Defendants without first obtaining leave of this Court and therefore suit is improper and must be dismissed**

    a. **28 U.S.C. §959 exception does not apply as Trustee was not carrying on a business of the Debtor**

2. **Defendants must seek leave of Court before filing any claim against Counter-Defendants and a suit brought without permission cannot be maintained**

3. **Any statements made during the course of litigation by Counter-Defendants are subject to the judicial privilege recognized by Michigan**

a. **Michigan recognizes the litigation/judicial privilege for communications made during legal proceedings;**
b. **Federal common law and case law also recognizes the litigation privilege;**

4. **While not alleged by Defendants even presuming *arguendo* that Counter-Defendants posted the legal pleadings on the internet, no liability can be derived to make Counter-Defendants liable**

5. **Counter-Defendants are immune from suit for the statements in the pleadings filed with the Court;**

a. **Trustee Immunity;**
b. **Immunity of Counsel for Trustee;**

6. **Business defamation per se is not actionable in Michigan**

7. **Counter-Defendant is entitled to costs and sanctions under 28 USC §1927;**

**III. CONTROLLING AUTHORITIES**

*Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir.), *cert. denied,* 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990)

*Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir. 1988)

*Car Carriers, Inc. v Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1745, 84 L.Ed.2d 821 (1985)

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

*Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)

*In re DeLorean Motor Company*, 991 F.2d 1236, 1240 (6th Cir. 1993)

*Carter v. Rodgers*, 220 F.3d 1249 (11th Cir. 2000)

*Blixseth v. Brown* (*In re Yellowstone Mountain Club, LLC*), 841 F.3d 1090, 1094 (9th Cir. 2016)

*MF Global Holdings Ltd. v. Allied World Assurance Company Ltd.* (*In re MF Global Holdings, Ltd.*), 562 B.R. 866 (Bankr. S.D.N.Y. 2017)

*In re Campbell,* 13 B.R. at 974, 976 (1981).

28 U.S.C. §959

*In re Bay Area Material Handling, Inc*., 1995 WL 747954, (N.D.Cal.), aff'd 111 F.3d 137 (9th Cir.1997)

*Leonard v. Vrooman,* 383 F.2d 556, 560 (9th Cir.1967)

Kefgen v Davidson, 241 Mich App 611, 617; 617 NW2d 351 (2000)

*Froling v Carpenter*, 203 Mich App 368, 371; 512 NW2d 6 (1994)

*Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992)

*Postill v. Booth Newspapers, Inc*., 118 Mich. App 608, 618; 325 NW2d 511 (1982)

*Dadd v. Mount Hope Church*, 486 Mich. 857, 860; 780 NW2d 763 (2010)

*Oesterle v. Wallace*, 272 Mich.App 260, 264; 725 NW2d 470 (2006)

33 Am Jur, Libel and Slander, § 179, pp 172, 173

Restatement (Second) of Torts §586 (1977)

*Raymond v. Croll*, 233 Mich 268

*Steffes v. Stepan Co.,* 144 F.3d 1070, 1075 (7th Cir.1998)

*Rodriguez v. Panayiotou,* 314 F.3d 979, 988 (9th Cir.2002)

*Mundy v. Hoard*, 216 Mich. 478, 491, 185 N.W. 872 (1921)

*Sanders v. Leeson Air Conditioning Corp*., 362 Mich. 692, 695-696, 108 N.W.2d 761 (1961)

*Tocco v. Piersante*, 69 Mich.App. 616, 629, 245 N.W.2d 356 (1976)

*In re Lowenbraun*, 453 F.3d 314 (6th Cir. 2006)

In *Re: McKenzie*, 716 F.3d 404 (6th Cir. 2013)

*Theiss v Scherer*, 396 F.2d 646, (6th Cir. 1968)

*Northland Wheels*, 213 Mich.App at 325

*Amway Corp. v. Procter & Gamble Co*., 346 F3d 180 (6th Cir. 2003)

*Grant, Konvalinka & Harrison (In re McKenzie)*, 716 F.3d 404, 412 (6th Cir. 2013)

*Ford Motor Credit Company v Weaver*, 680 F.2d 541 (1982)

*Smallwood v. U.S*., 358 F.Supp. 398, 404 (E.D.Mo.1973), aff'd mem. 486 F.2d 1407 (8th Cir.1973)

*Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir.1987), *cert. denied*, 486 U.S. 1040, 108 S.Ct. 2031, 100 L.Ed.2d 616 (1988)

28 U.S.C. §1927

11 U.S.C. §105(a)

**IV. FACTS:**

Defendants filed an answer and counterclaim on June 19, 2017. Defendants' counterclaim contains two counts, "Libel and Business Defamation".

Defendants' claims under both counts arise from allegations made in the Counter-Defendants application for default judgment, which was duly filed in conjunction with the instant adversary proceeding, which Defendants also claim was "repeated" in the Answer to Defendants' Motion to Dismiss/Set Aside Default Judgment [Docket 23 and 24]. Counter-Plaintiffs do not allege any other statements outside those in the pleadings. While the Counterclaim contains multiple paragraphs, none of same are relevant to the claims made by Defendants in the counterclaim and the only germane paragraph making any tangible allegations is paragraph 22. The rest of the "allegations" are spurious and unrelated to Counter-Plaintiffs' asserted 'claims'.

V. **STANDARD OF REVIEW UNDER F.R.CIV.P 12(B)(6) AND BANK. R.CIV.P. 7012**

12(b)(6) Standard:

This Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir.), *cert. denied,* 498 U.S. 867, 111 S.Ct. 182, 112 L.Ed.2d 145 (1990).

The standard to survive a 12(b)(6) motion requires more than the bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir. 1988); and must also contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* legal theory. *Car Carriers, Inc. v Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1745, 84 L.Ed.2d 821 (1985).

Rule 12(b)(6) of the Rules of Civil Procedure provides for a motion to dismiss based on failure to state a claim upon which relief can be granted. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his

'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.] Factual allegations must be enough to raise a right to relief above the speculative level...." Id. at 555 (internal citations omitted).

Although not outright overruling the "notice pleading" requirement under Rule 8(a)(2) entirely, Twombly concluded that the "no set of facts" standard "is best forgotten as an incomplete negative gloss on an accepted pleading standard." Id. at 563.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Id. at 570. Such allegations are not to be discounted because they are "unrealistic or nonsensical," but rather because they do nothing more than state a legal conclusion–even if that conclusion is cast in the form of a factual allegation. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). In sum, for a complaint to survive a motion to dismiss, the non-conclusory "factual content" and the reasonable inferences from that, must be "plausibly suggestive" of a claim entitling a plaintiff to relief. Id. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2).

## VI. LAW AND ARGUMENT:

### A. Defendants cannot not bring a suit against Counter-Defendants without first obtaining leave of this Court and therefore suit is improper and must be dismissed.

i. **The 28 USC §959 exception does not apply**.

28 USC §959(a) provides:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury (Emphasis added).

This exception does not apply to suits against the trustee for actions taken while administering the estate. *In re Campbell,* 13 B.R. at 974, 976 (1981). "Merely collecting, taking steps to preserve, and/or holding assets, as well as other aspects of administering and liquidating the estate, do not constitute `carrying on business' as that term has been judicially interpreted." *Id.* (citations omitted).

It is well established that administering a bankruptcy estate does not constitute operating the debtor's business. *See Bay Area, infra* at *4, citing *DeLorean, supra,* 991 F.2d at 1241

B. **Defendants must seek leave of Court before filing any claim against Counter-Defendants and a suit brought without permission cannot be maintained.**

With respect to the claim for libel and business defamation, Courts have held that a bankruptcy trustee could not be sued without leave of the appointing court for actions taken in the scope of his or her authority. *In re Bay Area Material Handling, Inc*., 1995 WL 747954, (N.D.Cal.), aff'd 111 F.3d 137 (9th Cir.1997); *In re DeLorean*, 991 F.2d 1236, 1240 (6th Cir.1993); *Leonard v. Vrooman*, 383 F.2d 556, 560 (9th Cir.1967). “Moreover, this protection extends to other persons appointed by the court, including the trustee's counsel. Id., citing *Bay Area* at * 3; *DeLorean*, 991 F.2d at 1241.

As discussed in *Bay Area,* there are only two exceptions to this rule. First, leave of court need not be sought if the trustee (other court appointed party) is acting in excess of his or her authority or in an unofficial capacity. *See Leonard v. Vrooman,* 383 F.2d 556, 560 (9th Cir.1967). Second, as provided by 28 U.S.C. § 959(a), a trustee may be sued without first getting the appointing court's permission if the trustee is carrying on the debtor's business. See *Bay Area* at *1-*4.

It is well established that administering a bankruptcy estate does not constitute operating the debtor's business. *See Bay Area* at *4, citing *DeLorean,* 991 F.2d at 1241.

Section 959 allows suits against a trustee, receiver, or manager of the property of the estate, including a debtor-in-possession, for their acts or transactions in carrying on business beyond the reorganizational administration of the estate.

In the instant matter, the only actions complained of by Defendants is that Counter-Defendants made allegations in an application for default judgment, an action taken in pursuing a default judgment in an adversary complaint filed in administration of the bankruptcy estate; and at least arguably "some of the same statements" repeated in the response to Defendants' motion to dismiss/relief from judgment, also a pleading filing while administering the estate. The Debtor in the underlying bankruptcy case has no "business" to carry on, nor have the Counter-Defendants taken any action outside of the Trustee's authority to administer the estate (and the related adversary proceedings), nor has anything of that nature been alleged by Defendants.

**C. Any statements made during the course of litigation by Counter-Defendants are subject to the judicial privilege recognized by Michigan.**

**i. Michigan recognizes the litigation/judicial privilege for communications made during legal proceedings.**

**Defamation:**

In order to establish a claim of defamation, a plaintiff must show: (1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm for defamation per se, or the existence of special harm caused by publication for defamation per quod. Kefgen v Davidson, 241 Mich App 611, 617; 617 NW2d 351 (2000).

The defense of privilege exists as a matter of public policy, in that some communications are so necessary that, even if defamatory, they should be made. *Postill v Booth Newspapers, Inc*, 118 Mich App 608, 619; 325 NW2d 511 (1982). "Privileged communications may be either absolutely privileged or qualifiedly privileged." Id. at 619-620. Where an absolute privilege exists, there can be no action for defamation. *Couch v Schultz*, 193 Mich App 292, 294; 483 NW2d 684 (1992). The doctrine of absolute privilege is narrow and applies only to matters of public concern. *Froling v Carpenter*, 203 Mich App

368, 371; 512 NW2d 6 (1994). Absolute privilege extends to (1) proceedings of legislative bodies, (2) judicial proceedings, and (3) communications by military and naval officers. Id. Judicial proceedings can include a hearing before a tribunal or administrative board that performs a judicial function. *Couch*, supra at 294.

**Privilege:**

Privilege can be used as a defense in a defamation action. *Postill v. Booth Newspapers, Inc*., 118 Mich. App 608, 618; 325 NW2d 511 (1982). The defense of privilege is grounded in public policy; in certain situations, the criticism uttered by the defendant is sufficiently important to justify protecting such criticism notwithstanding the harm done to the person at whom the criticism is directed. *Dadd v. Mount Hope Church*, 486 Mich. 857, 860; 780 NW2d 763 (2010). “Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried.” *Oesterle v. Wallace*, 272 Mich.App 260, 264; 725 NW2d 470 (2006). The purpose of absolute immunity for attorneys under the judicial proceedings privilege is to promote the public policy of allowing attorneys broad freedom to obtain justice for their clients. Id. at 265. The trial court correctly ruled that the filing of the federal complaint was not actionable because of the judicial proceedings privilege. See, generally, id. at 264.

The litigation privilege is well defined:

33 Am Jur, Libel and Slander, § 179, pp 172, 173:

> "In the United States the rule supported by the weight of authority is that attorneys conducting judicial proceedings are privileged from prosecution for libel or slander in respect of words or writings used in the course of such proceedings reflecting injuriously on others, when such words and writings are material and pertinent to the question involved, regardless of how false, malicious, or injurious they may be. Under the rule adopted by the American Law Institute, the statement is privileged if it has some relation to the proceeding in which it is uttered. An attorney at law has, therefore, a conditional privilege to make, during the progress of a trial, such fair comments on the circumstances of the case and the conduct of the parties in connection therewith as, in his judgment, seem proper, and it is not material, if the words are uttered in the course of a trial, whether in form they are addressed to a witness or to the court or jury, or are stated in the argumentative part of the attorney's brief. But the privilege does not extend

> to slanderous expressions against counsel, parties, or witnesses, when the expressions have no relation to or bearing upon the issue or subject matter before the court. Nor are statements privileged if they are not uttered in the course of a judicial proceeding. A repetition of privileged words uttered in the course of judicial proceedings, when no public or private duty requires an attorney to repeat them, may place him on the same footing as anyone else who utters defamatory statements concerning another."

All but two states recognize absolute immunity for lawyers involved in litigation with "very little variation" from state to state (Georgia and Louisiana both recognize qualified immunity). The Restatement formulation, adopted in nearly every state, describes the litigation privilege as follows:

“An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.”

Restatement (Second) of Torts §586 (1977).

In *Raymond v. Croll*, 233 Mich 268, this Court declined to recognize as absolutely privileged statements made by the State budget director to the State administrative board with reference to the financial responsibility of the plaintiff, a highway construction contractor. In reaching such conclusion the Court (p 272) quoted with approval from Newell, Slander and Libel (4th ed), § 351, as follows:

> "`Cases of absolute privilege are not numerous, and the courts refuse to extend their number. They are divided into 3 classes. (1) Proceedings of legislative bodies; (2) Judicial proceedings; and (3) Communications by military and naval officers.'"

The *Raymond* Court found the statements made were not within the bounds of the three exceptions.

Federal law generally borrows from state law in the context of application of litigation/judicial privilege. *See Steffes v. Stepan Co.,* 144 F.3d 1070, 1075 (7th Cir.1998).

The litigation privilege is a "long-standing common law rule that communications uttered or published in the courts of judicial proceedings are absolutely privileged." *Circus Circus Hotels v. Witherspoon,* 99

Nev. 56, 657 P.2d 101, 104 (1983). The policy behind the rule is to grant attorneys and other participants in judicial proceedings "the utmost freedom in their effort to obtain justice...." *Id.; see also Rodriguez v. Panayiotou,* 314 F.3d 979, 988 (9th Cir.2002) (privilege applies to any communication with some logical relation to a judicial or quasi-judicial proceeding made by a litigant or other participant in the proceeding). The privilege is a bar to a defamation claim even if it is alleged that the defamatory statements were made with knowledge of their falsity and with personal animosity toward the other party. *Id.*

To be protected, the defamatory communication need not be relevant to the proposed or pending litigation; it need only be related in some way to the subject of the controversy. The privilege applies to communications outside of court and those made before litigation has commenced as well as those made during actual judicial proceedings.

Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried. *Mundy v. Hoard*, 216 Mich. 478, 491, 185 N.W. 872 (1921);

" 'Judicial proceedings' may include any hearing before a tribunal or administrative board that performs a judicial function." *Couch*, supra at 294, 483 N.W.2d 684. Further, "immunity extends to every step in the proceeding and covers anything that may be said in relation to the matter at issue, including pleadings and affidavits." Id. at 295, 483 N.W.2d 684. See also *Sanders v. Leeson Air Conditioning Corp*., 362 Mich. 692, 695-696, 108 N.W.2d 761 (1961).

The purpose of absolute immunity under the judicial proceedings privilege, as it applies to attorneys, is to promote the public policy "of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients." 3 Restatement Torts, 2d, § 586, comment a, p. 247. In *Couch*, supra at 295, 483 N.W.2d 684, the Court stated that "[t]he judicial proceedings privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation.

Further, in *Couch, supra* at 294, 483 N.W.2d 684, the Court stated:

"An absolutely privileged communication is one for which no remedy is provided for damages in a defamation action because of the occasion on which the communication is made." Id.

"A privileged occasion is an occasion where the public good requires that a person be freed from liability for the publication of a statement that would otherwise be defamatory." Id.

"If a statement is absolutely privileged, it is not actionable even if it was false and maliciously published." Id.; See also *Tocco v. Piersante*, 69 Mich.App. 616, 629, 245 N.W.2d 356 (1976).

The litigation privilege is a "long-standing common law rule that communications uttered or published in the courts of judicial proceedings are absolutely privileged." *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 657 P.2d 101, 104 (1983). The policy behind the rule is to grant attorneys and other participants in judicial proceedings "the utmost freedom in their effort to obtain justice...." Id.; see also *Rodriguez v. Panayiotou*, 314 F.3d 979, 988 (9th Cir.2002) (privilege applies to any communication with some logical relation to a judicial or quasi-judicial proceeding made by a litigant or other participant in the proceeding). The privilege is a bar to a defamation claim even if it is alleged that the defamatory statements were made with knowledge of their falsity and with personal animosity toward the other party. Id.

To be protected, the defamatory communication need not be relevant to the proposed or pending litigation; it need only be related in some way to the subject of the controversy. The privilege applies to communications outside of court and those made before litigation has commenced as well as those made during actual judicial proceedings. Id.

In the matter of *In re Lowenbraun*, 453 F.3d 314 (6th Cir. 2006), the chapter 7 trustee commenced an avoidance action against the debtor and his ex-wife on the basis that the debtor and ex-wife had engaged in fraudulent transactions in their divorce proceedings. The parties agreed to a settlement, whereby the spouse agreed to transfer $1 million to the estate, placing it in an account in the name of the debtor, who would then transfer the money to the trustee. Upon transfer to the debtor's

account, the debtor absconded with the money. A reporter interviewed counsel for the trustee and published an article suggesting that the ex-wife had conspired with the debtor and had committed bankruptcy fraud. The ex-wife then sued the trustee's counsel based on these published statements. After finding that the Barton doctrine applied, the Sixth Circuit found that the trustee and counsel for the trustee were immune from suit under Kentucky law. Under Kentucky law, statements made in pleadings filed in judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject matter under inquiry. Further, these statements protected by the absolute privilege did not lose their privilege merely because they were reported in the newspaper. The record was unclear as to whether the published article merely repeated information available in the pleadings and discussed at court hearings or whether the trustee's counsel provided additional information to the reporter. Even if the published article contained additional information provided by trustee's counsel, the ex-wife offered no evidence to suggest that there was bad faith or that the information did not serve a public purpose.

Michigan's standards for judicial/litigation privilege mirror those of Kentucky, and the other 48 states that follow the litigation/judicial privilege rule. The statements made here were in pleadings filed with the Court, and relate directly to the conduct of Defendants, who in addition to stating that they were "assisting" the Debtor, had no hesitation in posting on public message boards that they wouldn't manufacture cabinets if Debtor did not possess the [Predator IP] license, and further assuring the buyers of the Predator pinball machine that they would be receiving their machines, notwithstanding the fact that Debtor never possessed the license to manufacture same..

Defendants' assertions that the statements have "no bearing on the issues" is simply untrue. The statements clearly relate to the conduct of Defendants with Debtor and the knowing participation by Defendants with Debtor. Not a single one of the allegations relates to anything other than Defendants' interaction and conduct with the Debtor, and are contained within the nexus of the "business relationship" (or lack thereof) between Defendants and Debtor.

**ii. Federal common law and case law also recognizes the litigation privilege**

In *Theiss v Scherer*, 396 F.2d 646, (6th Cir. 1968), the Court stated:

"It is beyond argument that statements made in pleadings file in a judicial proceeding come within the rule of absolute privilege".

The Court further stated:

"The rule of absolute privilege for relevant statements made by one attorney to another during the course of and in relation to judicial proceedings in which they are participating as counsel rests on solid basis…. The rights of clients should not be imperiled by subjecting their attorneys to the fear of suits for libel or slander."

While *Theiss, id*, dealt with the issue of statements made from attorney to attorney, the principles are the same as here. In addition to the federal common-law privilege, Courts, including the Courts in this circuit borrow from the state in which the matter derives. In this matter, the allegations made in the Counter-Claim are derived from state causes of action and as such, Counter-Defendants discussion of libel and judicial/legal privilege with respect to the state law-derived privilege is most appropriate.

D. **While not alleged by Defendants even presuming *arguendo* that Counter-Defendants posted the legal pleadings on the internet, no liability can be derived to make Counter-Defendants liable.**

Defendants only claim in the complaint is that Counter-Defendants including allegations in the application for default (and those repeated in the brief in response to motion) that they "knew" would be reposted on a website. Neither of the Counter-Defendants in the Counter-Claim posted any of the legal pleadings.

The fair-reporting privilege is contained within MCL 600.2911(3) which states, in relevant part:

> "Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report."

In order for a report to be privileged under this statute, the report must be "fair and true." Id. In other words, the report must substantially represent the public record or other pertinent matter. See *Northland Wheels*, 213 Mich.App at 325. If any inaccuracy does not alter the effect the literal truth would have on the recipient of the information, the pertinent standard has been satisfied. Id. Clearly, the publishing of an exact copy of the complaint that initiated judicial proceedings constitutes a "fair and true" report with respect to those proceedings.

MCL 600.2911(3) carves out no exception for malice or for so-called "self-reporters." See, generally, *Book–Gilbert v. Greenleaf*, 302 Mich.App 538, 541; 840 NW2d 743 (2013) (a court may not read into statutes language that the Legislature has seen fit to omit).[7]

In *Amway Corp. v. Procter & Gamble Co*., 346 F3d 180 (6th Cir. 2003), legal complaints filed against the plaintiff were posted on a website and the plaintiff took issue with those postings. The plaintiff argued, in part, that certain of the defendants could not avail themselves of the privilege codified in MCL 600.2911(3) because they had created one of the complaints and participated in publishing it on the website. *Amway*, 346 F3d at 185. In Amway, Plaintiff also argued that the conduct of certain of the defendants "was undertaken with a malicious and manifest disregard for the rights of [the plaintiff]." Id. at 184. The court concluded that "Michigan's fair reporting privilege applies to the publication of the entire complaints on [the] website, and no exception to the privilege applies to the conduct complained of here." Id. at 187.

E. **Counter-Defendants are immune from suit for the statements in the pleadings filed with the Court**.

**a. Trustee Immunity:**

Currently courts follow three main approaches when determining whether a bankruptcy trustee should be personally liable for a breach of his fiduciary duties while representing the estate. See Elizabeth H. McCullough, Bankruptcy Trustee Liability: Is There A Method In The Madness?, 15 LEWIS & CLARK L. REV. 153, 154 (2011)

A bankruptcy trustee's immunity from suit is derived from the immunity historically afforded to judges. *Grant, Konvalinka & Harrison (In re McKenzie)*, 716 F.3d 404, 412 (6th Cir. 2013) (citing *Kirk v. Hendon (In re Heinsohn*), 231 B.R. 48, 64 (Bankr. E.D. Tenn. 1999), aff'd 247 B.R. 237 (E.D. Tenn. 2000); *Schechter v. State of Ill. (In re Markos Gurnee P'ship*), 182 B.R. 211, 215 (Bankr. N.D. Ill. 1995), aff'd 195 B.R. 380 (N.D. Ill. 1996).

The Court stated In *Re: McKenzie*, 716 F.3d 404 (6th Cir. 2013):

"Judges enjoy absolute immunity from suit for money damages for actions taken in their judicial capacity, except when taken in the complete absence of jurisdiction. *Bush v. Rauch,* 38 F.3d 842, 847 (6th Cir.1994). Extension of such immunity to officials performing quasi-judicial duties has been recognized for "those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." *Id.* (extending immunity to probate court administrator). This determination is made using a "functional" approach, under which courts look to the nature of the function being performed rather than the identity of the actor performing it. *Id.; see also Forrester v. White,* 484 U.S. 219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). Also considered is "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester,* 484 U.S. at 224, 108 S.Ct. 538. Bankruptcy trustees serve in a variety of functions and may be immune for some but not all of those functions. *Weissman v. Hassett,* 47 B.R. 462, 466 (S.D.N.Y.1985)."

The *McKenzie* Court further went on to hold:

"…[A] a bankruptcy trustee is ordinarily entitled to quasi-judicial (or derivative) immunity from suit by third parties for actions taken in his official capacity. *See, e.g., Kashani v. Fulton (In re Kashani),* 190 B.R. 875, 883 (9th Cir. BAP 1995); *Schechter,* 182 B.R. at 216-17; *Weissman,* 47 B.R. at 466 ("trustees and receivers acting as officers of the court to conserve the bankrupt estate's assets are immune from suit"). For example, in *Heinsohn,* the district court affirmed the determination that the trustee was entitled to quasi-judicial immunity from suit for malicious prosecution in connection with

having reported possible criminal violations discovered in the course of the bankruptcy proceedings. Also, this court concluded in *Lowenbraun* that counsel for the trustee was entitled to absolute immunity with respect to state law claims brought by the non-debtor wife arising out of a contempt motion filed against her in bankruptcy court. 453 F.3d at 322-23. We emphasized that the defendant's "role as counsel for the trustee permitted him to investigate [the non-debtor wife's] transfer and to recover assets properly belonging to the bankruptcy estate." *Id.* at 323."

*McKenzie* did find that Trustees are not immune from suit for claims by beneficiaries of an estate for breach of fiduciary duty.

A bankruptcy trustee is liable personally only for acts willfully and deliberately in violation of his fiduciary duties. *Ford Motor Credit Company v Weaver*, 680 F.2d 541 (6th Cir. 1982), quoting *Sherr v. Winkler*, 552 F.2d at 1375 (10th Cir. 1977).

b. **Immunity of Counsel for Trustee:**

"To the extent that a trustee is immune from suit, a trustee's attorney is also immune." Id., citing *Bay Area* at *5; *Smallwood v. U.S*., 358 F.Supp. 398, 404 (E.D.Mo.1973), aff'd mem. 486 F.2d 1407 (8th Cir.1973); *Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385, 1390 (9th Cir.1987), *cert. denied*, 486 U.S. 1040, 108 S.Ct. 2031, 100 L.Ed.2d 616 (1988). The court held that Trustee and Attorney were immune under the litigation privilege.

In *Grant, Konvalinka and Harrison, P.C. v. Banks (In re McKenzie*), 2013 U.S. App. LEXIS 10491 (6th Cir. May 24, 2013), the United States Court of Appeals for the Sixth Circuit revisited the issues of when a trustee can be held liable and the scope of quasi-judicial immunity. The chapter 11 trustee in McKenzie filed three civil actions. The litigation centered on the transfer of a fifty-acre parcel of land from an entity in which the Debtor held a 50% interest to a newly-formed entity in which the Debtor held no interest. Addressing one of the three actions (the Trustee's adversary proceeding to avoid the transfer), the Bankruptcy Court granted the defendants' motion to dismiss, concluding that the Trustee failed to avert a transfer of the Debtor's interest in property; while the Debtor owned a one-half interest

in the property's corporate owner, the 50-acre parcel itself was not property of the estate. One of the Defendants, in turn, filed two adversary proceedings against the Trustee, and sought permission to bring a third action against the Trustee in state court pursuant to the Barton doctrine (which limits jurisdiction over certain claims to Bankruptcy Court), on grounds of malicious prosecution and abuse of process. The Bankruptcy Court dismissed the two adversary proceedings on grounds that they were barred by quasi-judicial immunity. The Bankruptcy Court also denied the defendant permission to sue the Trustee in state court. On appeal, the Defendant advanced two arguments: first, the Trustee's actions were outside the scope of his authority; second, the Trustee acted without prior Bankruptcy Court approval. The Sixth Circuit addressed the prior approval argument first. While noting that obtaining prior bankruptcy court approval would typically shield a trustee from claims other than claim for breach of fiduciary duty, the Sixth Circuit concluded that "a trustee is not required to obtain prior court approval in order to invoke quasi-judicial immunity from suit by a third party for actions taken by the trustee on behalf of the estate and within the scope of his authority." Id. at *18-*19. The Sixth Circuit also observed that the only context in which courts have found a trustee to be acting outside the scope of his authority has been where the trustee has seized property which is not estate property.

In *The DeLorean Motor Company*, 991 F.2d 1236, 1240 (6th Cir. 1993) Court also stated that:

"We hold, as a matter of law, counsel for trustee, court appointed officers who represent the estate, are the functional equivalent of a trustee, whereas here, they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets. *See In re Balboa Improvements, Ltd.,*99 B.R. 966, 970 (Bankr. 9th Cir. 1989) ("It is well settled that [a debtor's attorney] cannot be sued in state court without leave of the bankruptcy court for acts done in his official capacity and within his authority as an officer of the court.") (citing *In re Campbell,* 13 B.R. at 976)."

The protection that the leave requirement affords the Trustee and the estate would be meaningless if it could be avoided by simply suing the Trustee's attorneys. Therefore, leave of the Bankruptcy Court must be granted before a suit may be brought against counsel for trustee, in their

capacity as counsel for trustee, since such suit is essentially a suit against the trustee. *In Re Delorean Motor Co*, 991 F.2d 1236, 1241 (6th Cir. 1993)

Michigan courts have held that insults and other derogatory comments on "Internet message boards and similar communication platforms" are best regarded as "statements of pure opinion, rather than statement or implications of actual, provable fact." *Ghanam v. Does*, 303 Mich. App. 522, 547 (2014).

F. **Business defamation per se is not actionable in Michigan.**

Defamation regarding one's business or profession is not defamation per se in Michigan. See *George v. Senate Democratic Fund*, 2005 WL 102717 (Mich. Ct. App. 2005); *Pierson v. Ahern*, 2005 WL 1685103 (Mich. Ct. App. 2005).

Counter-Defendants' Counter-Claim makes claims for *per se* defamation, which is not actionable in Michigan.

**G. Counter-Defendant is entitled to costs and sanctions under 28 USC §1927.**

28 U.S.C. §1927 states:

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

The proper inquiry is not whether an attorney acted in bad faith; rather, a court should consider whether an attorney knows or reasonably knows that a claim pursued is frivolous. *Hall v Liberty Life Assur. Co. of Bos*, 595 F.3d 270, 275 (6th Cir. 2010).

Section 1927 sanctions are warranted when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.'" *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) (quoting *Ruben v. Warren City Schs.*, 825 F.2d 977, 984 (6th Cir. 1987).

In the instant matter, Defendants' Counsel has filed a Counter-Claim which cannot be maintained a as a matter of law. The statements made in pleadings filed with the Court are absolutely subject to litigation/judicial privilege and are not actionable.

**H. Counter-Defendant is entitled to an injunction pursuant to 11 USC §105(a).**

Plaintiff also requests that the Bankruptcy Court use its powers under 11 U.S.C. § 105(a) to enjoin Defendants from prosecuting the counterclaim.

"The basic purpose of [section 105] is to enable the court to do whatever is necessary to aid its jurisdiction, i.e., anything arising in or relating to a bankruptcy case." 2 COLLIER ON BANKRUPTCY ¶ 105.02 at 105-03 (15th ed. 1987). "Section 105(a) contemplates injunctive relief in precisely those instances where parties are `pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate.'" *In re Baptist,* 80 B.R. at 641 (quoting *Manville Corporation v. Equity Security Holders Committee* ( *In re Johns-Manville Corp.*), 801 F.2d 60, 63 (2nd Cir. 1986)).

Defendants' actions attempts to interfere in the administration of the estate. This allows the court to enter an injunction to prevent same. See also *In Re Delorean Motor Co*, 991 F.2d 1236, 1242 (6th Cir. 1993).

VI. **SUMMARY**

Defendants' Counterclaim is without merit. Defendants have not sought permission to file suit against Counter-Defendants. Further, aside from the Trustee (and his Counsel) having immunity from suit, the only statements complained of are the statements contained in two pleadings; the application for entry of default judgment and arguably Trustee's Brief in Response to Motion to Dismiss/Relief from Judgment. Those statements are clearly and unequivocally protected by the litigation/judicial privilege which is recognized not only in Michigan law (which is the basis for Counter-Plaintiffs' claim, but by Federal common law. Counter-Plaintiffs cannot state a recognizable cause of action against Counter-Defendants.

VII. **RELIEF REQUESTED**

Counter-Defendant moves this Honorable Court to:

a. Dismiss the instant matter pursuant to F.R.Civ.P. 12(b) with prejudice;

b. Grant Counter-Defendant costs and attorney fees pursuant to 28 U.S.C. §1927;

c. Enjoin Defendants from filing suit pursuant to 11 U.S.C. §105(a);

d. Grant such other relief as may be equitable in the circumstances.

/s Keith M. Nathanson

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**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF MICHIGAN**
**BAY CITY**

IN RE: Kevin W. Kulek

Chapter 7 Petition
16-21030-dob
Honorable Daniel Opperman

_____/

RANDALL L. FRANK, TRUSTEE,
Plaintiff/Counter-Defendant,

Adversary Case Number
17-02002-dob
Honorable Daniel Opperman

V

PAUL B. MALETICH
VIRTUAPIN CABINETS, INC.,
Defendants/Counter-Plaintiffs.
_____/

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_____/

**CERTIFICATE OF SERVICE**

Keith M. Nathanson, states that on July 10, 2017, he did serve by the ECF filing system, a copy of Motion to Dismiss, Memorandum in Support of Motion, Proposed Order,

Notice of Motion, and this Certificate of Service upon Counsel for Defendants at skaminski@schaferandweiner.com through electronic delivery of the pleadings via PACER/ECF.

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