IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

GEORGE L. MILLER, Chapter 7 Trustee Of the bankruptcy estates of AMERICAN BUSINESS FINANCIAL SERVICES, INC. and subsidiaries,	:	JULY TERM, 2006
	:	NO. 1225
	:	COMMERCE PROGRAM
Plaintiff,	:	
	:	Control Nos. 041182, 061519, 061580
v.	:	
ANTHONY J. SANTILLI, BEVERLY SANTILLI, ALBERT W. MANDIA, JEFFREY M. RUBIN et al.,	:	
Defendant.	:	

ORDER

AND NOW, this 20th day of September, 2007, after hearing oral argument and in accord with the Opinion issued simultaneously, it is hereby **ORDERED** that the Motion for Judgment On The Pleadings of JP Morgan, Bear Sterns, Morgan Stanley, and Credit Suisse is **GRANTED in part,** the Preliminary Objections of U.S. Bank are **SUSTAINED in part**, and the Preliminary Objections of the Director and Officer defendants[1] are **SUSTAINED in part.**

Count IV of the Complaint for Breach of Duty of Care, Mismanagement, Negligence and/or Gross Negligence is **DISMISSED** as to Leonard Becker, Michael R. DeLuca and Harold Sussman only. Count V claiming Aiding and Abetting Breach of Fiduciary Duty, Count VI claiming Aiding and Abetting Fraud, and Count VIII claiming Civil Conspiracy are **DISMISSED** as to U.S. Bank National Association only. Count VII claiming Deepening Insolvency and all allegations of joint and several liability contained in Count IX claiming Fraudulent Transfer are **DISMISSED** as to all defendants.

[1] The Director and Officer defendants are: Anthony J. Santilli, Beverly Santilli, Albert W. Mandia, Jeffrey M. Rubin, Leonard Becker, Michael R. DeLuca, and Harold Sussman.

The remainder of the Motion is **DENIED**, and the remainder of the Preliminary Objections are **OVERRULED**. Objecting defendants shall file an Answer to the Complaint within twenty (20) days of the date of entry hereof.

BY THE COURT,

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MARK I. BERNSTEIN, J.

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OPINION

Plaintiff George L. Miller is the Chapter 7 bankruptcy trustee (the "Trustee") of American Business Financial Services, Inc. and its subsidiaries ("ABFS"), which were in the business of making residential mortgage loans to credit-impaired or "subprime" borrowers (the "Subprime Loans"). ABFS is a Delaware corporation with its headquarters in Pennsylvania.

In this action, the Trustee has brought claims against the following persons: four officers of ABFS, Anthony J. Santilli, Beverly Santilli, Albert W. Mandia, and Jeffrey M. Rubin (collectively, the "Officers"); and three directors of ABFS, Leonard Becker, Michael R. DeLuca, and Harold Sussman (collectively, the "Directors"). The Trustee has also asserted claims against five financial institutions and their affiliates, all of whom had business dealings with ABFS: U.S. Bank National Association ("U.S. Bank"); JP Morgan Chase Bank, J.P. Morgan Securities, Inc., and JPMorgan Chase & Co (collectively, "JP Morgan"); Credit Suisse (USA), Inc., Credit Suisse First Boston, Credit Suisse First Boston Mortgage Securities Corp., and Credit Suisse First Boston Mortgage Capital, LLC (collectively, "Credit Suisse"); Bear, Sterns & Co., Inc.,

Bear Stearns Financial Products Inc., and Bear Sterns Asset Backed Securities, Inc. (collectively, "Bear Sterns"); and Morgan Stanley & Co., Morgan Stanley Dean Witter & Co., Morgan Stanley ABS Capital I, Inc., and Morgan Stanley Mortgage Capital, Inc. (collectively, "Morgan Stanley").

The Trustee alleges[2] that from 2000-2003, ABFS sold and pledged groups of Subprime Loans to certain trusts which it had created. Those trusts issued securities in order to raise capital for ABFS by selling interests in the trust assets ("Securitizations") primarily to institutional investors. These "Securitizations" were underwritten[3] by JP Morgan, Credit Suisse, Bear Sterns, and Morgan Stanley (collectively, the "Securitization Institutions"). ABFS received cash from the sale of the securities and retained rights to future income ("Residual Interests") on the Subprime Loans transferred to the trusts. This lawsuit centers on the fact that ABFS recorded the "fair value" of these Residual Interests as assets on its financial statements.

The Trustee alleges in the Complaint that the Officers, ABFS' accountants,[4] and the Securitization Institutions grossly overvalued the Residual Interests, so that ABFS would appear to be solvent and even prosperous when it was not. The Trustee also alleges in the Complaint that the Officers engaged in the following improper acts:

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[2] For purposes of deciding the Preliminary Objections, "all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purposes of review." Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 714 (Pa. Super. 2005). Similarly, in deciding a Motion for Judgment on the Pleadings, the court "must accept as true all well pleaded statements of fact of the party against whom the motion is [made] and consider against him only those facts that he specifically admits." Md. Cas. Co. v. Odyssey Contr. Corp., 894 A.2d 750, 753 (Pa. Super. 2006).

[3] "To underwrite" is "to assume financial responsibility for; guarantee against failure." American Heritage Dictionary, p 1948 (3d ed. 1992). "An underwriting contract . . . is an agreement, made before corporate shares are brought before the public, that in the event of the public not taking all the shares of the number mentioned in the agreement, the underwriter will take the shares which the public do not take." Blacks' Law Dictionary, p. 1527 (6th ed. 1990).

[4] The accountants were not named by the Trustee as defendants in this action, but the accountants have been joined as additional defendants.

> 67. Commencing at a time presently unknown by the Trustee and continuing until the ABFS bankruptcy filing, the Officer Defendants erroneously misused $5.7 million from the mortgage escrow funds they were charged with the responsibility to service and maintain.
> 99. During the five years immediately preceding ABFS's bankruptcy filing Defendants Santilli and Beverly Santilli were paid more than $10 million in unreasonable salaries and bonus compensation from an insolvent ABFS.
> 100. During the five years immediately preceding ABFS's bankruptcy filing, five other members of the Santilli family were on the company payroll (including children Carole Santilli and John Santilli) and were paid more than $2.6 million in unreasonable salaries and bonus compensation from an insolvent ABFS.
> 101. During the five years immediately preceding ABFS's bankruptcy filing, Defendants Santilli and Beverly Santilli essentially used ABFS as the Santilli family bank, wrongfully paying themselves substantial sums on account of personal charges and expenses that were not honest or legitimate business expenses of an insolvent ABFS.
> 102. During the five years immediately preceding ABFS's bankruptcy filing, Defendant Mandia was paid more than $2.5 million in unreasonable salary and bonus compensation from an insolvent ABFS.
> 103. During the five years immediately preceding ABFS's bankruptcy filing, Defendant Rubin was paid more than $2.4 million in unreasonable salary and bonus compensation from an insolvent ABFS.
> 104. During the period of ABFS's insolvency, the ABFS Defendants caused ABFS to declare and pay more than $1.4 million of unlawful dividends to Santilli and his wife.
> 105. During the period of ABFS's insolvency, the ABFS Defendants caused ABFS to relieve Santilli of the obligation to repay $600,000 that he had borrowed from ABFS (yet the loan was retained as an asset on ABFS's balance sheet).[5]

The Trustee claims that the Directors should have, but failed to, discover the overvaluations of the Residual Interests as well as the Officers' other financial chicanery. The Trustee alleges as follows:

> 114. At all times material hereto, the Outside Director Defendants knew or should have known that the Officer Defendants had been perpetrating the frauds and engaging in the wrongdoing alleged in this Complaint.
> 115. The Outside Director Defendants consciously and intentionally disregarded their corporate responsibilities, in that they, among other wrongs, (i) failed to act in good faith, (ii) failed to act in the honest belief that their actions or inaction were taken in the best interests of ABFS and its creditors, and (iii) knowingly and deliberately remained indifferent to critical deficiencies in ABFS's

[5] Complaint, ¶¶ 67, 99-105.

> corporate information and accounting systems, demonstrating a clear disregard for the financial health of the company.[6]

In addition to the Securitizations, ABFS raised funds through the sale of subordinated notes (the "Notes") to unsophisticated investors. These Notes were recorded on ABFS' balance sheet as debt. To reduce this debt, the Officers and Directors caused ABFS to offer to exchange the Notes for preferred stock in ABFS ("Exchange Offers"). US Bank served as the "indenture trustee" for the sale of the Notes and the Exchange Offers. As "indenture trustee," it is alleged in the Complaint that US Bank provided "financial cover and credibility in connection with ABFS's business."[7]

The Trustee has asserted the following claims against the various defendants based on the foregoing:

Count I for Fraud and Count IV for Breach of Duty of Care/Mismanagement/ Negligence/Gross Negligence against the Officers for falsifying ABFS' financial statements to hide its rapidly deteriorating financial position.

Count II for Breach of Fiduciary Duty and Count IV for Breach of Duty of Care/Mismanagement/ Negligence/Gross Negligence against the Officers for self-dealing and improper use of ABFS funds.

Count III for Breach of Fiduciary Duty and Count IV for Breach of Duty of Care/Mismanagement/ Negligence/Gross Negligence against the Directors because they failed to discover the Officers' wrongdoing.

[6] Complaint, ¶¶ 114-115.

[7] *Id.*, ¶ 156.

Count V for Aiding and Abetting Breach of Fiduciary Duty, Count VI for Aiding and Abetting Fraud, and Count VIII for Conspiracy to commit fraud and breach of fiduciary duty against US Bank for its role in the sales of Notes and the Exchange Offers.

Count V for Aiding and Abetting Breach of Fiduciary Duty, Count VI for Aiding and Abetting Fraud, and Count VIII for Conspiracy to commit fraud and breach of fiduciary duty against the Securitization Institutions for their role in the Securitizations.

Count VII for Deepening of Insolvency against all defendants for causing ABFS to continue in business while insolvent.

Count IX for Fraudulent Transfer against all defendants for taking money, including underwriting fees, from ABFS without affording reasonably equivalent value.

The Securitization Institutions answered the Complaint and filed the Motion for Judgment on the Pleadings presently before the court. The defendant Officers and Directors and US Bank filed the Preliminary Objections to the Complaint presently before the court. Since the same issues are raised in the Motion for Judgment on the Pleadings and the Preliminary Objections, they will be addressed together.

I. Choice of Law Analysis.

As a preliminary matter, the parties' question whether Pennsylvania or Delaware law applies to the Trustee's claims. ABFS was incorporated in Delaware, and, therefore, it is governed by the Delaware Corporations Law. ABFS' headquarters are in Pennsylvania. Since many of the activities alleged in the Complaint occurred in Pennsylvania, Pennsylvania law may apply to some claims. Where the parties dispute which jurisdiction's law applies, the court must first determine whether there is a true conflict of laws. The Superior Court has clearly explained this principle: "In Pennsylvania, choice of law analysis first entails a determination of whether

the laws of the competing states actually differ. If not, no further analysis is necessary. If [the court] determines a conflict is present, [it] must then analyze the governmental interests underlying the issue and determine which state has the greater interest in the application of its law."[8]

II. Count VII for Deepening Insolvency.

All defendants object to the claim for "deepening insolvency." Defendants argue that Delaware law applies. Plaintiff argues that Pennsylvania law applies. There is no true conflict because neither state recognizes a cause of action for deepening insolvency. The Delaware Chancery Court recently clearly held that deepening insolvency is not recognized as a cause of action in Delaware:

> The concept of deepening insolvency has been discussed at length in federal jurisprudence, perhaps because the term has the kind of stentorious academic ring that tends to dull the mind to the concept's ultimate emptiness.
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> * * *
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> The rejection of an independent cause of action for deepening insolvency does not absolve directors of insolvent corporations of responsibility. Rather, it remits plaintiffs to the contents of their traditional toolkit, which contains, among other things, causes of action for breach of fiduciary duty and for fraud. The contours of these causes of action have been carefully shaped by generations of experience, in order to balance the societal interests in protecting investors and creditors against exploitation by directors and in providing directors with sufficient insulation so that they can seek to create wealth through the good faith pursuit of business strategies that involve a risk of failure. If a plaintiff cannot state a claim that the directors of an insolvent corporation acted disloyally or without due care in implementing a business strategy, it may not cure that deficiency simply by alleging that the corporation became more insolvent as a result of the failed strategy.[9]

[8] Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. 2000).

[9] Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 204 (Del. Ch. 2006), *aff'd*, 2007 Del. LEXIS 357 (Del. Aug. 14, 2007).

The Delaware Supreme Court affirmed that holding without opinion.[10]

Likewise, no Pennsylvania state court has ever recognized a cause of action for deepening insolvency. The Third Circuit has predicted that "the Pennsylvania Supreme Court would determine that 'deepening insolvency' may give rise to a cognizable injury,"[11] but the Third Circuit later predicted that "only fraudulent conduct will suffice to support a deepening-insolvency claim under Pennsylvania law."[12] This court finds that the law of Pennsylvania parallels that of Delaware on the issue in this case.[13]

"Deepening insolvency" may be a cognizable harm justifying the court's exercise of equitable powers while there is still time to limit the natural and inevitable consequences of the continued "deepening." However, once the ultimate harm from an unrestrained deepening insolvency has been suffered and bankruptcy has occurred, traditional claims for fraud and breach of fiduciary duty, which "have been carefully shaped by generations of experience," are sufficient to recover for any wrongdoing. In this case, bankruptcy has already occurred and the Trustee is pursuing claims for fraud and breach of fiduciary duty. The Preliminary Objections are sustained, and the Motion for Judgment on the Pleadings is granted, as to the Trustee's claim for "deepening insolvency," and the claim is dismissed.

III. Count IX for Fraudulent Transfer.

All defendants object to the fraudulent transfer claims on the basis that the Trustee lacks standing to raise such claims. No party disputes that Pennsylvania law applies. The

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[10] Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 2007 Del. LEXIS 357 (Del. Aug. 14, 2007).

[11] Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 349-350 (3d Cir. 2001).

[12] In re Citx Corp., 448 F.3d 672, 681 (3d Cir. 2006).

[13] "A federal court's interpretation of Pennsylvania law is not binding on this court." Mutual Ben. Ins. Co. v. Goschenhoppen Mut. Ins. Co., 392 Pa. Super. 363, 370, 572 A.2d 1275, 1278 (1990).

Pennsylvania Uniform Fraudulent Transfer Act ("UFTA") creates a cause of action for a "creditor." It says:

> In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in sections 5108 (relating to defenses, liability and protection of transferee) and 5109 (relating to extinguishment of cause of action), may obtain . . . avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.[14]

The statute defines "creditor" as "a person who has a claim."[15] A "claim" is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."[16] Therefore, UFTA grants a cause of action to any person who has a "claim." Since the Trustee does not assert any right to payment against ABFS, the Trustee does not have a "claim" against ABFS. Therefore, under the terms of UFTA viewed in isolation, the Trustee does not have standing to bring an action against ABFS.

If the Trustee does have standing to bring a fraudulent transfer claim, it must be found in some other statute or rule of law. The Bankruptcy Code gives the Trustee a claim against ABFS under UFTA. The Bankruptcy Code provides:

> The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding [certain types of] unsecured claim[s].[17]

According to Collier on Bankruptcy, this provision "gives the trustee the right to use applicable state law, namely, the UFCA or the UFTA . . . to avoid a fraudulent transfer, separate and apart

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[14] 12 Pa. C.S. § 5107.

[15] *Id.* § 5101.

[16] *Id.*

[17] 11 U.S.C.S. § 544(b). Although the Trustee disclaims reliance on this section, the court must rule in accord with applicable law regardless of counsel's strategic decisions.

from the avoidance rights given the trustee" under other sections of the Bankruptcy Code.[18] Therefore, the Trustee has standing to assert a fraudulent transfer claim against the defendants.

The defendants, however, cannot be found jointly and severally liable for the fraudulent transfers ABFS made to other defendants. UFTA allows a creditor to sue only the specific transferee of a fraudulent transfer. Under UFTA,

> The judgment may be entered against . . . the first transferee of the asset or the person for whose benefit the transfer was made.[19]

The Trustee claims that each defendant is the first transferee in its own transaction with ABFS, so each can be found liable under UFTA only for the amounts it improperly received from ABFS and not for anything other defendants obtained in separate transactions. The allegations of joint and several liability for fraudulent transfers are dismissed.

IV. Count I for Fraud.

Moving defendants object to the Trustee's claims for fraud based on two related arguments. They claim that since the Trustee stands in the shoes of ABFS, the Trustee is *in pari delicto* with the Officers who committed the fraud. Defendants reasons that the Trustee cannot assert claims based on its own fraud. They also claim that the Officers' fraud must be imputed to ABFS, and therefore, neither the Trustee nor ABFS can claim to have justifiably relied upon the Officers misstatements.[20] The parties present no conflict between the law of Pennsylvania and Delaware on these issues.

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[18] 5-548 Collier on Bankruptcy-15th Edition Rev. § 548.01.

[19] 12 Pa. C.S. § 5108.

[20] Justifiable reliance by the victim is one of the required elements of a claim for fraud. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

In pari delicto is usually applied in an action between the corporation and an innocent third party.[21] In Wishnefsky v. Riley & Fanelli, P.C.,[22] the Superior Court said:

> The common law doctrine of *in pari delicto* ('in equal fault') is an application of the principle that no court will lend its aid to a man who grounds his action upon an immoral or illegal act. When the doctrine is applied, the result is to render the transaction between the parties absolutely without any force or effect whatever. The law will leave the parties just in the condition in which it finds them.

Herein, the corporation ABFS was used as the vehicle for the Officers' conspiracy with the other defendants. A conspiracy using the corporate structure improperly to defraud creditors and shareholders does not equate to ABFS being at fault. *In pari delicto* is not applicable when a corporation brings an action against an insider for misconduct. In reaching this conclusion, the court believes the reasoning of the Delaware Court of Chancery in Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P. is sound:

> There are certainly situations when an entity could be injured by an insider's misconduct and when the entity, as to third parties, would be charged with knowledge of that misconduct. Suppose, for example, that a board of directors conspired with the company's auditors to embezzle $100 million, giving the auditor a 10% cut if it characterized the stolen funds improperly in the company's financial statements. In that circumstance, the directors' knowledge of the wrongdoing would not bar a derivative suit against the directors and the auditors on behalf of the company, even though a third party relying reasonably on the company's false financial statements might have a basis to sue the company and charge it with its insiders' knowledge. Many of the great corporate scandals have involved concerted activity by company advisors and insiders, activity that sometimes harmed not only outsiders but also, derivatively, the company's innocent stockholders. The doctrine of in pari delicto has never operated in Delaware as a bar to providing relief to the innocent by way of a derivative suit.[23]

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[21] Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 212, n. 132 (Del. Ch. 2006), *aff'd*, 2007 Del. LEXIS 357 (Del. Aug. 14, 2007).

[22] 799 A.2d 827, 829 (Pa. Super. 2002).

[23] Trenwick, 906 A.2d at 212, n. 132.

Just as *in pari delicto* does not bar a shareholder derivative suit, it does not bar a bankruptcy trustee from asserting claims comparable to shareholder claims, such as the fraud claim asserted in this action.

Officers' fraudulent conduct will not be imputed to the corporation "if the officers' interests were adverse to the corporation and not for the benefit of the corporation."[24] In this case, the Trustee alleges that the Officers furthered their own interests adverse to those of ABFS by looting corporate assets. Specifically, the Complaint alleges that the Officers: 1) overstated ABFS' assets so as to prolong its existence as a vehicle for their wrongdoing; 2) misused $5.7 million in mortgage escrow funds; 3) overpaid themselves and family members; 4) reimbursed themselves with ABFS' funds for personal expenses; and 5) relieved one Officer of his obligation to repay a loan from ABFS.[25] These acts were not done for corporate benefit. The Officers' plundering of the company cannot be imputed to ABFS. ABFS cannot be *in pari delicto* with its looters. The Preliminary Objections are overruled, and the Motion for Judgment on the Pleadings is denied, as to the Trustee's claim for fraud.

V. Count V for Aiding and Abetting Breach of Fiduciary Duty, Count VI for Aiding and Abetting Fraud, and Count VIII for Conspiracy.

The Securitization Institutions and US Bank object to claims of aiding and abetting fraud and breach of fiduciary duty. They claim that no such cause of action exists in Pennsylvania. They are wrong. Aiding and abetting, or concerted action, as a cause of action is described in the Restatement of Torts as follows:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

[24] Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 359 (3d Cir. 2001).

[25] Complaint, ¶¶ 67, 85, 86, 99-105.

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[26]

This section of the Restatement is the law of Pennsylvania. It has been cited with approval by the Pennsylvania Supreme Court[27] and the Superior Court.[28] The Commonwealth Court has expressly held that aiding and abetting breach of fiduciary duty is a cognizable tort.[29]

As alleged in the Complaint, "the substantial assistance provided by [each of the Securitization Institutions] included . . . determining the value of the substantially inflated gain to

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[26] Restatement (Second) Torts § 876.

[27] Skipworth by Williams v. Lead Indus. Ass'n, 547 Pa. 224, 236, 690 A.2d 169, 174 (1997) (The Supreme Court found the Superior Court's interpretations of the concert of action theory to be "eminently reasonable" and "expressly adopt[ed] them.").

[28] Sovereign Bank v. Ganter, 914 A.2d 415, 424 (Pa. Super. 2006) ("Section 876 of the Restatement (Second) of Torts addresses the tort of civil aiding and abetting, which is also known as concerted tortious conduct. . . If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act. . . Considering the evidence in a light most favorable to Sovereign as the verdict winner, we conclude Sovereign presented sufficient, circumstantial evidence to demonstrate concerted tortious conduct on the part of Mr. Ganter."); Larsen v. Philadelphia Newspapers, 411 Pa. Super. 534, 547, 602 A.2d 324, 331 (1991) ("A cause of action for concerted activity under Section 876 of the Restatement (Second) of Torts has been recognized by our Pennsylvania courts."); Jefferis v. Commonwealth, 371 Pa. Super. 12, 18, 537 A.2d 355, 358 (1988)("Factors relevant to determining whether the defendant's act was a substantial factor in the commission of the tort include, but are not limited to, the nature of the act encouraged, the amount of assistance given, the defendant's presence or absence at the time of the tort, the defendant's relation to the tortfeasor and the foreseeability of the harm that occurred."); Kline v. Ball, 306 Pa. Super. 284, 287, 452 A.2d 727, 728 (1982) (In considering § 876(b), the court held that "we are inclined to feel that appellants' argument from the Restatement of Torts 2d has merit, and that on facts similar to those of the instant matter, § 876 might well prove applicable.")

[29] Koken v. Steinberg, 825 A.2d 723, 732 (Pa. Commw. 2003) ("the Liquidator has clearly identified the wrong, a breach of fiduciary duty, the wrongdoer, Reliance, and the party that acted in concert with the wrongdoer, Deliotte. Accordingly, this Court concludes that the Liquidator has stated a cause of action against Deloitte for aiding and abetting a breach of fiduciary duty pursuant to Section 876 of the Restatement (Second) of Torts.").

Delaware also recognizes such a cause of action. Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 215 (Del. Ch. 2006), *aff'd*, 2007 Del. LEXIS 357 (Del. Aug. 14, 2007).

be booked by ABFS in connection with the securitizations."[30] This factual allegation leads to the reasonable inference that the Securitization Institutions: 1) had knowledge of the Officers' wrongdoing; 2) committed their own wrong against ABFS; and 3) provided substantial assistance to the Officers in their fraudulent scheme. The Trustee pled all the elements of a claim for aiding and abetting fraud and breach of fiduciary duty against the Securitization Institutions. Based on these facts, the claim of conspiracy against the Securitization Institutions also stands.[31] The Securitization Institutions' Motion for Judgment on the Pleadings is denied as to the Trustee's claims for aiding and abetting and conspiracy.

There is, however, no factual allegation from which one can conclude that US Bank, the "indenture trustee," knew of the Officers' wrongdoing, or that US Bank committed any independent breach of duty owed to ABFS. The Trustee alleges that US Bank provided "substantial assistance" to the Officers as follows:

> 80. At all times material hereto, US Bank played a substantial role in the issuance and sale of ABFS Subordinated Notes, and, without the participation and financial credibility provided by US Bank, ABFS would not have been successful in continuing to issue and sell ABFS Subordinated Notes and the Officer Defendants' scheme would have unraveled and collapsed years earlier.
> 89. [T]he ABFS Defendants, BDO, US Bank and others concocted a scheme to remove debt from ABFS' balance sheet by the artifice of exchange offers, registered with the SEC, pursuant to which the existing holders of ABFS Subordinate Notes would be afforded the opportunity to 'exchange' these notes for preferred stock and/or combination of preferred stock and new debt.
> 156. The substantial assistance provided by US Bank included, but was not limited to: (a) serving as indenture trustee in connection with the sale of $1.5 billion of ABFS Subordinated Notes; (b) serving as indenture trustee in connection with the two exchange offers that were used as an artifice to mask ABFS's insolvency; (c) agreeing to serve as indenture trustee for the third

[30] Complaint, ¶¶ 155, 157-159.

[31] "In order to state a cause of action for civil conspiracy, a plaintiff must show that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979).

> exchange offer that never took place because the SEC denied approval; and, (d) providing financial cover and credibility in connection with ABFS's business.[32]

Substantial assistance is one of two requisite elements of a claim for aiding and abetting tortious conduct. The claim also requires either that US Bank knew of the defendants' wrongdoing that it was assisting, or that US Bank committed a separate tort against ABFS.[33] US Bank is only alleged to have served as the statutorily required indenture trustee. This activity does not rise to the level of aiding and abetting. Therefore, US Bank's Preliminary Objections as to the Trustee's claims for the aiding and abetting and conspiracy against US Bank are sustained and the claims must be dismissed.

VI. Count III for Breach of Fiduciary Duty and Count IV for Breach of Duty of Care/Mismanagement/Negligence/Gross Negligence.

The Directors object to the breach of fiduciary duty and gross negligence claims because ABFS' Certificate of Incorporation absolves them of any and all fiduciary responsibility. Under Delaware law, which applies because ABFS was incorporated in Delaware, an entity's Certificate of Incorporation may contain:

> A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit.[34]

[32] Complaint, ¶¶ 80, 89, and 156.

[33] Restatement (Second) Torts § 876.

[34] 8 Del. C. § 102(b)(7).

The Trustee admits that ABFS' Certificate of Incorporation contains this immunity provision, but the Trustee argues that the claims against the Directors are nonetheless cognizable because he alleges intentional misconduct as follows: [35]

> 144. The Outside Director Defendants' intentional ignorance, abdication of their roles as directors, and/or willful blindness toward ABFS' improper transactions and system failures constituted breaches of the Outside Director Defendants' fiduciary duties to ABFS and its creditors.
>
> 145. The Outside Directors failed to establish internal controls and acted with intentional and conscious disregard for ABFS and its creditors.[36]

The Delaware immunity statute does not bar claims for "intentional misconduct." The Trustee's fiduciary duty claim against the directors is not barred. However, in the Trustee's claim for "Breach of Duty of Care/Mismanagement/Negligence/Gross Negligence," the Trustee alleges that "[t]o the extent that any of the wrongdoing alleged [in the claim for breach of fiduciary duty] was not the result of intentional wrongdoing on the part of any of the ABFS Defendants, it resulted from mismanagement, negligence and/or gross negligence for which each said defendant is liable."[37] Delaware's immunity statute covers this claim. The Delaware Supreme Court has held that "even if the plaintiffs had stated a claim for gross negligence, such a well-pleaded claim is unavailing because defendants have brought forth the Section 102(b)(7) charter provision that bars such claims."[38] The Directors' Preliminary Objections to the Trustee's negligence claim against them are sustained, and the negligence claim is dismissed.

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[35] Complaint, ¶ 118.

[36] *Id.*, ¶¶ 144-145.

[37] *Id.*, ¶ 151.

[38] Malpiede v. Townson, 780 A.2d 1075, 1094-1095 (Del. 2001).

The Motion for Judgment on the Pleadings of the Securitization Institutions is granted in part and denied in part. The Preliminary Objections of US Bank and the Officers and Directors are sustained in part and overruled in part.

BY THE COURT,

MARK I. BERNSTEIN, J.