UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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In re:

PROCEDO, INC.,

Debtor.

ORDER ON DEFENDANTS' MOTIONS FOR DISMISSAL

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DATAWAVE INTERNATIONAL, LLC and MICHAEL J. IANNACONE, as Trustee for Procedo, Inc.

Plaintiffs,

BKY 10-38679

v.

ADV 13-3158

BLUESOURCE, INC., AKAIBU, INC., TRUSTED DATA SOLUTIONS, LLC, CHRISTOPHER M. CLARK, MATTHEW EDWARDS, BRIAN JANC, and JOSEPH R. KVIDERA,

Defendants.

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At St. Paul, Minnesota
April 1, 2016.

INTRODUCTION

Procedo, Inc. was a Mahtomedi, Minnesota-based company that was engaged in software development and marketing. On order of the Minnesota state courts, it was placed into receivership on March 29, 2010. The receiver negotiated a sale of Procedo's software-related assets to DataWave International, LLC ("DataWave").

Before the sale closed, Procedo went into bankruptcy under Chapter 7, through a voluntary petition filed on December 6, 2010.[1] Defendant Joseph Kvidera signed the petition and

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on *04/01/2016*
Lori Vosejpka, Clerk, By JRB, Deputy Clerk

[1] Hence, all further references to Procedo will be to "the Debtor."

associated documents in the stated capacity of sole owner and operator. Co-Plaintiff Michael J. Iannacone was appointed as the trustee of the Debtor's bankruptcy estate.[2]

Shortly after the bankruptcy filing (January, 2011), the Trustee conducted a sale of the Debtor's software-related assets pursuant to 11 U.S.C. § 363. DataWave purchased the assets from the Trustee. The terms of the Trustee's Asset Purchase Agreement ("the APA") were essentially the same as those for the receiver's proposed sale to DataWave.

More than two years after the bankruptcy filing and the closing of the Trustee's sale, this adversary proceeding was commenced--on July 31, 2013. DataWave sued on the accusation that the Defendants had pirated the most significant of the assets sold to DataWave--the program, source code, and licensing keys for software known as PAMM--and have been using them unlawfully to their own enrichment.[3] The APA gave the estate a share of a stream of future payments from income generated from the assets; the Plaintiffs call that "the Pipeline." Asserting that the estate's right to receive that was destroyed by the Defendants' actions, the Trustee has joined DataWave as a plaintiff.

The various defendants are said to have participated in the alleged expropriation in different ways. Defendants Joseph R. Kvidera and Brian Janc are classified on their close pre-sale association with the Debtor (Kvidera as founder, sole stockholder, and former Chief Executive Officer; Janc as employee and the principal developer of PAMM). Kvidera and Janc are accused of taking digital-format copies of the assets from the Debtor's control and then misappropriating them in their new personal affiliations with the corporate defendants. Defendants Bluesource, Inc. ("Bluesource"), Akaibu, Inc. ("Akaibu"), and Trusted Data Solutions, LLC ("TDS") are sued on the accusation that they exploited the assets after Kvidera and Janc extracted them from the Debtor. Defendants Christopher Clark and Matthew Edwards are classified on their associations with the corporate defendants (Clark identified as the President of TDS; Edwards as an officer of Bluesource

[2] Hence, "the Trustee" in all further references.

[3] PAMM, short for "Procedo Archive Migration Manager," is described as software "that performs email migration and archiving functions." Amended Complaint [Dkt. No. 18], ¶ 16.

and a shareholder in Akaibu), and the accusation that they and their companies personally participated in the misappropriations by Janc and Kvidera, or aided and abetted them.

The initiation of suit by this adversary proceeding followed motions in the main bankruptcy case, in which suspicions of the now-accused conduct were first raised. The Plaintiffs tried to use discovery-related measures under the Federal Rules of Bankruptcy Procedure to investigate whether the Defendants had pirated PAMM. The defendants strenuously resisted. They had many objections over the intrusiveness and disruptive potential of the discovery measures the Trustee was demanding. There was also much dissimulation from the defendants over the nature and causes of what the Trustee and DataWave were describing in their disquiet. All of that ended up being inconclusive.

The filing of the Plaintiffs' original complaint was the next action within the Debtor's case. After that, an Amended Complaint [Dkt. No. 18] was filed.

On a recitation of historical fact, the Plaintiffs pleaded 14 different counts in the Amended Complaint. Under them, claims for monetary relief were framed under widely-varying legal theories. Only half of the counts sounded under substantive law within the specialized expertise of a bankruptcy judge. Some of the counts named sub-aggregations of defendants as liable under their theories; others just named "Defendants" collectively, as the liable parties.

The Defendants filed separate motions for dismissal in lieu of filing answers--a total of three motions, each one nominally by a different group of movants. In total, they raised a welter of issues as to the adequacy of the Plaintiffs' fact-pleading and the viability of their theories of recovery under the pleaded facts and the invoked substantive law. The Plaintiffs responded in kind.[4]

As filed and argued, the motions presented quite a morass. Some of the counts were pleaded under theories commonly seen in bankruptcy litigation--the ones for avoidance of

[4] At the hearing on the motions, counsel appeared as follows: George H. Norris for Defendants Bluesource and Edwards; Michael T. Berger, for Defendants Akaibu and Janc; David B. Galle, for Defendants TDS, Clark, and Kvidera; and Jeffrey K. Priest and Steven M. Sitek for the Plaintiffs. Plaintiff Michael J. Iannacone also appeared.

allegedly-fraudulent transfers and for the turnover of assets alleged to be property of the bankruptcy estate. But, they were imprecisely framed under the pleaded facts; they proved difficult to fit to the context of the cited law. The remaining counts were pleaded under the law of intellectual property and business tort. They generated technical arguments from both sides--especially the defense. Some of these arguments were presented with a conclusory self-assuredness that was disquieting and facially suspect.

These motions were another big preemptive move by the defense in a lawsuit that had been commenced by complex pleading. As such, they ended up being another imposition on a hapless trial judge--part of the continuing fallout of the Supreme Court's adoption of a new tack on Rule 12(b)(6) under the much-cited opinions of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This order disposes of the defense's motions for dismissal, addressing the challenges to the Plaintiffs' pleading head-on.

The circumstances do not merit a decision organized in complex fashion by the sequence of the litigation. Nor is a painstaking recapitulation of the pleading necessary, or a separate detailing of the governing authorities on procedure and law. Rather, each count will be treated as to the adequacy of its fact-pleading and the viability of its asserted legal theory. The motions will be disposed of by collective rulings as to each count.

TREATMENT

Nonetheless, the analysis should be opened by setting out the general approach to the adequacy of pleading under the Supreme Court's recent jurisprudence and its local application. "[A] complaint must *contain* sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible on its face,*'" if it is to pass muster in the face of a motion for dismissal. *Ashcroft v. Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp.v. Twombly*, 550 U.S. at 547) (emphasis added). To meet this standard, the facts pled must show more than just a "sheer possibility" of proving the claim on its legal merits. *Iqbal*, 556 U.S. at 663. To be plausible, fact-pleading must be enough to support a "reasonable inference that the defendant is liable for the [conduct] alleged." *Id*. The pleaded facts must "affirmatively and plausibly suggest that [the plaintiff] has the right [it] claims"; the pleading of "facts that are merely consistent with such a right" will not suffice, if they do not meet all the elements under law. *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (citing *Twombly*, 550 U.S. at 554-557). A "formulaic recitation of the elements of a cause of action," in conclusory legal terminology alone, will not suffice. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).

I. Counts Under Fraudulent Transfer Statutes (Claims One Through Four and Seven)

Five separate counts (termed "Claims") of the Amended Complaint are framed under federal and state fraudulent-transfer statutes. In the prefatory paragraph to each count, it is pleaded that "Plaintiffs incorporate" all of their previous, general fact-pleading into the particular count. But then the closing paragraph of Claims One through Four identifies the Trustee as the "party entitled to judgment" against the Defendants under the cited fraudulent-transfer laws. Claim Seven asserts that "Defendants are liable *to Plaintiffs*" and "*Plaintiffs* are entitled to judgment . . . ." Amended Complaint, ¶ 84 (emphasis added). This inconsistency created some confusion as to which Plaintiffs assert the standing to obtain this type of relief, giving rise to a certain amount of dithering by the defense.[5]

However, as a matter of law, only the Trustee has standing to sue on these counts, in the Debtor's bankruptcy case. When a claim for avoidance under fraudulent-transfer law is brought in a bankruptcy case, it is an attribute of the bankruptcy estate and a trustee is the only statutorily-named party vested with the power to avoid the subject transfer. The text of the Bankruptcy Code and Supreme Court precedent dictate that. 11 U.S.C. §§ 544(a) - (b) (identifying

[5]In the end, Claim Seven is duplicative and there was no real reason to include it in the Amended Complaint. Apparently the thought was to advance a fraudulent-transfer claim in the right of DataWave as a pre-petition creditor of Debtor Procedo; or maybe as a post-petition creditor on account of the partial failure of the APA; and in either instance, as a plaintiff that would have been entitled to sue on the fraudulent-transfer theory had a bankruptcy case not wrapped around the events. If that was the idea, the thought process was not deep. Just pondering the abstractions is headache-inducing, for anyone who has really had to deal with the law of fraudulent transfer in application. The Trustee and only the Trustee had the power to take up an avoidance remedy, under § 549 for any post-petition transfer; and with that limitation on the range of theories, Claim Seven was entirely duplicative of the first four counts.

"[t]he trustee" in the bankruptcy case as the party empowered to avoid transfers under their provisions); 11 U.S.C. § 548(a)(1) (ditto); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (where provision for particular remedy in the Bankruptcy Code names trustee as the party empowered to use it, and no other class of party is named, "the trustee is the only party empowered to invoke the provision"). One exception, derivative standing, has been judicially created; but it has not been set up in the Debtor's case. Under the factual posture of the Amended Complaint's pleading, it could not be set up.[6]

For substantive authority, all five of the counts cite Minnesota state law--the Minnesota enactment of the Uniform Fraudulent Transfer Act ("MUFTA"), which 11 U.S.C. § 544(b) empowers a trustee in bankruptcy to use.[7] Claims One through Four also cite 11 U.S.C. § 548, which contains an independent remedy for avoidance of fraudulent transfers that a trustee in bankruptcy may use. In two of the counts (Claims One and Four), the Trustee pleads the actual-fraud variant of the remedy under both sources. In the other two (Claims Two and Three), he uses the constructive-fraud variant.

[6]A creditor may be judicially granted derivative standing to pursue avoidance litigation for the benefit of the bankruptcy estate if the trustee serving in a case has not pursued the claim for avoidance and unjustifiably refuses to pursue it. The creditor must move the court for permission to pursue it. Derivative standing can be granted if the trustee does not oppose the request. *In re Racing Servs., Inc.*, 540 F.3d 892, 900 (8th Cir. 2008). Here, the Trustee is the one party-plaintiff who expressly seeks relief under Claims One through Four. There is no opening for DataWave to get judicially vested as a plaintiff on them. There would be none for Claim Seven either--even had it been framed as solely brought by DataWave rather than under the nonsensical rubric of a joint claim.

[7]In application, § 544(b)(1) enables the trustee to invoke the state substantive law of fraudulent transfer, if an unsecured creditor could have used it outside of bankruptcy to challenge its debtor's transfers of assets. *E.g.*, *In re Marlar*, 267 F.3d 749, 755-756 (8th Cir. 2001); *In re Popkin & Stern*, 223 F.3d 764, 768 n.11 (8th Cir. 2000); *In re Estate of Graven*, 64 F.3d 453, 456 n.5 (8th Cir. 1995); *In re Graven*, 936 F.2d 378, 383 n.7 (8th Cir. 1991); *In re DLC, Ltd.*, 295 B.R. 593, 601 (B.A.P. 8th Cir. 2003). MUFTA was the fraudulent-transfer statute on the books in Minnesota when this matter was sued out. In 2015 the Minnesota legislature amended and retitled MUFTA using a new uniform law, the Uniform Voidable Transactions Act. 2015 Minn. Laws, ch. 17. The amendment applies only to transactions that occur after August 1, 2015. 2015 Minn. Laws, ch. 17, ¶ 13. Thus, MUFTA's provisions still apply to this adversary proceeding.

A. Basic Applicability of Fraudulent Transfer Remedies to the "Transfers" Pleaded

As framed and pleaded, these counts raise a serious issue at their very foundation: If assumed to be true, the acts attributed to Janc and Kvidera in the Amended Complaints were a misappropriation of the PAMM source code and other property of the Debtor toward their own, personal, subsequent disposition--a "theft" if you will, for the purposes of argument. Assuming those acts as fact, was there even a "transfer" actionable under the law of fraudulent transfer?

As the Minnesota Supreme Court twice observed recently, MUFTA was "[d]esigned to prevent *debtors* from placing property that is otherwise available for the payment of their debts out of the reach of their creditors . . . ." *Finn v. Alliance Bank*, 860 N.W.2d 638, 644 (Minn. 2015) (citing *Citizens State Bank Norwood Young America v. Brown*, 849 N.W.2d 55, 60 (Minn. 2014); emphasis added and interior quotes omitted). This observation goes to the state statute that the Trustee relies on; but the federal statute, 11 U.S.C. § 548(a), likewise redresses acts committed *by* financially-distressed debtors that are either intended to harm their creditors, or do result in harm to those creditors at a time when the transferor-debtor either is insolvent at the time of transfer or is made so by the transfer. Under that construction the actor on an impugned transfer must have been the debtor itself, for the transfer to be actionable under § 548(a) as statutorily fraudulent on that debtor's creditors.

This all is reflected in the text for all but one of the statutory bases for Claims One through Four and Seven:

> A transfer made . . . *by a debtor* . . . is fraudulent as
> to a creditor . . . *if the debtor made the transfer* . . . ,

Minn. Stat. § 513.44(a) (2014) (emphasis added), if made under the circumstances specified afterwards at Minn. Stat. §§ 513.44(a)(1) - (2) (2014). To equal effect, Minn. Stat. §§ 513.45(a) - (b) (2014) deem a "transfer made . . . *by a debtor*" constructively fraudulent on contemporaneous ("present") creditors on proof of contemporaneous or resultant insolvency and variant measures of financial distress. (Again, emphasis added.) Finally,

> the trustee may avoid any transfer . . . of an interest of the debtor in property . . . if *the debtor* voluntarily or involuntarily . . . *made* such transfer . . .

with actual fraudulent intent. 11 U.S.C. § 548(a)(1)(A) (emphasis added). Of all the fraudulent-transfer statutes the Trustee cites, only the constructive-fraud variant of the federal law, 11 U.S.C. § 548(a)(1)(B), lacks facial reference to an act of transfer at the volition of the transferor-debtor; but in context the only sensible reading of this provision contemplates a transfer effected by the referent debtor also.[8]

To support Claims One through Four and Seven, the Plaintiffs plead that Janc--identified as "a writer and developer of the source code for . . . PAMM"--took certain actions at some point between the initiation of the receivership on March 29, 2010 and October, 2010, when he "accepted employment with [defendant] Bluesource": Janc accessed PAMM and its source code "on the Procedo servers," then "obtain[ed] possession and control of" it "by copying it to an external storage device and backing it up on a laptop computer under his control." Amended Complaint, ¶¶ 21, 23.[9] Then, the Plaintiffs plead, in the first half of 2011, while "in possession of" those repositories of a copy of the PAMM source code, Janc "produced" a separate program for the same functionality in email migration and archiving, which Janc and Bluesource then "used to perform services for [Bluesource's] customers." Amended Complaint, ¶ 26. After that, it is pled, Janc took employment with Defendant Akaibu, an offshoot of Bluesource formed by Edwards and others "with the purpose of purchasing" the new, competing software from Bluesource--which Akaibu is alleged to have acquired, and then used to service its own customers. Amended Complaint, ¶ 27. Janc is accused of having breached covenants of non-disclosure and non-competition in his employment

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[8]Section 548(a)(1)(B) applies only to a "transfer . . . of an interest of the debtor in property"; and when the contemporaneously- or resultantly-insolvent debtor "received less than a reasonably equivalent value in exchange . . . ." The notion of a receipt-in-exchange for property of the debtor makes sense only if *the debtor* and the recipient are two reciprocal actors in the relevant events.

[9]Though not lodged within the segregated text of the counts, these allegations of specific fact are merged into them by the boilerplate legerdemain of incorporating all that was pled before.

contracts with the Debtor, and "convert[ing] property of the Bankruptcy Estate" and "of DataWave." Amended Complaint, ¶ 28.

In turn, the Plaintiffs plead that Kvidera "began working for [defendant] TDS" *before* he put the Debtor into bankruptcy. Amended Complaint, ¶ 29. They then plead:

> 31. Shortly before the Petition Date, TDS entered into an agreement with Kvidera to purchase a development license for the PAMM software. The Receiver did not authorize TDS to use the PAMM software or source code. TDS wanted to acquire the PAMM software to perform email archive data migrations, which is why they were interested in licensing the PAMM software. On the same day that Kvidera filed the bankruptcy petition on behalf of Procedo, TDS wired $15,000 to the Receiver, purportedly for the purchase of the PAMM software development license. The Trustee did not authorize a new license for the PAMM software to TDS.
>
> 32. Before TDS could use the software, it needed a license key from Procedo. On information and belief, TDS never obtained a license key from the Receiver or the Trustee and, instead, obtained one from Kvidera.
>
> 33. In 2012, DataWave learned that TDS was offering email migration archive services with the PAMM software and license key. TDS is not an authorized user of the PAMM software or license key.
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> 34. Additionally, based upon the testimony of a current TDS employee, TDS procured and serviced the Debtor's accounts after it filed for bankruptcy protection resulting in lost customers to DataWave and lost revenue to the bankruptcy estate.

Amended Complaint, ¶¶ 31 - 34.

The only other pleading as to the identity of the actor on a fraudulent transfer or transfers is:

> 37. Procedo, through Kvidera and Janc, made fraudulent transfers of the Assets (the "Transfers") to Kvidera and Janc with the actual intent to hinder, delay or defraud DataWave, the bankruptcy estate and other creditors . . .

Amended Complaint, ¶ 37.

Even when assumed as true and construed in the light most favorable to the Trustee,[10] none of this plausibly sets out acts *by the Debtor*, *of the Debtor's own volition*, to transfer the PAMM source code, customer-related information, or any other asset of the Debtor to anyone or anything. In fact, the pleaded surrounding circumstances reflect that it was not *the Debtor*, acting as a corporate entity, affirmatively directing assets *away* and *out* from its control. Every last one of Kvidera's and Janc's actions are identified to the time when the Debtor was under the oversight and active management of the receiver, or to the period after the filing of the bankruptcy petition when the Debtor's assets were under the Trustee's charge.[11] With the Debtor's assets under the control of third-party fiduciaries, neither Kvidera nor Janc *could* have been empowered to act on behalf of the Debtor, to do the very serious things that the Trustee pleads, absent leave from those fiduciaries. The Trustee does not allege that they received such permission. If somehow the Debtor itself retained a residual corporate power to transfer any of these assets to outside parties during the receivership, the Trustee never alleges that Kvidera or Janc acted within the scope of their own authority from the Debtor, in taking access to PAMM or its source code to expropriate them or in purloining anything else of the Debtor's commercially-intangible property. And without that, there is no sense to ¶ 37, the one pleading of fact directed to this specific point. How could it have been that the Debtor, "*through* Kvidera and Janc," fraudulently transferred the assets "*to* Kvidera and Janc"?

Only one plausible reading can be given to the complaint's allegations in their entirety, against the way Kvidera and Janc are depicted as the active parties: the expropriation of the source code and other information was not the act *of the Debtor* at all. As pled, Kvidera and Janc would be the actors, going ahead personally and in their own right to *take* property from the Debtor. As pled, the Debtor was not an active transferor at all; it was a passive victim of an act of

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[10] *Farm Credit Servs. of Am. v. Am. State Bank*, 339 F.3d 764, 767 (8th Cir. 2003).

[11] In item 4 of its Statement of Financial Affairs [Dkt. No. 1, 29 of 47], the Debtor recited that the receivership had first been imposed by the state court on March 29, 2010. Then "[t]he receivership was expanded pursuant to court order to include day-to-day operational management of business on July 28, 2010."

expropriation.[12] There is no salvation in the Trustee's conclusory allegation in ¶ 37, that Kvidera and Janc acted with an accompanying, creditor-targeted, fraudulent intent on *their* part. If, as pleaded, Kvidera and Janc lawfully took the assets from a supine Debtor, their acts are chargeable to them--not to the Debtor as a transferor under fraudulent transfer law. If their acts are actionable, it is under law other than the fraudulent transfer statutes.

On this most basal of bases, the Trustee failed to state a claim on which relief in avoidance could be granted on the basis of fraudulent-transfer law against any of the Defendants. This merits the dismissal of Claims One through Four and Seven pursuant to Rule 12(b)(6).[13] The overarching thrust of the Plaintiffs' narrative is that thefts occurred, at the hands of Kvidera and Janc. It is not possible to envision a different pleading of fact, for the extraction of PAMM from the Debtor, of a voluntary transfer on the Debtor's part that was under facial color of legitimacy and legality, that would not be irreconcilably inconsistent with facts already pled. Granting leave to amend thus would be futile, because it would only set up another effort for dismissal and weighty satellite litigation under Rule 11. (In bluntly colloquial terms: you are allowed to plead *theories* in the alternative; you're not allowed to plead *facts* in the alternative.) Thus, dismissal with prejudice, now, is the only proper disposition of these five counts.

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[12]One can put it in a tactile way: the extraction of PAMM, the source code, and the customer information was not the result of the Debtor *pushing* the assets *from* its own control *to* Kvidera and Janc; it was the act of Kvidera and Janc *pulling* them *out away* from their repose in the Debtor.

[13]It is not necessary to reach the other deficiencies of the fact-pleading for these claims, but they are manifest and manifold. Local precedent puts it in a way that is colloquial but nonetheless evocative: a theory for relief must set out enough facts to make out the "who, what, when, where, and how" to match to the legal basis of suit that is being invoked. *E.g.*, *Freitas v. Wells Fargo Home Mtg., Inc.*, 703 F.3d 436, 439 (8th Cir. 2013). It is not just that the Amended Complaint names "who"'s who do not match to the sort of actor identified in the cited law. It is also deficient or garbled or both, when it comes to the "what, when, where, and how" of fraudulent transfers of property of the Debtor, during the period of time vaguely identified.

B. Timeliness of Trustee's Suit Under Fraudulent-Transfer Theories; Adequacy of Trustee's Pleading for an Exception

Most of the defense's argument on the fraudulent-transfer counts was directed toward a different aspect of Claims One through Four and Seven: timeliness of suit, under the provision in the Bankruptcy Code that governs trustees' actions for avoidance. It is appropriate to address the parties' contentions on this aspect, not the least because the real dimensions of this controversy are much larger than either side seemed to recognize. Had there been transfers by the Debtor to be subjected to avoidance, the Trustee's claims would require a lot more pleading to avoid dismissal of the entirety of all these counts, on the ground of untimeliness of suit.

For avoidance litigation in a bankruptcy case, 11 U.S.C. § 546(a) provides, in pertinent part:

> (a) An action or proceeding under [11 U.S.C. §§] 544, . . . [or] 548 . . . may not be commenced after the earlier of--
>
> > (1) the later of--
> >
> > > (A) 2 years after the entry of the order for relief; or
> > >
> > > (B) 1 year after the appointment or election of the first trustee under [11 U.S.C. §] 702, . . . if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
> >
> > (2) the time the case is closed or dismissed.

The commencement of the Debtor's bankruptcy case under a voluntary petition "constitute[d] an order for relief under" Chapter 7. 11 U.S.C. § 301(b). In the federal courts, "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3, *as incorporated by* Fed. R. Bankr. P. 7003. As noted earlier, the petition was filed on December 6, 2010; the complaint in this adversary proceeding was filed on July 31, 2013. That latter date fell after December 6, 2012, the date two years after the deemed entry of an order for relief in the Debtor's case.

In an earlier round of motions for dismissal, the Defendants raised the timeliness of suit as a ground for dismissal. Those motions were superseded by the filing of an Amended Complaint, ratified by a later-filed stipulation. Apparently, counsel agreed that new motions for dismissal would supplant the earlier motions, and would be framed to respond to the Amended Complaint.

In the Amended Complaint, the Plaintiffs claim one of the judicially-created exceptions to statutes of limitation: equitable tolling, with its "discovery rule.[14] Amended Complaint, ¶ 14. In the current round of motions, the Defendants moved for the dismissal of Claims One through Four and Seven, on the argument that the Amended Complaint's fact-pleading cannot support the exception and the Plaintiffs could not plausibly plead such supporting facts in any event. The Trustee, of course, insists that his pleading for the exception is adequate.[15]

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[14]In their briefing, the Defendants characterize § 546(a) as a statute of limitations. There is case law to support the proposition. *E.g.*, *In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 701 (11th Cir. 2005); *In re United Ins. Mgmt., Inc.*, 14 F.3d 1380, 1385 (9th Cir. 1994); *In re Klayman*, 228 B.R. 805, 806 (Bankr. M.D. Fla. 1999). The characterization is debatable, however, and the reasons have some substance. Treating § 546(a) as a statute of limitations in the broader sense could bring much baggage from non-bankruptcy law, to the construction of a statutory measure that functions more as a deadline for suit statutorily imposed for administration-centered reasons within a previously-commenced, broader proceeding (the bankruptcy case). *See In re Petters Co., Inc.*, 494 B.R. 413, 450 (Bankr. D. Minn. 2013) (terming § 546(a)(1) as a "deadline" for a trustee's commencement of suit, distinct from any statute of limitations applicable under state law that may be imported through 11 U.S.C. § 544). The "true" statutes of limitation that apply to fraudulent transfer claims under non-bankruptcy law have their function in a bankruptcy case, to delimit the temporal range of transfers that are subject to a trustee's avoidance power under § 544. *In re Petters Co., Inc.*, 494 B.R. at 440-441 (if trustee names predicate creditor that possessed pre-petition claim that is allowable in bankruptcy case, trustee may avoid all fraudulent transfers that took place within applicable state law limitations period, dating back from bankruptcy filing). There is no precedent from the Eighth Circuit, as to whether the generally-recognized, judicially-created overrides to statutes of limitation apply to the deadline imposed by § 546(a). Given the Supreme Court's general pronouncement that the doctrine of equitable tolling is to be read into every federal statute, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), its applicability will be assumed for the decision at bar. In their current motions, the Defendants only challenge the adequacy of the Trustee's pleading for the exception, and that is the issue that will be addressed.

[15]In ¶ 13 of the Amended Complaint, the Plaintiffs also cite 18 U.S.C. § 3284, to assert that an extension of the deadline for suit was warranted. That statute provides that "the concealment of assets of a debtor shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied . . . ." This proposition was remarkably ignorant. Title 18 is the United States *Criminal* Code. Its provisions do not apply in a case under the civil bankruptcy jurisdiction. And a non-individual debtor cannot receive a discharge under Chapter 7 anyway. 11 U.S.C. § 727(a)(1). So, the statutory

As a matter of equity, the discovery rule tolls the running of a limitations period when a defendant has concealed facts that otherwise would alert a plaintiff that a cause of action has accrued. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). In the case of such concealment, a statute of limitations does not begin to run until a plaintiff discovers or should have discovered the facts that give rise to a cause of action. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 646 (2010) (for purposes of statute of limitations, discovery rule contemplates claim accruing "when the litigant first knows or with due diligence should know facts that will form the basis for an action").

In setting a deadline for a trustee's commencement of an avoidance proceeding, § 546 structures on an assumption: from the very beginning of his tenure, a plaintiff-trustee does not operate in a complete vacuum as to avoidable transfers. When a debtor petitions for bankruptcy, it must disclose the specifics of all non-ordinary course transfers of property made within the two years preceding the bankruptcy filing.[16] A trustee has other, early avenues for investigation as well: interrogation of the debtor at the meeting of creditors; the debtor's obligation under 11 U.S.C. §§ 521(a)(3) - (5) to cooperate with the trustee; and examination pursuant to Fed. R. Bankr. P. 2004.

So the actual, statutorily-fixed period for commencement of suit in avoidance under § 546 starts at a bright line, the date of the bankruptcy filing--not to points more specific to an individual case or subjectively-oriented like the date on which a trustee gained actual knowledge of a transfer.

Thus, assuming that equitable tolling is available to override the strict deadline, it is proper to bind a trustee to pleading specific facts to support it--i.e. that the trustee's lack of knowledge early in the case was due to particular circumstances not properly laid to him. This excuse can be established through two alternatives: fraudulent concealment by the opposing party,

language lacks a meaningful reference point for application, even if it applied directly in the Debtor's case. With late-coming prudence, the Plaintiffs abandoned this theory for tolling or extension before oral argument was presented.

[16] At the time when the debtor's petition was filed, this was required by Item 10 of Official Form B 7, the Statement of Financial Affairs.

or an objectively-determinable inability to timely discover the facts. *Gabelli v. S.E.C.*, ___ U.S. ___, 133 S.Ct. 1216, 1221 (2013).

For the first, a plaintiff must allege and prove that the defendant took affirmative steps that were calculated to prevent the plaintiff from discovering the facts. *In re Int'l Admin. Servs., Inc.*, 408 F.3d at 701-702. The second has been termed (loosely), a "passive discovery rule" or "negligent concealment." *Id*. It does not look directly to the defendant's actions; rather, it is available where the circumstances did not permit the plaintiff to timely discover the relevant facts through an exercise of due diligence. *Id*.

For a proper assertion of fraudulent concealment here, the Trustee must first allege that the Defendants took "affirmative steps to divert or mislead or prevent discovery" of the fraud-based cause of action. *In re Pomaville*, 190 B.R. 632, 637 (Bankr. D. Minn. 1995). Given the exception's trigger-point in fraudulent conduct, it is appropriate to require "particularity" for the pleading of the "circumstances constituting fraud," in line with the requirements of Rule 9(b).[17] As noted earlier, this requires the pleading of "the who, what, when, where, and how: the first paragraph of any newspaper story." *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d at 439. *See also Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011); *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011).

To challenge the sufficiency of the Trustee's pleading for equitable tolling, the defense points out that there are no fact-allegations specific to the conduct of any defendant. Paragraphs 23, 29, 31, and 32 set out what Kvidera or Janc did to extract PAMM or its attributes from the Debtor; and indeed, they do not say a thing about concealment. Nor is there enough in their wording for a defensible inference of concealment. More to the point, their allegations go only to *pre-petition* acts. As such, they are not directly relevant to the *Trustee's* ability to sue, or to the deadline that activated only upon the bankruptcy filing.

[17] Fed. R. Civ. P. 9(b), *as incorporated by* Fed. R. Bankr. P. 7009.

The Amended Complaint has four paragraphs that do resonate to the principles of the discovery rule in their frame of reference and wording: ¶¶ 42, 52, 60, and 69. They allege a fraudulent concealment attributed to the Defendants generally, that would have waylaid the *predicate creditors* from which the Trustee would derive his standing under § 544. The Trustee expressly asserts in all of those paragraphs that the predicate creditors "did not know of or discover Defendants' fraud at any time within the six years before the Petition Date."

Even if assumed true, this circumstance is beside the point. If the Trustee seeks an excuse for not having sued by his own post-petition deadline, anything done to stymie the predicate creditors during an earlier six-year limitations period under state law was irrelevant. The Trustee need not stretch a state-law limitations period or the "lookback" of § 548(a)(1), to ensnarl all of Kvidera's and Janc's actions; those all took place in very close proximity to the bankruptcy filing for the Debtor. *Cf. In re Petters Co., Inc.*, 495 B.R. 887, 901-904 (Bankr. D. Minn. 2013) (applying "discovery rule" such that avoidance of transfers made more than six years before bankruptcy filing may not be time-barred).

Once that dross is taken out of the arguments, something is clear: it was incumbent on the Trustee to plead, with specificity, affirmative and intentional acts by the Defendants, starting with the date of the Debtor's bankruptcy filing and up to the Trustee's two-year statutory deadline, that prevented *him* from recognizing that he had a factual basis on which to sue any of the Defendants as recipients of an avoidable transfer. The pleading of the circumstances of concealment had to go to the two separate extractions of PAMM--the copying of the source code, to which Janc would have been a first recipient (and thence to Bluesource and Akaibu) and the transfer of a licensing key, with access to PAMM's source code, to which Kvidera was the facilitator and possibly would have been the first recipient (thence to TDS).

As to those chains of participation, the Trustee makes no express allegation of secrecy in the initial, pre-petition extraction--i.e. that it was deliberately hidden from the receiver or from any other party interested at that time in a potential dissipation of the assets' value. The pleading (in ¶¶ 23-27 and 30-32) says nothing directly as to them doing those things without disclosure. Without an allegation more specific as to what Kvidera and Janc did *not* do contemporaneously as a matter of fact, there is nothing in the allegation of surrounding circumstances that would support an inference of intentional concealment.[18]

Without pleading or inference as to an initial subterfuge, there is no basis on which to infer a continuing concealment from the Trustee, after he was seated in authority post-petition. Then there is no direct fact-pleading that any defendant prevented the Trustee from learning about Kvidera or Janc spiriting PAMM's core attributes away from the exclusive control of the Debtor, or a concealment of the post-petition possession or control of those assets in any defendant, whether in their original form or altered.

Via his response to these motions, the Trustee gets specific for the first time: he relies on negligent concealment and the passive discovery rule, as alternate bases for equitable tolling. He now begs off by suggesting that he only had to consult the Debtor's schedules for his reliance, and did not have to conduct a thoroughgoing investigation into potential avoidance claims. The Defendants argue that the Trustee failed to plead any facts to support negligent concealment and that he has no excuse under this theory for missing the deadline.

To invoke this basis for tolling, a plaintiff must allege that its ignorance of a factual basis for suit was not its fault, and was not attributable to a lack of diligence or care on its own part. Put another way, the basis of suit must not have been capable of discovery by the performance of due diligence on the plaintiff's part. *Merck & Co. v. Reynolds*, 559 U.S. at 644-645. If that is proven, the limitations period will be deemed to have started on the actual discovery of the fraud. *Id.*

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[18]The Trustee tries to backfill for this in his briefing, by arguing that his pleading characterizes as secretive the entirety of the Defendants' conduct in relation to the sued-on acts. As the Trustee would have it, that alone is enough to support tolling. This argument is flawed. The narrative within ¶¶ 23-27 and 30-32 *suggests* secrecy; i.e. it could support an inference to that effect. But it does not say so, in so many words. Had it been made, a general allegation of secrecy would be consistent with fraudulent concealment; but a broad allegation alone would not carry the notion of a targeted concealment against potential plaintiffs. And in any event, a *prior* maintenance of secrecy does not go directly to the Trustee's *later-maturing* duty of due diligence, as to which there are no allegations regarding a continuum of secrecy. If, for instance, the acts of Kvidera and Janc were easily-discoverable after the fact, any secrecy in which they were first carried out is largely beside the point, as to the negligent concealment theory.

From that framing, the proper pleading for negligent concealment would include allegations as to:

- the due diligence effort that a similarly-situated plaintiff would perform, in relation to the subject matter of the fraud;

- the actions toward due diligence that the plaintiff actually did perform; and

- any inherent inability to discover the facts relating to the underlying claim of fraud by the exercise of objectively-measured due diligence, and a de facto lack of discovery by the plaintiff's own effort due to that.

In the Amended Complaint, the Trustee never sets out what a standard-compliant performance of due diligence would have amounted to, on the administrative tasks presented to him on his appointment in the Debtor's case. He seems to say that he was entitled to rely on the content of the Debtor's statement of financial affairs and schedules to evaluate the possibility of avoidance actions, and that it was not incumbent on him to do more than that to preserve the negligent-concealment theory as an excuse for untimely commencement of suit. Plaintiffs' Opposition to Defendants' Motions to Dismiss [Dkt. No. 47], 9. (The Trustee does not plead this position in the text of the Amended Complaint.)

The Trustee cites to *In re Pomaville*, 190 B.R. at 637, for this specific proposition. The citation is not on-point, however. *Pomaville* lays out an objective standard, under which a trustee is required "to conduct searches that are realistic in the ordinary course of a trustee's performance of his duties." *Id*. *Pomaville* does not stand for the proposition that reliance solely on a debtor's statements and schedules as due diligence toward timely commencing suit on potentially-avoidable transfers, is sufficient for the purposes of the negligent-concealment theory. Rather, it contemplates a deeper level of analysis from a trustee, from the get-go.

As a general rule, the negligent concealment option revolves around an objective duty of care, deemed to a plaintiff under the circumstances presented in the particular case. In context here, framing that duty starts by recognizing a trustee's duties and goals in administering a debtor's assets.

Here, the Trustee was charged in the first instance with preserving the value of a collection of intangible corporate assets that were wrapped in the sensitivities of trade secret and maintained in electronic format. Dauntingly, that format made the intangible assets easy to remove via download, and easy to transfer by hard or soft storage media and to upload elsewhere. With that sort of vulnerability, the Trustee was obligated to administer the assets toward a sale to maximize the amount recovered on that value. This entailed taking appropriate action to see that the assets--particularly PAMM and the customer data--stayed whole, uncopied, under control, and protected in confidentiality to the point of sale.

Obviously, given the unique attributes of electronic-format assets, a sale could close without an actual discovery of access and potential misappropriation if the sale were conducted on an expedited basis. If it emerged after such a sale that a third party had tampered with or misappropriated such assets, it would suggest an investigation toward legal redress for the injured party or parties. Here, through the Amended Complaint, the Trustee is identifiable as the only injured party for all of the claims under fraudulent transfer law. Given the statutory scheme for standing, he was subject to the deadline for suit set by § 546.

Where, as here, suit on those causes of action was not commenced until after the deadline, the availability of an excuse under the negligent-concealment option would turn on a number of things: what the Trustee did do post-petition, before and after the sale, to safeguard against such third-party expropriation; whether the Trustee was reasonably likely to have discovered possible misfeasance after its occurrence through reasonably-available means; and whether the Trustee exercised due diligence to uncover any accomplished misappropriation and to investigate a factual basis for suit on fraudulent-transfer theories.

The Trustee's acts must be gauged in light of the means through which he could have learned those things, in the exercise of diligence customary for a trustee in this sort of case. This would require identifying the means of monitoring and investigation that would have been available--i.e. the technology--and those that would have been objectively appropriate--"due"--under the circumstances.

The Trustee has pled nothing on any of that, as to either event through which PAMM allegedly was extracted from the Debtor. He does not set out what he did to investigate or monitor the access to PAMM through available means, in proximity to the bankruptcy filing or his sale. He does not plead anything as to the technical means which any seller could have used, in regards to a bundle of assets that included comprehensive computer programming and customer data. This would go to whether he was safeguarding value before sale, in the first line of his duty; but it would also go to whether he was aware, or could have become aware, of any claims against third parties that would have originated from unauthorized access to PAMM and the Debtor's customer data that took place before the bankruptcy filing, or before the Trustee started taking steps toward his sale.

With no such pleading at all, the Amended Complaint does not stake out the negligent-concealment override to the time-barring defense. The Defendants' assertion that fraudulent-transfer claims are barred on the very face of the Trustee's own pleading is fully-supported and without rebuttal.

The question then would be whether leave to amend should be granted, to give the Trustee a chance to preserve his fraudulent-transfer claims for the advancement of the negligent-concealment excuse. Ordinarily, of course, leave to amend a pleading is favored. *E.g.*, Fed. R. Civ. P. 15(a)(2), *as incorporated by* Fed. R. Bankr. P. 7015. However, when facts already pled by a plaintiff conclusively defeat any theory to be advanced by an amendment on its merits, amendment would be futile and dismissal under Rule 12(b)(6) should then be granted with prejudice. *Zutz v. Nelson*, 601 F.3d 842, 850 (8th Cir. 2010).

As between the two pleaded acts of extraction and the two arrays of defendants, the outcome of this analysis would split.

The acts attributed to Janc are the downloading of a copy of PAMM to his own control and the subsequent passing-on to Bluesource and Akaibu. Just enough is pled already to merit giving the Trustee a chance to replead for a tolling defense for his missed deadline. There is just enough to anchor an inference of secrecy on Janc's part, an intent to conceal, when he downloaded PAMM and took it to Bluesource. That in turn suggests that Janc and the eventual recipients of the source code intended to hide their possession on a continuing basis, on after the Trustee's sale.

This alone is not enough to excuse the Trustee's failure to timely sue the Janc/Bluesource defendants. The Trustee's burden would be to show that he would not have been able to discover Janc's access and the Janc/Bluesource defendants' retransfer and subsequent exploitation of PAMM and the other information, in time to sue by the statutory two-year deadline. One undeniable circumstance confronted the Trustee immediately on his administration: the Debtor's abrupt precipitation into bankruptcy at Kvidera's doing, in the face of the receiver's impending sale to DataWave. That could raise a reasonable suspicion that Kvidera (and possibly Janc) hoped for a different disposition of PAMM through a bankruptcy process, one way or another, honestly or dishonestly. From there, the question would be the weight and the reasonableness of such suspicions, and the nature of the investigation that would have been due under the circumstances, toward safeguarding the integrity of the assets and to see that the Trustee's chosen buyer got the long-term value of what it paid for. This inquiry would bear directly on the possibility of redress for any unauthorized access and misappropriation of the assets or their value.

But that would all be for a next stage, were the Trustee to possess fraudulent-transfer claims viable on their abstract merits. The fact that Janc's acts were not immediately apparent preserved the issue of whether they and their consequences would have been discoverable through due diligence. Thus, dismissal with prejudice on the ground of time-barring, as against the Janc/Bluesource defendants, would not be warranted. An opportunity to amend, toward a saving exception to the time-barring defense, would be appropriate if there were a viable cause of action.

The same cannot be said for the fraudulent-transfer claims against Kvidera, TDS, and Clark, premised on Kvidera's alleged misuse of a licensing key for PAMM. Kvidera is alleged to have granted the license in close proximity to the bankruptcy filing that he did for the Debtor--

"[s]hortly before the Petition Date," per ¶ 31 of the Amended Complaint. He is alleged to have then transferred the licensing key to TDS for consideration--$15,000.00, wired to the receiver "on the same day that Kvidera filed the bankruptcy petition on behalf of" the Debtor. Amended Complaint, ¶ 31.[19]

On his appointment, the Trustee was statutorily obligated to meet with the Debtor, 11 U.S.C. § 341(d), and to thoroughly investigate the Debtor's financial affairs, 11 U.S.C. § 704(a)(4). *See In re United Ins. Mgmt., Inc.*, 14 F.3d at 1386. These general duties alone made it incumbent on the Trustee to immediately inquire of a previously-seated receiver. But more tellingly, the Trustee had an obligation to enforce the bar on any further administration through the receivership, 11 U.S.C. § 543(a), and to ensure immediate, full compliance with the receiver's nondiscretionary obligation to turn over and account for all property of the Debtor held by him, 11 U.S.C. § 543(b).

Those were the Trustee's paramount obligations as soon as he was appointed. On consultation with the receiver, the Trustee would have learned that something had happened through Kvidera's actions. The mere receipt of the $15,000.00 in exchange for access to PAMM raised the strong prospect that PAMM's potential value could escape to a competitor of a buyer, if the Trustee ultimately did not sell to that putative licensee. These circumstances gave more than enough notice to the Trustee, that claims might eventually arise as a result of the grant of a license under such suspect conditions; in TDS's hands, the access to PAMM's structure and content might be substantially misused toward harm to the estate or to the purchaser of assets.

This notice would have come to the Trustee at the very outset of his two-year period for suit. The information did not unmistakably or necessarily say "fraudulent transfer" on its face. It was, however, a watchword for vigilance as to any *later*-developing chicanery on the part of

[19]Here again is the baffling incongruity that the Plaintiffs' sparse pleading does not address. If the receiver was vested with control over the Debtor's day-to-day operations *and* had negotiated a sale of all of its operating assets in the role of liquidator, how did Kvidera purport to have the authority to do this? How did the receiver not know something or do something to safeguard against any pre-sale manipulation of the assets he was selling? How could TDS and Clark, as licensees and recipients, have thought this was okay?

Kvidera and his new employer. And, it came so early that there was no excuse for not developing a theory on which to sue those parties before the deadline.

To the extent that the claims against the Kvidera/TDS defendants on account of the grant of license were properly actionable as fraudulent transfers, the Trustee's suit for that relief would be time-barred. The pleaded circumstances of the Trustee's early administration leave him no excuse to support an equitable tolling for the running of his deadline for suit against those opponents. If fraudulent-transfer remedies were substantively available to the Trustee on the transactions pled against the Kvidera/TDS defendants, dismissal with prejudice would be merited on Claims One through Four and Seven against those defendants.[20]

II. Count Framed Under Trustee's Turnover Remedy (Claim Five)

Claim Five of the Amended Complaint is styled under 11 U.S.C. § 542. Again, the Trustee is apparently the one asserting the right to relief under this count and its theory.[21] After another rote incorporation of all that went before, it is pled:

> Defendants are in possession, custody or control of the Assets, which is [sic] property that the Trustee may use, sell or lease in the administration of the Bankruptcy Estate, including Procedo's software, laptop, computer programs, and related computer equipment.

Amended Complaint, ¶ 72. The Defendants are alleged to "have failed and refused to deliver the Assets to the Trustee," Amended Complaint, ¶ 73; which, it is alleged, "has damaged the

[20]The analysis of this section--numbered I.B.--is arguably superfluous, given the outcome in Section I.A. However, it is presented for two reasons. First, it recognizes and reflects the substantial attention that the parties gave to the very obvious, very serious prospect that all claims under the fraudulent-transfer theory were time-barred on the very face of the original complaint, and the issue was not squarely addressed in the Amended Complaint. Second, it underlines how half of the Trustee's case on fraudulent transfer--all claims against the Kvidera/TDS defendants--were doubly doomed. Thus, the analysis for disposition on an alternate ground is laid out--not the least for the benefit of any appellate tribunal that may have to review these controversies.

[21]The statute, after all, requires any "entity . . . in possession, custody, or control, of property that the trustee may use, sell or lease . . ." to "deliver *to the trustee*, and account for, such property . . . ." 11 U.S.C. § 542(a) (emphasis added). The trustee is also the designated recipient of turnover from a custodian of "property of the debtor held by or transferred to such custodian," 11 U.S.C. § 543(b)(1). ("Custodian" is a defined term under 11 U.S.C. § 101(11). It includes a receiver who was appointed under nonbankruptcy law. § 101(11)(A).) The construction etched in *Hartford Underwriters, supra* at p. 6, applies with equal strength here.

[bankruptcy] Estate by diverting revenue to which the Estate was entitled under the BPA and APA to themselves," Amended Complaint, ¶ 75.[22] As relief, the Trustee seeks a directive to the Defendants as a group, to "deliver to the Trustee, and account for, such property or the value of such property." Amended Complaint, ¶ 76.

The sense of this count is quite obscure; the references to its subject matter are just too garbled. Earlier, the phrase "the Assets" is established as a defined term inclusive of several categories of asset. Amended Complaint, ¶ 18. Among them were the property of the bankruptcy estate that DataWave purchased via the Trustee's sale (a subclass termed "the Purchased Assets"), plus the funds sourced in the future revenues from DataWave's servicing of purchased customer accounts, that were to be paid to the Trustee post-sale pursuant to the APA (termed "the Pipeline"). *Id*.

Under governing law, this broad inclusiveness makes no sense. The turnover remedy under § 542 "permits a trustee to compel turnover only from entities which have control of property of the [bankruptcy] estate or its proceeds at the time of the turnover demand." *In re Falzerano*, 686 F.3d 885, 887 (8th Cir. 2012). *See also In re Pyatt*, 486 F.3d 423, 428-429 (8th Cir. 2007). The limitation of turnover to the *current* property of the estate is reflected in the statute for the remedy. *Supra*, 23 n.20.[23] When a trustee sells property of the estate pursuant to 11 U.S.C. § 363, the trustee divests the estate of all right, title, and interest in the property sold. *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 731-732 (8th Cir. 2004). Perforce, it is no longer property of the estate after a sale, and it is no longer subject to the trustee's claim, control, demand, or will.

The Trustee here has no right to the turnover of anything that he let go to DataWave via his sale. "Procedo's software, laptop, computer programs, and related computer equipment" all passed to *DataWave's* ownership. Because only a trustee can exercise the statutory remedy

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[22]In the Amended Complaint, "BPA" signifies the Business Protection Agreements with the Debtor, with covenants of confidentiality and non-competition, that Janc and Kvidera had signed. Amended Complaint, ¶ 22.

[23]Dovetailing with § 542(a), 11 U.S.C. § 363(b)(1) vests the trustee with the power to "use, sell, or lease . . . *property of the estate*." (Emphasis added.)

of turnover, DataWave has no right through the bankruptcy process to compel any of the Defendants to surrender anything in their possession to which it asserts ownership in its own right--no matter how they got their possession.[24]

That much comes from the blunt application of straight-forward precepts, however much the Trustee fluffed the simplicity arrayed against him. Of the Trustee's whole turnover demand, the one aspect with any potential nuance is the matter of the Pipeline--the post-sale payment stream to flow from the existing customer accounts that the Trustee had sold to DataWave. The APA gave the bankruptcy estate a right to a stream of payments from DataWave as a part of the consideration to be paid by DataWave over time. It was to correspond to a share of the revenues on the accounts. The complaint does not say it in so many words, but the Trustee's grievance as to the Pipeline is that he did not receive the monies that were to be derived from DataWave's revenues, as projected from those customers' future payments on the accounts after DataWave began servicing them. He attributes that to the pirating of PAMM and the luring-away of those customers by the use of the competing product developed by BlueSource and purveyed by Akaibu. Amended Complaint, ¶¶ 26 - 27; *see also* Plaintiffs' Opposition to Defendants' Motions to Dismiss [Dkt. No. 47, pp. 16-17].

Such allegations might support a claim for damages under some common-law theory applicable outside of bankruptcy. However, they do not make out a right in a trustee to the turnover of a specific asset in the current possession of a defendant. Under the terms of sale, the estate had a right to payment *from DataWave* after DataWave collected the ongoing service charges from

[24] DataWave and the Trustee may have been anticipating this issue when they settled between themselves the uncertainty over their respective rights of suit against the Defendants in 2013. They got court approval of the settlement in February, 2014, over TDS's objections [BKY 10-38679, Dkt. No. 130]. As between the two of them, the Trustee and DataWave agreed that "each shall be deemed to have a property interest in the debtor's software programs." As broadly and clumsily worded as this proviso is, it served only as a foundation for the real object of the settlement--DataWave and the Trustee were joining forces to pursue their respective claims on the Defendants' alleged wrongdoing, and would divide the gross recoveries according to a stated formula. There is no principled way to apply the terms of this two-party accord so as to revest previously-conveyed property back into the estate, let alone to convey back into the estate any asset misappropriated from DataWave after the sale. The court's approval did not bind any party other than DataWave and the Trustee, to the substantive implications of an accord that ran only between those two signatories.

customers on the accounts it bought. Asset Purchase Agreement, §§ 2.1.4.1 - 2.1.4.5. The estate had no right to receive payment directly from the customers, held back from the sale and remaining in the estate. If any defendant received ill-gotten gains derived from its misconduct in relation to PAMM and the former customers of the Debtor, those riches did not come from the distinct income streams traceable to contractual rights on customer accounts sold to DataWave. The asset the Trustee sold to DataWave, the accounts based on pre-existing contracts between the Debtor and specific customers, did not generate the value in the possession of the Defendants, to which the Trustee asserts his vague claim of turnover.

Again, there is no conceivable amendment to factual allegations that could save Claim Five's non-meritorious legal theory, without grossly contradicting the established terms of the Trustee's sale. Dismissal of Claim Five with prejudice is merited.

III. Count on Assertion that Defendants Violated the Automatic Stay (Claim Six)

In Claim Six, the Trustee and DataWave characterized acts by the Defendants as violations of the automatic stay in bankruptcy, specifically the prohibition against "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" under 11 U.S.C. § 362(a)(3):

> As set forth above, Defendants took actions to obtain possession of Procedo's property and/or exercised control over the Debtor's property, namely the PAMM source code and software, in violation of the automatic stay provisions of the Bankruptcy Code.

Amended Complaint, ¶ 79.[25] The resultant damage is identified to "the Estate by diverting revenue to which the Estate was entitled under the BPA and APA to themselves." Amended Complaint, ¶ 80. Notwithstanding that, it is asserted that "Defendants are liable *to Plaintiffs* for damages proximately caused by these violations." Amended Complaint, ¶ 81 (emphasis added).

This count is another instance of muddled references resulting in a confusing claim to relief. As framed under the cited legal authority, Claim Six could not support a recovery in

[25] Section 362(a)(3) is not cited as the specific stay at issue, until p. 47 of the Plaintiffs' Opposition [Dkt. No. 47].

DataWave's favor. The stay cited for the alleged violation protected only the bankruptcy estate, from action that otherwise would impair the value of estate assets or would harm the estate's recovery from the liquidation of those assets. Actual or prospective purchasers of such assets are not directly protected by the terms of § 362(a)(3). Thus, such purchasers lack standing to assert a violation of the stay as a cause of action directly against the violator--even if the violation impaired the value of assets sold or to be sold to them.[26] So, clearly, the Trustee is the only plaintiff with standing to pursue this claim under its internal sensibility. To the extent that this claim seeks a recovery for the "Plaintiffs" collectively, it must be dismissed as to all of the Defendants for any claim impliedly asserted by DataWave.

After that, there is no monopoly of muddling in the arguments from both sides.[27]

In his pleading, the Trustee does not cite any authority in statute or law for his asserted cause of action on a violation of the automatic stay, other than his broad invocation of "11 U.S.C. § 362." 11 U.S.C. § 362(k) does create a remedy for an injury caused by a willful violation of the automatic stay; but it runs only to "an individual." The Eighth Circuit has held that the bankruptcy estate of a debtor-corporation is not an "individual" for the purposes of § 362(k). *In re Just Brakes Corporate Systs., Inc.*, 108 F.3d 881, 884 (8th Cir. 1997).[28] A corporate debtor's bankruptcy estate has no cause of action under the statute for actual or punitive damages, costs, or attorneys' fees, even if the trustee proves up a willful violation. *Id*.[29] Further, the contempt power

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[26]Such a party's recourse would lie against the estate, and it would be purely a matter of the market: a prospective purchaser could withdraw its offer, or demand an adjustment to the proposed price to reflect the negative impact on its own expectations. If the sale has closed and the trustee made any warranties, the buyer could make a claim against the estate after the fact, for breach of warranty and damages.

[27]One very quick disposition on one egregious instance of muddling from the defense side: TDS argued that the dismissal of Claim Six was imperative on procedural grounds, because it was improper to raise the issue of a violation of the automatic stay via an adversary proceeding. This argument was utter foolishness. *See* Fed. R. Bankr. P. 7001(1).

[28]When the *Just Brakes* litigation made its way through the courts, the relevant text was numbered as § 362(h).

[29]The outcome on this point in *Just Brakes* was phrased in terms of "§ 362([k]) only appl[ying] to 'individual' debtors, not to corporate entities such as Just Brakes." 108 F.3d at 884. The corporation-debtor in *Just Brakes* was in bankruptcy under Chapter 7; all of its assets were subject to a trustee's

does not lie to address a violation of § 362(a), at least to justify imposing punitive sanctions; Congress did not expressly confer "power to punish for a violation of § 362(a)." 108 F.3d at 885.

The *Just Brakes* court did recognize a wellspring of authority to fashion a remedy for a violation of the stay that harms the estate of a corporate debtor. That lies in the grant of equitable power under 11 U.S.C. § 105(a). 108 F.3d at 885. Such a remedy is equitable in nature and remedial in function. It is directed toward compensation, rather than the broader reach of damages cognizable under law. *Id*. Punitive damages are not available under this general power. 108 F.3d at 885. Thus, a recovery for the bankruptcy estate of a corporation-debtor through the exercise of the equitable power under § 105(a) is limited to the value lost through the stay violation, plus the costs incurred by the estate in making the estate whole for the third-party interference in violation of § 362(a). 108 F.3d at 885-886.

The defense here properly raised the principal holding of *Just Brakes*, that § 362(k) was not available to the Trustee. However, it then tried to use that as a smoke screen to obscure the opinion's saving measure for a bankruptcy estate, the crafting of circumscribed relief under § 105(a).[30]

In turn, however, there is just as much nebulosity in the Trustee's fact-pleading on specific acts by any of the Defendants *that took place after the Debtor's bankruptcy filing*--as they had to for them to be actionable as stay violations.

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administration, and it was not eligible for a discharge (11 U.S.C. § 727(a)(1). After a corporation is put into bankruptcy under Chapter 7, the entity itself generally does not have residual interests of its own to be protected by the automatic stay or to be advanced by any other bankruptcy remedy. In *Just Brakes*, the complainant of a stay violation was the trustee on behalf of the estate, and the estate alone. For a Chapter 7 case, then, it is appropriate to read the Eighth Circuit's exclusion from § 362(k) for "corporate entities" as applying to the bankruptcy estate of a corporation-debtor--and not, strictly speaking, to the debtor-entity itself.

[30]For nearly three decades, jurisprudence from the Supreme Court has limited the scope of the equity power under § 105(a), to granting relief strictly consistent with the substantive provisions of the Bankruptcy Code. *Law v. Siegel*, 571 U.S. ___, ___, 134 S.Ct. 1188, 1194 (2014); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Despite those pronouncements, the statute does empower the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. Making a traceable compensatory award to redress a violation that has caused harm to the administrative function in bankruptcy, is undeniably "necessary . . . to carry out the provisions of" the Code.

Janc's act of downloading PAMM was the signal event from which half of this lawsuit flows. That act is identified to the time "[p]rior to the Petition Date." Amended Complaint, ¶ 23. At that point, the automatic stay had not yet been triggered.[31] Janc's act of downloading could not have been a violation of an automatic stay in bankruptcy. The Trustee does not specifically allege that Janc violated the stay through his continuing possession of the copy. The Amended Complaint is almost completely lacking in fact-pleading to link Bluesource or Akaibu to a stay violation in consequence of Janc's actions. Bluesource's hiring of Janc, Amended Complaint, ¶ 24, might partly support an inference that Bluesource then took possession of the copy; but that is dated to October, 2010. The Debtor was not put into bankruptcy until December 6, 2010.

If the Trustee considers Bluesource's continuing possession or control over the copy or any subsequent exploitation of PAMM to be a violation, he certainly does not plead as much. The next fact-pleading attributes to Bluesource an intent to "acquir[e] trade secrets that belonged to" the Debtor, through its hiring of Janc. Amended Complaint, ¶ 25. However, this abruptly shoehorns in a different sort of expropriation, and a more general one. Without any surrounding fact-pleading, it is almost a non sequitur as to any inference of stay violation.

The Trustee's next allegation, Amended Complaint, ¶ 26, is that Janc then created a new software program for Bluesource by wrongfully using PAMM, while in possession of the laptop to which the copy had been downloaded. This is closer in nature to an act "to exercise control over property of the estate," in the sense of altering an asset that had been property of the estate. But, again, neither facts nor legal characterizations are pleaded to link these acts in time, to a concurrent usurpation of property of the estate on the part of Bluesource or Janc.

At this point, Bluesource raised a notion transplanted from its argument on Claim Five; but the argument is inapposite. Bluesource claims that once the Trustee closed the sale to DataWave, all possible claims of stay violation were mooted because PAMM was no longer property of the bankruptcy estate. This argument has a tinge of sophistry to it. Yes, the Trustee

[31] 11 U.S.C. § 362(a) provides that "a petition filed under [the Bankruptcy Code] operates as a stay, applicable to all entities . . . ."

could do better to plausibly plead out a chain of possession and control. But on such pleading, any serial misappropriation and wrongful exploitation of PAMM by Janc and then Bluesource could be characterized as destabilizing the estate's realization on the sale. That could have happened through jeopardizing the estate's realization on the Pipeline as a component of the purchase price, or by a buyer making post-closing claims for failure of consideration and the like. If a pre-sale violation of the stay impaired the ultimate value of the assets as it was realized through sale, that violation could retain its actionability after the sale. Through the Pipeline, the estate had continuing pecuniary expectations from the post-sale use of PAMM. A loss of exclusive access to PAMM logically could impair DataWave's ability to fund those payments to the estate.[32]

Given that, and the fact that Bluesource hired Janc before the sale, Bluesource's mootness argument does not sit well. It is almost a taunt: "Didn't catch my violation of the stay before the sale, can't accuse me now." This notion cannot cut off the Trustee's cause of action on a possible violation of the stay; its only, gossamer support is the bare historical sequence pleaded in the Amended Complaint.

However, the claim of stay violation as to Akaibu, premised on its later acquisition from Bluesource, is different. Whatever Akaibu acquired in access to PAMM or assets derived from PAMM when it first employed Janc, the acquisition occurred no earlier than the hiring in November, 2011. Amended Complaint, ¶ 27. That was well after the Trustee's sale to DataWave. The Trustee pleads no traced continuity or chain of possession between the estate's holding of PAMM before the sale and Akaibu's receipt of whatever it got years later. Without such a chain, the stay against exercise of control over estate assets cannot be construed to stretch over such a gap. It is not possible to conceive of an alternate set of facts to support a continuity of interests in PAMM itself, through the point of any acquisition by Akaibu in November, 2011, without contradicting already-pled facts going to Akaibu's involvement.

[32] This is the main gravamen of the claims pleaded against the Janc/DataWave defendants.

On that analysis, the Amended Complaint's pleading on Claim Six against the Janc/Bluesource group of defendants fails muster under Rule 12(b)(6). But, it is appropriate to grant leave to amend on Claim Six as to Janc and Bluesource, given the possibility of a factually-plausible, legally-viable claim against them for stay violation that became actionable at some point in the historical sequence of events. On the other hand, a claim of stay violation against Akaibu cannot possibly be viable. Claim Six must be dismissed with prejudice as to Akaibu.

The same analysis applies to Claim Six's pleading against Kvidera and TDS. Kvidera's suspect act of granting the license and giving the license key to TDS is dated to a point in very close proximity to the bankruptcy filing. Amended Complaint, ¶¶ 31-32. The Trustee alleges that TDS sent $15,000.00 to the receiver "[o]n the same day that Kvidera filed the bankruptcy petition on behalf of" the Debtor, "purportedly for the purchase of the PAMM software development license." Amended Complaint, ¶ 31. But for that the Trustee does not stake out any specific position as to what occurred then on the legal plane: was the payment effective consideration? If so, when was it effective? That is, was the purported grant of license effective before or after the bankruptcy filing and the creation of the estate? Did the license become enforceable against the estate? If not, was there a stay violation in TDS's retention of PAMM and the license key after the bankruptcy filing?

The Trustee does not even plead as to the adequacy of the $15,000.00 in consideration. He does not allege that he ever attempted to avoid the license or to recover PAMM from TDS's control through some other means. Without any of that, it is doubtful that TDS's continuing access to PAMM could be characterized as a taking or withholding from the bankruptcy estate. There may well be facts to plead, to support that. But on the incomplete state of the historical and transactional facts, an actionable violation of the stay on the part of Kvidera and TDS is not plausibly pled.

The other chain of acts impugned as a stay violation starts with the Trustee's allegation that in 2012 "DataWave learned that TDS was offering email migration archive services with the PAMM software and license key." Amended Complaint, ¶ 33. Then comes the statement:

> . . . based upon the testimony of a current TDS employee, TDS procured and serviced the Debtor's accounts after it filed for bankruptcy protection resulting in lost customers to DataWave and lost revenue to the bankruptcy estate.

Amended Complaint, ¶ 34.

On its face, this allegation cuts too many different ways at once. Accusing TDS of a misappropriation of "the Debtor's accounts after [the Debtor] filed for bankruptcy protection" says nothing about whether the account data was purloined before the sale--in which case, control and possession of estate assets were indeed taken. It does not specify a theft that took place after the sale--in which case DataWave would be the proper complainant, but it cannot sue under theories based on bankruptcy law's protections through the automatic stay. The pleaded harm is a loss of "customers to [sic] DataWave and lost revenue to the bankruptcy estate." The stay never lay to directly protect DataWave from the former, whether as a prospective or actual purchaser of the business attributes. And, the bankruptcy estate did not lose "revenue," per se, in the sense of rents, profits, etc. directly derived from an asset in the estate. Its contractual entitlement to a stream of payment from its purchaser, in the nature of a portion of the purchase price, would have been frustrated and reduced in value by the acts the Trustee attributes to the Defendants.

As to the latter, i.e. the estate's expectations of realization through the Pipeline, not enough is pled to make out causality. The starting point probably would be an initial theft of customer data, that may or may not have been property of the estate when taken. That would have to be linked to actual harm to the estate's one residual, post-sale right derived from the assets sold, the Pipeline-generated monies from revenues DataWave was to earn and collect from those former customers of the Debtor for which it purchased customer data and any rights under pending contracts.[33] Did TDS lure the relevant customers completely away from DataWave? If so, when did that happen in relation to the sale? How did that relate to the reduction or termination of the revenues that were to fund the Pipeline?

[33] The complaint is quite vague as to the form and nature of what DataWave purchased, as to the property rights associated with the Debtor's customer relationships.

Linkage of that sort is not inconceivable, but nothing has been pled so far to support it in a plausible fashion. It cannot be said that a grant of leave to amend would be futile, as to that and the alleged expropriation-by-license that Kvidera effected; so the Trustee should have an opportunity to do so. But the fact-pleading on an amendment must be much more precise, to describe culpable acts by the remaining Defendants to spirit away the possession, control, or value of assets from the bankruptcy estate, at a time when those assets were property of the estate. And as to the withholding of such assets if previously-spirited, the Trustee must plead how the remaining Defendants retained such assets to their own control, use, or exploitation, again during a time when the assets were still property of the bankruptcy estate. Those points will be crucial, for identifying and quantifying the loss for which the estate would be compensated, through the equitable remedy from *Just Brakes*.

IV. Count on Minnesota Trade Secret Act (Claim Eight)

Claim Eight under the Amended Complaint is the first one premised on substantive law that falls outside the usual bailiwick of bankruptcy. The pleading within the count itself is short. It uses another wholesale incorporation of everything pled before. Amended Complaint, ¶ 85. Then it has very little pleading as to acts or events that does not duplicate earlier fact-pleading. Needless to say, the task of vetting for plausibility became quite tedious.

The problems with this count begin with its title: a general allegation of “Violations” of a statute says nothing about the specific statutory rights sued on, an invasion of such rights, the resultant actionability under statute, and the like. The count leads off with the general accusation, “Defendants misappropriated [the Debtor’s] trade secrets, in the form of the PAMM software, source code, license keys and a laptop computer.” Amended Complaint, ¶ 86. The following paragraph makes terse reference to “the estate’s claims under the Minnesota Uniform Trade Secrets Act.” From this, only one inference is possible: the cause of action asserted under Claim Eight is a misappropriation of trade secrets actionable under the Minnesota enactment of the Uniform Trade Secrets Act, Minn. Stat. § 325C.01 et seq. (“MUTSA”).

Then there is the problem as to which Defendants are alleged to be liable on acts of such misappropriation. The opening sentence of ¶ 86 impugns "Defendants" generally; but it goes on to make individual allegations of specific wrongful conduct against all of the named Defendants other than Edwards:

> Specifically, with respect to Defendant Janc, he willfully, knowingly and wrongfully used and misappropriated the source code for the PAMM software to develop Evolve for Bluesource. Bluesource willfully, knowingly and wrongfully used the Evolve software and sold it to Akaibu, which continues to willfully, knowingly and wrongfully to [sic] offer it for sale to this day. Defendants Kvidera, Clark and TDS willfully, knowingly, and wrongfully converted the PAMM software, source code and licensing keys without consent and continue to use it and variations of the PAMM software and license keys to this date.[34]

Amended Complaint, ¶ 86. Here and there, in the 84 preceding paragraphs of the Amended Complaint, Edwards is linked to various acts causatory of harm to the Plaintiffs. That gives an attenuated basis for drawing him into the defendant-group under Claim Eight; but the Plaintiffs should have treated him in ¶ 86 as they did all of the other defendants, and cited acts on his part that they characterized as misappropriations.

After that, there is the very troublesome issue of standing to sue on the specific cause of action under Claim Eight. This was raised mainly by Bluesource and TDS but it applies as to this claim in its entirety, against all named Defendants.

Minnesota law, specifically MUTSA, protects trade secrets as an asset. Claim Eight is premised on the notion that the content of PAMM and various attributes of PAMM were trade secrets protectible under Minnesota law.[35] As an asset of the Debtor, PAMM and all property rights

[34] At one point in its motion Akaibu seemed to take the position that this count lay only against Janc. Akaibu presented little to no argument framed in mind of dismissal of a claim against itself. Under the quoted fact-pleading, the premise was simply wrong; but nonetheless the viability of the complaint as against Akaibu will be treated.

[35] Other things in the picture, like the data within the Debtor's customer base, may have come under the rubric of trade secrets also; but that is not pleaded.

associated with it passed into the estate when the Debtor filed for bankruptcy. 11 U.S.C. § 541(a). A fortiori, any claim that had arisen pre-petition as a result of a violation of a legally-protected trade secret in PAMM passed into the bankruptcy estate as well. *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1001 (8th Cir. 2008). To the extent that a violation of legal protection of a trade secret inhering in PAMM occurred post-petition but before the Trustee's sale, a legal claim to be made whole for it was similarly property of the estate. 11 U.S.C. § 541(a)(6) (proceeds or products of property of the estate are property of the estate themselves).

After the sale, the time of accrual would determine the ownership and repose of trade secret claims relating to PAMM as property of the estate or not. Those arising from pre-sale violations would be governed by the terms of sale, i.e. the right to them would depend on whether the Trustee reserved them for (and in) the estate, or conveyed them to DataWave. Claims arising from post-sale violations would inhere in DataWave alone, as the successor-owner of the protected asset itself.

In the Amended Complaint, the Trustee makes a summary assertion going to all trade secret claims associated with PAMM:

> The Trustee did not sell, assign or transfer any of the estate's claims based on violation of Minnesota Uniform Trade Secrets Act to DataWave. As a result, the Trustee has standing to assert the estate's claim under the Minnesota Uniform Trade Secrets Act against Defendants.

Amended Complaint, ¶ 87. For the motions at bar, Bluesource [Moton to Dismiss, Dkt. No. 26, p. 15] and TDS [Motion to Dismiss, Dkt. No. 35, p. 18] argue that the Trustee lacks standing on Claim Eight because he conveyed to DataWave all property attributes relating to PAMM, including all preexisting rights of suit that flowed from the Debtor's ownership of PAMM.

To maintain his current standing to sue on Claim Eight, the Trustee denies that. Then he asserts that the identity of a named plaintiff is irrelevant for two reasons: first his settlement agreement with DataWave purported to vest an interest in "the Debtor's software programs" in both of them; and second "the Trustee retained an interest in the disposition and use of those assets under the APA because the Trustee was entitlted to, but did not receive, deferred payments."

These two points are gobbledygook. Two different provisos of the APA[36] destroy them. First, among the "Intangible Assets" to be sold, the APA includes "[a]ll of Debtor's interests in any trade secrets previously used in Debtor's business, including to all SEO materials, customer lists, telephone numbers, customer contact information, customer files and information and emails." Schedule 1.1 to APA [Dkt. No. 18, at 61 of 68; Dkt. No. 26, at 39 of 59.] A right of action stemming from an interest in a "trade secret[ ] previously used" is itself an "interest in" the trade secret, absent an express reservation of such rights to sue from the assets to be sold.

Second, the APA has a supplementary provision that sweeps in rights of action derivative of the main property rights in PAMM that are being sold:

> For all of these purchased intangible assets, Debtor also assign [sic] all rights of recovery for past infringement, al [sic] rights of registration, all rights and benefits under any applicable treaty or convention; and all rights sufficient to have any registration, patent, or similar legal protection to issue in the name of Buyer.

This comes in the second sentence immediately following the inclusion of "all of Debtor's interest in any trade secrets previously used . . . ." The later provision uses the word "infringement," which can be a term of art in the law of copyright. But in context it cannot be limited to just rights of action on claims of copyright; the reference is "*all of* these purchased intangible assets" (emphasis added), and the sentence is the last one in a long paragraph that itemizes multiple classes of intangible assets. Schedule 1.1 to APA [Dkt. No. 18, at 61 of 68; Dkt. No. 26, at 39 of 59.] The subject of this

[36] Under Eighth Circuit precedent, the text of the APA is properly considered in passing on the Defendants' motions for dismissal. The Trustee expressly pled that the incidents of his sale to DataWave preserved his standing for Claim Eight. Thus, the terms of the sale are "necessarily embraced by the pleading." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). Since the APA is an extrinsic document with objectively-manifested content and the facial content is material to the pleaded controversy, it is appropriate to consider its terms. *In re Petters Co., Inc.*, ___ B.R. at ____ n.9, 2016 WL 787612 *5 n.9. The APA itself is an exhibit to the Amended Complaint [Dkt. No. 18]. It also is in the record for these motions as an attachment to the motion of Defendants Bluesource and Edwards [Dkt. No. 26].

extension is properly read as including trade secrets and the word "infringement" as properly read as connotative rather than denotative, in the vernacular rather than as a term of art--to include misappropriation of a trade secret, a sort of invasion qualitatively similar to an infringement of a copyright.[37]

And then there is that other basis that the Trustee asserts for a continuing right of action in the estate. When the Trustee and DataWave resolved their own issues for an alliance-in-suit against the Defendants, they included a recitation: "The parties agree that each shall be deemed to have a property interest in the debtor's software programs." Settlement Agreement, 2 [BKY 10-38679, Dkt. No. 118].[38]

This recitation is terribly vague. The Trustee's blunt insistence on giving it collateral effect against the Defendants already has been rejected from one perspective. *Supra*, p. 25 n.23. There are other reasons why the Trustee is flatly wrong in this.

On its face, the recitation leaves completely unclear how its "deeming" is to function toward any substantive purpose within the joint litigation that the settlement contemplates. Given that ambiguity alone, it is troubling that the Trustee tries to assert it toward a continuing (or revested) standing to sue on any claim that the Defendants unlawfully invaded property rights in PAMM.

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[37]TDS made a third argument for a broad sweep in the Trustee's sale, based on a stray clause at the end of Schedule 1.1 of the APA [Dkt. No. 18, at 63 of 68; Dkt. No. 26, at 41 of 59]. This argument was foolish. Schedule 1.1(a) is a list of "tangible assets" to be conveyed to DataWave. The stray clause at its end is "[a]nd any other known assets not listed above that are owned by the Debtor." A right of action is not a tangible asset. The schedule is part of the very organization of the APA, which segregated classes of assets between tangible and intangible. The quoted clause is poorly drafted--the modifier "tangible" is not added to the other modifier "other known," thus not avoiding all possible doubt. However, that absence is not material. The clause must be read as modifying the class of assets categorized into the separate segment of the asset schedule, *tangible* assets. It operates only to sweep *all other tangible* assets into the array of property sold. And in any event, a broader reading of the clause would still not get TDS there. The Plaintiffs assert that they were not aware of any misappropriation of trade secret when the sale was closed. Amended Complaint, ¶ 14. A right of action on such a misappropriation therefore could not have been a "known" asset that went to DataWave with other assets.

[38]It is a little more of a stretch to consider this document as "necessarily embraced" by the Amended Complaint. However, its content does not help the Trustee on the matter of standing. Thus, it is not necessary to formally rule on whether it is properly considered under the *Porous Media* rule.

In any event, the ruling to approve the settlement was made on the clear pronouncement that none of its terms would be applied to vest any more standing to sue in either DataWave or the Trustee, than they already possessed in the wake of the sale and its necessary consequences on the matter of standing. The Trustee seems to think that he is allowed to do a makeover of his understandings with DataWave on the incidents of a long-closed sale, and the rejuggling could be applied on the offense to bind future opponents in litigation who were not parties to the settlement. That notion is utterly without merit.

This leads to the issue of DataWave's standing to sue, as to the pleaded claims under the trade secret theory.[39] This gets the analysis into the merits, and a lot more is required than any of the parties contemplated in their submissions.

To state a claim for misappropriation of trade secret, a complaint must plead two main elements: the existence of a protectible trade secret, and its misappropriation by the defendant. Without the former, there can be no case for the latter. *Electro-craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 897 (Minn. 1983). The *existence of the trade secret*, as a defensible property right, is the very first inquiry. *Id*.

MUTSA defines "trade secret" as

> . . . information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> > (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper

[39] Again, it has to be pointed out: though the Amended Complaint has much imprecision in its party-references, in the text of Claim Eight itself "Plaintiffs" are the parties initially incorporating all previously-pled text, and "Plaintiffs" are the ones alleged to "have suffered damages in an amount to be proven at trial," as a result of the alleged misappropriation of trade secrets. Amended Complaint, ¶¶ 85, 88. The use of the collective tag indicates that both parties-plaintiff are asserting Claim Eight as pled. (Yes, the Trustee insisted in ¶ 87 that the estate had retained *all* rights of action under MUTSA, to bootstrap his assertion of standing. His erroneous postulate does not override the actuality of the sale, or his own acquiescence to the way the claim was pleaded--in which DataWave is included in the collective as a party asserting a right to relief on the theory of the claim.) Thus, DataWave is the one plaintiff that may assert Claim Eight, whether that be as assignee of the estate's interest in the right of action as it originally accrued, or as the holder of a claim in its own right for any conduct directly actionable against the Defendants under MUTSA that occurred after DataWave purchased PAMM.

> means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Minn. Stat. § 325C.01, Subd. 5. There is no indication in the Amended Complaint that a court ever addressed PAMM's status as a trade secret of the Debtor; so it is fair to infer that there never was such a ruling. As a result, DataWave's allegation that a trade secret existed is only a partisan legal conclusion, which need not be assumed as true in passing on the sufficiency of the pleading. *Hanten v. School Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999) (for analysis under Rule 12(b)(6), court need not accept wholly conclusory allegations as true).

Under the statute's definition, DataWave was required to affirmatively plead four different things:

1. The secret was not generally known.
2. The secret was not readily ascertainable.
3. The information content of the secret derived independent economic value from its secret status.
4. The holder of the secret took reasonable steps to maintain its secrecy.

In addition, the courts have added another point that a plaintiff must specify and prove, arguably at the beginning:

5. The nature of the information that was and is to be protected as a trade secret.

Fox Sports Net N., LLC v. Minnesota Twins P'ship, 319 F.3d 329, 335 (8th Cir. 2003) (citing *Electro-craft Corp.*, 332 N.W.2d at 898). Without such specificity, a court should not be granting protection under the rubric of trade secret. *Electro-craft Corp.*, 332 N.W.2d at 898.

DataWave's complaint is seriously deficient as to four out of these five requirements.

The shortcomings start with the threshold element, just what is being sued on. In ¶ 86, the complaint identifies "Procedo's trade secrets, [as] . . . the PAMM software, source code, license keys, and a laptop computer." The inclusion of a laptop computer in this enumeration was seriously off the mark. Obviously the reference is to the one that received Janc's download. As such, the computer was the *receptacle* of any information capable of being a trade secret; it was not the trade secret itself.

On a similar thought, there should have been more detail about the attributes of the other three items that DataWave identifies as trade secrets in themselves, in a conclusory fashion. In a 21st-century sense, PAMM, its source code, and the licensing keys for the software are also receptacles for the *information* that constitutes a trade secret. A layperson might equate a "computer program" to the notion of something that would be "kept secret" in a commercial context; but the attributes and content of a "program" are really what a competitor would be interested in--*information* in the digital or cybernetic sense, the structure and content of the program itself, unique in configuration, that offers a customer something of value. To adequately identify the secret sued-on--the "nature of the information" that would be a protectible trade secret--the Amended Complaint should say more about the function PAMM was created to serve and (in broad brush at least) the special aspects of PAMM that enabled it to serve that function better.

DataWave missed the point on that specificity requirement, and that spills over to the first statutory requirement, that *the secret was not generally known* when it was allegedly misappropriated. DataWave has not even alleged this in the words of the statute, let alone given any detail as to how or why. DataWave did acknowledge that PAMM as a product was put into the public stream of commerce. Amended Complaint, ¶ 17. This implies at least a degree of public access, to at least part of the subject of suit. Yes, the whole issue seems to be the underlying source code for the operating program that itself was sold to the public, a deeper structure as to which access enables the inspection of the program's internal connectivity, function, and operation; something that apparently would allow cloning for alteration and something that an owner would want to preserve as secret to keep its product whole, integral, and competitive in the market. But there is not even the bare allegation that the source code or the licensing key (which apparently allows access to the source code) were not generally known.

Coming back to the earlier point, there is no allegation that the structure and content of the source code was *novel or unique* in any way--a quality that surely is relevant by its inherent inconsistency with the characteristic of being generally known. DataWave does acknowledge that third parties' software to meet the same need was out in the market for e-mail migration service, in competition. Amended Complaint, ¶ 30. This raises the possibility that there might have been only one potential platform for a program to perform the function across e-mail systems, which perforce have some level of commonality to interact with one another. If that were the case, it would raise the bar for alleging PAMM's uniqueness to bolster its status as a protectible secret. *Jostens, Inc. v. Nat'l Computer Systs., Inc.*, 318 N.W.2d 691, 698 (Minn. 1982) ("Mere variations in general processes known in the field which embody no superior advantages are not protected").

In short, the Amended Complaint has no fact-pleading toward this requirement. This fails muster under Rule 12(b)(6).[40]

The second statutory element is that the alleged secret is *not "readily ascertainable."* *Electro-craft Corp.*, 332 N.W.2d at 900. In essence, this means that the alleged secret is not easily reverse-engineered--i.e. discoverable by taking the commercially-available product and breaking it down into its component parts using generally-available technology. *Electro-craft Corp.*, 332 N.W.2d at 899. If the information in question is "easily" accessed through reverse engineering, i.e. discoverable without significant expenditure of labor, time, and cost, it is readily ascertainable and thus does not qualify as a trade secret. *Id*. On the other hand, the more detailed and complex an alleged secret is, the less likely it can be found readily ascertainable. *Id*.

Another consideration relevant to ready ascertainability is the identity of the employee-developer(s) of the information in question; the relative experience, skill, and expertise of the developer(s); and the input of that personal skill into the information that is to be analyzed as a trade secret. If an employee-developer's creativity, skill, and pre-employment experience with

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[40]There is also the point that DataWave barely even alleged that the protectible information was confidential during the Debtor's development and use of it. Pleading that alone would not have been enough, *Hot Stuff Foods, LLC v. Dornbach*, 726 F.Supp.2d 1038, 1044 (D. of Minn. 2010); but it would have been a start, at least.

the subject matter and processes of the alleged secret are so intrinsic to the alleged secret, a process or aggregation of information may be far more personal to the employee; it may not be a unique and protectible trade secret belonging to the employer. *Electro-craft Corp*., 332 N.W.2d at 898-899; *Lasermaster Corp. v. Sentinel Imaging*, 931 F.Supp. 628, 636-637 (D. Minn. 1996). *See also Dynamics Research Corp. v. Analytic Sciences Corp.*, 400 N.E.2d 1274, 1283 (Mass. App. 1980).[41] Here, again, DataWave's pleading fails to address ready ascertainability as a requirement, and it fails entirely. On a more abstracted level, the thrust of the fact-pleading is far too broad: a former employee wrote a similar program for his new employer. Amended Complaint, ¶ 26. As to this requirement, the Amended Complaint fails muster under Rule 12(b)(6) as well.

The third statutory element is *an independent economic value to the maintenance of secrecy* for the information in question. *Electro-craft Corp*., 332 N.W.2d at 900. The case law does not set out a rigid analysis for this requirement. However, the element descends from a cognate in the common law, and it carries forward the same thought: the possession of the secret must give the holder some economic business advantage in the market's open competition. *Id*. If a competitor accessing the information would get a market advantage without having invested the time and money into its development that the holder did, the requirement might be met. *Surgidev Corp. v. Eye Tech., Inc.*, 648 F.Supp. 661, 698 (D. Minn. 1996), *aff'd* 828 F.2d 452 (8th Cir. 1987).

By now, it almost goes without saying that DataWave's pleading fails muster on this count also. The phrase "independent market value" is absent from the complaint. And with this tag absent, there is no other fact-pleading that goes to the issue as a matter of logic.

The final requirement is that the plaintiff have taken *reasonable steps to maintain secrecy*, before complaining of a misappropriation. *Electro-craft Corp*., 332 N.W.2d at 901. This is the only requirement as to which the Amended Complaint has some cognizable content. DataWave alleges that the Debtor had had Janc, as an employee-developer, sign the BPC, and the

[41]In *Electro-craft Corp*., the Minnesota Supreme Court cited *Dynamics Research Corp.* as authority for this point.

BPC included a covenant of non-competition, obligations of confidentiality, and an assignment to the Debtor of the rights in PAMM. Amended Complaint, ¶ 22; also ¶¶ 23, 43, 52, 60, and 69. This unquestionably was a measure to maintain secrecy as to the content and attributes of PAMM.

Bluesource (and Akaibu and TDS, by joinder) does admit as much. But then the Defendants go for a preemptive shot on the cheap. They assert that the measures pleaded were not reasonable, on the basis of the surrounding fact-pleading. This argument has no merit.

Under MUTSA, the reasonableness of measures to maintain secrecy of trade-related information is an issue of fact. *Gronholz v. Sears, Roebuck and Co.*, 869 F.2d 390, 393 (8th Cir. 1989); *Surgidev Corp. v. Eye Tech., Inc.*, 648 F.Supp. at 693 (". . . to determine if secrecy has been maintained, the trier of fact must consider the entirety of circumstances surrounding its use"), *aff'd* 828 F.2d 452. Where an issue is denominated as one of fact, a defendant may prevail on it in a motion for dismissal in only two scenarios: the complaint is devoid of fact averments going to the issue; or case law precedent has already classified a particular pleaded allegation as insufficient to meet the issue.

Numerous possible measures for secrecy may be considered in passing on the reasonableness of what a particular plaintiff did. Brent A. Olson, 20A1 Minn. Prac., Business Law Deskbook ¶ 18:7 (2015) (collecting citations to numerous opinions). But no extant court decisions support the Defendants' blunt and shallow argument, that the measures pleaded here were not reasonable as a matter of law. Bluesource's argument that the BPA *became* unenforceable against Janc under its terms may not bear at all on the maintenance-of-secrecy requirement as it went to Janc's active downloading, or the later expropriation of PAMM's capabilities that DataWave attributes to him and his later employers. In any event, that issue is fact-bound as well and there are not enough fact-averments on the record to address it in a principled fashion.[42] This stab toward dismissal is another shallow and gratuitous move that only wasted time and attention.

[42]Shame on Bluesource for even making this argument in the context of a motion for dismissal--not having deigned to responsively *plead independent fact-averments* to support an affirmative defense.

On a collateral track, the Defendants asserted that the receiver failed to take reasonable steps to protect secrecy during his tenure. This argument similarly presents inherent fact issues; it definitely is not sustainable as a matter of law. The argument also elides the fact that the BPA continued in force against Janc during the receiver's tenure as custodian of PAMM, and Janc had no fewer duties under it then than he did to the Debtor or to DataWave as the Debtor's successor.

This last requirement is the one prerequisite for *trade secret protection* on which the Amended Complaint is adequate.

The other main element for Claim Eight is *misappropriation*. (It will be assumed for the sake of analysis that there was a trade secret in the picture at the time of the relevant events, notwithstanding the noted infirmities of the pleading.)

MUTSA defines "misappropriation" as:

> (i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (ii) disclosure or use of a trade secret of another without express or implied consent by a person who
>
>> (A) used improper means to acquire knowledge of the trade secret; or
>>
>> (B) at the time of disclosure or use, knew or had reason to know that the discloser's or user's knowledge of the trade secret was
>>
>>> (I) derived from or through a person who had utilized improper means to acquire it;
>>>
>>> (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
>>>
>>> (III) derived from or through a person who owed a duty to the

> person seeking relief to maintain its secrecy or limit its use; or
>
> (C) before a material change of the discloser's or user's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Minn. Stat. § 325C.01, Subd. 3. It further outlines the included term "improper means" as:

> . . . includ[ing] theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

Minn. Stat. § 325C.01, Subd. 2. DataWave does not cite the statute, per se, as to the bases for liability it posits. A loop through the Amended Complaint leads to the conclusion that DataWave complains of both *disclosure* and *use* of a trade secret, without consent, by a party that had an obligation to preserve its secrecy.

As to this element, the analysis must separate out by each defendant as a potential actor on a misappropriation.

As to Janc, the Amended Complaint has enough to make out an acquisition by him, in one sense--the download. There is no explicit allegation that he then gave any associated trade secret (i.e. made a disclosure) to Bluesource, Akaibu, or Edwards. There is enough on which to make such an inference, however, in the allegations that he went to work for Bluesource; took a copy of PAMM with him; and then developed a competing program for Bluesource. Amended Complaint, ¶¶ 24-28. Unquestionably, these allegations presuppose that Janc gave any related trade secret to Bluesource, by using PAMM while he worked for Bluesource.

There is no affirmative allegation that Janc lacked consent from the holder of the alleged trade secret when he did these things. Again, there is a basis for an inference of that: the allegations that Janc did this during the term of the receivership, "intentionally, willfully, and wrongfully" breaching his obligations under his BPA by doing so. Amended Complaint, ¶¶ 23, 28, and 86. This is enough of an allegation toward Janc having knowledge of a duty of secrecy that arose during his employment.

Thus, as to Janc the Amended Complaint does adequately plead a misappropriation, potentially as to both acquisition and disclosure.

As to Kvidera, disclosure is adequately pled: the giving to TDS of a license key that he was not authorized to give. Amended Complaint, ¶ 29. There is an allegation of lack of authority from the receiver, Amended Complaint, ¶ 23, which can equate to lack of consent from the holder of a potential trade secret. Kvidera's breach of his BPA is also adequately pled. Amended Complaint, ¶¶ 22, 43.

As to Bluesource, Akaibu, and TDS, improper acquisition and use involves a different factual context. The allegations as to Janc and Kvidera make out the use of improper means by them in their original acquisition from the Debtor. Bluesource is properly attributed with knowledge of that improper means, in the allegation that Edwards had reviewed Janc's BPA with the Debtor. Amended Complaint, ¶ 24. By derivation, Akaibu (an entity founded by Edwards), would be properly attributed with this knowledge. Amended Complaint, ¶ 24.

This is enough to plead an acquisition by Bluesource, Akaibu, and Edwards, from a party whom they knew to be under a duty of secrecy.

As to TDS and Clark, there is the explicit allegation that Kvidera was hired for the purpose of acquiring PAMM and its attributes. Amended Complaint, ¶ 25. There is no explicit allegation that Clark (hence TDS) knew that Kvidera was subject to duties under the BPA. However, given the means by which TDS got the license key, there is enough stated on which to infer that TDS and Clark knew that Kvidera might be using some improper means to get them the licensing key. TDS had actual notice of the Debtor being under receivership--it did, after all, wire the consideration directly to the receiver. To be sure, there could be more detail as to TDS having the knowledge that it would be invading a trade secret. But DataWave will have the opportunity to provide that on repleading.

This leaves the appropriate form of disposition on these motions as the last matter for treatment of Claim Eight.

Clearly, dismissal as to the Trustee is necessary, and it should be with prejudice. Any and all rights of suit under a trade-secret theory went to DataWave in the sale and the Trustee had no right to name himself as a plaintiff for this cause of action.

As to DataWave, there is a basis for standing, on the ground that it took all of the estate's preexisting rights of suit on this theory whether they arose in the Debtor's favor pre-petition or arose in favor of the bankruptcy estate post-petition. In addition, DataWave might have a right of suit in its own capacity, for any misappropriation identified to post-sale activity by any of the Defendants.

Any disposition for DataWave as plaintiff has to focus on the Amended Complaint's substantive deficiencies on the trade-secret cause of action--its failure to plead the requisites of a protectible trade secret. The Amended Complaint is seriously lacking in content for that threshold element. The little that is pled may even support an inference that the information in controversy was not a protected or protectible trade secret at all--whether as a bundle of personal, experienced-derived knowledge attributable to Janc as a person; or as a sole-possible solution to a common problem in e-mail migration, readily-conceivable through generally-available means.

It is tempting to say that DataWave has not suggested "at least colorable grounds for relief" on Claim Eight to date, as was its initial burden in pleading. Were that the case, a grant of leave to amend could properly be denied, despite the general preference for liberality in grants of such leave. *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 224 (8th Cir. 1994).

However, the possibility of a protectible trade secret in PAMM or some part of it cannot be rejected out of hand--not the least because of the highly technical nature of the subject matter, the inaccessibility of the actual information within the source code to untrained members of the general public, and so forth. To opposite effect, it has not yet been alleged that PAMM embodied a unique, unprecedented solution for its target function, not reproduceable through alternate approaches. But, given the lack of any averment from the defense decisively to the contrary, one cannot say that is impossible, in words that would resonate with DataWave's chosen theory.[43] Thus, DataWave will be granted leave to amend, to address the deficiencies in its pleading in Claim Eight.

V. Count on Allegation of Infringement of Copyright (Claim Nine)

The Amended Complaint's Claim Nine sounds under another body of law outside the standard turf of the bankruptcy court and its processes. The Plaintiffs seek an award of damages on a claim pleaded against all of the Defendants, under the federal statutory law of copyright. The assertion is that the Defendants have infringed on a copyright for PAMM.

Apart from another stock reincorporation of the earlier pleading, this count consists of only three averments:

> 90. DataWave copyrighted PAMM on January 31, 2013.
>
> 91. As set forth above, Defendants Bluesource, Akaibu, and TDS have reproduced, used, distributed, and/or made the PAMM source code, software, and license keys into derivative work without Procedo's permission.
>
> 92. As the copyright owner, DataWave is entitled to recover actual damages and profits from Bluesource, Akaibu, and TDS attributable to the infringement, including attorney fees and costs.

Amended Complaint, ¶¶ 90-92. The closing prayer for relief requests judgment "against Defendants in favor of Plaintiffs for damages measured by the transfers, for copyright infringement . . . ." Amended Complaint, 23. However, Claim Eight's allegation of an "entitle[ment] to recover damages and profits . . . attributable to the infringement" names only the corporate defendants--Bluesource, Akaibu, and TDS. To the extent that the Plaintiffs would have the prayer for relief considered as a "complaint" against the four individual defendants, Claim Eight must be dismissed;

[43] Again, the defense is trying to grab all options, despite its choice of a specific preemptive means to get the litigation against it terminated early on. That means is subject to its own limitations. The defense cannot have all avenues, where the inquiry toward such a termination is circumscribed by the potential scope of the Plaintiffs' pleading.

there is no fact-pleading at all to support a claim on which legal relief could be granted against those defendants under a copyright-related theory, because there is no statement that they did anything themselves to infringe.

Then there is the issue of the proper plaintiff. In generic fashion, ¶ 96 and the prayer for relief identify "Plaintiffs" as the complainants on this count. However, the terms of the Trustee's sale apply to the right of action under Claim Nine to even surer effect than they did to Claim Eight. "Debtor's entire right, title and interest in all copyrights . . . [referenced] in the 'Software' provision" of the APA, i.e. PAMM, "in all versions . . . including the software and service codes" enumerated after that, were sold to DataWave. That sale included an assignment of "all rights of recovery for past infringement." The last quoted word unquestionably signifies a violation of copyright. Schedule 1.1 to APA [Dkt. No. 18, at 1-2]. The Trustee cannot assert a status as a revested owner of these rights of suit any more than he could the trade secret-related ones. *Supra*, 24. DataWave is the sole party in interest as plaintiff for Claim Nine; thus, Claim Nine must be dismissed against the three corporate defendants, as to any right of recovery asserted by the Trustee.

This leaves a claim by DataWave, against Bluesource, Akaibu, and TDS, on the assertion of infringement of copyright.[44] None of the parties--not DataWave in its pleading, nor the

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[44]This is as good a time as any to address the matter of jurisdiction--which is necessary because Bluesource [Motion to Dismiss, Dkt. No. 26, p. 13]; Akaibu [Motion to Dismiss, Dkt. No. 30, p. 14]; and TDS [Motion to Dismiss, Dkt. No. 35, p. 20] all asserted a lack of the federal bankruptcy jurisdiction as a basis for the dismissal of all claims as to which DataWave was the real party in interest as plaintiff. It goes without saying that DataWave's claims under Claims Eight and Nine do not qualify as core proceedings in the Debtor's bankruptcy case, within the scope of 28 U.S.C. §§ 157(b)(2)(A) - (O). All of the enumerated types of core proceeding that are linkable to specific governing law--i.e., 28 U.S.C. §§ 157(b)(2)(B) - (N)--implicate the central forms of relief in bankruptcy: discharge of debt and the administration (assembling and division) of the bankruptcy estate. Core proceedings have been described as "those which arise only in bankruptcy or involve a right created by federal bankruptcy law." *Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773 (8th Cir. 1995). The catchall provisions of 28 U.S.C. §§ 157(b)(2)(A) and (O) are not to be construed broadly. *In re Cassidy Land and Cattle Co., Inc.*, 836 F.2d 1130, 1132 (8th Cir. 1988). But the bankruptcy jurisdiction extends beyond that, to "all civil proceedings related to cases under" the Bankruptcy Code. 28 U.S.C. § 1334(b). The scope of related-proceeding jurisdiction has long been described as "broad." *E.g., Cutcliff v. Reuter*, 791 F.3d 875, 881-882 (8th Cir. 2015); *Buffets, Inc. v. Leischow,* 732 F.3d 889, 894 (8th Cir. 2013); *In re Farmland Industs., Inc.*, 567 F.3d 1010, 1019 (8th Cir. 2009); *In re Titan Energy, Inc*., 837 F.2d 325, 330 (8th Cir. 1988). It is "met if the proceeding 'could alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankruptcy estate.'" *Cutcliff v. Reuter*, 791 F.3d at 881-882; *In re Dogpatch U.S.A., Inc*., 810 F.2d 782, 786 (8th Cir. 1987). *See also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995); *Integrated Health Servs. of Cliff Manor, Inc. v. THCI Co., LLC*, 417 F.3d 953, 958 (8th Cir. 2005); *Kocher v. Dow Chemical Co.*, 132 F.3d 1225, 1230-1231 (8th Cir. 1997); *Abramowitz v.*

Defendants in any of their motions--recognize the substantial complexities of that cause of action, or the full onus that lay on DataWave to plausibly plead such a claim. On the other hand, the Defendants failed to recognize the nub within the Amended Complaint that suggests that DataWave would be able to adequately plead a claim by amendment.

A properly-pled claim for copyright infringement should expressly address seven elements for the cause of action.[45]

The first is a *registration* of the asserted copyright. Under the Copyright Act of 1976, copyright protection attaches in favor of the author of a work as soon as it is fixed in a tangible medium. *Community For Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). At that moment, the author is granted the exclusive rights of a copyright for the work. However, registration of a copyright with the Copyright Office is a prerequisite to bringing an action for infringement. 17 U.S.C. § 411(a); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 156 (2010). When the Copyright Office approves the registration, a certificate of registration is issued to the owner. U.S. Copyright Office, Circular No. 1: Copyright Basics, p. 7 (2012) available at http://copyright.gov/circs/circ01.pdf

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Palmer, 999 F.2d 1274,1277 (8th Cir. 1993); *In re Titan Energy, Inc*., 837 F.2d at 330 (all opining that related-proceeding jurisdiction may lie where the outcome of a proceeding "could conceivably have any effect" on the administration of the bankruptcy estate). The outcome of DataWave's copyright and trade-secret claims certainly could have an effect on the Trustee's administration of the estate. A judgment in DataWave's favor will result directly in money coming into the estate upon collection, under the join-and-share provisions of the settlement between the estate and DataWave. The settlement resolved a snag of uncertainties as to the Plaintiffs' rights against each other as well as their respective rights against the Defendants. And contrary to the Defendants' argument, the settlement was not a facile but empty pretext for DataWave to invoke the bankruptcy jurisdiction over claims against the Defendants that legally inured only to DataWave and should have been brought in other forums under other jurisdiction. The estate's practical chances of realizing on the balance of the purchase price for the Debtor's assets were tied directly into DataWave's successful transition into fulfilling the Debtor's customer contracts. Both Plaintiffs allege with some substance that the return to both DataWave and the estate from the sale was destroyed by the Defendants' wrongdoing. The Trustee would have had a claim against DataWave under the APA, perhaps regardless of DataWave's separate success against the Defendants. The two Plaintiffs' interests were deeply intertwined in the root-cause of their common frustration, which they attribute to the Defendants' wrongdoing. There was nothing pretextual in the way they pared down the large number of potential disputes they faced in cumulation, and joined to confront the Defendants on a much smaller number and range of disputes. The outcome of DataWave's individual claims against the Defendants has a fully-conceivable impact on the Trustee's handling and administration of the estate. Thus these claims qualify in context as related proceedings under the bankruptcy jurisdiction.

[45]None of the parties seemed to recognize this rather important point. In any event, no party's argument was built on it.

(last visited March 31, 2016). Registration is prima facie evidence of a valid copyright. 17 U.S.C. § 410(c).

DataWave did not plead in precise terms that a copyright for PAMM had been registered. The only allegations regarding the arising and protection of a copyright are too vague: "DataWave *obtained* a copyright on PAMM on January 31, 2013," Amended Complaint, ¶ 20; and "DataWave *copyrighted* PAMM on January 31, 2013," Amended Complaint, ¶ 90 (emphasis added in both). Neither of these allegations uses the verbs that have meaning under the Copyright Act, going to the fact of registration as a prerequisite to suit. However, the verbiage is evocative enough of the real thing that DataWave should be given an opportunity to say it correctly via amendment--despite the Defendants' snippy insistence on dismissal for not using the right word.[46]

The second element for the cause of action is the *ownership* of the copyright. A plaintiff must own a copyright to sue for infringement. *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 830 (8th Cir. 1992); *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 941 (8th Cir. 1992). Ownership can be obtained in two ways: accession as author, upon the fixing of the work in a tangible medium; or acquisition from a prior owner. Acquisition by transfer requires compliance with 17 U.S.C. § 204(a), i.e. the obtaining of "an instrument of conveyance, or a note or memorandum of the transfer, . . . in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent." As to owner-status, the Amended Complaint's historical narrative rules out author-owner status for DataWave. Transferee-owner status has support, via the allegations regarding the Trustee's sale to DataWave, Amended Complaint, ¶ 18, and the use of the APA as an exhibit to the Amended Complaint. As assets being sold, the APA expressly includes all rights to sue for past infringement, in addition to a present interest in any copyright itself. APA, Schedule 1.1 "Intangible Assets" [Exhibit to Amended Complaint, Dkt. No. 18, p. 61].

This raises another wrinkle, which turns on the time(s) of the infringement(s) complain-of. To "institute an action," a plaintiff may sue only if an infringement was "committed

[46]The defense's attachment to magic words is particularly petty, given the availability of the Copyright Office's readily-searchable registration database on-line at www.copyright.gov.

while [the plaintiff] is the owner of it," i.e. the copyright. 17 U.S.C. § 501(b). DataWave does not allege the identity of the holder of a copyright in PAMM for any relevant time. The only allegations in reference to the Debtor term it the developer and owner of PAMM. Amended Complaint, ¶ 17. Had the Debtor been termed the "author," the linkage to a pre-sale vesting of a copyright would have been more clear. If the notion is that a work-for-hire relationship involving Janc vested the Debtor with a copyright in a creation of Janc's, no facts are pled to that effect. The allegations in ¶¶ 20 and 90 do not go conceptually to the notion of the Debtor or DataWave *owning* a copyright.

After that, DataWave does not link its accusation of infringement to a specific date or dates, pre- or post-confirmation. Nor does it pointedly allege that either entity (the Debtor or DataWave) had a copyright as of the date of any infringement.[47]

Clearly, the permutations multiply out from these variables--possession, registration, and act of infringement. At present, the Amended Complaint's skeletal narrative might buttress the notion of a copyright lodging in the Debtor through a work-for-hire linkage sometime in 2010, assuming that sort of lodging would be legally viable. It might support that a repose of that copyright in the Debtor's ownership through the date of the Trustee's sale, and passing to DataWave in January, 2011 by the sale; and then an infringement occurring sometime in 2011 and continuing after that. But the imprecise pleading-to-date would only be circumstantial, collateral reinforcement for something that would have to be alleged much more directly. Another issue of law would be posed by the relationship of all that to DataWave's registration of a copyright (again, a fact not pled in so many words so far); the relevant content of the registration itself; and the effect of those things on a cause of action for infringement.

Specific fact-pleading reflective of the actual, as-yet-unknown historical events might be irreconcilably inconsistent with a legally-sustainable claim for infringement. But despite the present gaps and deficiencies of the Amended Complaint, DataWave should have the opportunity

[47]Even with the cumulative incorporation-by-reference of all previous pleading, there are no allegations going to this key point of fact.

to set out more material facts by amendment. The current pleading cannot be considered inconsistent with a viable infringement claim . . . yet.

The third element for an infringement claim, expressed as a requirement for pleading under Rule 8, is an adequate *identification of the work* that would be subject to the copyright at issue, i.e. "which specific original work is the subject of the copyright claim." *Calloway v. Marvel Entm't Group*, 1983 WL 1141, *3 (S.D.N.Y. June 30, 1983). The possibility of physically, operationally, or conceptually separable elements within a product, each individually subject to copyright protection or not, is germane to this issue. *Ochre LLC v. Rockwell Architecture, Planning and Design, P.C.*, 530 Fed.Appx. 19, 20-21 (2nd Cir. 2013).

In the pleading, DataWave identifies the copyrighted work only as "PAMM."[48] PAMM is described as "software . . . that performs email migration and archiving functions." Amended Complaint, ¶ 16. However, the word "software" has an elusive, connotative meaning--to the general public, and (probably) within the programming industry. The Amended Complaint uses the word "software" and "source code" almost interchangeably, though the terms almost certainly denote different things, perhaps the latter a subset of the former. The APA at Schedule 1.1 [Dkt. No. 18, p. 60 of 68] describes PAMM as a collective of several different "modules," apparently with each constituting a separate aggregation of digital code. DataWave never pleads which of the elements of PAMM are the work subject to its assertion of copyright protection, or if a whole thing is.

This point is important for notice pleading and the maintenance of suit by both sides. It may be answered by reference to the content of a registration, if that is what DataWave did on January 31, 2013. The Defendants argue with some strength that some kinds or aspects of computer software are not even subject to copyright at all, as a matter of law. To enable the pursuit of this line of defense, DataWave must identify the protected work within PAMM, up to the entirety of it, that DataWave posits as being under copyright. On amendment, it will not be necessary to identify every single minute component with specificity. But if the entirety of PAMM is the protected

[48] Hence the indeterminacy within the phrase "copyright in PAMM" and variations thereof, as they appear in this decision. It isn't pretty, but it's all that can be used.

work, however it has been described to date, DataWave must define it by any elements that constitute works under copyright law, to enable the defense to develop the nuances of its theory on this element.

The fourth requirement for a prima facie case on infringement is a *right to be vindicated* in the plaintiff. This consideration overlaps with the element of ownership. It applies chiefly in situations where a copyright has been licensed or purchased and the licensee or purchaser is the plaintiff. 3 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 1202[C] (Matthew Bender, Rev. Ed.). For an author who originated a work, this is not an issue. If a plaintiff is not an author, it must have possessed the specific right in the work that would be vindicated by suing on an infringement of a copyright in the work.

Assumed as true, DataWave's pleading meets this element. As the purchaser of PAMM from the estate, DataWave would have acquired and then owned any and all rights to the work itself, and to all protection of copyright as to the full work.[49]

Identifying an infringement of an exclusive right, with reference to the infringed-on copyrighted work and the acts of infringement, is the fifth element. *Hartman v. Hallmark Cards, Inc.*, 639 F.Supp. 816, 820 (W.D. Mo. 1986), *aff'd*, 833 F.2d 117 (8th Cir. 1987). *See also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (defining "infringer of [a] copyright" by nature of violation of legally-established rights). *Cf. Franklin Elec. Publishers, Inc. v. Unisonic Prods. Corp*., 763 F.Supp. 1, 4 (S.D.N.Y. 1991) (inability to determine from pleading whether infringement had been on software elements or visual elements of computer).

At this point, the defense slipped in a point that is relevant to the inquiry on this element: ideas, processes, procedures, systems, and methods of operation are not subject to copyright. *See* 17 U.S.C. § 102. Creating a work that performs the same function or completes the same process as a different, copyrighted work, is not an infringement standing alone. The

[49]The point here goes to DataWave's accusation that Janc produced a competing program derivative of PAMM for Bluesource after he went to work there. The owner of a copyright has "the *exclusive* right . . . to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2) (emphasis added).

Defendants do raise a point: this precept poses a challenge of proof for infringement actions like DataWave's, because computer software is generally function- or process-based. *E.g.*, *Oracle America, Inc. v. Google, Inc.*, 872 F.Supp.2d 974, 998 n.8 (N.D. Calif. 2012). Thus, the identification of the work for this element should name it by a fixed, discernible medium, such as the source code for a full program, or by content, i.e. some other definable component within the program's structure.

As to the act of infringement, the courts recognize the inherent difficulties: direct evidence of infringement is rarely available. *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 732 (8th Cir. 2006). For purposes of pleading and proof, a plaintiff may allege that the putative infringer had access to a protected work, and the similarity between the protected work and the one sued-on, as a substitute for direct evidence. *Nelson v. PRN Prods., Inc.*, 873 F.3d 1141, 1142 (8th Cir. 1989). Access may be established by demonstrating that a defendant had an "opportunity to view or copy." *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d at 942 (citation and internal quote omitted). Substantial similarity is a two-part question, going to both "the general ideas [and] the expressions of those ideas as well." *Hartman v. Hallmark Cards, Inc.*, 833 F.2d at 120 (citation and internal quote omitted).

As to Bluesource and Akaibu, DataWave does not plead an infringement with enough specificity. The pleading is certainly sufficient as to Janc's access to PAMM, and his sharing of it with Bluesource and Akaibu. But DataWave identifies the "Evolve" program-product as the ultimate vehicle of the alleged infringement on a copyright in PAMM. As to that, it does not identify any component or structural aspect of "Evolve" as an infringement itself, as to a component, structural aspect, or other protectible element of PAMM.

The allegation that "Evolve" "performs the same functions as the PAMM software," Amended Complaint, ¶ 26, is obviously not sufficient. The statute itself says so, because functionality is not capable of copyright. There is nothing beyond that in the Amended Complaint that goes to a similarity between the two programs, let alone the substantial similarity that is necessary to support an inference of infringement. This may be down at the level of source code, if it lies anywhere; but neither that nor any other nexus of substantial similarity is pled.[50]

As to TDS, the allegation of an unauthorized receipt of a licensing key from Kvidera suffices as to the access requirement. But there is no allegation that TDS went on to produce anything derivative using copyrighted elements of PAMM, or even to use and adapt some other party's derivative work.

It has been judicially recognized that with universally-used technology, a software user's computer generally reproduces the software on installation, and that process constitutes a "copy" within the purview of the exclusive rights that are lodged in a copyright holder under 17 U.S.C. § 106. *Levey v. Brownstone Inv. Group, LLC*, 590 Fed.Appx. 132, 135-136 (3d Cir. 2014).[51] If this is the basis for DataWave's claim of infringement against TDS, the complaint should say so. If the more weighty act of alteration, adaption, or producing a derivative work is the basis, the complaint should say that. *Levey v. Brownstone Inv. Group, LLC*, 590 Fed.Appx. at 136.

Again, it cannot be said categorically as a matter of logic, that newly-pled specific facts responsive to this element would be irreconcilably inconsistent with prior pleading. So DataWave will have an opportunity to amend toward (far) better detail on this element as well.

Timely commencement of suit is the sixth element of infringement that must be pled. The Copyright Act includes a three-year statute of limitations for claims of infringement. 17 U.S.C. § 507. The period commences with the occurrence of the infringement. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, ___ U.S. ___, 134 S.Ct. 1962, 1969 (2014).

As pleaded already, the Amended Complaint is sufficient for this as to Bluesource and Akaibu. The allegations are that Janc started his employment with Bluesource between

[50] At least once during hearings throughout this campaign, the Defendants offered a line-by-line review of source codes by a third-party expert as a way of getting to the bottom of this point. Probably, it will have to come to that.

[51] Hence, the strictly-structured grant of license to any retail customer "purchasing" software on the open consumer market, that is embedded in the lengthy boilerplate appearing for the purchaser's consent immediately on initial download.

January and June, 2011. This adversary proceeding was commenced on July 31, 2013, with a count for copyright infringement pled in the original complaint. As to TDS, the allegation is that it received a licensing key without authorization just as the Debtor was put into bankruptcy, on December 6, 2010. It is, of course, possible that some separate act of infringement on TDS's part occurred after that.

The Amended Complaint is not chronologically linear and is none too precise either, as to the sequence of the events relevant to Claim Eight. But even on the skeleton summarized above, with an inference in DataWave's favor that Bluesource began exploiting PAMM as soon as Janc brought it in, timeliness of suit is made out. If the mere act of TDS's acquisition of access implies immediate exploitation by TDS, timely commencement of suit against that defendant is pled for DataWave as well.[52]

Damages by nature and entitlement is the last element of infringement. At broadest, a plaintiff in a case for infringement of copyright has two options as to damages: actual damages and profits (i.e. the defendant's enrichment from the infringing use), or statutory damages under 17 U.S.C. § 504. However, registration prior to the act of infringement is a prerequisite for an entitlement to statutory damages, 17 U.S.C. § 412, subject to limited exception for a registration made within three months of the first publication of the work, 17 U.S.C. § 412(2).

For this analysis, it will be assumed that DataWave's imprecise terminology reflects its act of registration, taking place on January 31, 2013. The other fact-pleading suggests that a first publication would have occurred no later than sometime in 2010. Thus it does not seem that any infringement took place within three months of any first publication, if the infringement was inherent in the pleaded acts of Janc and Kvidera in mid- to late 2011 or their near-term consequences in the pleaded actions of the corporate defendants in consort with Kvidera and Janc. Those would have taken place six to nine months or more, after the end of 2010.

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[52]Regardless, it would be prudent for DataWave to plead more detail on a historical timeline, for future attention to this element in any ensuing procedural context--not to mention for the materiality to other surviving claims.

Thus, any claim for statutory damages would have to be premised on an act of infringement, strictly and separately identifiable, that occurred after January 31, 2013. DataWave does not identify anything like this in the pleading. Read in DataWave's favor, the pleading alleges a first act of infringement sometime in 2011.

The pleading does not expressly frame the notion of a continuing infringement, but DataWave may be driving at that. However, the Copyright Act does not recognize continuing infringement for the accrual of a right to statutory damages--requiring, as it does, a temporal proximity to registration. It seems that almost every circuit but ours has rejected the idea. 6 William F. Patry, Patry on Copyright § 22:201 (2016) (collecting cases). And, the Eighth Circuit has not addressed the issue.

This is probably why DataWave did not request an award of statutory damages as such, and never invoked 17 U.S.C. §§ 504-505 for a measure of damages. In the Amended Complaint's prayer for relief, the request is for actual damages, profits, attorney's fees, and costs.

For attorney's fees and costs, the invocation is "pursuant to 17 U.S.C. § 501 et seq." If this incorporates a reference to 17 U.S.C. § 505, it is inapposite. Attorney's fees are only recoverable under the Copyright Act in conjunction with an award of statutory damages. 17 U.S.C. § 412. If DataWave expects to recover attorney's fees, it will have to pull up some authority other than the statute.

This analysis will trim out a lot of potential controversy from Claim Nine via the dismissal of various parties and claims to recovery. It also puts the onus on DataWave to substantially refine the surviving aspects of the claim. The Trustee will no longer be a party-plaintiff under Claim Nine, and there will no longer be claims in suit under Claim Nine against Kvidera, Janc, Clark, and Edwards. DataWave must plead more detail on multiple points of fact: the specific work(s) within PAMM as to which a copyright arose; the genesis and attachment of ownership rights as to such copyright(s); registration; the specific nature and circumstances of the infringement(s) sued-on; the relation of the infringement(s) to other acts and events that are relevant to rights of suit under the Copyright Act; the identity and nature of the derivative work that TDS is alleged to have created from PAMM; and any other acts, events, or circumstances that bear on the statute of limitations for suit on infringement. This all sounds like a tall order; but addressing these points via amendment will be necessary to set out a sustainable cause of action on Claim Nine. DataWave will have its opportunity to do that.

VI. Counts on Various Causes of Action Under State Law (Claims Ten and Twelve through Fourteen)

With one exception, the balance of the Amended Complaint's pleaded counts sound under nonbankruptcy *law*--i.e. state common law.[53] These counts have the same internal inconsistencies as to the identity of the plaintiffs seeking relief.[54]

Individually or collectively, the Defendants have pointed that out. They also attack the adequacy of the fact-pleading to support liability in them, individually or collectively, under the common law principles named as the bases for the various counts.

However, at this stage it is not warranted to get hammer-and-tongs into all of those contentions or the Plaintiffs' attempts to vindicate their pleading. The reason is that the Plaintiffs do not identify which state's common law they rely on for the claims pleaded in these counts. That is of real moment for three reasons.

First, a state's, some state's common law has to govern. "There is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Second, it is not foreordained that a particular state's law governs. Here that one state could be Minnesota, at least as the Defendants have assumed in the way they frame their arguments for dismissal. That is likely to be the case. But among them the Defendants are identified by the pleading to five different states by criteria like residence, state of incorporation, principal place of business, and conduct of

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[53]The one outlier is Claim Eleven, which is articulated as a claim for unjust enrichment and therefore sounds in *equity*. That one has its own problems for viability, and is treated separately.

[54]Which is to say, there is the same rote reincorporation of all previous pleading, at the behest of "Plaintiffs" generally, and vague closing allegations that "Plaintiffs" suffered injury or harm or are otherwise "entitled to judgment." Specific factual allegations internal to these counts may suggest real-party-in-interest status in only one or the other of the two plaintiffs, however. As to the identity of defendants alleged to be liable, the counts themselves are somewhat more specific than the earlier counts in the Amended Complaint.

business: Texas, New York, Delaware, Minnesota, and Wisconsin. Amended Complaint, ¶¶ 3 (Bluesource; three different states including Minnesota); 4 (Akaibu; Texas); 5 (TDS; Delaware, New York, Minnesota); 6 (Clark; New York); 7 (Edwards; Texas); 8 (Janc; Wisconsin); 9 (Kvidera; Minnesota). For the attachment of a particular state's legal governance, the relevant acts and relationships might repose anywhere among them. The Debtor is identified to Minnesota alone. Amended Complaint, ¶ 1 (incorporation and principal place of business). The BPA, at its paragraph 76, states that it is to be governed by Minnesota law.[55]

The fact-pleading does not link the alleged wrongdoing to any geographic situs. Nor does it furnish any other rationale for subjecting any particular claim to the legal governance of any particular state. Minnesota is the most likely source of governing authority on law here. But nothing in the pleading furnishes a colorable basis for that--there is not even a unilateral invocation by the Plaintiffs, with factual support or not.

Third, particular states may vary in their identification of the elements for a cause of action at common law.[56] More fundamentally, not all states' supreme courts may have formally recognized all of these causes of action, even within the limited constellation of forums noted earlier. *E.g.*, *Millman v. Provident Life & Acc. Ins. Co.*, 2014 WL 3725342 *1 (W.D. Mo. July 25, 2014) (dismissing count of plaintiff's complaint because Missouri had not yet recognized common-law cause of action on which count was based).

Frankly, absent any of that there is no warrant to spend judicial resources on determining the adequacy of the Plaintiffs' pleading on these counts. It would neither be economical nor appropriate to pose the choice-of-law issue *sua sponte* and then dispose of it

[55]The BPA is Exhibit 4 to the Declaration of George H. Norris, in support of Bluesource's and Edwards's motion for dismissal [Dkt. No. 14, 31 of 35].

[56]This is a long-recognized incident of federalism's structure in the United States. *Wheaton v. Peters*, 33 U.S. 591, 592-595 (1834) ("No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted only so far as its principles were suited to the condition of the colonies: and from this circumstance, . . . what is the common law in one state, is not so considered in another"). *See also State of Kan. v. State of Colo.*, 206 U.S. 46, 86 (1907) (power of changing common law rule "undoubtedly belongs to each state").

unilaterally, without a strong and sufficiently-specific statement from the Plaintiffs and some input from the defense. At this point, the Amended Complaint may have adequate fact-pleading to meet specificity requirements under Rule 8(a)(2) and to avoid dismissal under Rule 12(b)(6), if Minnesota law furnishes the applicable rule of decision.[57] But the pleading lacks the specificity to make that the issue, at this point in the litigation.

It is not possible to pass on these substantively-founded issues until the Plaintiffs set out a legal *basis* for the claims in these counts. That is to say, they must identify the state that furnishes the common law under which they assert they are entitled to relief; conform their fact-pleading to the requirements of that state's common law; and ultimately show they have the evidence to meet the elements. Since the Plaintiffs have to replead the other counts of the

[57]As to Claim Twelve, "Breach of Fiduciary Duty" on the part of Kvidera, Minnesota law requires the existence of a fiduciary duty and a breach of that duty, plus causation and damages. *ACCAP-HUD Homes Tax Credit Ltd. P'ship v. Minnesota Ctys. Intergovernmental Trust*, 2012 WL 5834560, at *4 (Minn. Ct. App. Nov. 19, 2012). Given Kvidera's pleaded status as a former CEO of the Debtor, enough is pleaded to ground such a duty to the Debtor, and a possible breach via the alleged grant of the licensing key and Kvidera's ensuing actions. Existence of a fiduciary duty may be a matter of law stemming from a particular relationship, *e.g., Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985), or it may be driven by the factual dimension of relationships and "behaviors," *NeoNetworks, Inc. v. Mark U. Cree*, 2008 WL 2104161, at *3 (Minn. Ct. App. May 20, 2008). As to Claim Thirteen, "Conversion" on the part of Janc and Kvidera, Minnesota law requires "an exercise of dominion over [property] which is inconsistent with and in repudiation of the owner's right to the [property] or some act done which destroys or changes their character or deprives the owner of possession permanently or for an indefinite length of time." *Hildegarde, Inc. v. Wright*, 244 Minn. 410, 413, 70 N.W.2d 257, 259-260 (1955). Little need be said about the sufficiency of the pleading to meet this test, with the allegations of Janc's and Kvidera's actions involving PAMM and the effect that those had on the Debtor and its successors-in-interest as to their interests in PAMM. It would be sufficient. On Claim Fourteen, "Aiding and Abetting Breach of Fiduciary Duty" on the part of Bluesource, Akaibu, and Edwards, Minnesota law imposes liability for aiding and abetting when a primary tortfeasor has committed a tort that caused injury to the plaintiff; the defendant knew that the primary tortfeasor's conduct constituted a breach of a duty of the primary tortfeasor; and the defendant substantially assisted or encouraged the primary tortfeasor in the achievement of the breach. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). Again, the fact-pleading should be adequate to make out a claim on this basis, in four allegations: Bluesource and Akaibu were the end-recipients of substantial value from Janc's conversion of PAMM; Bluesource knew about Janc's obligations to the Debtor under the BPP; there was a substantial link between Bluesource and Akaibu through the person of Edwards; and both corporate defendants went on to employ Janc to manipulate the structure of PAMM for their own enrichment. As to the direct adequacy of pleading, the only hinky count is Claim Ten, worded as "interference with business relationships/prospective business advantage" on the part of Kvidera, Clark, and TDS. The titling and orientation of this count do not match to Minnesota's recently-evolving law on such interference-based "business torts," in either of the variant causes of action. *Compare Kjesbo v. Ricks*, 517 N.W.2d 585, 588 (Minn. 1994) *with Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 218 (Minn. 2014). The Plaintiffs should not be held entirely to account for the recent advent of *Gieseke* in Minnesota law, however. Any nonconformity with that decision's rulings could be remedied in an amendment with more thought . . . than is evidenced in the pleading within the Amended Complaint.

Amended Complaint that are not to be dismissed, they will have the opportunity to do this--in that specific regard (legal basis) and in any broader way necessary to meet that specification (allegation of additional historical fact).[58]

VII. Count on Unjust Enrichment (Claim Eleven)

In one more count, the Plaintiffs allege that "Defendants Bluesource, Akaibu and TDS wrongfully and knowingly received a benefit from" the Debtor, when they received access to PAMM's content from Kvidera and Janc, at a time when the Debtor owned PAMM and PAMM was subject to the APA at the instance of the receiver or the Trustee as administrators of the Debtor's assets. Amended Complaint, ¶ 98. Thus, as the Plaintiffs would have it,

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[58] On its face, this reasoning will seem unorthodox. Over the years, the jurisprudence under Rule 8 has avoided any explicit requirement that *law* be pleaded in a complaint with a stated degree of specificity, under jeopardy of dismissal for failure to state a claim upon which relief may be granted. *E.g.*, *Johnson v. City of Shelby*, ___ U.S. ___, 135 S.Ct. 346 (2014) (rules of pleading under *Twombly* and *Iqbal* "do not countenance dismissal of a complaint for imperfect statement of legal theory supporting the claim asserted"); *Hatmaker v. Memorial Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010) (*Twombly* and *Iqbal* "do not undermine the principle that plaintiffs in federal courts are not required to plead legal theories"); *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 846 (8th Cir. 2014). But, the Eighth Circuit has also held that a complaint must give a plaintiff notice of the "claim [put into suit] and the grounds on which it rested." *Eckert v. Titan Tire Corp.*, 514 F.3d 801, 806 (8th Cir. 2008). Though a complaint need not *cite* to the particular authority relied-on for a cause of action, it "must still provide fair notice of the claim," i.e. that the claim is "*based on*" a particular source of law. *Eckert*, 514 F.3d at 807 (emphasis added) (though plaintiff cited ERISA in introductory section of complaint, failure to ever specify that claim for miscalculation of pension benefits was "based on ERISA" merited dismissal). Here, the Plaintiffs have put claims sounding under state common law into suit in a federal court, under the bankruptcy jurisdiction. This adversary proceeding is not in a federal court under diversity-of-citizenship jurisdiction, 28 U.S.C. § 1332. Thus the default rules by which a specific source of law may be identified for that sort of federal jurisdiction, which have evolved since *Erie R. Co. v. Tompkins,* do not apply. This puts a premium on identifying the state that provides the rule of decision under its common law, as to any such claim. Only then will a defendant have "fair notice," and only then will the adequacy of the alleged factual grounds for the claim be determinable from the commencement of suit through proof at trial. This approach relies on a distinction between the legal *theory* of a cause of action and the legal *basis*. The legal theory is best understood as a direct linkage between the facts asserted and the specific elements of the claim under governing law--a detailed, facial explanation of why the claim "works" as fully meritorious in the substantive sense. That deeper level of overt analysis is not required in pleading; it comes later, even as early as a motion for dismissal, but all the magic interlinked words of a spell need not be pleaded initially. The legal *basis*, on the other hand, would be a simple identification of the specific law on which the claim is brought--by origin (common law doctrine) or by memorialization (statute or regulation). For an early vetting under Rule 12(b)(6), the onus of pleading a legal basis actually promotes the inquiry made central by *Twombly* and *Iqbal*, of gauging the plausibility of the claim sued out, on the overall sensibility of its fact-pleading in light of the requirements of the law under which the claim is brought. Justice Souter very nicely put this thought, in his dissent in *Iqbal*: "[W]ithout knowing the elements of [the] claim [in suit], there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim." *Ashcroft v. Iqbal*, 556 U.S. at 691. And where the elements are fixed by common law that can vary from state to state, they can be known only by identifying the state . . . in the complaint.

> [i]t would be inequitable for Defendants to retain the benefits of the PAMM software, source code, and license key without paying for them.

Amended Complaint, ¶ 100. They further allege, "Defendants have been unjustly enriched," Amended Complaint, ¶ 101; and "Plaintiffs have suffered damages in an amount to be proven at trial," *id*.

In theory one or both of the Plaintiffs might make a case for relief on this basis, in the abstract and in isolation. But a claim for unjust enrichment cannot be maintained in this lawsuit. Even pared down by the other rulings in this order, the Amended Complaint asserts multiple other causes of action for recovery of damages under statute or common law. They are premised on the very same factual grounds. Unjust enrichment is an equitable remedy. Equitable remedies lie only where there is no adequate remedy at law. When multiple legal claims on the same subject matter are joined with a claim for unjust enrichment, the equitable claim is barred and must be dismissed. *In re Petters Co., Inc.*, ___ B.R. ___, 2016 WL 787612 *15 (Bankr. D. Minn. Feb. 29, 2016); *In re Petters Co., Inc.*, 499 B.R. 342, 370-375 (Bankr. D. Minn. 2013) (relying on analysis in *United States v. Bame*, 721 F.3d 1025, 1029-1031 (8th Cir. 2013)) (all applying Minnesota law). Claim Eleven must be dismissed, and with prejudice.

VIII. Defense of Discharge in Bankruptcy Asserted by Defendant Kvidera (All Claims).

The submissions of the Bluesource/Kvidera Defendants contained an additional pitch for dismissal, as to Defendant Kvidera and on a defense unique to him: discharge in bankruptcy.[59]

[59] It seems to be proper that Kvidera raised this theory for dismissal in an early motion under Rule 12(b)(6). Before its amendment in 2010, Fed. R. Civ. P. 8(c) classified discharge in bankruptcy as an affirmative defense, which a defendant was required to assert in a responsive pleading at the risk of forfeiting it. (Fed. R. Bankr. P. 7008 incorporates Fed. R. Civ. P. 8(c)). However, discharge in bankruptcy is no longer in the list of such defenses. (The reason for the deletion is obscure; the only evidence is obliquely phrased. *See* Report of the Judicial Conference Committee on Rule of Practice and Procedure 47 (May 2009) available at http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2009 (last visited March 31, 2016)). Given the powerful effect of the discharge injunction in bankruptcy, 11 U.S.C. §§ 524(a)(2) - (3), it seems best to recognize discharge in bankruptcy as a collateral basis for dismissal under Rule 12(b)(6), even if it has nothing to do with the substantive merits as would the lack of an intrinsic, merits-oriented basis "upon which relief can be granted." If a plaintiff is federally enjoined from proceeding to judgment, relief certainly "can [not] be granted" on the claim in suit; this would be contrary to the relief from the underlying liability that would have been granted previously in a collateral bankruptcy case, through a permanent injunction.

Kvidera recites in the submissions that he filed for relief under Chapter 7 in this court on December 6, 2010, opening BKY 10-38676, and received a discharge without objection.[60] An order of discharge was indeed entered for Kvidera on March 14, 2011 [BKY 10-38676, Dkt. No. 35].

So, as Kvidera would have it, end of story; you can't catch me, you can't even chase me.

It is not as simple as that. The full record in BKY 10-38676 reveals much more that is relevant to whether the Plaintiffs may still enforce any claim on which Kvidera would be personally liable.[61]

The clerk's notice in Kvidera's case [BKY 10-38676, Dkt. No. 6] set March 4, 2011 as the deadline for timely filing objections to discharge under 11 U.S.C. § 727(a) or nondischargeability proceedings under 11 U.S.C. § 523(c). No complaints for either relief were timely filed and Kvidera received an order of discharge.

However, there were no entries at all in Kvidera's original and amended Schedules F for Procedo, DataWave, or the Trustee as potential holders of unsecured claims against him. Nor were any of those three parties included on the address matrix for the case, at any point during its pendency.[62] This means that the clerk's notices--including that under Dkt. No. 6--would not have been officially sent to any of those parties. There is no docket entry reflecting that Kvidera or his

[60] Kvidera put himself and the Debtor into bankruptcy on the very same day.

[61] Strictly speaking, the content of the case file in BKY 10-38676 is not "necessarily embraced by the pleadings" as they stood before these motions--which is to say, the Amended Complaint had nothing on its face about Kvidera's status as a petitioner in bankruptcy. Perhaps it is "necessarily embraced by" Kvidera's motion for dismissal; though that looks like the lazy and self-serving stretch of the record that too many defendants essay these days when they move for dismissal. But, whatever--a court can take judicial notice of the facial status of its own records, at least, when that is relevant to a controversy before it. It does not hurt the Plaintiffs' case to indulge Kvidera by looking into his bankruptcy case; he was the one to suggest that, in his attempt at an endgame-maneuver through Rule 12(b)(6). It just does not work to his benefit as readily as he may have thought.

[62] For that matter, none of them were on the address matrix up to the date of the entry of this order. The address matrix is fully accessible via CM/ECF.

bankruptcy counsel served any of the court's notices directly on any of the three, before the deadline for complaint or before the case was closed.[63]

Kvidera failed to list on a schedule either of the two parties that now are suing him on a debt that they attribute at least partly to wrongdoing on his part that occurred before he filed for bankruptcy.[64] This circumstance immediately implicates 11 U.S.C. § 523(a)(3). That nondischargeability provision excepts from discharge an unlisted and unscheduled debt if the debtor's failure to include it prejudiced the creditor's right to participate in the bankruptcy process in either of two ways. *In re Anderson*, 72 B.R. 783, 786 (Bankr. D. Minn. 1987). The first is the right to be a plaintiff in a nondischargeability proceeding that is subject to 11 U.S.C. § 523(c). The second is to receive as a distributee from the bankruptcy estate. *In re Petty*, 491 B.R. 554 (B.A.P. 8th Cir. 2013) (discussing § 523(a)(3)(B)); *In re Everly*, 346 B.R. 791 (B.A.P. 8th Cir. 2006) (ditto); *In re Moua*, 457 B.R. 755 (Bankr. D. Minn. 2001) (discussing 11 U.S.C. § 523(a)(3)(B) and summarizing state of local jurisprudence on it); *In re Hauge*, 232 B.R. 141 (Bankr. D. Minn. 1999) (discussing both provisions).

After its facial trigger (absence from the debt schedules), § 523(a)(3) is not applied in the bankruptcy courts in a formalistic fashion, strictly from the face of the schedules. An unscheduled creditor that has not received formal notice of its debtor's bankruptcy filing may still be denied an exception from discharge if it had actual, extrinsic knowledge of its debtor's status in bankruptcy in time to protect its two sets of bankruptcy-specific procedural rights. The statute itself

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[63]Kvidera did schedule the Debtor--i.e. Procedo--as a co-debtor of his on several debts to third parties, on his Schedule H. Apparently the principal entry on this specialized schedule did not propagate over to the address matrix through the petition-preparation software that Kvidera's bankruptcy counsel used.

[64]Perhaps more meaningfully, he did not see either of those parties, or the Debtor, were included on the address matrix for his case. The address matrix is the practical nexus for the actual giving of notice; the clerk, through the Bankruptcy Noticing Center that contracts with the federal courts, uses the data on it to address all notices mailed to creditors. A filed schedule is just a document on the surface of the court's record. It enables a fuller review of a debtor's whole debt structure; but it does not actually function in the process of giving clerk's notices. The sense of the syntax of § 523(a)(3) is that scheduling automatically leads to receiving notice. It may have worked that way decades ago, when the volume of bankruptcy filings was much lower and clerk's staff performed a high level of quality control (direct comparison of schedules against address matrices) in every single case. Doing it that way has not been feasible for years and years.

says so, in both of its prongs, by its carveout: “unless such creditor had notice or actual knowledge of the case in time” to protect its right to participation. 11 U.S.C. §§ 523(a)(3)(A) - (B); *In re Anderson*, 72 B.R. at 786.

This is the law that governs the situation at bar. It raises a welter of issues in relation to the Plaintiffs’ claims in suit against Kvidera. None of those issues were acknowledged by Kvidera’s counsel (not surprisingly), and not a one of them was raised by counsel for DataWave or the Trustee (most puzzlingly). The Plaintiffs’ factual allegations against Kvidera might well fit an exception to discharge under 11 U.S.C. §§ 523(a)(6) (debt arising from infliction of willful and malicious injury, including conversion), 523(a)(4), or possibly 523(a)(2)(A). An unknowing loss of the opportunity to timely seek such relief against Kvidera would support an exception to discharge under § 523(a)(3)(A). Section 523(a)(3)(B) might also lie to except any debt from discharge here. *In re Hauge*, 232 B.R. at 150. A deadline was set in Kvidera’s case for filing of proofs of claim. The trustee of his estate did make a distribution to creditors, albeit one that did not go down to the priority-bracket for general unsecured claims. [BKY 10-38676, Dkt. No. 60].

Given the way Kvidera’s bankruptcy case was handled, the mere past grant of discharge to him does not bar the prosecution of the Plaintiffs’ current claims against him. It cannot be said at this point that relief cannot be granted to the Plaintiffs as a matter of law, due to the bar of the discharge injunction. Kvidera, then, is not entitled to dismissal across the board on this ground.

On a repleading, it would be prudent for the Plaintiffs to expand the scope of their requested relief against Kvidera, to include a request for a determination of dischargeability under 11 U.S.C. § 523(a)(3). Such relief would not be time-barred by any grant of relief in Kvidera’s own case. *In re Everly*, 346 B.R. at 796. The Plaintiffs’ right to such relief can be addressed within this adversary proceeding.[65]

[65]Requests for exception to discharge under § 523(a)(3) are not subject to the procedural onus of § 523(c). They are not even subject to exclusive federal jurisdiction. *In re Everly*, 346 B.R. at 796; *In re Anderson*, 72 B.R. 495, 496 (Bankr. D. Minn. 1987) (noting that dischargeability under § 523(a)(3) may be determined “by a court [other than the bankruptcy court] when an attempt is made to collect [the] debt” in

OUTCOME

On those rulings, six of the Amended Complaint's fourteen counts must be dismissed with prejudice. All of the remaining counts require amendment, and the Plaintiffs should be given leave to amend. Fed. R. Civ. P. 15(a)(2), *as incorporated by* Fed. R. Bankr. P. 7015. The amendments should evidence a considerably-sharpened analysis as to the appropriate parties-plaintiff for each substantive theory of recovery, and the fact-pleading should be fine-tuned in equal measure. A period of three weeks is sufficient to do that.[66]

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question). (*Willows Convalescent Centers, Inc. v. Durheim*, 434 N.W.2d 677 (Minn. App. 1989) is one local example of how dischargeability under § 523(a)(3) may be determined by a state court.) If the issue may be reached in a collection action brought in state court, it certainly may be presented in an adversary proceeding pending in a bankruptcy court where recovery on the debt is sought--even if that adversary proceeding was not commenced in the bankruptcy case of the referent debtor.

[66]This order includes final dispositions as to some of the claims sued-out in the Amended Complaint. Some of the counts are dismissed in their entirety (Claims One through Five, Seven, and Eleven) and some are dismissed only as to certain plaintiffs or certain defendants (Claims Six, Eight, and Nine). Of the claims sued-out in these counts, some are statutorily classified as core proceedings (Claims One through Four and Seven, 28 U.S.C. § 157(b)(2)(H); Five, 28 U.S.C. § 157(b)(2)(E); and Six, 28 U.S.C. § 157(b)(2)(G) and (O)). As to those, final disposition may be made at the order of a bankruptcy judge. 28 U.S.C. § 157(b)(1). Other claims adjudged appropriate for dismissal have been determined to be proceedings related to the Debtor's bankruptcy case, hence subject to federal jurisdiction via this adversary proceeding (Claims Eight and Nine). Claim Eleven, as an action for damages (or equitable relief cognate to damages) against third parties that are not creditor-claimants against the bankruptcy estate, is in those regards indistinguishable from *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Hence it too is a related proceeding. All of these claims are properly heard by a bankruptcy judge, 28 U.S.C. § 157(c)(1), but a dispositive order or judgment may be entered by a bankruptcy judge only with the consent of all parties to this proceeding, 28 U.S.C. § 157(c)(2). The Plaintiffs have given that consent. Amended Complaint, ¶ 11. Because none of the Defendants wanted to plead before this, they have not been required to formally evidence their consent or lack thereof, under the pleading requirements that were in effect for this litigation, Fed. R. Bankr. P. 7012(b). Before last year, this would have created an anomaly, leaving indeterminate the situs of decision-making power for any final disposition of claims on these motions. However, in *Wellness Int'l Network, Ltd. v. Sharif*, the Supreme Court held that neither the Constitution nor the statutory provisions for the bankruptcy jurisdiction required parties' consent to be express. ___ U.S. ___, 135 S.Ct. 1932, 1947 (2015). A party may be deemed to have impliedly consented, as long as there are sufficient indicia of knowledge and voluntariness. *Id*. The "key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case." *Id*. (citation and interior quotes omitted). Those indicia are adequately presented throughout the record of the litigation here: the Plaintiffs' pleading on the point, ¶ 11 of both versions of the complaint, which asserted core-proceeding status for everything but prominently featured the concept of consent that would turn on the proceeding's ultimate status; the defense's manifested understanding of the distinction between core and related proceedings, in its strenuously-advanced argument that DataWave's claims could not even be related proceedings, and had to be dismissed for lack of federal jurisdiction; the frame of reference in both rounds of the defense's motions, which never broached the issue of judicial authority and which were consistently cast in terms of final disposition at the order of the presiding bankruptcy judge; and the lack of even a peep about any of this elsewhere in any written submission or during oral argument. All of the Defendants impliedly consented to a bankruptcy judge's authority to order any final disposition on any claim in suit here, on their motions or otherwise. Thus this order is entered as dispositive, in the United States Bankruptcy Court,

ORDER

IT IS THEREFORE ORDERED:

1. Claims One through Five, Seven, and Eleven of the Plaintiffs' Amended Complaint are dismissed with prejudice, as to all named plaintiffs and all named defendants.

2. Claim Six is dismissed as to all claims made by Plaintiff DataWave. All claims by Plaintiff Trustee are dismissed as to Defendant Akaibu.

3. Claims Eight and Nine are dismissed as to all claims made by Plaintiff Trustee.

4. As to all remaining claims by either plaintiff as to all other defendants under Claims Six, Eight, Nine, Ten, and Twelve through Fourteen, the Defendants' motions for dismissal are denied, subject to the Plaintiffs' timely compliance with Term 6.

5. Defendant Kvidera's motion for dismissal on his assertion of the defense of discharge in bankruptcy is denied, subject to the Plaintiffs' timely compliance with Term 6.

6. The Plaintiffs shall file a second amended complaint to address the deficiencies identified in this order, by *April 20, 2016*.

7. No further motions for dismissal shall be filed and none further will be entertained. All further contentions from the Defendants as to the Plaintiffs' claims and case shall be presented on motions for summary judgment or at trial.

8. Pursuant to Fed. R. Civ. P. 15(a)(3), *as incorporated by* Fed. R. Bankr. P. 7015, the Defedants shall file their answers to the second amended complaint by *May 4, 2016*.

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under the signature of the presiding bankruptcy judge.

9. Pursuant to the parties' stipulation [Dkt. No. 42], discovery will no longer be stayed after the entry of this order. All parties may commence discovery and are encouraged to do so with dispatch.

BY THE COURT:

/e/ Gregory F. Kishel

GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE