UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY

In re:	Chapter 7 Case No. 16-21030-dob
KEVIN W. KULEK,	Hon. Daniel Opperman
Debtor. _____/	
RANDALL L. FRANK, TRUSTEE	
Plaintiff/ Counter-Defendant,	
v.	Adversary Pro. No. 17-02002-dob
PAUL B. MALETICH and VIRTUAPIN CABINETS, INC.	
Defendants/ Counter-Plaintiffs. _____/	

COUNTER-PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Counter-Plaintiffs, Paul B. Maletich ("Maletich") and VirtuaPin Cabinets, Inc. ("VirtuaPin") (Maletich and VirtuaPin are collectively referred to herein as the "Counter-Plaintiffs"), by and through counsel, Schafer and Weiner, PLLC, for their *Response to Motion to Dismiss* state as follows:

INTRODUCTION

The Counter-Defendants take the absurd and legally unsupported position that they cannot be liable for defaming the Counter-Plaintiffs because they are a bankruptcy trustee and its counsel and the defamatory statements were made in papers that they filed with this Court in their official capacity. Their *Motion to Dismiss* [DN 53] should be denied.

FACTS

On January 2, 2017, the trustee for the Chapter 7 Bankruptcy Estate of Kevin W. Kulek, Randall L. Frank (the "Trustee"), by and through his counsel, Keith M. Nathanson and Keith M. Nathanson, PLLC ("Trustee's Counsel") (Trustee and Trustee's counsel are collectively referred to herein as the "Counter-Defendants"), filed a two count *Complaint* against the Counter-Plaintiffs seeking to recover allegedly fraudulent transfers under 11 U.S.C. §548 (the "Adversary Proceeding").

On March 8, 2017, Counter-Defendants filed an *Application for Entry of Default Judgment* [DN 15] (the "Application"). In the Application, the Counter-Defendants accused Maletich of committing various crimes under Michigan and Federal law by alleging the following:

- Defendant was involved in the Debtor's "business" (SkitB Pinball) and involved in the fraud of obtaining money from approximately 250 prospective purchasers of a "Predator" pinball machine. *See* ¶6 of the Application.

- That Defendant…marketed the pinball machine for sale and collected 'deposits' for the purchase, ranging from $250 to $4,750.00 per person, with most of the 250 purchasers paying $4,750.00. *See* ¶8 of the Application.

- Defendants…attempt[ed] to 'structure' and avid [sic] what Defendants...believed to be IRS reporting requirements for transfers of money in excess of $10,000… *See* ¶12 of the Application.

The Counter-Defendants also accused both Counter-Plaintiffs of other wrongdoing in the Application:

> Defendants closely associated themselves with the Debtor and assisted the Debtor in the fraud including such actions as: (a) providing Debtor with false invoices for materials and goods which were never provided and would never be provided to allow Debtor to draw off money from the PayPal account; (b) providing and generating false bills of costs and expenses; (c) assisting Debtor in obtaining money for use for personal expenses, with no intent of using same for the production and sale of the Predator pinball machine.

See ¶11 of the Application.

On March 8, 2017, this Court entered a Default Judgment against the Counter-Plaintiffs in the Adversary Proceeding. Then, on March 21, 2017, the Counter-Plaintiffs filed a *Motion to Dismiss/Set Aside Default Judgment* [DN 18]. In responding to the *Motion to Dismiss/Set Aside Default Judgment*, the Counter-Defendants again accused the Counter-Plaintiffs of wrongdoing: "[Maletich and VirtuaPin] helped Debtor perpetrate the fraud that the Predator pinball machine was licensed...; having Debtor transfer money to [Maletich and VirtuaPin] in amounts

less than $10,000.00 per transfer with multiple checks written on the same day. *See* ¶13 of *Answer to Motion to Dismiss/ Set Aside Default Judgment* [DN 23].

The Court ultimately granted the Counter-Plaintiff's request to set aside the *Default Judgment* and an *Order Granting, In Part, and Denying, In Part, Defendants' Motion to Dismiss/ Set Aside Default Judgment* was entered by the Court [DN 50].

On June 19, 2017, Counter-Plaintiffs filed their *Answer, Affirmative Defenses, and Counterclaim* [DN 48].[1] The Counterclaim includes two counts: Count I seeks recovery for the false and defamatory statements Counter-Defendants made regarding Maletich in the Application and Count II seeks recovery for the false and defamatory statements Counter-Defendants made regarding VirtuaPin in the Application.

[1] Counter-Plaintiffs considered bringing the defamation claims against Trustee's Counsel in a third-party complaint pursuant to Fed. R. Civ. P. 14, made applicable to these proceedings by Fed. R. Bankr. P. 7014. In light of the ample case law indicating that counsel for the trustee is the functional equivalent of the trustee, the Counter-Plaintiffs reasoned that a Counterclaim against Trustee and Trustee's Counsel was appropriate under the circumstances. The Counter-Defendants have not argued that the Counterclaim is procedurally improper in any way. If this Court disagrees with Counter-Plaintiffs' reasoning, Counter-Plaintiffs request that the Court grant them leave to file a third-party complaint when the Motion to Dismiss is denied.

On July 10, 2017, the Counter-Defendants filed their *Motion to Dismiss* the Counterclaim.[2] The 22-page *Motion to Dismiss* contains only two paragraphs of analysis. It otherwise consists of an endless string of quotes from cases (many of which are more than 20 years old and do not accurately reflect the current state of the law). Counter-Defendants' lack of analysis makes it difficult to know exactly what their arguments are. Nevertheless, the applicable law does not support dismissal of the Counterclaim on any of the grounds asserted by the Counter-Defendants. Therefore, the Motion to Dismiss should be denied in its entirety.

ARGUMENT

I. Legal Standard- Motion to Dismiss

Fed. R. Civ. P. 12(b)(6) permits a defendant to assert the defense of "failure to state a claim upon which relief may be granted" by motion. A motion brought pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. The court must accept as true all factual allegations in the complaint, and any ambiguities must be resolved in the plaintiff's favor. Jackson v. Richards Medical Co., 961 F. 2d 575, 577 (6th Cir. 1992). Granting a Fed. R. Civ. P. 12(b)(6) motion is proper

[2] It is worth noting that the Motion to Dismiss does not comply with L.B.R. 9029-1 (E.D.M.), which requires that the type size of all text and footnotes be no smaller than 14 point.

when there is no set of facts that would allow the plaintiff to recover. Carter v. Cornwell, 983 F. 2d 52, 54 (6th Cir. 1993).

The Counter-Defendants do not allege that the Counterclaim does not meet the pleading standards set forth in Fed. R. Civ. P. 8(a), Bell Atlantic Corp v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007), or Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009). Thus, this Court need only decide whether there is sufficient legal bases to grant Counter-Defendants relief on their defamation claims based upon the Counter-Defendants' various legal arguments.

II. The Counter-Plaintiffs Were Not Required to Seek this Court's Leave to File the Counterclaim

The Counter-Defendants first argue that the Counterclaim should be dismissed because the Counter-Plaintiffs did not seek leave of this Court to file it. However, the case law is clear -- Counter-Plaintiffs were not required to obtain this Court's leave before suing the Counter-Defendants.[3]

[3] On June 10, 2017, prior to filing the *Motion to Dismiss*, Trustee's Counsel discussed the bases for the *Motion to Dismiss* with Counter-Plaintiff's counsel. During that call, Counter-Plaintiffs' counsel detailed why obtaining leave was unnecessary. Trustee's Counsel could not explain why he thought it was, but said that he would "look into it." Plainly, he did not and now Counter-Plaintiffs have expended time and money responding to this untenable argument once again.

A. Leave is Only Necessary if the Action is Not Being Brought in the Bankruptcy Court

"It is well settled that leave of the appointing forum must be obtained by any party wishing to institute an action in a ***non-appointing forum*** against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court." Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236, 1240 (6th Cir. 1993). *See also,* Heavrin v. Schilling (In re Triple S Rests., Inc.), 519 F.3d 575, 578 (6th Cir. 2008) ("leave of the [bankruptcy] forum must be obtained by any party wishing to institute an action in a [state] forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court. This rule allows bankruptcy courts to retain greater control over administration of the estate.") (internal citations omitted); Lowenbraun v. Canary (In re Lowenbraun), 453 F.3d 314, 321 (6th Cir. 2006) ("It is well settled that leave of the bankruptcy forum must be obtained by any party wishing to institute an action in a [state] forum against a trustee for actions done in the trustee's official capacity and within the trustee's official capacity as an officer of the court. This doctrine…applies to trustee's counsel as well as to trustees themselves...") (internal citations omitted). This doctrine "is a practical tool to ensure that all lawsuits that could affect the administration of the bankruptcy estate proceed either in the bankruptcy court, or with the knowledge and approval of the

bankruptcy court." Lunan v. Jones (In re Lunan), 489 B.R. 711, 728 (E.D. Tenn. 2012).

This doctrine does not apply in this case because the Counter-Plaintiffs filed its claim against the Counter-Defendants in the bankruptcy court. Because the rule is inapplicable here, and the Counter-Defendants may be sued in this Court without leave of this Court, the *Motion to Dismiss* must be denied to the extent it relies on this rule.

B. 28 U.S.C. §959

The Counter-Defendants argue that 28 U.S.C. §959(a) does not apply. Section 959(a), Title 28, of the United States Code is a limited exception to the rule that was set forth in the previous section, which allows suits to be filed against a bankruptcy trustee in a non-bankruptcy forum without first obtaining leave from the bankruptcy court for actions taken by the trustee while "carrying on business." In re DeLorean Motor Co., 991 F.2d at 1241. Because the doctrine is not applicable in the first place, there is no reason for this Court to waste its time considering whether the 28 U.S.C. §959(a) exception to the rule applies.

III. The Counter-Defendants are Not Immune from Suit

The Counter-Defendants argue, without any analysis whatsoever, that they are "immune from suit for making false and defamatory statements in papers filed with this Court." *See* Motion to Dismiss, p. 16. The Counter-Defendants are not immune from suit for making false and defamatory statements in papers filed with this Court.

A. The "Functional Approach": Immunity is Determined on a Case by Case Basis

There is no bright line rule that a bankruptcy trustee and his counsel are immune from suit. Instead, whether a bankruptcy trustee and his or her counsel are entitled to immunity from suit is determined on a case-by-case basis using what is commonly referred to as the "functional approach." *See* Forrester v. White, 484 U.S. 219; 108 S. Ct. 538 (1987) (adopting the "functional approach").

The "functional approach" determines whether judicial immunity should be extended to "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." Grant, Konvalinka & Harrison, P.C. v. Banks (In re McKenzie), 716 F.3d 404, 412 (6th Cir. 2013). Under the functional approach, "the nature of the functions with which a particular official or class of officials has been lawfully entrusted [is examined], and…[then the court]…evaluate[s] 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. Immunity is "justified and defined by the functions it protects and serves, not by the person to whom it attaches." Id. "Bankruptcy trustees serve in a variety of functions and may be immune for some but not all of those functions." In re McKenzie, 716 F.3d at 412.

While bankruptcy trustees have been afforded immunity from suit after application of the "functional approach" as case law cited by Counter-Defendants demonstrates, none of those cases involve a trustee and/or his counsel being sued for defamation.[4] The only case that addresses whether a trustee and its counsel are immune from suit for making false and defamatory statements in papers filed in the bankruptcy court is Lisowski v. Davis (In re Davis), 312 B.R. 681 (D. Nev. 2004).

B. In re Davis: Trustees and Their Counsel are not Immune from Suit for Libel

In In re Davis, the bankruptcy trustee filed an adversary proceeding seeking denial of the debtors' discharge pursuant to 11 U.S.C. §727. Id. The debtors filed a counterclaim against the trustee and his counsel that included claims for libel and slander in which the debtors alleged that the trustee and his counsel "repeatedly made statements and ***written pleadings*** [in the bankruptcy case] which were intended to injure the credibility of the debtors…" Id. The trustee and his counsel filed a motion

[4] *See, e.g.*, In re McKenzie, 716 F.3d 404 (holding that trustee and his counsel were entitled to immunity from malicious prosecution and abuse of process claims).

to dismiss the counterclaim in its entirety on numerous legal grounds, including that the libel and slander claims should be dismissed because they are immune from suit. Id. at 684-85.

The court expressly held that ***a bankruptcy trustee and his counsel are "not immune from suit for libel and slander..."*** Id. at 688-89. The court first correctly pointed out that "a trustee may be liable for intentional or negligent violations of duties imposed on him by law."[5] Id. at 688. The court then examined various cases in which trustees had been denied immunity from suit based upon this principle. Id. The Court concluded that those cases provided a basis to find that the trustee and his counsel were not immune from suit for libel and slander. Id. In re Davis makes it plain that the trustee and his counsel are not immune from being sued for libel even when the libel claims arise out of statements made by the trustee and his counsel in pleadings and papers filed by them in the bankruptcy court.

Like the counter-plaintiffs In re Davis, the Counter-Plaintiffs here brought a counterclaim against the Trustee and Trustee's Counsel in the bankruptcy court for defamatory statements made by Trustee and Trustee's Counsel in papers filed before the bankruptcy court. That Circuit has adopted the principal that a bankruptcy

[5] This rule has been adopted in the Sixth Circuit. *See* Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 462 (6th Cir. 1982) ("A bankruptcy trustee is liable…for acts willfully and deliberately in violation of his…duties."). *Also see*, In re Reich, 54 B.R. 995, 1000 (E.D. Mich. 1985) ("[A] trustee is subject to…liability for not only intentional but also negligent violations of duties imposed upon him by law.")

trustee is liable for intentional and negligent violations of his duties, which was the basis for the court's conclusion that the trustee and his or her counsel are not immune from suit for libel.

This Court should adopt the reasoning of the In re Davis court and deny the Counter-Defendants request for dismissal of the Counterclaim on the basis of immunity.

IV. The Counter-Defendants' Defamatory Statements are Not Privileged

The Counter-Defendants argue that the Counterclaim should be dismissed because the defamatory statements are privileged. The Counter-Defendants assert two different privileges: (i) the judicial proceedings/ litigation privilege, and (ii) the fair reporting privilege.[6]

[6] Many of the cases cited by the Counter-Defendants only discuss qualified privilege. *See e.g.*, Postill v. Booth Newspapers, Inc., 118 Mich. App. 608 (1992) and Dadd v. Mt. Hope Church & Int'l Outreach Ministries, 486 Mich. 857 (2010). However, it does not appear that Counter-Defendants are asserting that a qualified privilege applies here. If they are, they did not specify which one and there are many. Further, Counter-Defendants do not even attempt to apply the standards set forth in those cases and they unquestionably have the burden to demonstrate that a qualified privilege applies if they are asserting one. *See* Dadd, 486 Mich. at 861 ("The defendant has the burden of proving the existence of a 'qualified privilege.'"). It seems Counter-Defendants erroneously cited certain cases and the standards in those cases in their brief. Thus, the Counter-Plaintiffs will not address qualified privilege, but are prepared to do so if asked to do so by the Court or if Count-Defendants later specify what qualified privilege, if any, they are relying upon.

A. The Judicial Proceedings/ Litigation Privilege is Inapplicable

Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are privileged only if they are relevant, material, or pertinent to the issue or subject matter before the court. Oesterle v. Wallace, 272 Mich. App. 260, 264 (2006) ("[T]he privilege does not extend to slanderous [or libelous] expressions against counsel, parties, or witnesses, when the expressions have no bearing upon the issue or subject matter before the court."). When a defamation claim is based upon statements in pleadings and other papers filed in a lawsuit, courts analyze whether the allegedly defamatory statements are relevant, material, or pertinent to the issue or subject matter before it. *See e.g.*, Bedford v. Abushmaies, 2013 Mich. App. LEXIS 563 *3-4 (Mar. 26, 2013); Parviz Daneshgari & Motor Consultants of Am. v. Greenbaum, 2011 Mich. App. LEXIS 1369 *6-8 (July 21, 2011); Slomka v. City of Hamtramck Hous. Comm'n,, 2007 Mich. App. LEXIS 2579 *8-9 (Nov. 15, 2007).

The Counter-Defendants claim that the judicial proceedings/litigation privilege applies because the Statements "relate directly to the conduct of [Counter-Plaintiffs]" and "relate to the conduct of [Counter-Plaintiffs] with Debtor and the knowing participation by [Counter-Plaintiffs] with Debtor." *See* Motion to Dismiss,

p. 14. However, Section 548 does not test the knowledge, actions, or intent of the ***transferee*** -- It is the ***debtor's*** fraudulent intent or constructive fraud, along with other suspicious behavior ***by the debtor*** that is at issue. *See e.g.*, Boyd v. Sachs, 153 B.R. 457, 500 (W.D. Mich. 1993) ("[T]he focus of these sections is not upon the acts of the transferee but upon the transferor…"); Emerson v. Maples (In re Mark Benskin & Co.), 161 B.R. 644, 651 (W.D. Tenn. 1993) ("Section 548 does not … test the knowledge or intent of the transferee. It is the debtor/transferor's fraudulent intent or constructive fraud that is at issue….").

To recover under 11 U.S.C. §548, the Counter-Defendants must prove, at a minimum, either (i) that within the two years prior to the filing of the bankruptcy case ***the Debtor*** transferred property that he had an interest in (or incurred an obligation) with the intent to hinder, delay or defraud creditors, or (ii) that within the two years prior to the filing of the bankruptcy case ***the Debtor*** transferred property that he has an interest in (or incurred an obligation) for less than reasonably equivalent value and the Debtor was insolvent at the time of the transfer (or date the obligation was incurred). Whether the Counter-Plaintiffs assisted the Debtor in some fraudulent scheme (which they did not) does not make it any more or less likely that ***the Debtor*** transferred property (or incurred an obligation) with the intent to hinder, delay, or defraud creditors or for less than reasonably equivalent value. ***All that matters for the purposes of 11 U.S.C. §548 is what the Debtor did***.

The Counter-Plaintiffs' alleged conduct is just not relevant, material or pertinent to obtaining recovery under 11 U.S.C. §548. Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. *See* Fed. R. Evid. 401. The Counter-Plaintiffs' conduct simply does not assist the court in any way in determining liability. Indeed, the Counter-Defendants even admit in their Complaint that the Counter-Plaintiffs' intent and conduct is "irrelevant" to their claims. *See* Complaint, ¶34.

Because the libelous statements are not relevant, material, or pertinent to the issues before this Court in the Adversary Proceeding, the judicial proceedings/litigation privilege does not apply.

B. Statutory Fair Reporting Privilege is not Applicable

The Counter-Defendants assert that "presuming *arguendo* that Counter-Defendants posted the legal pleadings on the internet, no liability can be derived…" citing the fair reporting privilege codified in MCL §600.2911(3), which precludes damages in a libel suit where a defendant engages in the publication of the contents of a public record so long as that the defendant presents a "fair and true" report of that record. The Counter-Plaintiffs' defamation claims are not based upon the

Counter-Defendants' reporting of the legal pleadings. Thus, it is unnecessary for this Court to even consider application of the fair reporting privilege.

V. Business Defamation *Per Se* is Actionable Under Michigan Law

The Counter-Defendants argue that "defamation regarding one's business or profession is not defamation per se in Michigan" and is not actionable. *See* Motion to Dismiss, p. 20. Business defamation and business defamation *per se* are both actionable claims under Michigan law.[7] *See, e.g.,* Heritage Optional Center, Inc. v. Levine, 137 Mich. App. 793 (1984).

In Heritage Optional Center, Inc., the Michigan Court of Appeals held that a corporation may be defamed, and, correspondingly, may bring an action for damages. [Citation]. The Heritage Optical court also concluded that statements impugning a corporation's business, and its methods of doing business constitute defamation *per se*. Id. at 798. Statements that are defamatory *per se* do not require either the allegation or proof of special damages. Id. at 797. Heritage Optical remains the law almost three decades since the opinion was issued. *See, e.g.,* Dearborn Tree Serv. v. Gray's Outdoor Servs., LLC, 2015 U.S. Dist. LEXIS 113646

[7] During the June 10, 2017 telephone conversation between Trustee's Counsel and counsel for Counter-Plaintiffs, counsel for Counter-Plaintiffs also explained that business defamation *per se* was a cause of action under Michigan law.

*24-25, FN 4 (E.D. Mich. Aug. 27, 2015) (stating "false and malicious statements injurious to a person in his or her business, or that accuse the commission of a crime, are actionable *per se*, and special damages need not be alleged or proved.").

The Heritage Optical holding was expanded to include statements injurious to a person in his or her business are defamatory *per se*. *See* Falls Sporting News Pub. Co., 834 F.2d 611, 615 (6th Cir. 1987) ("a statement is defamatory *per se* if it is injurious to a person in his or her business"). *See also*, Chonich v. Wayne County Community College, 973 F.2d 1271, 1276 (6th Cir. 1991) *cert. denied* 1994 U.S. LEXIS 4914 (1994). Further, "an accusation of a commission of a crime is defamatory *per se*." Savage v. Lincoln Benefit Life Co., 49 F. Supp.2d 536, 543 (E.D. Mich. 1999).

The Counter-Defendants have peculiarly pointed this Court to unpublished Michigan Court of Appeals decisions from over ten years ago in support of their argument. The cases cited by the Counter-Defendants simply do not reflect the current state of the law.

VI. There is No Basis to Award Costs and Sanctions to Counter-Defendants under 28 U.S.C. § 1927

The Counter-Defendants seek sanctions at every turn in this case. Even when there is no valid basis for the sanctions sought.[8] They are at it once again.

This time, Counter-Defendants seek sanctions against Counter-Plaintiffs' counsel under 28 U.S.C. §1927 because Counter-Plaintiffs' counsel allegedly "filed a Counter-Claim which cannot be maintained as a matter of law." Counter-Defendants claim that the Counterclaim cannot be maintained as a matter of law because "the statements made in pleadings [sic] filed with the Court are absolutely subject to the litigation/judicial privilege and are not actionable." *See* Motion to Dismiss, p. 21.

Section 1927, Title 28 of the United States Code permits an attorney to be sanctioned if he or she "unreasonably and vexatiously" multiplies the proceedings in a case. "An attorney that reasonably believes his claim is meritorious is not subject to sanctions" under 28 U.S.C. §1927. In re Royal Manor Mgmt., 525 B.R. 338, 365 (B.A.P. 6th Cir. 2015) *citing* Ridder v. City of Springfield, 109 F.3d 288, 297-98 (6th Cir. 1997). "There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the

[8] The Counter-Defendants just sought sanctions under Fed. R. Civ. P. 9011 against the Counter-Plaintiffs not even thirty (30) days ago without having any valid basis in law or fact to seek such sanctions against the Counter-Plantiffs.

bench, could agree falls short of the obligations owned by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." Id. *citing* Riddle v. Egensperger, 266 F.3d 542, 546 (6th Cir. 2001).

First and foremost, counsel for the Counter-Plaintiffs simply filed a Counterclaim. No proceedings were multiplied. Further, as demonstrated by the foregoing clear and concise arguments, there are valid reasons why the Counterclaim can and should be maintained as a matter of law. Bringing the Counterclaim was reasonable. Failing to bring the Counterclaim, would have fallen short of counsel's obligations to the Counter-Plaintiffs. The Counter-Defendants request for sanctions against counsel for Counter-Defendants under 11 U.S.C. §1927 should be denied.

VII. An Injunction Pursuant to 11 U.S.C. §105(a) is Inappropriate

The Counter-Defendants request that this Court "use its powers under 11 U.S.C §105(a) to enjoin [Counter-Plaintiffs] from prosecuting the Counterclaim" because it "interferes with the administration of the estate." *See* Motion to Dismiss, p. 21. The Counter-Defendants do not explain how the Counterclaim interferes with the administration of the estate nor do they point this Court to any case law in which a bankruptcy court used its powers under 11 U.S.C. §105(a) to enjoin the prosecution of a Counterclaim that was brought in bankruptcy court.

First, after a diligent search Counter-Defendants could find no case in which a bankruptcy court has used its powers under 11 U.S.C. §105(a) to enjoin an action that was brought in the bankruptcy court against a trustee. Further, in In re DeLorean, the United States Court of Appeals for the Sixth Circuit indicated only that an injunction under 11 U.S.C. §105(a) may be appropriate when there is an action pending ***in another court*** that threatens the integrity of the bankruptcy estate. *See* In re Delorean Motor Co., 991 F.2d at 1242 ("Section 105 contemplates injunctive relief in precisely those instances where parties are pursuing actions pending ***in other courts*** that threaten the integrity of the bankruptcy estate."). Other courts have also came to the same conclusion. *See e.g.*, Schechter v. Dep't of Revenue (In re Markos Gurnee Pship.), 182 B.R. 211, 222 (N.D. Ill. 1995) ("[W]here adjudication of a particular action in a nonbankruptcy forum would 'embarrass, burden, delay or otherwise impede' the bankruptcy proceedings, the bankruptcy court may enjoin the prosecution of that action in the nonbankruptcy forum…").

Next, in Amedisys, Inc. v. Nat'l Century Fin. Enters. (In re Nat'l Century Fin Enters.), 423 F.3d 567, 579 (6th Cir. 2005), the Sixth Circuit stated, "When the bankruptcy court enjoins an action under § 105(a) it ***must*** consider the four preliminary injunction factors, and apply a standard of clear and convincing evidence." *See also,* In re DeLorean, 755 F.2d 1223, 1228 (6th Cir. 1985) (explaining that a bankruptcy court must make "specific findings concerning…four

factors, unless fewer are dispositive of the issue[,]" for a §105(a) injunction: "(1) the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; (4) whether the public interest would be served by the injunction.") The Counter-Defendants have not even attempted to show that any of these factors apply.

The request for an injunction under 11 U.S.C. §105(a) should be denied because (i) the Counter-Defendants failed to identify any case where a bankruptcy court enjoined an action against a trustee brought in bankruptcy court 11 U.S.C. §105(a) and (ii) the Counter-Defendants have not endeavored to establish that the four preliminary injunction factors apply and it is their burden of proof.

CONCLUSION

The Counter-Defendants can and should be liable for defaming the Counter-Plaintiffs in the Application. The statements were not relevant, material, or pertinent to the issues before this Court in the Adversary Proceeding and the statements have unquestionably effected the livelihood of Maletich and VirtuaPin's business.

Respectfully Submitted,

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