UNITED STATES BANKRUPTCY COURT

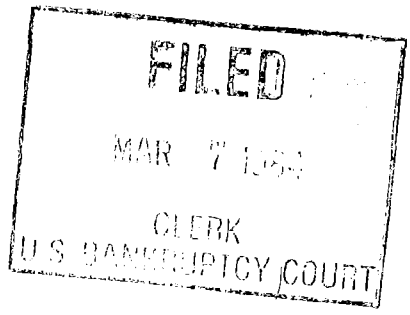
WESTERN DISTRICT OF WISCONSIN

In re:

NORTHWEST LIQUOR INDUSTRIES, INC.
a/k/a Lakeland Liquor Co., Inc.
a/k/a Eau Claire Liquor Co., Inc.
a/k/a Northern Liquor Co., Inc.
a/k/a Northwest Liquor Co., Inc.
a/k/a Northern Brewing Company

Case Number:

76-1422



DON E. WHINNERY, TRUSTEE,

Plaintiff,

v.

RALPH BUCHMAN, WILLIAM VICTOR GRUMAN, PHOENIX FUND, INC., a Florida corporation, ASHLEY H. SLOMANN, MILDA SLOMANN, ASHLEY H. SLOMANN, Custodian for GEOFFREY L. SLOMANN, ASHLEY H. SLOMANN, as Custodian for SUSAN H. SLOMANN, HERMAN NEMZOFF, THE ESTATE OF PHILLIP SLOMANN, Deceased, FRANK L. GUTH, RUDY W. DE KEYSER, BONITA ROONEY, OLIVE HYLAND, CONGRESS FINANCIAL CORPORATION, a California corporation, JOHN DOE and MARY ROE,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW
and
ORDER
-DISMISSING IN PART AND TRANSFERRING IN PART MOTION TO DISMISS CERTAIN COUNTS
-DENYING MOTION FOR SEPARATE TRIALS
-DENYING IN PART AND GRANTING IN PART MOTIONS TO STRIKE JURY TRIAL AND FOR TRIAL TO THE COURT
-TRANSFERRING PROCEEDINGS.

Don E. Whinnery, Trustee for the bankrupt, by his attorney, Michael L. Meyer of Robins, Zelle, Larson & Kaplan, having filed an Amended Complaint against Ralph Buchman and others; and Congress Financial Corporation, one of the named defendants, by its attorneys, Marvin E. Klitsner and Michael P. Erhard of Foley & Lardner, having filed motions (1) to dismiss certain counts of the amended complaint, (2) for separate trials and (3) to strike the Trustee's demand for trial by jury and for trial to the Court; and Congress Financial Corporation submitting a Brief and a Reply Brief in support of its motions; and the Trustee submitting a Memorandum in opposition to said motions; and named defendants Ashley H. Slomann (individually and as custodian for Geoffrey L. Slomann and Susan H. Slomann), Herman Nemzoff, Frank L. Guth, Rudy DeKeyser and Bonita Rooney, by their attorney, Charles F. Smith of Tinkham, Smith, Bliss, Patterson, Richards & Hessert, submitting a Brief in opposition to the motion for separate trials; and named defendants Olive Hyland and the Estate of Phillip Slomann, having adopted other briefs filed in opposition to the motion for separate trials; and a hearing having been held; and the Trustee appearing in person and by attorney; and Congress Financial Corporation appearing by attorneys; and the Estate of Phillip Slomann appearing by its attorney, Kevin C. O'Keefe of Parke & Heim, Ltd., in opposition to the motion for separate trials;

and named defendants Ralph Buchman and William Victor Gruman being represented by attorney Peter C. Gunther of Crooks, Low & Connell; and named defendant Olive Hyland being represented by Frank T. Mustacci of Korth, Rodd, Mouw, Johnson & Mustacci, S.C.; and the Court having read the briefs and memorandum, heard the arguments of counsel, considered the record and file, and being fully advised in the premises, FINDS:

1. That, on November 26, 1976, Northwest Liquor Industries, Inc. (NWI), filed a petition in bankruptcy under Chapter XI of the repealed Bankruptcy Act of 1898.

2. That, at the first meeting of creditors, held January 3 and 4, 1977, NWI was adjudicated a bankrupt and Don E. Whinnery was appointed trustee by the Court.

3. That the Trustee has filed an Amended Complaint which begins with 24 paragraphs of averments setting out the Trustee's version of the facts: a story of a group of closely held companies which are purchased[1] and subsequently mismanaged with the knowledge of the sellers, the buyer and the buyer's financier--in fact, everyone but the creditors.[2]

4. That the Trustee's Amended Complaint contains 8 counts, to-wit:

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[1] The method of purchase was a form of leveraged or "bootstrap" acquisition. See 8 Z. Cravitch, Business Organizations sec. 160.02 (1983); see generally Annot., 71 ALR 3d 639 (1976).

[2] "Appendix A--Roster" and "Appendix B--Summary of Transaction" are set out at the conclusion of this opinion solely for reference. They are not findings of fact.

Count	Claim	Defendants Named
1*	Breach of Fiduciary Duty	Buyer, Lender, Sellers
2*	Conspiracy to Defraud	Buyer, Lender, Sellers
3	Fraudulent Conveyance	Sellers
4*	Fraudulent Conveyance	Lender
5	Fraudulent Conveyance	Buyer
6*	Aiding and Abetting	Lender
7*	Equitable Subordination	Lender
8	Equitable Subordination	Sellers

*Challenged by Lender's Motion to Dismiss.

5. That the Trustee's Amended Complaint concludes with a prayer for relief against the defendants. In regard to Congress, the Court is requested to:

(1) void Congress' security interest in the bankrupt's assets,

(2) award a money judgment in the amount of the greater of:

(a) the value of money and assets received by the lender in regard to the transaction at bar, or

(b) the amount necessary to make the bankrupt's creditors whole, and

(3) void or, in the alternative, subordinate Congress' claims to the bankrupt estate.

6. That the Court need not dwell on the protracted and tortuous legal history of this bankruptcy case, see Congress Financial Corp. v. Whinnery (In re Northwest Liquor Ind., Inc.), No. 78-C-243, slip op. at 2 - 7 (W.D. Wis. Nov. 9, 1982) (excellent summary), except to note that extensive discovery has occurred in this proceeding and a related, essentially parallel, state court proceeding, and that the Trustee, pursuant to the order of the District Court, id. slip op. at 14, dismissed his state court action against Congress.

7. Jurisdiction. That the Bankruptcy Reform Act of 1978 has no effect on the case at bar. Pub L. 95 - 598, title IV, secs. 403(a) & 404(a), 92 Stat. 2683 & 2684; In re Parr, 3 B.R. 692, 696 - 697 (Bankr. E.D. N.Y. 1980).

8. That the Federal Court of Bankruptcy has jurisdiction over the controversy at bar (insofar as it relates to Congress) which is exclusive of the Wisconsin state courts. Congress Financial Corp. v. Whinnery, supra Finding 6.

9. That a court of bankruptcy is presided over by either a district judge or a bankruptcy judge. Bankruptcy Act of 1898 sec. 1a, 11 U.S.C. sec. 1(a)(1976)(repealed). See Former Bankruptcy Rule 901(7) ("bankruptcy judge" is referee in bankruptcy).

10. That a bankruptcy judge can only hear cases which fall within the summary[3] jurisdiction of a bankruptcy court. See Weidhorn v. Levy, 253 U.S. 268, 40 S.Ct. 522, 64 L.Ed. 898 (1920); cf. D.Epstein, Debtor - Creditor Law 137 (1980) (summary jurisdiction is the only jurisdiction of bankruptcy courts).

11. That summary jurisdiction is present when the Court is in actual or constructive possession of the res of the dispute, when the adverse claimant consents or where specifically conferred by statute. 3 A. Paskay, Collier Bankruptcy Manual sec. 2.008 (2nd ed. 1978).

12. That Congress, an adverse claimant, has consented to the summary jurisdiction of this Court.

13. That, whatever the historical authority for a bankruptcy judge to preside over a plenary[4] suit, e.g. Whitney v. Wenman, 198 U.S. 539, 553, 25 S.Ct. 778, 49 L.Ed. 1157 (1905), current law clearly provides for formal proceedings, Former Bankruptcy Rule 701, see generally 28 U.S.C. sec. 2075 (1976) (repealed in pertinent part) (rules supersede prior law).

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[3] The summary/plenary nomenclature has been applied in at least three distinct--but seldom distinguished--contexts: subject-matter jurisdiction, procedural protection (expeditious/formal) and substance (equity/law).

[4] The summary/plenary distinction is made here in the context of procedural protection.

Motion to Dismiss Certain Counts

14. That Congress has moved, "pursuant to Rules 9(b), 12(b)(6) and 56(b), Federal Rules of Civil Procedure," to dismiss all or part of Counts 1, 2, 4, 6 & 7 of the Trustee's Amended Complaint.

15. That Fed. R. Civ. P. 9(b), 12(b)(6) and 56(b) are incorporated by reference in Former Bankruptcy Rules 709, 712 and 756 respectively.

16. Judgment on the Pleadings. That Fed. R. Civ. P. 9(b) relates to pleadings and provides, in pertinent part: "In all averments of fraud . . . the circumstances . . . shall be stated with particularity."

17. That courts have identified four purposes for the particularity requirement of Rule 9(b): (1) to apprise the other party of the claim, (2) to permit drafting of a responsive pleading, (3) to protect against baseless claims and (4) to minimize "strike suits." Annot., 27 A.L.R. Fed. 407, 414 - 418 (1976).

18. That, in this case, (1) extensive discovery and litigation has apprised all parties of the Trustee's claims, (2) responsive pleadings have been filed, (3) baseless claims, if any, can be dealt with under Rule 56(b) and (4) there is no "strike suit."

19. That it would serve no functional purpose for this Court to consider the merits of Congress' motion pursuant to Rule 9(b).

20. That Fed. R. Civ. P. 12(b) provides, in pertinent part:

> . . .the following defenses may . . . be made by motion:. . . (6) failure to state a claim upon which relief can be granted, . . . If, on a motion asserting the defense numbered (6) . . ., matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . as provided in Rule 56, . . .

21. That Congress has presented matters outside the pleading and that said matters have not been excluded by this Court.

22. That the motion to dismiss certain counts shall be treated as a motion for summary judgment under Fed. R. Civ. P. 56. See Trustee's Memorandum in Opposition to Motions 2 (filed August 22, 1983), Congress' Reply Brief 1 & 2 (filed September 12, 1983).

23. Judgment on the Merits. That Fed. R. Civ. P. 56 provides, in pertinent part:

> (b) . . . A party against whom a claim, . . . is asserted . . . may, at any time, move. . . for a summary judgment. . .
> (c) . . .The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

24. That, as a preliminary matter to the determinations set out in Rule 56(c), the Court must ascertain the appropriate rule

of law to apply and determine which facts would be material (i.e., facts which the Trustee must show to prevail on each Count).

25. Fiduciary Duty. That a lender, as a lender, does not owe a fiduciary duty to its borrowers. See, e.g., In re Prima Co., 98 F.2d 952, 964 (7th Cir. 1938), cert. denied, 305 U. S. 658, 59 S.Ct. 357, 83 L.Ed. 426 (1939).

26. That "persons offering financial investment services have a fiduciary duty to disclose to their clients all material information concerning the transaction involved." Gries v. First Wis. Natl. Bank of Milwaukee, 82 Wis. 2d 774, 778, 264 N.W.2d 254, 256 (Sup. 1978).[5]

27. That, turning away the negligence claim of non-corporate commercial borrowers against a lending bank, the Gries court noted that the borrowers were not "in any sense incompetent, infirm or peculiarly dependent on the bank to make their business decisions." Id., 82 Wis. 2d at 779, 264 N.W.2d at 257.

28. That the Trustee argues that a company is "peculiarly dependent" upon a lender when corporate interests are ignored by both sellers and buyers.

29. That, while the Trustee's invitation to apply the Gries

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[5] Schweiger v. Loewi & Co., Inc., 65 Wis.2d 56, 221 N.W.2d 882 (Sup. 1974), is inapposite to the extent that it places a broader fiduciary duty upon one who acts as an agent or advisor.

negative dictum as positive law is attractive, it must be declined--at least in the corporate setting: Given the established fiduciary duties of controlling shareholders, corporate directors and corporate officers, cf. Finding 30 (controlling lender), requiring commercial lenders to meet a general fiduciary standard would be an unnecessary burden on commerce.

30. That a lender in control of the affairs of a debtor corporation owes a general fudiciary duty to that corporation. See In re Process-Manz, Inc., 236 F.Supp. 333, 348 (N.D.Ill. 1964), rev'd. on other grounds, 369 F.2d 513 (7th Cir. 1966), cert. denied, 386 U. S. 957, 87 S.Ct. 1022, 18 L.Ed. 2d 104 (1967). Cf. Finding 27.

31. That control, in this context, means complete domination. Edwards v. Northwestern Bank, 39 N.C. App. 261, 277, 250 S.E. 2d 651, 662 (1979). See Process-Manz, supra Finding 30 ("the bankrupt. . . was the alter ego of" the creditor).

32. Non-Fiduciary Duty. That, as the Trustee's Amended Complaint does not allege breach of non-fiduciary duties (i.e., ordinary negligence), this Court need not resolve the parties' dispute as to the rule of law regarding that issue.

33. Conspiracy. That a civil conspiracy consists of the formation and operation of a conspiracy, a wrongful act done pursuant thereto, and damage resulting therefrom. See Onderdonk v. Lamb,

79 Wis.2d 241, 247, 255 N.W.2d 507, 510 (Sup. 1977).

34. That a conspiracy claim requires proof of a bad faith combination. City of Kiel v. Frank Shoe Mfg. Co., 245 Wis. 292, 296, 14 N.W.2d 164, 166 (Sup. 1944).

35. That both tortious (intentional) fraudulent conveyance and technical (unintentional) fraudulent conveyance are wrongful acts upon which a conspiracy claim may rest.[6] See Dalton v. Meister, 71 Wis.2d 504, 520-522, 239 N.W.2d 9, 18 (Sup. 1976) (suggesting that any statutorily recognized fraudulent conveyance is a legal wrong).

36. Fraudulent Conveyance. That Congress' Motion to Dismiss is not directed to so much of the Trustee's Amended Complaint as alleges technical fraudulent conveyance.

37. That proof of defendant's intent to hinder, delay or avoid creditors is required for a tortious fraudulent conveyance recovery. In re Beechwood Medicenter of Flint, 23 B.R. 939, 942-943 (Bankr. E.D.Mich. 1982) (cases collected).

38. That intent to hinder, delay or avoid creditors may be inferred from facts which lead the fact finder to the irresistible conclusion that the actor was motivated by said intent. Process-

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[6] Thus, a combination which forms to carry out an independent wrongful act may--without intent--become involved in a fraudulent conveyance and the first two of the three elements of an actionable civil conspiracy are met.

Manz, supra Finding 30, 236 F.Supp. at 347. While a party is assumed to intend the natural consequences of its acts, id., proof of technical fraudulent conveyance, standing alone, does not support a finding of tortious fraudulent conveyance.[7]

39. Aiding & Abetting. That a claim for Aiding & Abetting will be sustained where a third party wrongs the plaintiff,[7A] the defendant knew of the wrong and the defendant knowingly and substantially provided assistance in effecting the wrong. See Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94-97 (5th Cir. 1975) (securities law). See also Landy v. F.D.I.C., 486 F.2d 139, 162-163 (3rd Cir. 1973) (securities law; discusses common law principles of aiding & abetting).

40. That, in this context, knowledge ("scienter") may be found on proof of the defendant's reckless failure to discover the true nature of the state of affairs. See Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1044-1045 (7th Cir. 1977) (securities law) cert. denied, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1978).

41. That, while scienter may be shown by circumstantial evidence, such evidence must be more than a transaction in the ordinary course of a legitimate business. Woodward, supra Finding 39. On the

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[7] E.g., a transferee for inadequate consideration may not know or have reason to know that the transferor is insolvent.

[7A] E.g., third party breaches a fiduciary duty to plaintiff. Rowen v. LeMars Mut. Ins. Co. of Iowa, 282 N.W.2d 639, 654 (Iowa 1979).

other hand, that the defendant stood to benefit from the wrongdoing would be an element weighing toward a finding of scienter. See Monsen v. Consolidated Dressed Beef Co., Inc., 579 F.2d 793, 799 (3rd Cir. 1978) (securities law), cert. denied, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1979).

42. That assistance includes inactivity in the face of a duty to act, see id., 579 F.2d at 800; and that substantiality is to be determined from the amount of assistance given, the defendant's presence or absence at the time of the wrong, the defendant's relationship to the primary wrongdoer and the defendant's state of mind. See Landy, supra Finding 39, at 163.

43. Equitable Subordination. That equitable subordination is appropriate when the creditor has engaged in inequitable conduct (i.e., acts which correspond to breach of fiduciary duty by an insider or gross misconduct by an outsider), the breach or misconduct results in injury to other creditors or works an unfair advantage on the defendant-creditor, and subordination is not inconsistent to the statutory scheme. See In re Teletronics Services, Inc., 29 B.R. 139, 167-172 (Bankr. E.D.N.Y. 1983)(Code case; Act cases collected).

44. Non-equitable Subordination. That, as the Trustee appears to have waived his claims for subordination on grounds other than

equitable subordination, infra Finding 72, note 10,[8] this Court need not resolve the parties' dispute as to the rule of law regarding this issue.

45. Genuine Issue of Material Fact. That the moving party has the burden of showing the absence of a genuine issue as to any material fact. Adickes v. Kress & Co., 398 U.S. 144, 157, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970). Of course, if a defendant-movant can show that there is no genuine issue as to the plaintiff's inability to prove any one essential fact, it has met its burden.

46. That, accordingly, while it has been said that a motion for summary judgment searches the record, 73 Am.Jur.2d Summary Judgment sec. 29 (1974), the movant must direct the Court to facts in the record which it believes are material and not subject to genuine dispute. See Commercial Disc. Corp. v. Milw. Western Bank, 61 Wis.2d 671, 678, 214 N.W.2d 33, 36-37 (Sup. 1974) and Preloznik v. City of Madison, 113 Wis.2d 112, 119-120, 334 N.W.2d 580, 584 (App. 1983) (specificity in, and explanation of relevance of, supporting documents required under Wis. Stats. sec. 802.08, which is substantially similar to Fed. R. Civ. P. 56); cf. Lawson v. Sheriff of Tippecanoe Cty., No. 82-1838, ____ F.2d ____ (7th Cir. Jan. 23, 1984) (slip op. at 4: "The judge was not obliged to comb the record for evidence contradicting the [movant's] affidavit. . .").

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[8] This Court will leave to the trial court the determination, if necessary, whether fraud or debt incurred in the course of a corporation's redemption of its own stock are "inequitable conduct" within the ambit of equitable subordination.

47. That, without reference to the voluminous materials filed in state court (loaned to this Court with the consent of the parties), the record in this case fills more than two 24-inch deep filing cabinet drawers.

48. That the motion to dismiss filed by Congress is accompanied by two appendices (collectively labeled "Vol. II"): "A. Review and Analysis of Those of Plaintiff's Answers to Interrogatories which Pertain to Challenged Pleadings" (48 pages of subappendices entitled "Appendix A-1" through "Appendix A-8") and "B. Summaries of Those Portions of Depositions Which Pertain to Challenged Pleadings" (55 pages of line-by-line summaries of depositions).

49. That the Motion to Dismiss, Brief in Support of Congress' Motions and Reply Brief filed by Congress refer to said appendices in only the most general of terms.

50. That the Court has not been clearly and distinctly convinced of the factual grounds for Congress' Motion to Dismiss.

51. That, as this matter is being transferred to the District Court, Finding 85, it would be inappropriate for this Court to rule further on the merits of the Motion to Dismiss.

Motion for a Separate Trial

52. That Congress has moved, pursuant to Fed. R. Civ. P. 42(b), for a separate trial of those of the Trustee's claims which relate to Congress.

53. That Fed. R. Civ. P. 42(b) is incorporated by reference in Former Bankruptcy Rule 742.

54. That Fed. R. Civ. P. 42(b) provides, in pertinent part:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial . . . of any separate issue. . .

55. Convenience. That a single trial, with all parties present, would be more convenient and would present fewer complexities than two trials with absent parties.

56. Prejudice-Taint. That, as the potential for prejudice to Congress at a single trial is equal to the potential for prejudice to the sellers and to the Trustee at separate trials, this factor is neutral.

57. Prejudice-Confusion. That the issues common to the defendants in this litigation (e.g., whether the sale of the business was a proximate cause of its failure) suggest that a single trial would be the best approach to the truth. Congress' concerns regarding those issues which are not common to all defendants (e.g.,

whether any given defendant intended that the sale would result in the failure of the business) should be addressed to the trial court in the form of, for example, a motion for a bifurcated trial on the issues of causation and responsibility or a motion for special verdicts or jury interrogatories.

58. That, in as much as the equitable subordination claim will be tried to the Court, Finding 83, the prayer for relief provides no basis to order a separate trial for Congress.

59. That Congress has not presented sufficient information to permit this Court to determine the significance of the possibility of issue preclusion against some of the defendants resulting from "the Retirement Club suit." See Congress' Reply Brief 23 - 24 (filed September 12, 1983).

60. Prejudice-Affluence. That the possibility of prejudice resulting from the comparative wealth of Congress is a minor factor which may be cured by appropriate jury instructions.

61. Economy. That the cost to the courts, litigants and witnesses would be significantly greater if two trials are ordered.

62. That Congress argues that, inasmuch as a larger trial increases the possibility of a mistrial, said cost difference is illusory.

63. That, as this Court assumes regularity in Federal Court proceedings, Congress' argument must be rejected.

Motion to Strike Jury Trial Demand[9]

64. That Congress has moved to strike the Trustee's demand for trial by jury and has moved for trial before the Court.

65. Constitutional Considerations. That this Court will assume, without deciding, that there is no direct Seventh Amendment right to a trial by jury of any matter brought within a bankruptcy court's summary subject-matter jurisdiction. See Katchen v. Landy, 382 U.S. 323, 336-337, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966).

66. Statutory Considerations. That Bankruptcy Act of 1898 sec. 19c, 11 U.S.C. sec. 42(c)(1976)(repealed) provides, in pertinent part:

> The right to submit to a jury matters in controversy . . . under this title shall be determined and enjoyed, except as provided by this title, according to the laws of the United States now in force or such as may be hereafter enacted in relation to trials by jury.

67. That Section 19c creates an indirect Seventh Amendment right to a trial by jury in certain bankruptcy court proceedings.

68. That the case at bar is a matter in controversy. See In re Russell, 101 F. 248, 251 (2nd Cir. 1900), In re Goldberg &

[9] This discussion may be of importance in cases proceeding under The Bankruptcy Reform Act of 1978. Compare In re Portage Associates, Inc., 16 B.R. 445 (Bankr. N.D. Ohio 1982) with In re First Financial Group of Texas, Inc., 11 B.R. 67 (Bankr. S.D. Tex. 1981).

Bagman, 232 F. 194, 195 (S.D.N.Y. 1916) (L. Hand, J.); see also Finding 6.

69. That the Bankruptcy Act does not appear to provide an exception to section 19c in the case at bar.

70. That, accordingly, the Trustee has a right to a jury trial of any legal claims. See Dairy Queen v. Wood, 369 U.S. 469, 479 - 480, 82 S.Ct. 894, 8 L.E.2d 44 (1962).

71. Fiduciary Duty Claim. That a fiduciary duty claim is legal when there exists an adequate remedy at law. Jefferson Nat. Bank v. Central Nat. Bank in Chicago, 700 F.2d 1143, 1149 - 1150 (7th Cir. 1983).

72. That Congress would show, by reference to the Trustee's request for subordination, that a court of law lacks the capacity to give adequate relief. And that the Trustee maintains that the equitable subordination claim is a separate and distinct cause of action.[10]

73. That, as this Court finds equitable subordination to be a separate and distinct cause of action, Finding 82, the Trustee'a argument is persuasive.

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[10] The Trustee appears to waive by inconsistency any claim to subordination based solely upon other grounds, see Trustee's Memorandum in Opposition to Motions 43 - 46 (filed Aug. 22, 1983) (arguing subordination as a remedy for fraud and for debt incurred in the course of a corporation's redemption of its own stock).

74. That, consequently, there exists an adequate remedy at law for the alleged breach of fiduciary duty.

75. That attempts by Congress to label the request for a money judgment as a request for substitutionary restitution or an equitable accounting do not affect the finding a court of law would have the capacity to grant a money judgment which would provide adequate relief. See Dairy Queen v. Wood, supra Finding 70, 369 U.S. at 477 - 479.

76. That Count 1 of the Amended Complaint, breach of fiduciary duty, is a legal claim triable to a jury.

77. Fraudulent Conveyance Claim. That a fraudulent conveyance claim is legal "in absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have . . ." Schoenthal v. Irving Trust Co., 287 U.S. 92, 95, 53 S.Ct. 50, 77 L.Ed. 185 (1932). See generally In re Black & Geddes, Inc., 25 B.R. 278 (Bankr. S.D.N.Y. 1982) (recent cases collected).

78. That Findings 72, 73 & 75 are applicable to the fraudulent conveyance claim.

79. That, accordingly, a court at law would have the capacity to grant the relief which the allegations of fraudulent conveyance show the Trustee entitled to have. And that Count 4, fraudulent

conveyance, is a legal claim triable to a jury.

80. Conspiracy and Aiding & Abetting Claims. That, in regard to Counts 2 and 6 of the Amended Complaint, Congress does not dispute that "whether those claims merit a jury adjudication turns on plaintiff's right to a jury trial on the underlying issues of breach of fiduciary duty and fraudulent conveyance. If plaintiff is so entitled, . . . issues relating to conspiracy and aiding and abetting will also be tried to the jury." Trustee's Memorandum in Opposition to Motions 56 (filed August 22, 1983).

81. That, as the fiduciary duty and fraudulent conveyance claims have been found to be triable to a jury, Findings 76 & 79, the conspiracy and aiding & abetting claims are also triable to a jury.

82. Equitable Subordination Claim. That equitable subordination is a separate and distinct claim which requires proof of inequitable conduct on the part of the defendant corresponding to breach of fiduciary duty by an insider or gross misconduct by an outsider. See In re Teletronics Services, Inc., supra Finding 43.

83. That both parties agree that Count 7, equitable subordination, is an equitable cause of action and is not triable to a jury.

84. Complexity. Assuming, without deciding, that there is a complexity exception to the Seventh Amendment right to a jury trial, see Jefferson Nat. Bank v. Central Nat. Bank in Chicago, supra Finding 71, the case at bar is not so complex or technical as to warrant trial to the Court: fact finding will involve a single, basic transaction and a total of fourteen defendants represented by a total of five law firms.

85. Forum. That, with the exception of contested involuntary petitions, Former Bankruptcy Rule 115(b), a Bankruptcy Judge is required to refer jury trials to the District Court. Former Bankruptcy Rule 409(c).

CONCLUSIONS OF LAW

1. That it is unnecessary for this Court to reach so much of the motion of Congress Financial Corporation to dismiss certain counts of the Trustee's Amended Complaint as is pursuant to Fed. R. Civ. P. 9(b). Findings 16 - 19.

2. That, in light of so much of the motion of Congress Financial Corporation to dismiss certain counts of the Trustee's Amended Complaint as is pursuant to Fed. R. Civ. P. 56(b), it is unnecessary for this Court to reach so much of the motion of Congress Financial Corporation to dismiss certain counts of the Trustee's

Amended Complaint as is pursuant to Fed. R. Civ. P. 12(b)(6). Findings 20 - 22.

3. That, in regard to so much of the motion of Congress Financial Corporation to dismiss certain counts of the Trustee's Amended Complaint as is pursuant to Fed. R. Civ. P. 56(b):

3A. To prevail on Count 1 of the Amended Complaint (breach of fiduciary duty), the Trustee must show, inter alia, either that Congress did not disclose material information to the bankrupt or that Congress completely dominated and controlled the affairs of the bankrupt and did not act in a fiduciary manner. Findings 25 - 31.

3B. To prevail on Count 2 of the Amended Complaint (conspiracy), the Trustee must show (1) the formation and operation of a bad faith combination which (2) engages in a wrongful act (e.g., fraudulent conveyance) which (3) is a proximate cause of damage to the plaintiff. Findings 33 - 35.

3C. To prevail on so much of Count 4 of the Amended Complaint as is directed toward tortious fraudulent conveyance, the Trustee must, inter alia, --in the absence of direct evidence--present evidence which leads to the irresistible conclusion that Congress was motivated to act by a desire to hinder, delay or avoid other creditors.

3D. To prevail on Count 6 of the Amended Complaint (aiding & abetting), the Trustee must show that (1) a third party committed a tort, (2) Congress either knew of the tort or recklessly failed to discover it and, (3) with knowledge of--or with reckless disregard for--its role, (4) Congress substantively acted to effect the tort or failed to act substantively in the face of a duty to prevent the effecting of the tort. Findings 39 - 42.

3E. To prevail on Count 7 of the Amended Complaint (equitable subordination), the Trustee must show that (1) Congress has engaged in conduct corresponding to breach of fiduciary duty by an insider or gross misconduct by an outsider, (2) the breach or misconduct results in injury to the other creditors or works an unfair advantage to Congress and (3) subordination is not inconsistent with the Bankruptcy Act of 1898, 11 U.S.C. sec. 1, et seq. (1976) (repealed).

3F. Congress Financial Corporation has not met its burden of showing the absence of a genuine issue as to any material fact. Findings 23 - 24 & 45 - 50.

4. That a separate trial of those of the Trustee's claims which relate to Congress Financial Corporation would not further convenience, avoid prejudice or be conducive to expediency or economy. Findings 52 - 63.

5. That the Trustee is entitled to a jury trial on Counts 1, 2, 4 & 6 of his Amended Complaint in the above captioned matter but not on Count 7 of said Complaint. Findings 64 - 84.

ORDER

IT IS ORDERED THAT:

1. So much of the motion of Congress Financial Corporation to dismiss certain counts of the Amended Complaint in the above captioned matter as is pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6) be, and the same hereby is, dismissed.
2. So much of the motion of Congress Financial Corporation to dismiss certain counts of the Amended Complaint in the above captioned matter as is pursuant to Fed. R. Civ. P. 56(b) be, and the same hereby is,held in abeyance and transferred to the United States District Court for the Western District of Wisconsin for reargument on the question of genuine issue of material fact and a decision on the merits. See infra Order 6.
3. The motion of Congress Financial Corporation for separate trials in the above captioned matter be, and the same hereby is, denied.
4. So much of the motions of Congress Financial Corporation to strike the Trustee's demand for trial by jury and for trial to

the Court as relates to Counts 1, 2, 4 & 6 of the Trustee's Amended Complaint in the above captioned matter be, and the same hereby is, denied.

5. So much of the motions of Congress Financial Corporation to strike the Trustee's demand for trial by jury and for trial to the Court as relates to Count 7 of the Trustee's Amended Complaint in the above captioned matter be, and the same hereby is, granted.

6. The proceedings in the above captioned matter, including such documents in the record and file as the parties request, be transferred to the United States District Court for the Western District of Wisconsin for trial in accordance with Former Bankruptcy Rule 409(c).

7. No costs be allowed to any of the parties.

Dated: March 7, 1984.

BY THE COURT:

William H. Frawley
Bankruptcy Judge

APPENDIX A

Roster

Buyer.....William Victor Gruman

Phoenix Fund, Inc. (wholly owned by Gruman)

Ralph Buchman (Gruman's assistant)

Bankrupt.....Northwest Liquor Industries, Inc. (NWI)

"Pre-Merger" or "Operating Companies:

Northwest Liquor Co., Inc. (NWC)

Eau Claire Liquor Co., Inc. (partially owned subsidiary of NWC)

Lakeland Liquor Co., Inc. (partially owned subsidiary of NWC)

Northern Liquor Co., Inc. (partially owned subsidiary of NWC)

Northern Brewing Co., Inc. (wholly owned subsidiary of Northern Liquor Co., Inc.)

Lender.....Congress Financial Corporation

Sellers.....of Northwest Liquor Co., Inc.

Phillip Slomann, deceased

Milda Slomann*

Ashley Slomann,* individually and as custodian for

Geoffrey L. Slomann

Susan H. Slomann

APPENDIX A (Cont.)

Sellers.....of Northwest Liquor Co., Inc. (Cont.)

Herman Nemzoff*

Frank L. Guth*

of Eau Claire Liquor Co., Inc.

Rudy W. DeKeyser*

Herman Nemzoff*

of Lakeland Liquor Co., Inc.

Olive Hyland

of Northern Liquor Co., Inc.

Bonita Rooney*

*Jointly represented by counsel.

Trustee.....Don E. Whinnery

Related Litigant...Northwest Investment and Retirement Club (which includes some or all of sellers as members): Has sued sellers in Federal District Court on notes issued to the Pre-Merger Companies.

APPENDIX B

Summary of Transaction
from Trustee's Pre-Trial Statement (uncontested facts)
pages 13-21
and Lender's Reply Brief pages 13-18

May 26, 1976

Buyer Gruman and sellers entered into an agreement for the purchase and sale of corporate stock of pre-merger companies (PMC). Statement paragraph 8.a.

June 3, 1976

Gruman and sellers entered into extension of purchase and sale agreement. Statement paragraph 8.b.

June 10, 1976

Congress (Lender) contacted regarding the financing of the purchase and sale. Reply paragraph 3.

June 15, 1976

Agreement between buyer and sellers regarding inspection of books and records. Statement paragraph 8.c.

June 16, 1976

Lender sends letter expressing interest in providing financing. Statement paragraph 9.

Before July 2, 1976

Buyer causes Northwest Liquor Industries, Inc. (NWI) to be formed. Buyer is 100% owner. Statement paragraph 10.

Buyer deposits $500,000 into the account of "Northwest Liquor Company" (see July 8, 1976, below). Statement paragraph 11.

July 2, 1976

The "Transaction" breaks down into four conceptually distinct events:

Purchase and Sale. The buyer and sellers entered into warranties and a trust agreement and amended the purchase and sale agreement. Statement paragraph 8.d through 8.g "The essential terms of the Sale Agreement called for payment by Gruman or his assignee (ultimately Northwest Liquor Industries, Inc.) of the net book value of the assets plus $500,000.00 for goodwill." Reply paragraph 2.

APPENDIX B (Cont.)

Assignment to NWI. The buyer assigned all of his interest in the purchase and sale agreement to NWI. NWI assumed all of the buyer's obligations under that agreement. Statement paragraph 12.

Loan. Lender caused checks to be issued to the purchase and sale trustee for $2,300,000 (the purchase price of the pre-merger companies) and to NWI for $431,455.48 (to repay "purported" loans from sellers to pre-merger companies). Statement paragraph 15. The purchase and sale trustee paid $1,840,000 to the sellers. Statement paragraph 21.

NWI gave the lender security agreements covering accounts receivable and inventory and assigned the "contract" as collateral security. Statement paragraph 13.a. through c.

The pre-merger companies gave the lender a security agreement covering accounts receivable and inventory and guaranteed the obligations of NWI. Statement paragraph 13 f. and g.

The buyer guaranteed the obligations of NWI. Statement paragraph 13.d.

NWI, the lender and some of the pre-merger companies entered into a pledge and hypothecation agreement. Paragraph 13.e.

Merger. Pre-merger companies were merged into NWI. Statement paragraph 14.

"Within Several Days of" July 2, 1976.

Notice by mail sent to trade creditors regarding NWI's purchase of the pre-merger companies and lender's role as secured lender. Reply paragraph 9. Trustee's exhibit 258.

July 8, 1976

Buyer has the $500,000 referred to at Before July 2, 1976 transferred from "Northwest Liquor Company" to a bank in Tampa, Florida. Statement paragraph 16.

August and September 1976

Two suppliers (Seagram and Sons and Fromm & Sichel) notify NWI that they had decided to stop extending credit. Statement paragraph 17.

Before September 30, 1976

NWI forms subsidiaries: Lakeland Liquor Co., Inc., Eau Claire Liquor, Inc., Northern Liquor Co., Inc. and Northwest Liquor Co., Inc. Statement paragraphs 19 and 2.

September 30, 1976

The subsidiaries gave the lender a general security agreement and a guarantee of the obligations of NWI. Statement paragraph 20.a. & b.

APPENDIX B (Cont.)

September 30, 1976 (Cont.)

NWI gave the lender a guarantee of the obligations of the subsidiaries. Statement paragraph 20.c.

October 1, 1976

The purchase and sale trustee disburses the assets of the trust account to the sellers, NWI (as buyer Gruman's assignee) and others. Statement paragraph 21.

September or October 1976

NWI's liquor license temporarily suspended. Statement paragraph 18.