U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **14-04262-hb**
Adversary Proceeding Number: **17-80113-hb**

ORDER

The relief set forth on the following pages, for a total of 23 pages including this page, is hereby ORDERED.

FILED BY THE COURT
04/20/2018

UNITED STATES BANKRUPTCY COURT DISTRICT OF SOUTH CAROLINA SEAL

Entered: 04/23/2018

US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, Dozier Financial, Inc., Debtor(s).	C/A No. 14-04262-HB Adv. Pro. No. 17-80113-HB
Janet B. Haigler, Plaintiff(s), v. Michael Dozier, Sequence Financial Specialists, LLC, WebsterRogers, LLP, WebsterRogers Financial Advisors, LLC, Shilson, Goldberg, Cheung & Associates, Willcox Buyck and Williams, P.A., Defendant(s).	Chapter 7 **ORDER GRANTING IN PART AND DENYING IN PART THE MOTIONS TO DISMISS FILED BY DEFENDANTS SEQUENCE FINANCIAL SPECIALISTS, LLC, WEBSTERROGERS, LLP, WEBSTERROGERS FINANCIAL ADVISORS, LLC, AND WILLCOX BUYCK AND WILLIAMS, P.A.**

THIS MATTER is before the Court upon the Motions to Dismiss filed by Defendants Sequence Financial Specialists, LLC ("Sequence"),[1] WebsterRogers, LLP and WebsterRogers Financial Advisors, LLC (collectively, "WebsterRogers"),[2] and Willcox Buyck and Williams, P.A. ("WBW")[3] pursuant to Fed. R. Civ. P. 12(b)(6).[4] Plaintiff Janet B. Haigler ("Trustee") filed Objections to the Motions.[5]

[1] ECF No. 31, filed Feb. 28, 2018.
[2] ECF No. 30, filed Feb. 28, 2018.
[3] ECF No. 37, filed Mar. 12, 2018.
[4] Made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012. Unless otherwise noted, Sequence, WebsterRogers, and WBW will be collectively referred to herein as "Defendants."
[5] ECF Nos. 42, 43, & 45.

I. JURISDICTION

This proceeding relates to the Chapter 7 bankruptcy case of Dozier Financial, Inc. ("Debtor"). Accordingly, the District Court for the District of South Carolina has jurisdiction under 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a) and Local Civ. Rule 83.IX.01 (D.S.C.), the district court has referred this proceeding to the bankruptcy court. This proceeding involves claims for damages under non-bankruptcy law and is not a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(2).[6] Under 28 U.S.C. § 157(c), this Court has the authority to hear, but not to determine, a non-core proceeding unless all of the parties consent to this Court's determination under 28 U.S.C. § 157(c)(2).

II. TRUSTEE'S ALLEGATIONS[7]

Trustee is the Chapter 7 trustee for Debtor and brings this action on behalf of the estate ("Estate Claims") and as a result of claims assigned to the estate that were personal to certain investors/creditors of Debtor ("Investor Claims"). All of the claims arise from actions relating to Defendants' involvement with the restructuring of Michael Dozier's business operations and selling of securities to third party investors to raise funds. Trustee seeks to recover the losses that resulted from the sale of such securities.

Michael Dozier was the sole shareholder, director, and officer of Debtor and operated used car dealerships in South Carolina. In April 2009, Michael Dozier employed WebsterRogers and Sequence to facilitate in the restructuring of his business and to raise capital to support the dealerships' operations. Throughout their involvement, Sequence and

[6] The Complaint fails to assert whether this matter is a core proceeding. However, Trustee's Objections acknowledge this matter is not a core proceeding under 28 U.S.C. § 157(b)(2).
[7] These allegations do not constitute factual findings by the Court, but are merely a summary of Trustee's allegations that must be considered in review of the Motions to Dismiss. The Complaint includes 106 pages of allegations and causes of action the Court reviewed to decide this matter.

WebsterRogers marketed themselves and operated as a single firm providing accounting and investment advice services to Debtor.

WebsterRogers and Sequence provided Michael Dozier with advice to create a business model that involved the formation of several business entities, including Debtor. Debtor's business primarily involved servicing financing contracts for Michael Dozier's used car dealerships. WebsterRogers and Sequence also recommended Michael Dozier begin selling securities to investors to raise funds. Sequence agreed to act as the placement agent for any private offering of any securities, as an underwriter in any public offering of securities, and as a broker in soliciting investments in Debtor.

In July 2009, Michael Dozier engaged WBW, a law firm located in South Carolina, to provide legal services, including advice related to the restructuring of his business and the securities transactions. WBW assisted with the formation of the various entities that formed Michael Dozier's business model, including Debtor and the car dealerships. WBW also assisted with enabling Debtor to secure capital through security offerings, including the drafting of offerings for the solicitation of investments from third parties. Sequence and WebsterRogers were also engaged to seek additional financing necessary for implementing the business model it had previously developed and to consult with WBW regarding the issuance of a private placement memorandum to raise capital. WebsterRogers also specifically agreed to determine and evaluate the tax and generally accepted accounting principles and reporting options for the businesses.

Despite hiring these professionals, Michael Dozier used the business' accounts to improperly pay for personal obligations and excessive compensation from the inception of

Debtor and the other related entities. Sequence, WebsterRogers, and WBW were aware that Michael Dozier was improperly appropriating assets of the businesses for his personal benefit.

Sequence, WebsterRogers, and WBW generated the financial reports for the Debtor, which included the company ledgers for the car dealerships and the Debtor, profit and loss statements, balance sheets, income statements, and cash flow statements. These Defendants knew these financial reports would be used by Debtor in acquiring capital through the sale of securities. These financial reports were deficient, false, and misleading because they, through improper accounting methods: improperly allocated assets, liabilities, and costs; significantly overestimated the accounts receivable owed to the Debtor from the related entities; and significantly underestimated the amounts payable by the Debtor. As a result, the financial statements made it appear that Debtor had a positive net worth when the business was actually operating at or near a net loss.

When confronted with numerous red flags concerning the accuracy of Debtor's financial statements, Sequence and WebsterRogers did not abide by the standards of due diligence governing the conduct of brokers, underwriters, and investment advisers. Sequence and its employees also assisted Michael Dozier in his concealment from the Debtor and the investors the Debtor's financial condition.

The financial statements were used to market the securities to be purchased by the investors. The investors were first solicited to invest in Debtor in September 2009 through a Private Placement Memorandum ("2009 PPM"), which was drafted by WBW. Prior to approval of these materials and their distribution to investors, Sequence and WebsterRogers did not conduct independent investigations into the capital requirements of Michael Dozier's business. Overall, in offering and selling these investments, Defendants made false and misleading disclosures and omitted material facts relating to the risks of investing in the Debtor, the Debtor's financial performance, and how the Debtor would use the investment proceeds. The 2009 PPM also made a selling point to investors that independent underwriters, brokers, accountants, and attorneys had performed due diligence and, thus, acted as gatekeepers against possible misdeeds by Debtor or Michael Dozier. However, the investors' funds were improperly used for liabilities and operating costs of the car dealerships, personal obligations of Michael Dozier, and improper distributions to him. Defendants knew the 2009 PPM included these misrepresentations and omissions regarding Debtor's business and the investment risks associated therewith.

In October 2009, Michael Dozier began selling securities to the public that he believed were exempt offerings under federal and state securities laws. Sequence and WebsterRogers did not conduct independent investigations to ensure that Michael Dozier did not sell stock to unaccredited investors, which would destroy any safe harbor registration exemption for the securities issued under the 2009 PPM.

In December 2009, WBW was made aware that proceeds of the 2009 offering were not being used in accordance with the escrow terms provided in the 2009 PPM and that the offering was improperly handled by Michael Dozier, which could raise securities liability. WBW had a duty to advise the Debtor and investors to address this transactional risk.

In March 2010, Sequence, WebsterRogers, and WBW compiled an addendum to the 2009 PPM to be sent to prior and new, prospective investors ("2010 Executive Summary"). The 2010 Executive Summary attached unaudited financial reports for the Debtor that were prepared by Sequence and WebsterRogers. These financial reports included the same material misrepresentations in the prior financial reports and 2009 PPM. Despite this, WBW, Sequence, and WebsterRogers approved 2010 Executive Summary and enclosed information to be used by Michael Dozier in future solicitations from investors.

Upon the recommendation of WebsterRogers and Sequence, Shilson, Goldberg, Cheung & Associates ("SGC") was retained by the Debtor in late 2010 or early 2011 to conduct an audit of Debtor's 2010 financial statements. SGC is an accounting firm with extensive experience with used car dealerships and their related finance companies. SGC failed to comply with auditing standards by failing to obtain reasonable assurance that the financial statements it audited were free of material misstatements and failing to assess the risk that Debtor's financial statements could be materially misstated as a result of fraud. There were significant accounting red flags within the SCG-prepared audit report of Debtor that SGC, Sequence, and WebsterRogers should have been aware of and resulted in a severely deficient audit report.

In 2011, Michael Dozier began engaging in a check kiting scheme between the accounts of the Debtor and the car dealerships. These fraudulent transfers gave rise to obligations of Michael Dozier, the Debtor, and the dealerships in excess of $3,000,000.00 to the banks with negative cash balances. Michael Dozier disclosed to WBW, Sequence, and WebsterRogers that liabilities were generated at banks where he and the Debtor held accounts as a result of a series of overdrafts. WBW also learned that several of the overdrafts were directly tied to proceeds from the prior offerings. To correct this significant shortfall, Michael Dozier, Sequence, WebsterRogers, and WBW prepared another private offering memorandum and updated the marketing materials for the offering ("2011 PPM").

The 2011 PPM did not explain the intended use of the proceeds to pay off these liabilities, even though these proceeds were immediately used for liabilities of the Debtor and

Michael Dozier and were wrongfully diverted for personal payments to Michael Dozier. Additionally, the 2011 PPM incorporated misstatements from the previous offerings. Like the 2009 PPM, the 2011 PPM made a selling point to investors that independent underwriters, brokers, and attorneys had performed due diligence and, thus, acted as gatekeepers against possible misdeeds by the Debtor and Michael Dozier – even though Sequence, WebsterRogers, and WBW were already aware of Michael Dozier's improper conduct.

When the investors' first notes became due in Fall 2012, additional information was sent to them regarding the ability to extend the terms of their notes as well as soliciting new investments ("Rollover Letters"). The Rollover Letters informed investors that they could renew their notes or liquidate them and receive their interest and principal in full, even though Debtor lacked the ability to repay the notes. The Rollover Letters stated Debtor was continuing its growth and success, when in actuality it was insolvent.

In late 2013, Debtor began missing scheduled note payments and Michael Dozier informed the investors that the delay would be temporary. WBW should have advised the investors that the missed note payments signaled a material risk that the business was failing and, therefore, in order to protect themselves from harm, the investors should verify any representations.

From October 2009 through June 2013, Debtor raised approximately $3,621,116.14 from at least 36 investors in at least two states (North and South Carolina). These funds were raised through the sale of at least 73 nonnegotiable promissory notes to both accredited and unaccredited investors; however, many of the investors were unaccredited, unsophisticated, and elderly. Much of the money raised through the improper securities offerings was appropriated by Michael Dozier to pay the fees for the services rendered by Sequence, WebsterRogers, WBW, and SGC, or for Michael Dozier's own personal obligations.

In Spring 2014, WBW began collecting the necessary information for filing a Form D with the Securities and Exchange Commission or the Attorney General, but ultimately failed to comply with this requirement. An involuntary Chapter 7 petition was filed against Debtor on July 29, 2014.

III. Causes of Action

Trustee asserts generally that Defendants offered to sell and sold securities to the investors by means that contained untrue statements and omitted material facts and, in connection with the offer and sale of securities, disseminated or approved false statements they knew or reasonably should have known were false or misleading that the investors relied on. As a result, Defendants also breached their contractual and common law duties owed to the Debtor and investors. With specific regard to WBW, Trustee also asserts it provided legal advice and decisions concerning the solicitation of investments despite its awareness of Michael Dozier's illegal actions in using Debtor's property.

The Trustee's causes of action are divided into two categories: personal claims to the Debtor stemming from her role as bankruptcy trustee for the Debtor (the Estate Claims); and claims assigned to the estate that were personal to investors of the Debtor (the Investor Claims). Some of the causes of action appear to be brought on behalf of both the estate and the investors. The Estate Claims against Defendants are as follows: (1) breach of contract accompanied by fraudulent act; (2) common law fraud; (3) negligence; (4) breach of fiduciary duty; (5) professional negligence and legal malpractice;[8] (6) aiding and abetting breach of fiduciary duty; and (7) constructive fraud.

With regard to the Investor Claims, the Complaint alleges that between January 2, 2017, and October 6, 2017, numerous individuals who were investors in Debtor assigned to Trustee all of their right, title, and interest in and to the claims set forth in the Complaint and the Trustee is now the true and lawful owner of these claims. The Investor Claims against Defendants are: (1) violation of § 12(a)(2) of the Securities Act; (2) violation of § 10 and Rule 10b-5 of the Securities and Exchange Act of 1934; (3) violation of § 20(a) of the Securities and Exchange Act of 1934; (4) violation of the South Carolina Uniform Securities Act, S.C. Code § 35-1-101 *et seq.*; (5) common law fraud; (6) negligence; (7) breach of fiduciary duty; (8) professional negligence and legal malpractice;[9] and (9) constructive fraud.

DISCUSSION AND CONCLUSIONS OF LAW

By filing the instant Motions seeking relief from this Court and not expressly objecting to this Court making a final determination on these Motions, the parties have consented to the Court's determination of the Motions under 28 U.S.C. § 157(c)(2).[10]

I. STANDARD OF REVIEW

Rule 8 provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A motion filed under

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[8] This cause of action is asserted against only WBW.

[9] This cause of action is asserted against only WBW.

[10] *See In re AstroTurf, LLC*, C/A No. 16-41504-PWB, 2017 WL 3889710, at *2 (Bankr. N.D. Ga. Sept. 5, 2017) (concluding that the defendant consented to the court's determination of its motion to dismiss because the defendant "invokes the Court's determination of it without objecting to its authority to do so. The Court does not consider [the defendant's] invocation of a ruling on its motion to constitute an admission that this is a core proceeding or consent to determination of other issues that may arise in this proceeding."); *In re Westbrook*, 123 B.R. 728, 730 (Bankr. E.D. Pa. 1991) (finding that the defendant "praying that this court shall grant its Motion to Dismiss, appears to either concur that this matter is core or likewise consent to our determining the Motion").

12(b)(6) challenges the legal sufficiency of the Complaint and provides that a party may move to dismiss for failure to state a claim upon which relief can be granted. When ruling on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). In order 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

"In addition to meeting the plausibility standard of *Iqbal*, fraud claims . . . must be pleaded with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure." *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455-56 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 1759, 188 L. Ed. 2d 592 (2014) (citing *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-85 (4th Cir. 1999)). Pursuant to Rule 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "To meet this standard, [a] plaintiff must, at minimum, describe 'the time, place, and contents of the false representations as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008) (quoting *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)).

II. *IN PARI DELICTO*

Defendants assert the Estate Claims should be dismissed based on the doctrine of *in pari delicto* because Debtor participated in any alleged wrongdoing from which those causes of action arise. "*In pari delicto* is an affirmative defense that precludes a plaintiff who participated in the same wrongdoing as the defendant from recovering damages from that wrongdoing." *Grayson Consulting, Inc. v. Wachovia Secs., LLC (In re Derivium Capital LLC),* 716 F.3d 355, 367 (4th Cir. 2013). Under this doctrine, "[i]f the plaintiff bears equal or greater fault in the alleged tortious conduct as the defendant, the defense of *in pari delicto* will bar the plaintiff's claims." *In re Infinity Bus. Grp., Inc.*, 497 B.R. 794, 805 (Bankr. D.S.C. 2013) (citing *Derivium Capital,* 716 F.3d at 367). On a Rule 12(b)(6) Motion, grounds for this affirmative defense must clearly appear on the face of the Complaint. *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (stating that the burden of establishing the affirmative defense rests on the defendant and "[i]t follows, therefore, that a motion to dismiss filed under Federal Rule of Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense . . . But in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6). This principle only applies, however, if all facts necessary to the affirmative defense "clearly appear *on the face of the complaint*." (emphasis in original) (citations omitted)).

To obtain dismissal of the Estate Claims based on the defense of *in pari delicto,* it must clearly appear from the face of the Complaint that Debtor bears equal or greater fault for the conduct serving as the basis for these claims. Considering that there is a distinction to be made between the actions of Debtor and of the individual Michael Dozier, a finding that *in pari delicto* precludes the Estate Claims cannot be determined from the face of the Complaint. *See Infinity Bus. Grp.,* 497 B.R. at 805-16 (analyzing the *in pari delicto* defense at the motion to dismiss stage and ultimately denying the motion, in part, because the compliant included sufficient allegations to plausibly suggest that the law would not impute the liability for the defendants' acts and knowledge to the debtor because it included sufficient allegations for the court to reasonably infer that the defendants were acting fraudulently against the debtor). Therefore, Defendants' Motions to Dismiss the Estate Claims on *in pari delicto* grounds must be denied.

III. ASSIGNMENTS OF INVESTOR CLAIMS

Defendants assert the Investor Claims should be dismissed because the Trustee lacks standing to bring these claims because the assignments from the investors to the Trustee are improper and unenforceable.

A. ASSIGNABILITY OF THE CLAIMS

Defendants assert the assignments of the Investor Claims are invalid because they are not assignable under South Carolina law. In support of this argument, Defendants rely on the dissenting opinion in *In re Bogdan*, 414 F.3d 507 (4th Cir. 2005) and attempt to distinguish *Bogdan* from the case at hand. In *Bogdan*, the debtor was involved with others in a real estate "flipping scheme" that defrauded numerous mortgage lenders. Some of the lenders injured by this scheme unconditionally assigned to the trustee all of their claims against the debtor and his alleged coconspirators. The trustee then filed an adversary proceeding as assignee of these mortgage lenders and asserted various causes of action against the alleged coconspirators, which were dismissed because the trustee lacked standing. *Id.* at 509-11.

The Fourth Circuit reversed the lower court's decision and concluded that the trustee had standing because he was not making any claim on behalf of the creditors, but by taking unconditional assignments from the creditors, was making his claim on behalf of the estate. *Id.* at 511. The court reasoned that "[t]he mortgage lenders will recover, if at all, like any other creditor of the estate, by sharing from the assets the trustee is able to collect on behalf of the estate." *Id.* at 512. The Fourth Circuit also determined there was no potential for duplicative and inconsistent litigation by the assignees because "[b]y giving the trustee unconditional assignments of their potential claims, the mortgage lenders have relinquished all rights to seek recovery against Bogdan and the alleged coconspirators." *Id.* The court also concluded that the Bankruptcy Code implicitly authorizes the type of suit brought by the trustee. *Id.* ("[T]he unconditional assignments acquired by Bogdan's trustee from the mortgage lenders after commencement of this bankruptcy case constitute 'property of the estate' that the trustee is authorized to 'collect and reduce to money' on behalf of the estate . . . Accordingly, the trustee has the requisite standing to sue Bogdan's alleged coconspirators 'to collect and reduce to money' the causes of action he acquired for the estate from the mortgage lenders after commencement of this bankruptcy case.").

The dissenting opinion acknowledged that the majority's decision "is predicated entirely on the assumed validity of the assignments, a proposition we accept in viewing the complaint in the light most favorable to the trustee . . ." However, it went on to state that "the assignments here are likely invalid under Maryland law, which precludes the assignment of claims if it contravenes public policy." *Id.* at 516 (citations omitted). The dissenter believed the assignment contravened Maryland's public policy because "the trustee for the estate of a tortfeasor is seeking to sue the debtor's joint tortfeasors. Put simply, one of several thieves, purportedly acting on behalf of his victims, is suing his fellow thieves." *Id.* at 517.

Defendants have challenged the validity of the assignments under South Carolina law, which was not analyzed in *Bogdan*. Therefore, the Court must look further into this issue. The general rule followed in the Fourth Circuit is that "[f]ederal bankruptcy law looks to state law for definition of what interests are rights of the debtor or creditors of the debtor." *Steyr-Daimler-Puch of Am. Corp. v. Pappas,* 852 F.2d 132, 135 (4th Cir. 1988). State law limitations on the assignability of state law claims are not preempted by the Bankruptcy Code and remain effective as "limitations imposed upon the debtor by applicable nonbankruptcy law." *Integrated Solutions Inc. v. Serv. Support Specialties, Inc.,* 124 F.3d 487, 493 (3d Cir. 1999) (citations omitted).[11] "It is the established law in South Carolina, and elsewhere as well, that a right of action is assignable if, and only if, the same action would survive to the assignor's personal representative in the event of the assignor's death." *Schneider v. Allstate Ins. Co.,* 487 F. Supp. 239, 241 (D.S.C. 1980) (citing *Doremus v. Atlantic Coast R.R. Co.,* 242 S.C. 123, 130 S.E.2d 370 (1963)). South Carolina law provides:

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. Code Ann. § 15-5-90. "The general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions." *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96-97 (2002). Despite the clear language of the statute, South Carolina courts have created certain exceptions to the survivability statute, including actions for fraud and deceit. *Id.* (citing *Mattison v. Palmetto State Life Ins. Co.*, 197

[11] However, the Court looks to federal law for any limitations on the assignability of federal claims. *See Bluebird Partners, L.P. v. First Fid. Bank, N.A. New Jersey*, 85 F.3d 970, 973 (2d Cir. 1996) ("The federal courts have consistently determined that federal law governs the assignability of claims under the federal securities laws."); *see also In re Preston Trucking Co., Inc.*, 392 B.R. 623, 630 (D. Md. 2008) (reasoning that because the WARN Act is a federal statute, that the assignability of claims brought under it was governed by federal law). The Investor Claims against Defendants include federal causes of action for violations of: § 12(a)(2) of the Securities Act; § 10 and Rule 10(b)(5) of the Securities and Exchange Act of 1934; and § 20(a) of the Securities and Exchange Act of 1934. Although briefed by the Trustee, Defendants did not raise any arguments that these claims were not assignable under federal law; therefore, the Court will not address the validity of the assignments of these claims.

S.C. 256, 15 S.E.2d 117 (1941) (a cause of action for fraud did not survive the death of a person who was allegedly defrauded by an apparent cancellation of an insurance policy)).

The plaintiff in *Ferguson* brought an action under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, alleging the dealer included an improper fee in the purchase price of the car and concealed that price through either fraudulent actions or negligent practices. *Id.* at 561-62. The Dealers Act defined fraud broadly to include "a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact." S.C. Code Ann. § 56–15–10(m). The South Carolina Supreme Court found that even though the plaintiff's cause of action arose directly under the Dealers Act, because it was based upon a theory of fraud and deceit it did not survive the plaintiff's death.

In *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003), the South Carolina Supreme Court did not expand its holding in *Ferguson* to actions brought under the Consumer Protection Code. The court reasoned that, even though "[t]he Consumer Protection Code and the Dealers Act share a common purpose: protection of the consumer . . . the Dealers Act arguably expanded the definition of fraud to include actions that would not normally amount to fraud. The Consumer Protection Code does not define fraud at all." *Id.* at 378. Further, the plaintiff in *Ferguson* alleged the dealer committed an unfair act by failing to disclose a closing fee in the price of the car whereas in *Tilley*, the plaintiffs asserted the defendant violated statutory mandates of "S.C. Code Ann. § 37-10-102 in failing to notify them of their right to choose an attorney and insurance agent of their preference. Neither § 37-10-102 nor the penalty section, § 37–10–105, refer to violation of the statutory preference requirements in terms of unfairness, fraud, or deceit." *Id.* at 378.

To the extent the Trustee's Investor Claims assert a common law fraud claim, such claim is not assignable under South Carolina law and must be dismissed. *See Mattison*, 197 S.C. 256, 15 S.E.2d 117. However, the Court cannot conclude from the face of the Complaint that the remaining state law Investor Claims fall within the "fraud and deceit" exception to the survivability statute. *See, e.g., Designer Showrooms, Inc. v. Kelley*, 304 S.C. 478, 480-81, 405 S.E.2d 417, 419 (Ct. App. 1991) ("An intent to deceive is an essential element of 'actual fraud' but neither actual dishonesty of purpose nor intent to deceive is an essential element of 'constructive fraud,' and the presence or absence of such an intent distinguishes actual fraud from constructive fraud. "). Therefore, to the extent sixth cause of action in the Complaint asserts a claim for common law fraud against Defendants on behalf of the investors, it must be dismissed. However, Defendants have failed to show at this stage that relief should be granted pursuant to Rule 12(b)(6) regarding the remaining Investor Claims.

B. <u>CONFLICT OF INTEREST</u>

Defendants also contend the assignments of the Investor Claims are invalid because they are in contravention of public policy because they create a conflict of interest between the Trustee's obligations to the investors and her duties as trustee of Debtor's estate, and may result in a violation of the Trustee's fiduciary duties. In support of this, Defendants rely on *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 775 S.E.2d 37 (2015), and also argue that the assignments were conditional and have caused the Trustee to have an attorney-client relationship with the investors.

Trustee argues that no conflict or potential breach of her fiduciary duties arises from the assignments because any relationship between the Trustee and the investors is identical to the relationship between the Trustee and all other creditors of Debtor's estate – she is trying to collect as property of the estate money and assets to be distributed to all creditors, including the investors. Trustee asserts she owes no additional duties to the investors as a result of the assignments of the Investor Claims apart from those she already owed under 11 U.S.C. § 704. Nothing in the Complaint contradicts this argument.

In *Skipper*, the South Carolina Supreme Court specifically prohibited the assignment of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose. *Id.* at 36, 775 S.E.2d at 55. The court noted "[t]he most common reason other courts have declined to permit assignments of legal malpractice claims is to avoid the risk of collusion between the parties." *Id.* The court also reasoned that "permitting the assignment of legal malpractice claims between adversaries threatens the integrity of the attorney-client relationship" because it would allow plaintiffs "to drive a wedge between the defense attorney and his client by creating a conflict of interest." *Id.* at 37, 775 S.E.2d at 55 (quoting *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994)). Lastly, the court concluded that allowing such assignments "would lead to disreputable role reversals in which the plaintiff-assignee would be required to take a position 'diametrically opposed' to its position in the underlying litigation." *Id.* (citing *Zuniga*, 878 S.W.2d at 317).

At this stage in the litigation, the Court cannot determine from the face of the Complaint that the risks associated with the assignment prohibited in *Skipper* are present in the instant matter rendering the assignments by the investors to Defendants contrary to South Carolina public policy. Moreover, as a fiduciary of the estate's creditors, "[l]ike any other fiduciary, a trustee must act with reasonable care and due diligence in discharging his statutory duties." *In re Dec*, 272 B.R. 218, 230–31 (Bankr. N.D. Ill. 2001) (citing *Lewis v. Cowan (In re Cowan)*, 235 B.R. 922, 924 (Bankr. W.D. Mo. 1999)). These duties appear to limit any risk of collusion present in *Skipper*.

Defendants also present specious arguments that the assignments are conditional and somehow provide the investors with preferential treatment to other creditors of the estate. Trustee counters that she is merely acting under the duties already statutorily required of her under 11 U.S.C. § 704 and there is nothing to indicate that a conflict arises among the Trustee, the investors, and the other unsecured creditors of the estate. *See Bogdan*, 414 F.3d at 513-14 ("Moreover, our cases establish that trustees must always act in the best interest of the estate . . . These checks and balances will help ensure that trustees forego actions not in the best interests of the bankruptcy estate." (citations omitted)). Applying the standards of Rule 12(b)(6) and after a review of the record, the Court can find no grounds for dismissal as a result of these arguments.

C. Contribution Among Joint Tortfeasors Act

Defendants Sequence and WebsterRogers argue the assignments do not comply with South Carolina's Contribution Among Joint Tortfeasors Act, S.C. Code. Ann. § 15-38-10 *et seq.* ("Joint Tortfeasors Act") because the investors have not extinguished their claims against the Debtor as required by S.C. Code Ann. § 15-38-20(D). This provision provides:

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

S.C. Code Ann. § 15-38-20(D). Trustee asserts the Joint Tortfeasors Act is not applicable here because she is not seeking contribution and there has been no settlement of any claims by the investors against Debtor because their claims were filed under 11 U.S.C. § 501 and could still be subject to objection by the Trustee. Applying the Rule 12(b)(6) standards, the Court cannot conclusively determine from the allegations of the Complaint that the Joint Tortfeasors Act is applicable to the facts presented here. Accordingly, dismissal on this ground must be denied.

IV. FAILURE TO ADEQUATELY PLEAD

A. FEDERAL SECURITIES CLAIMS

Defendants argue the Complaint fails to plead sufficient allegations to state claims for relief for violations of § 12(a)(2) of the Securities Act of 1933, § 10 of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, and § 20(a) of the Securities and Exchange Act of 1934 (collectively, "Securities Claims"). Defendants argue the Trustee fails to allege fraud and other elements of the Securities Claims under the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and Fed. R. Civ. P. 9(b). They also contend the securities were not sold at a public offering and the Defendants were not the "makers" of the statements in the PPM, did not offer or sell the notes to the investors, and did not control the Debtor's actions in doing so.

Section 12(a)(2) of the Securities Act provides that any person who "offers or sells a security . . . by means of a prospectus or oral communication" containing a materially false statement or material omission "shall be liable . . . to the person purchasing such security from him." 15 U.S.C. § 77*l*(a)(2). To establish standing under § 12(a)(2), a plaintiff must allege she purchased shares from "[a]ny person" who "offer[ed] or s[old] a security . . . by means of a prospectus." 15 U.S.C. § 77*l*(a)(2). In *Gustafson v. Alloyd Co.*, 513 U.S. 561, 115 S. Ct. 1061, 131 L.Ed.2d 1 (1995), the Supreme Court determined that, because "prospectus" is a term of art referring to a specific document in a public offering, sales made pursuant to private contracts are not made by means of a prospectus. *See id.* at 580-84, 115 S. Ct. 1061. Therefore, § 12(a)(2) liability is "limited to public offerings," and purchasers in the secondary market may not sue. *Id.* at 578, 115 S. Ct. 1061. In *Yates v. Mun. Mortg. & Equity, LLC,* 744 F.3d 874 (4th Cir. 2014), the Fourth Circuit found that allegations that a plaintiff purchased securities "pursuant and/or traceable to" a public offering can be sufficient if coupled with additional supportive facts to give rise to a plausible inference of standing in certain circumstances. *Id.* at 899-900 (citing *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 776 (1st Cir. 2011) (finding the "pursuant and/or traceable to" terminology sufficient when coupled with allegations that plaintiffs "acquired" securities "from" the defendants and that the defendants "promoted and sold" the securities to the plaintiffs).

Section 10(b), Rule 10b-5, and section 20(a) "act to protect the integrity of the market in securities," *see Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 623 (4th Cir. 2008) and make it unlawful to employ deceptive or manipulative devices "in connection with the purchase or sale of any security." 15 U.S.C. § 78j; *see also 1*5 U.S.C. § 78t; 17 C.F.R. § 240.10b-5. A claim for securities fraud under section 10(b) and Rule 10b-5 must demonstrate: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 157, 128 S. Ct. 761, 169 L. Ed.2d 627 (2008) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42, 125 S. Ct. 1627, 161 L. Ed.2d 577 (2005)). Section 20(a) is the vehicle for imposing liability on control persons and is derivative of – and dependent upon – the liability of the controlled person under section 10(b). *See Yates*, 744 F.3d at 894 n.8. Because of the potential significant liability for defendants under a securities fraud claim, Congress enacted the PSLRA to prevent any abuse. *See Cozzarelli*, 549 F.3d at 623.

> Pursuant thereto, a securities fraud complaint must "specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading." *See* 15 U.S.C. § 78u-4(b)(1). Further, "the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2)(A). If those exacting pleading requirements are not satisfied, the complaint must be dismissed.

Singer v. Reali, 883 F.3d 425, 439 (4th Cir. 2018) (citing *Cozzarelli*, 549 F.3d at 623) (footnote omitted).

Applying the relevant standards under Fed. R. Civ. P. 8(a), 9(b), 12(b)(6), and the PSLRA, and considering as true the ample factual allegations of the Complaint, the Court finds the Trustee has sufficiently alleged the Securities Claims against the Defendants. The arguments presented by the Defendants attack the merits of the Trustee's Securities Claims by denying their involvement and roles in the securities scheme described in detail in the Complaint and are not appropriate at the Rule 12(b)(6) stage.

B. <u>SOUTH CAROLINA SECURITIES CLAIM</u>

WBW also moves for dismissal of the claim for violation of the South Carolina Uniform Securities Act, S.C. Code § 35-1-101 *et seq.* WBW asserts it did not engage in the selling of any securities and was not a broker or agent of the Debtor in order for liability to be imposed under this Act. "Section 35–1–509 creates a civil cause of action against a seller, agent, or broker-dealer who buys or sells a security in violation of the South Carolina Uniform Securities Act's registration requirements." *Beechwood Dev. Grp., Inc. v. Konersman*, 517 F. Supp. 2d 770, 773 (D.S.C. 2007) (footnote omitted). The provision:

> creates a civil cause of action against one who sells a security *either* (1) in violation of the Act's registration requirements *or* (2) "by means of an untrue statement of a material fact or omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading."

Id. at 774 (quoting S.C. Code § 35–1–509) (emphasis in original). Like the Securities Claims, this argument also attacks the merits of the Trustee's allegations by denying WBW's involvement and role in the securities scheme described in detail in the Complaint and is not appropriate at the Rule 12(b)(6) stage. Therefore, WBW's Motion to Dismiss this cause of action must also be denied.

CONCLUSION

Based on the foregoing, **IT IS, THEREFORE, ORDERED THAT**:

(1) Defendants' Motions to Dismiss are **granted** to the extent the sixth cause of action in the Complaint asserts a claim for common law fraud against Defendants on behalf of the investors;[12]

(2) all other remaining requested relief in Defendants' Motions to Dismiss is **denied**; and

(3) pursuant to Fed. R. Bankr. P. 7012(a), Defendants shall file a responsive pleading within **fourteen (14) days** from entry of this Order.

AND IT IS SO ORDERED.

[12] However, the sixth cause of action asserting a claim for common law fraud against Defendants on behalf of the estate remains.