



ENTERED

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The following constitutes the order of the Court.

Signed August 23, 2004.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
PRECEPT BUSINESS SERVICES,	§	CASE NO. 01-31351-SAF-7
INC., et al.,	§	(Jointly Administered)
DEBTOR(S).	§	
	§	
STEVEN S. TUROFF, AS THE	§	
CHAPTER 7 TRUSTEE FOR	§	
PRECEPT BUSINESS SERVICES,	§	
INC., et al.,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 04-3216
	§	
JACKSON WALKER, L.L.P., et al.,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

Jackson Walker, L.L.P., and Charles D. Maguire, Jr., defendants, move the court for partial summary judgment regarding liability for seven claims alleged by Steven S. Turoff, the plaintiff and the Chapter 7 trustee of the bankruptcy estate of Precept Business Services, Inc., the debtor. Jackson Walker and

Maguire also move for partial summary judgment regarding the elements of causation and damages for the seven claims. Turoff opposes the motions. The court conducted a hearing on the motions on May 26, 2004.

Turoff alleges eight claims for relief against the defendants: (1) breach of fiduciary duty; (2) aiding and abetting the Precept officers' and directors' breach of fiduciary duties; (3) aiding and abetting bank fraud; (4) civil conspiracy; (5) negligent misrepresentation; (6) constructive fraud; (7) legal malpractice; and (8) equitable subordination.

The defendants contend that Turoff cannot establish liability for the first seven claims. Jackson Walker asserts that the negligent misrepresentation and civil conspiracy claims are barred by limitations. On the aiding and abetting bank fraud claim, Jackson Walker asserts that Turoff lacks summary judgment evidence to prove that Precept committed fraud to obtain a March 22, 1999, \$40 million Credit Facility or that Jackson Walker intended to assist or did assist in the alleged fraud. On the negligent misrepresentation claim, Jackson Walker asserts that Turoff lacks summary judgment evidence establishing that Jackson Walker supplied false information to the banks. On the civil conspiracy claim, Jackson Walker asserts that Turoff lacks summary judgment evidence of any underlying tort. Jackson Walker also argues that there is no genuine issue of material fact that

it committed legal malpractice. Jackson Walker argues that the trustee's complaints under his cause of action for breach of fiduciary duty states a claim for legal malpractice and not a claim for breach of fiduciary duty. Jackson Walker states that even if the trustee does state a claim for breach of fiduciary duty, he has not offered summary judgment evidence of the essential elements for that claim. Regarding the trustee's claim for aiding and abetting breach of fiduciary duty, Jackson Walker states that the trustee has failed to prove that the Precept directors and officers breached a fiduciary duty to the company or that their alleged breaches resulted in injury to the plaintiff. Jackson Walker also states that there is no evidence that Jackson Walker knowingly participated in the alleged breaches of fiduciary duty. In response to the trustee's claim for constructive fraud, Jackson Walker argues that there is no evidence that Jackson Walker breached any legal duty to Precept and that the claim, therefore, fails as a matter of law.

The defendants also contend that Turoff cannot establish damages or causation for the first seven claims. The damages summary judgment motion does not apply to the equitable subordination claim. For equitable subordination, Turoff seeks the subordination of the Jackson Walker claim against the bankruptcy estate. Jackson Walker states in its motion for summary judgment regarding damages and causation that the motion

applies to Turoff's legal malpractice claim, but the court does not consider the motion to apply to the legal malpractice claim because of Turoff's position in his response to the motion. For legal malpractice, Turoff seeks a disgorgement of fees paid and the disallowance of Jackson Walker's claim against the bankruptcy estate.

Before addressing the summary judgment motions themselves, the court must first address several challenges to portions of the summary judgment evidence.

Deutscher Affidavit

In support of summary judgment, the defendant submitted the affidavit of Layne A. Deutscher, Precept's former general counsel. Turoff objects to Deutscher's affidavit and moves to strike it. The defendants filed a motion to extend the time to respond to Turoff's motion to strike. The court held a hearing on the motion to extend the time to respond on July 2, 2004. The court denied the motion to extend the time to respond to Turoff's motion to strike.

Turoff asserts three broad problems with Deutscher's affidavit. Turoff contends 1) that he lacked a reasonable opportunity to depose Deutscher; 2) that Deutscher, a former defendant in the case, is implicated in many of the allegations asserted against Jackson Walker; and 3) that Turoff has not had an adequate opportunity to explore Deutscher's biases or

opinions. None of those general contentions warrant striking the affidavit.

In addition, Turoff launches a multi-page, multi-line attack on the affidavit, asserting that Deutscher's statements are self-serving because he is an interested witness, that he is offering expert opinions, that his statements are overly broad or conclusory, that he lacks personal knowledge or that he is offering hearsay testimony. None of these specific contentions warrant striking the portions of the affidavit.

In his response to the summary judgment motions, Turoff argues that the court is not obligated to accept all of Jackson Walker's summary judgment evidence. The court may weigh evidence in its summary judgment analysis, considering the circumstances of a witness in the context of the transaction at issue. The court must view the evidence in the light most favorable to the party opposing the motion for summary judgment, drawing inferences in favor of the non-moving party. Competing inferences from summary judgment evidence mandates a trial.

The summary judgment decision-making process compels the denial of Turoff's motion to strike. The court expects that witnesses would be involved in the challenged transactions. A witness may, of course, have a vested interest to protect. Here, Deutscher was the general counsel, and even a defendant in this litigation. He was involved in the events that gave rise to this

litigation. Turoff may certainly argue that his summary judgment averments are self-serving or otherwise biased to best portray his involvement in the events, but that does not support a motion to strike the affidavit. Rather, it supports an argument by Turoff in the context of the very standards for review of summary judgment motions he advocates.

Because of Deutscher's involvement as general counsel, he may opine, as a lay witness, about the transactions and the role played by the various parties.

With regard to the hearsay concerns, the court will not consider the affidavit for the truth of what Douglas Deason or David Neely, both of whom are former officers and directors of Precept, may have told Deutscher in the conversations he describes.

With regard to the deposition contentions, Turoff has not filed a motion to compel the deposition nor requested that the court defer consideration of the summary judgment motions for further discovery pursuant to Fed. R. Civ. P. 56(f).

For these reasons, the court will deny Turoff's motion to strike Deutscher's affidavit and overrule Turoff's objections, except with regard to the hearsay ruling.

Winters and Souza Declarations

Jackson Walker objects to and moves to strike testimony from the declarations of William Winters and Richard Souza, submitted

by Turoff in support of his response to the motions for summary judgment. Specifically, Jackson Walker moves to strike paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Winters declaration and paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Souza declaration. Jackson Walker contends that the declarations should not be used to address reliance, false statements or fraudulent omissions. At the hearing, Jackson Walker acknowledged the court's order entered June 3, 2004, on a similar motion brought by Ernst & Young, LLP, in adversary proceeding no. 02-3583. But Jackson Walker contends that Ernst & Young's summary judgment motion ruling challenged the reliance element of Turoff's claim, whereas Jackson Walker also challenges the false statement and fraudulent omission elements. Turoff responds that the court should apply its Ernst & Young decision.

The court overruled Ernst & Young's objections and denied its motion to strike the two declarations. Jackson Walker, like Ernst & Young, argues that the declarations are inconsistent with the declarants' depositions and therefore not proper summary judgment evidence. The court adopts its order entered June 3, 2004, in adversary proceeding no. 02-3583. Based on the court's review of the Winters and Souza declarations and the declarants' depositions, the court cannot conclude that the declarations are inconsistent with the depositions. As observed in the Ernst & Young ruling, while it appears that the declarants should have

supplemented their deposition testimony, the declarations are not necessarily inconsistent with the deposition responses to counsel's questioning.

At the hearing, Turoff represented that he only presented the declarations as summary judgment evidence on the element of reliance. The court accepts that representation and does not consider the declarations for the elements of false statement or fraudulent omission.

Nevertheless, the court addresses several components of Jackson Walker's motion in greater detail. Neither Souza nor Winters made the ultimate credit decisions for their respective banks. Souza was Wells Fargo's loan team manager for the Precept account. He made credit recommendations and thus functioned as part of Wells Fargo's decision-making process. Winters was Bank One's senior underwriter. He too made credit recommendations and functioned as part of Bank One's decision-making process. Both may therefore testify regarding recommendations they would make in their respective bank's decision-making process based on a set of information. Both may respond to hypothetical fact situations based on their function in their respective bank's decision-making process. Even though neither made the ultimate credit decision, both may testify from their perspective in the decision-making process.

Jackson Walker states that Souza testified at deposition: "I

am not aware of any misrepresentations or omissions by Jackson Walker in connection with the March 1999 Credit Facility or the amendments thereto [and] I do not recall Jackson Walker providing any information that was material to Wells Fargo's decision to enter into the March 1999 Credit Facility or any amendments thereto." In the deposition, Souza actually said:

Q: . . .did you ever have any communications with anyone from Jackson Walker?

A: No, I did not.

Q: As the corporate representative of Wells Fargo Bank, are you aware of any communications between Wells Fargo and Jackson Walker relating to those issues?

A: No, I'm not.

Q: Did you ever try to contact Jackson Walker in connection with any of those issues?

A: No.

Q: Would it be accurate to say that in connection with the 1999 credit facility that from your perspective Jackson Walker did not provide any information that is -- that is material to the bank's decision to enter into the credit facility?

A: I don't remember any information from Jackson.

Q: So, to your knowledge, were there any misrepresentations or omissions by Jackson Walker with regard to the credit facility?

A: None that I'm aware of.

Q: And the amendments?

A: None.

(Objections omitted.)

In his declaration, Souza opined on the recommendation he would have made based on, in effect, hypothetical assumptions put to him by Turoff's lawyers. Those comments are not inherently inconsistent with the above-quoted deposition testimony. Rather, the declaration suggests an evidentiary weight and credibility decision for the fact finder.

A similar exchange took place with Winters, with a similar declaration. The court draws the same inferences. The comments in the declaration are not inherently inconsistent with the deposition responses.

For the series of statements concerning what Souza and Winters would have done if certain facts exist, the court considers those as opinions of loan team members and underwriters about the impact on their credit recommendations of facts, posed as hypothetical questions. Loan officers and underwriters may offer that type of testimony. They may testify about the impact of assumed facts on how they perform their jobs. As discussed below, there are genuine issues of material fact about the basis of those hypothetical questions.

Both declarants make several vague references in their statements, for example, "among other information." While the court disregards vague statements, that does not mean that the declarations should not be considered. Rather, it means the court should read the declarations based on common sense. Both declarants refer to statements made by other persons. The court does not consider those statements for the truth of the matter asserted. Both declarants refer to written documents. The court does not consider the references to the documents to establish the content of the documents. Both declarants comment on what Jackson Walker knew. The declarants lack a foundation to provide

that testimony, so the court does not consider that testimony. Both declarants comment on GAAP standards for particular items. Jackson Walker contends that testimony amounts to unsubstantiated expert opinion. Turoff does not offer Souza or Winters as an expert. But they may testify about their understanding of GAAP as used to perform their functions in the banks' credit decision-making process. The declarants refer to a "scheme" in several instances. The court accords no significance to that label for purposes of the summary judgment motion.

Except as pertains to hearsay and statements about what Jackson Walker knew, the court will overrule the objections and deny the motions. The court does not, however, consider the declarations with regarding to false statements and fraudulent omissions.

Summary Judgment Standards

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion, the inference to be drawn

from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

If the court concludes that summary judgment is inappropriate, it will merely enter an order denying the motion. Material fact disputes and competing factual inferences need not be discussed in an order denying a motion, as those factual disputes will necessarily be addressed at trial.

Liability

Banks' Claims - Public Policy Issues

Jackson Walker contends that the court should dismiss all claims Turoff asserts on behalf of Bank One and Wells Fargo. Jackson Walker asserts that the assignment from the banks to Turoff violates public policy. The banks transferred claims to Turoff as the Precept Chapter 7 trustee pursuant to a settlement

approved by the court in the underlying bankruptcy case by order entered on April 11, 2002. Jackson Walker has filed a claim in the underlying bankruptcy case, is a party in interest in the underlying bankruptcy case, had notice of the motion to approve the settlement, did not contest the settlement and did not seek relief from the order approving the settlement. The order is final and cannot be collaterally attacked.

Jackson Walker argues that Precept and the defendants are joint tortfeasors, and that Texas public policy does not permit an assignment of a claim of a joint tortfeasor. Jackson Walker reluctantly recognizes that Turoff is not Precept, and that a Chapter 7 trustee is not the debtor. Turoff may be subject to the claims and defenses which might have been asserted against Precept or the banks pre-petition, but that does not mean that the Chapter 7 trustee may not prosecute for the benefit of creditors a creditor's claim transferred to the bankruptcy estate. The Bankruptcy Code provides that property may be transferred to a bankruptcy estate. 11 U.S.C. § 541(a)(7). The trustee must then liquidate the property of the bankruptcy estate for the benefit of creditors. 11 U.S.C. § 704. Whether this federal authorization for the transfer of claims is superior to any state law to the contrary would be best determined after a trial on the merits of the claim. U.S. Const. art. VI, cl. 2.

In a similar vein, the defendants suggest the doctrine of *in*

pari delicto bars Turoff's claims. As the court held in its previous ruling on motions to dismiss in adversary proceeding no. 02-3583 and in the order entered June 3, 2004, denying the Ernst & Young motion for summary judgment in that adversary proceeding, the applicability of the doctrine of *in pari delicto* in this case cannot be determined until the facts have been found. Applying the Rule 12(b)(6) standards, the court previously held that it could not conclude that Turoff could not prove a set of facts for adverse actions which would make the *in pari delicto* doctrine inapplicable. Similarly, using summary judgment standards, there are genuine issues of material fact of whether there were adverse actions which would make the *in pari delicto* doctrine inapplicable. As the court discussed in the Rule 12(b)(6) motions in this case, developing case law questions whether the doctrine of *in pari delicto* should be applied to a Chapter 7 trustee. That case law may reach the Fifth Circuit. Without repeating that analysis in this decision, the court merely observes that the public policy consideration concerning the doctrine's applicability to a Chapter 7 trustee need not be considered if the court finds there were adverse actions that would make the doctrine not applicable on its own terms. Should the court find that there were no adverse actions, the question would then be ripe for adjudication.

In the above-referenced rulings on the motions to dismiss,

the court determined that the banks' assignments did not create so-called Mary Carter agreements.

As there are genuine issues of material fact that must be decided, the court defers addressing any of these public policy issues until trial.

Banks' Claims - Limitations

Jackson Walker also contends that the negligent misrepresentation and civil conspiracy claims are barred by limitations. Both claims must be filed within two years of the accrual of the claim. Tex. Civ. Prac. & Rem. Code § 16.003 (2002); see Texas Am. Corp. v. Woodbridge Joint Venture, 809 S.W.2d 299, 303 (Tex. App.--Fort Worth 1991, writ denied); Stevenson v. Koutzarov, 795 S.W.2d 313, 318-19 (Tex. App.--Houston [1st Dist.] 1990, writ denied). Texas recognizes the discovery rule, which tolls the accrual of the cause of action until "the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim." Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732, 734 (Tex. 2001). However, in Texas, the statute of limitation for claims of negligent misrepresentation is not tolled by application of the discovery rule. See Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas, 20 F.3d 1362, 1372 (5th Cir. 1994).

The court next considers the doctrine of fraudulent concealment:

Fraudulent concealment is an equitable doctrine that, when properly invoked, estops a defendant from relying on the statute of limitations as an affirmative defense to a . . . claim when a defendant is under a duty to make disclosure, but fraudulently conceals the existence of a cause of action from the plaintiff. [citation omitted] To show entitlement to the estoppel effect of fraudulent concealment, the plaintiff must show: (1) the defendant had actual knowledge of the wrong; (2) a duty to disclose the wrong; and (3) a fixed purpose to conceal the wrong.

Casey v. Methodist Hosp., 907 S.W.2d 898, 903 (Tex. App.--Houston [1st Dist.] 1995, no writ). Texas recognizes that fraudulent concealment has an estoppel effect which ends "when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed cause of action. Knowledge of such facts is in law equivalent to knowledge of the cause of action." Casey, 907 S.W.2d at 904.

The Credit Facility closed on March 22, 1999. Any claims of negligent misrepresentation or civil conspiracy pertaining to the Credit Facility belonged to the banks. Creditors filed involuntary bankruptcy petitions against Precept in January 2001. The court entered an order for relief on February 22, 2001. The commencement of the bankruptcy case tolled the running of limitations for actions owned by Precept but not for actions owned by non-debtors – here, the banks. 11 U.S.C. § 108(a). The post-petition assignment of the banks' claims to Turoff did not affect the application of limitations to the claims.

Unless tolled by the discovery rule or the fraudulent concealment doctrine, limitations ran March 22, 2001. Turoff filed the complaint on November 27, 2002. Because the discovery rule is not applicable to a negligent misrepresentation claim, limitations on that claim ran March 22, 2001, unless the fraudulent concealment doctrine is applicable.

The parties summarize their respective summary judgment evidence concerning when the banks learned of sufficient facts and circumstances for a reasonably prudent person to make inquiry. For purposes of analyzing a summary judgment motion, the court must draw inferences in favor of the party opposing the motion. Drawing such inferences, the court concludes that there are genuine issues of material fact concerning the applicable accrual date for the causes of action under the discovery rule as it applies to the civil conspiracy claim and under the fraudulent concealment doctrine as it applies to both the civil conspiracy claim and the negligent misrepresentation claim. Those facts must therefore be determined at trial before the court can determine if the claims are time-barred.

Banks' Claims - Aiding and Abetting Fraud

While questioning whether Texas recognizes a claim for aiding and abetting fraud separate and apart from a conspiracy claim, see, e.g., Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co., 51 S.W.3d 573, 583 n.7 (Tex. 2001), Jackson Walker moves for

summary judgment dismissing the claim for lack of evidence that Precept committed fraud to obtain the March 22, 1999, Credit Facility or that Jackson Walker aided and abetted any fraudulent activity by Precept. Jackson Walker comments that while Turoff's response "is full of allegations and inflammatory accusations about improper conduct by Jackson Walker," Turoff presents little summary judgment evidence regarding Jackson Walker's actions. Reply of Jackson Walker L.L.P. and Charles D. Maguire, Jr. in Support of Motion for Partial Summary Judgment on Liability at 2. The court must indeed read through Turoff's allegations and inflammatory accusations to focus on actual summary judgment evidence.

Nevertheless, Turoff has presented summary judgment evidence to establish genuine issues of material fact requiring a trial on the claim of aiding and abetting fraud. There are genuine issues of material fact of whether Precept perpetrated a fraud against the banks. So, there are genuine issues of material fact of whether Jackson Walker aided and abetted that alleged fraud. These genuine issues of material fact defeat summary judgment.

Banks' Claims - Negligent Misrepresentation

Jackson Walker asserts that there is no summary judgment evidence that it supplied false information to the banks. If the defendants did not supply false information to the banks, they contend that Turoff may not prevail on a claim of negligent

misrepresentation. The elements of the cause of action of negligent misrepresentation in Texas are: (1) the defendant made a representation in the course of his business; (2) the defendant supplied "false information" for the guidance of others in their business; (3) the defendant failed to exercise reasonable care or competence in communicating this information; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered some pecuniary loss. Federal Land Bank Ass'n of Tyler v. Sloan, 825 S.W.2d 439, 442 (Tex. 1991).

From Turoff's summary judgment evidence, the fact finder could infer that Jackson Walker or Maguire failed to disclose information. Even so, a failure to disclose information does not satisfy the requirement that the defendants supplied false information. See Airborne Freight Corp., Inc. v. C.R. Lee Enters., Inc., 847 S.W.2d 289, 294 (Tex. App.-- El Paso 1992, writ denied) ("Significantly, the sort of 'false information' contemplated in a negligent misrepresentation case is a misstatement of *existing fact*."). Winters testified at his deposition that Jackson Walker did not provide false information in connection with the March 22 Credit Facility. Michael Sullivan, the corporate representative from Wells Fargo, testified similarly at his deposition. Neither the Winters nor Souza declarations conflict with that testimony.

Jackson Walker supplied an opinion letter to Bank One and

Wells Fargo. Winters and Sullivan testified that the opinion letter did not contain false statements. Turoff complains about Jackson Walker's knowledge that Precept would violate Representation and Warranty 6.7 of the Credit Facility. But the opinion letter supplies no statement about Representation and Warranty 6.7. The opinion letter states that "[i]n rendering this opinion, we have assumed, with your consent and without any independent investigation, all of the following: . . . C. that all of the Transaction Documents will be performed strictly in accordance with the terms thereof. . . ." The letter assumes Precept will strictly perform in accordance with the terms of the transaction documents, but Jackson Walker makes no statement of whether Precept can perform. Jackson Walker does not supply a statement about the accuracies of representations made by Precept.

Turoff contends that Jackson Walker had a duty to disclose what it knew about Precept and the persons in control of Precept. Whether or not Jackson Walker had that duty, any non-disclosure is not a basis for a negligent misrepresentation claim. See Clardy Mfg. Co. v. Marine Midland Bus. Loans, Inc., 88 F.3d 347, 357 (5th Cir. 1996), cert. denied ("A claim for negligent misrepresentation under Texas law contemplates that the 'false information' provided by the defendant is a misstatement of *existing fact*.").

Because there is no genuine issue of material fact that the defendants did not supply false information to the banks, the court will grant the portion of the summary judgment motion seeking to dismiss Turoff's negligent misrepresentation claim.

Banks' Claims - Civil Conspiracy

The defendants move for summary judgment dismissing Turoff's claim for civil conspiracy regarding the banks. They maintain that Turoff cannot establish an underlying tort or that the defendants had a meeting of the minds regarding the tort. The elements of a claim of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. Jackson v. Radcliffe, 795 F.Supp. 197, 209 (S.D. Tex. 1992).

Turoff contends that Precept tortiously misled the banks and that by doing so, Precept committed a fraud on the banks. As discussed above, there is a genuine issue of material fact of whether Precept perpetrated a fraud against the banks. Turoff argues that Jackson Walker conspired by concealing the nature of the repurchase program and the stock transaction. Shortly after the March 1999 Credit Facility closed, Jackson Walker met with Neely, Douglas Deason, Darwin Deason and Deutscher to discuss the stock transaction. Despite obtaining information about the transaction, Jackson Walker did not disclose that information to

the banks. Construing the evidence in the light most favorable to Turoff, a fact finder could draw an inference that Jackson Walker intended for the course of action to occur or that Jackson Walker intentionally furthered Precept's course of action. Consequently, there are genuine issues of material fact requiring a trial on this claim.

Precept's Claims - Legal Malpractice

The defendants move for summary judgment dismissing Turoff's claim for legal malpractice regarding Jackson Walker's work as Precept's lawyers. The elements of a claim for legal malpractice are: (1) the attorney owed a duty to the client; (2) the attorney breached this duty; (3) the breach of the duty caused the client's injury; and (4) damages resulted. Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995).

Turoff contends that Jackson Walker failed to provide Precept with adequate or reasonable advice concerning Precept's corporate governance practices, acquisition programs and public disclosures. In many respects, Jackson Walker points to Deutscher's affidavit, arguing that he addressed corporate governance and board communications regarding acquisitions. Deutscher had been involved in Precept's due diligence regarding Precept's acquisitions. On the other hand, Turoff presents summary judgment evidence of Jackson Walker's inferred knowledge of Precept's decision-making structure and Jackson Walker's

knowledge of transactions. Turoff contends that Jackson Walker had a duty to communicate with Precept's board regardless of the role played by Deutscher. There are genuine issues of material fact that must be determined before the court can assess whether Jackson Walker acted under the standard of a reasonably prudent lawyer. The court exercises its discretion to determine these factual disputes at trial before considering the duty since the nature of the duty itself is a matter of considerable public and professional debate.

With regard to disclosures, Jackson Walker states that it made a professional decision that Precept did not need to disclose what the parties refer to as the TSC transaction, the stock purchase program, or the John Rose lawsuits. "A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney." Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989). "Some courts have held that if an attorney makes an error in judgment, but acted in good faith and in what the attorney believed was the client's best interest, the attorney is not liable for malpractice." Id. Jackson Walker faults Turoff for not presenting an expert witness to opine on whether Jackson Walker made a reasonably prudent decision. The court can make that decision without an expert's opinion.

A fact finder may draw competing inferences regarding legal malpractice, which creates a genuine issue of material fact.

Summary judgment will be denied on the issue of legal malpractice.

**Precept's Claims - Breach of Fiduciary Duty and
Aiding and Abetting Breach of Fiduciary Duty**

Jackson Walker moves for summary judgment dismissing Turoff's claims for breach of fiduciary duty and aiding and abetting the Precept directors' breach of their fiduciary duties. Jackson Walker argues that the fiduciary duty claims merely spin Turoff's malpractice claim. Jackson Walker asserts that if Turoff establishes at trial that Jackson Walker provided bad legal advice regarding corporate governance and Precept's duty to disclose certain information, that gives rise to a malpractice claim, not a breach of fiduciary duty claim. Goffney v Rabson, 56 S.W.3d 186, 193-94 (Tex. App.-- Houston [14th Dist] 2001, pet. denied).

Citing the Texas Disciplinary Rules of Professional Conduct, Turoff asserts that Jackson Walker must be held to a fiduciary standard. However, if Turoff establishes his factual claims at trial, he will have demonstrated that Jackson Walker failed to perform according to professional standards. That would amount to legal malpractice.

Turoff attempts to cast his claim as presenting a failure to disclose conflicts of interest, citing authority suggesting that a concealed professional conflict of interest may trigger a

breach of fiduciary duty claim, rather than a legal malpractice claim. See Deutsch v. Hoover, Bax & Slovacek, L.L.P., 97 S.W.3d 179, 189 (Tex. App.-- Houston [14th Dist.] 2002, no pet.). There is no genuine issue of material fact that Jackson Walker did not conceal that it represented or had represented Precept, the banks, Darwin Deason, and others. The factual dispute concerns Jackson Walker's performance. The court has determined that Jackson Walker's motion for summary judgment on the legal malpractice claim must be denied. But the evidence does not raise a genuine issue of material fact making the alleged wrongful conduct sound in a breach of fiduciary duty. Id. at 190.

Turoff suggests that Jackson Walker improperly billed Precept for its services. Billing disagreements connote contract disputes, not fiduciary disputes. The court will grant the defendants' motion for summary judgment on the claim of breach of fiduciary duty.

On the other hand, Turoff has presented summary judgment evidence concerning his allegations that Precept's directors breached their fiduciary duties to the corporation. Drawing inferences in favor of Turoff, Turoff's malpractice evidence establishes a genuine issue of material fact of whether Jackson Walker may have aided in the directors' breach of their fiduciary duties. The court will therefore deny Jackson Walker's summary

judgment motion regarding the claim that the defendants aided and abetted the directors' breach of their fiduciary duty.

Precept's Claims - Constructive Fraud

Jackson Walker moves for summary judgment dismissing the constructive fraud claim. The parties agree that constructive fraud involves the breach of a legal or equitable duty arising from a fiduciary or confidential relationship. "[C]onstructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964).

Jackson Walker had a duty to Precept of a lawyer to client. The court has found a genuine issue of material fact of whether Jackson Walker breached that duty -- that is, committed legal malpractice.

Turoff does not explain how his malpractice claim can be recast as a constructive fraud claim. Jackson Walker argues that Turoff must stand in Precept's shoes and, in that capacity, cannot maintain the claim. Turoff counters that the *in pari delicto* doctrine should not be applied. As addressed above, the court defers a decision on the application of that doctrine until contested facts can be determined at trial. But that does not explain why a legal malpractice claim should result in a

constructive fraud judgment. Similarly, Turoff does not explain how his aiding and abetting a breach of fiduciary duty claim can be re-cast as a constructive fraud claim. Because of the lack of summary judgment evidence from Turoff to support a legal theory making alleged conduct subject to a constructive fraud claim, Jackson Walker is entitled to summary judgment on the constructive fraud claim.

Damages and Causation

In exhibit C to his initial disclosures, Turoff stated that he "used the total amount of outstanding claims against the Estates as a proxy for the total actual damages sought in this adversary proceeding." He disclosed a debt owed to Bank One of \$19,063,982.94, a debt owed to Wells Fargo of \$11,428,088.24, and a collective debt owed to other creditors of \$18,836,457.10, subject to the bankruptcy claims allowance process. Turoff thereby asserted total actual damages of approximately \$49 million.

Dennis McGettigan, Turoff's expert, compared the value of Precept's assets available to creditors as of either March 31, 1999, or June 30, 1999, to the values ultimately realized upon liquidation of the estate. He opined a range of lost value of \$37 million to \$43 million from March 31, 1999, and \$23 million to \$28 million from June 30, 1999. McGettigan calculated unpaid claims of \$35 million. Based on these calculations, McGettigan

opined that Precept and its creditors suffered damages attributable to the defendants of \$35 million to \$43 million if measured from March 31, 1999, and \$23 million to \$35 million if measured from June 30, 1999. There are genuine issues of material fact regarding McGettigan's valuation opinion.

Both Turoff and McGettigan refer to creditor losses. Other than Turoff's prosecution of the claims of Bank One and Wells Fargo transferred to the bankruptcy estate, Turoff prosecutes causes of action belonging to the bankruptcy estate, albeit for the ultimate benefit of and distribution of recovery to the creditors of the bankruptcy estate. But the damages must have been suffered by Precept.

Having noted this, the court finds genuine issues of material fact regarding damages. As discussed in the court's order granting in part and denying in part a motion for summary judgment in adversary proceeding no. 02-3583, a Chapter 7 trustee rather instinctively couches his statement of damages in terms of the impact on creditors. But that does not negate the summary judgment evidence suggesting damages to the banks or to Precept. Thus, for example, assuming Turoff establishes the elements of aiding and abetting bank fraud, Turoff has presented summary judgment evidence of the damages to the banks, namely, the unpaid debt resulting from the fraud. If Turoff is successful, he will collect damages and distribute the recovery to Precept's unpaid

creditors.

For the most part, Turoff maintains that damages should be measured by the total amount of unpaid claims against Precept or by McGettigan's calculation of the lost value of Precept. The court does not address the legal standard for the measure of damages until the underlying factual issues have been tried. Nevertheless, this court has discretion in the manner of conducting trials before this court. Even though summary judgment must be denied, the court will require that Turoff specify damages by claim for relief or be deemed to waive specified damages at trial. See In re All Trac Transp., Inc. , 306 B.R. 859, 899-907 (Bankr. N.D. Tex. 2004).

Turoff argues that "the damages calculus in this litigation will not be simple." Simple or complex, Turoff is not excused from specifying what damages the banks or Precept suffered from each claim for relief. Without damages caused by acts under each claim, Turoff cannot prevail on that claim. The court does not accept Turoff's contention that damages cannot be separated by claim. Turoff must prove damages for a claim to establish the claim. Nevertheless, if Precept or the banks suffered the same damages for each set of actions, then Turoff should so specify.

Turoff has presented summary judgment evidence of approximately \$19 million owed to Bank One and \$11 million owed to Wells Fargo. The court may infer that those amounts measure

the damages to the bank caused by the defendants aiding and abetting bank fraud, if proved. Turoff has presented summary judgment evidence that the stock repurchase program caused Precept to suffer \$1 million in damages, that the John Rose litigation caused Precept to suffer \$5 million in damages, and that over-billing caused Precept to suffer approximately \$18,000 in damages. Generally, Turoff has presented summary judgment evidence that Precept lost value of between \$23 million and \$43 million, and that Precept had about \$49 million of unpaid creditors according to Turoff but \$35 million according to McGettigan, subject to the bankruptcy claims allowance process. Turoff attributes the unpaid debt or the loss of value to the consequences of the defendants' acts.

In anticipation of trial and to prepare for the submission of a joint pretrial order, Turoff shall file, by September 15, 2004, a statement, signed by Turoff and counsel, disclosing the damages allegedly caused by Jackson Walker specific to each claim for relief. Turoff must itemize damages, for example, the stock repurchase cost or the Rose litigation cost, or be deemed to have waived an itemized damage for the specific claim. If applicable, Turoff may disclose the McGettigan lost value measurement or the Turoff unpaid creditor measurement for each specific claim.

Turoff will be limited to the damages specified for each claim for relief. If Turoff does not itemize damages for a claim

for relief, but instead asserts damages of unpaid creditors or loss of value for that claim, then Turoff will have waived itemized damages for that claim, and proceed to trial on the unpaid creditors or loss of value theory of damages. All Trac, 306 B.R. at 899-907.

The court will decide the appropriate legal standard for the measure of damages when it issues its findings of fact and conclusions of law following trial. Accordingly, the court does not address, on this summary judgment motion, the appropriateness of the deepening insolvency theory or the unpaid creditor theory as a measure of damages for any of the alleged claims.

Because the court has determined that there are genuine issues of material fact on liability, causation and damages, the court defers consideration of exemplary or punitive damages until trial.

Order

Based on the foregoing,

IT IS ORDERED that the objections of Steven S. Turoff to the affidavit of Layne A. Deutscher are **OVERRULED** and the motion to strike the affidavit is **DENIED**, except that the court will not consider the description of conversations with Douglas Deason and David Neely for the truth of the matters that may have been stated by Deason or Neely.

IT IS FURTHER ORDERED that, except as the declarations

contain hearsay or purport to establish what Jackson Walker knew about certain matters, the objections of Jackson Walker, L.L.P., and Charles Maguire to the declarations of William Winters and Richard Souza are **OVERRULED** and the motions to strike the declarations are **DENIED**.

IT IS FURTHER ORDERED that the motion of Jackson Walker, L.L.P., and Charles Maguire for summary judgment regarding liability is **GRANTED IN PART** and **DENIED IN PART**. The claims of negligent misrepresentation, breach of fiduciary duty and constructive fraud are **DISMISSED**.

IT IS FURTHER ORDERED that the motion of Jackson Walker, L.L.P., and Charles Maguire for summary judgment regarding damages and causation is **DENIED**.

IT IS FURTHER ORDERED that, by September 15, 2004, Steven S. Turoff, shall file a statement, signed by Turoff and his counsel, specifying all actual damages with itemization, if applicable, that he claims the defendants caused for each claim for relief except equitable subordination. Turoff will be limited to the damages specified for each claim for relief. If Turoff does not itemize damages for a claim for relief, but instead asserts damages of unpaid creditors or loss of value for that claim, then Turoff will have waived itemized damages for that claim and proceed to trial on the unpaid creditor theory or loss of value theory of damages.

###END OF ORDER###