

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE: )  
 )  
iHEALTHCARE, INC., ) CASE NO. 07-20612 JPK  
 ) Chapter 11  
 )  
Debtor. )  
\*\*\*\*\*  
iHEALTHCARE, INC., )  
 )  
Plaintiff, )  
 )  
v. ) ADVERSARY NO. 09-2079  
 )  
JEFFREY YESSENOW, LEROY J. )  
 )  
WRIGHT, ALFRED SHARP, )  
 )  
HILTON HUDSON and PAUL )  
 )  
JONES, )  
 )  
Defendants. )

MEMORANDUM OF DECISION CONCERNING  
DEFENDANT JEFFREY YESSENOW'S MOTION TO DISMISS

This adversary proceeding was initiated by a complaint filed by the Debtor-in-Possession, iHealthcare, Inc. ("iHealthcare") on March 13, 2009, against the following defendants: Jeffrey Yessenow, Leroy J. Wright, Alfred Sharp, Hilton Hudson and Paul Jones.<sup>1</sup> Subsequently on May 27, 2010, the plaintiff filed a motion to amend the complaint which the court granted, and the amended complaint was deemed filed as of July 14, 2010 ("Complaint").<sup>2</sup> On August 13, 2010, the defendant Jeffrey Yessenow ("Yessenow") filed a motion to dismiss ("Motion"), along with a memorandum of law in support thereof.<sup>3</sup> On August 26, 2010, the court entered an order establishing a briefing schedule. The Plaintiff iHealthcare filed its response to

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<sup>1</sup> On October 1, 2010, the court received notice that the Defendant Leroy J. Wright was deceased.

<sup>2</sup> See, Docket Entry #31.

<sup>3</sup> Yessenow had also filed a motion to dismiss prior to this on December 28, 2009; however, that motion was rendered moot by the fact that the court allowed the filing of the amended complaint.

the foregoing motion on September 27, 2010, and Yessenow filed a reply brief on October 22, 2010.

In entering this order, the court determines that actions asserted by the plaintiff are not within the court's "core proceedings" jurisdiction as provided for by 28 U.S.C. § 157(b), but rather constitute "proceedings . . . related to a case under title 11" under 28 U.S.C. § 157(a). The court's jurisdiction is thus defined as that imparted in "related to" proceedings. Pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and N.D.Ind.L.R. 200.1(a)(1), this court has jurisdiction to fully administer "related to" proceedings to the fullest extent provided for by 28 U.S.C. § 157(c)(1). At a telephonic conference held on May 12, 2011, both the plaintiff and the defendant Jeffrey Yessenow consented to this court's final determination of Yessenow's motion to dismiss pursuant to 28 U.S.C. §157(c)(2) [Record #72]. The court will therefore itself finally determine that motion, and the procedure provided for by 28 U.S.C. § 157(c)(1) for submission of proposed findings of fact and conclusions of law to the district court will not be applied with respect to final determination of the Motion.

#### Analysis

iHealthcare filed its petition for relief under Chapter 11 of the United States Bankruptcy Code on March 13, 2009. Previously, on January 31, 2007, an involuntary Chapter 7 bankruptcy case [Case No. 07-20188] was filed against Heartland Memorial Hospital, LLC ("Heartland"), a wholly owned subsidiary of iHealthcare. That case was converted to one under Chapter 11 of the United States Bankruptcy Code pursuant to the debtor's request. On October 19, 2008, the court entered an order confirming a plan of liquidation which appointed David Abrams as the liquidating trustee and court-appointed manager of Heartland. On February 28, 2009, Abrams as the liquidating trustee in the Heartland bankruptcy filed two adversary proceedings: *Abrams v. Collins, et al.*, Adversary Proceeding #09-2068; and *Abrams v. Munster Medical Holdings, LLC, et al.*, Adversary Proceeding # 09-02069 (the "Heartland

Adversaries”). In each case Yessenow was named as a defendant, along with others. On March 13, 2009, iHealthcare filed this adversary proceeding against Yessenow, Wright, Sharp, Hudson and Jones (the “iHealthcare Adversary”). Yessenow premises his motion to dismiss on the contention that the Heartland Adversaries raise the same issues and facts as does the iHealthcare Adversary, essentially asserting that all three cases concern the business transactions of Heartland Memorial Hospital, LLC from late 2004 until an involuntary bankruptcy petition was filed against it in early 2007. Yessenow takes the position that since the Heartland Adversaries were filed prior to the filing of the iHealthcare Adversary, the iHealthcare Adversary should be dismissed on the basis that it is a duplicative proceeding.

The Seventh Circuit Court of Appeals in the case of *Serlin v. Arthur Anderson & Company*, 3 F.3d 221 (7<sup>th</sup> Cir. 1993) stated the standard for determining whether a case should be dismissed on the basis that it is duplicative. In that case a former employee brought an action under the Age Discrimination in Employment Act against his employer. The first case was filed July 9, 1992, in the United States District Court sitting in the Northern District of Illinois. The defendant filed a motion to dismiss on the basis that the complaint was not served within the time limits of Rule 4(j) of the Federal Rules of Civil Procedure. The plaintiff realized that there was a possibility that by the time the first filed case was dismissed, the statute of limitations would have run, and he would be barred from filing another action. While the motion to dismiss was pending, Serlin filed a second nearly identical action against the defendant in the same district. The court stated:

As a general rule, a federal suit may be dismissed "for reasons of wise judicial administration . . . whenever it is duplicative of a parallel action already pending in another federal court." *Ridge Gold Standard Liquors v. Joseph E. Seagram*, 572 F. Supp. 1210, 1213 (N.D. Ill. 1983) [\*\*4] (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976); *Calvert Fire Ins. Co. v. Am. Mut. Reinsurance Co.*, 600 F.2d 1228, 1233 (7<sup>th</sup> Cir. 1979)). District courts are accorded "a great deal of latitude and

discretion" in determining whether one action is duplicative of another, but generally, a suit is duplicative if the "claims, parties, and available relief do not significantly differ between the two actions." Ridge Gold, 572 F. Supp. at 1213 (citations omitted).

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Our analysis is not ended, however, for in Calvert Fire Insurance Co. v. American Mutual Reinsurance Co., 600 F.2d 1228 (7<sup>th</sup> Cir. 1979), we held that before dismissing a suit as duplicate, "the district judge should consider any special factors counseling for or against the exercise of jurisdiction in the case before him." Calvert Fire, 600 F.2d at 1234. Serlin claims that such a countervailing "special factor" exists in the present case because, if his second suit is dismissed as duplicative of his first, and if his first is dismissed after August 1992 for untimely service under Federal Rule 4(j), then he will be out of court and barred by the statute of limitations from refiling his age-discrimination complaint. In light of this possible consequence, he argues, Judge Aspin abused his discretion in dismissing his complaint as duplicative.

This argument is without merit. We have held that an abuse of discretion is established only where no reasonable man could agree with the district court; if reasonable men could differ as to the propriety of the court's action, no abuse of discretion has been shown." Smith v. Widman Trucking & Excavating, 627 F.2d 792, 795-96 (1980) (citing Beshear v. Weinzapfel, 474 F.2d 127, 134 (7<sup>th</sup> Cir. 1973)). In this instance, there are a number of reasons why a reasonable person could agree with Judge Aspin's decision to dismiss Serlin's duplicative complaint.

*Serlin*, 3 F.3d at 223-24 (emphasis supplied).

If the cases are indeed duplicative, there is a rebuttable presumption that the first should proceed and the second case be dismissed; *Asset Allocation and Management Co. v. Western Employers Insurance Company*, 892 F.2d 566, 573 (7<sup>th</sup> Cir 1989, as corrected 1990). As aptly summarized in the case of *Indianapolis Motor Speedway Corporation v. Polaris Industries, Inc.*, 2000 U.S. Dist. Lexis 8397 (S.D. Ind. 2000):

There is a strong legal presumption against having related actions pending simultaneously in different courts. "As a general rule, a federal suit may be dismissed 'for reasons of wise judicial administration ... whenever it is duplicative of a parallel action already pending in another federal court.'" *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7<sup>th</sup> Cir. 1993) (quoting *Ridge Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 572 F. Supp. 1210, 1213 (N.D. Ill. 1983) (citing *Colorado River*

*Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976))). A suit is considered duplicative "if the claims, parties, and available relief do not significantly differ between the two actions." *Serlin*, 3 F.3d at 223.

However, the Seventh Circuit does not espouse a rigid "first-to-file" rule. See *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 (7<sup>th</sup> Cir. 1987). To do so would simply encourage "an unseemly race to the courthouse." *Id.* Instead, there is a rebuttable presumption that the first case should be allowed to proceed and the second case abated. See *Asset Allocation and Management Co. v. Western Employers Ins. Co.*, 892 F.2d 566, 573 (7<sup>th</sup> Cir. 1989). This first-to-file rule gives priority, for purposes of venue selection, to the party who first establishes jurisdiction, see *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1004 (8<sup>th</sup> Cir. 1993); *Asset Allocation*, 892 F.2d at 572, while recognizing that the rule "yields to the interest of justice." See *Applexion S.A. v. Amalgamated Sugar Co.*, 1995 U.S. Dist. LEXIS 9350, No. 95- C-858, 1995 WL 404843, at \*2 (N.D. Ill. July 7, 1995) (citing *Asset Allocation*, 892 F.2d at 572-73). Thus, the plaintiff bears the burden of showing any compelling circumstance or an imbalance of convenience to overcome the presumption that the second-filed case should be dismissed in favor of the case filed first. See *Central States, Southeast and Southwest Areas Pension Fund v. Paramount Liquor Co.*, 34 F. Supp. 2d 1092, 1094 (N.D. Ill. 1999), *app. dismissed*, 203 F.3d 442 (7<sup>th</sup> Cir. 2000); *Applexion*, 1995 U.S. Dist. LEXIS 9350, 1995 WL 404843, at \*2. Such circumstances include a showing: that the plaintiff in the first-filed action raced to the courthouse to avoid litigating in another forum, see *Tempco Elec. Heater Corp.*, 819 F.2d at 750; that the plaintiff in the second-filed action may not be able to obtain jurisdiction over an indispensable defendant in the forum of the first-filed action, see *Asset Allocation*, 892 F.2d at 573; that the first-filed action is trivial in relation to the second-filed action, see *id.*; that the second-filed action has developed further than the first-filed action, see *Applexion*, 1995 U.S. Dist. LEXIS 9350, 1995 WL 404843, at \*2; or that the first-filed action was brought in bad faith, see *id.*

But even if the plaintiff fails to overcome the foregoing presumption, the Seventh Circuit Court of Appeals in the case of *Central States, Southeast and Southwest Areas Pension Fund v. Paramount Liquor, Co.*, 203 F.3d 442, 444-445 (7<sup>th</sup> Cir. 2000) set a fairly high bar for the outright dismissal of a duplicative case, stating the following:

To determine whether Paramount Liquor is entitled to reimbursement for the attorneys' fees it incurred, we must ask

whether the Fund's position was substantially justified. See *Perlman v. Swiss Bank Corp.*, 195 F.3d 975, 980 (7<sup>th</sup> Cir. 1999); *Construction Industry Retirement Fund of Rockford v. Kasper Trucking, Inc.*, 10 F.3d 465, 469-70 (7<sup>th</sup> Cir. 1993). At its core, the Fund's position is that the Illinois action should have been kept alive to ensure that the Fund would not forfeit its opportunity to obtain substantive review of the arbitrator's award. And that position is not only substantially justified but also absolutely correct.

When comity among tribunals justifies giving priority to a particular suit, the other action (or actions) should be stayed, rather than dismissed, unless it is absolutely clear that dismissal cannot adversely affect any litigant's interests. See, e.g., *Deakins v. Monaghan*, 484 U.S. 193, 202-04, 98 L. Ed. 2d 529, 108 S. Ct. 523 (1988); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-20, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976); *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 96 L. Ed. 200, 72 S. Ct. 219 (1952); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 838-39 (7<sup>th</sup> Cir. 1999). There is no "first filed doctrine" requiring dismissal of all suits after the first; such a rule would be incompatible with *Deakins* and other decisions that require parallel or duplicative litigation to be stayed rather than dismissed. And even a stay should not be issued automatically when suits are filed in different districts on the same day. "No mechanical rule governs the handling of overlapping cases. Judges sometimes stay proceedings in the more recently filed case to allow the first to proceed; sometimes a stay permits the more comprehensive of the actions to go forward. But the judge hearing the second-filed case may conclude that it is a superior vehicle and may press forward. When the cases proceed in parallel, the first to reach judgment controls the other, through claim preclusion (*res judicata*)." *Blair*, 181 F.3d at 838. (citation omitted)

Outright dismissal is most likely to be appropriate when, as in *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221 (7<sup>th</sup> Cir. 1993), the same party has filed all of the suits. Our suits were filed by different litigants, each presumptively entitled to its choice of forum. Nothing justified dismissal rather than a stay of the Fund's suit; dismissal created an unwarranted risk of legal prejudice, should Paramount Liquor then dismiss its own suit. So the Fund's appeal is substantially justified. If Paramount Liquor had asked only for a stay in the district court, expenses would have been minimal, and there would not have been an appeal. Paramount Liquor has only itself to blame for the legal fees incurred in this case, and it may not shift them to the Fund. (Emphasis supplied).

In determining whether this case is duplicative, the place to start is with a review of the

allegations contained in the iHealthcare Complaint, along with the facts which form the basis of those allegations and the relief prayed for. The court will then compare the foregoing with the allegations, facts and relief prayed for as pled in the Heartland Adversaries.

The court concedes Yessenow's contentions that the factual averments of the complaint in this case and those in the presently operative complaints in the Heartland Adversaries all contain a number of identical, essentially identical, or very similar averments. That being said, the test for duplicity of pleadings is not whether they share assertions of operative facts, but rather whether the **claims** advanced, the parties advancing them, and the relief requested do not significantly differ.

In this case, the plaintiff asserted claims against the named defendants in two counts. The claims in the first count are for corporate waste/breach of fiduciary duty, in part stated as follows:

92. The Defendants breached their fiduciary duties in the following matters:

a. They failed to pay payroll withholding taxes to the Internal Revenue Service (IRS) and the State of Indiana while continuing to pay themselves excessive, and in many cases unauthorized and illegal compensation and distributions, and went on paying other creditors whose claims were inferior to these tax claims. Moreover, in or about the Fall or Winter of 2005 or 2006 they collected a refund believed to be in excess of \$800,000 from the IRS and misapplied that money to themselves and inferior creditors rather than pay the delinquent payroll taxes. This conduct was contrary to the law, willful and reckless and ultimately caused the insolvency and liquidation of Heartland with a total loss of value to iHealthcare of its 100% ownership of Heartland. (See also paragraphs 64 through 74, 77-78 and 80-88 above.)

b. Defendants wrongfully terminated the employment agreements of Heartland's orthopedic surgeons which resulted in the loss of over \$5,000,000 of revenue per year from their services and millions more per year of lost revenue from their surgeries and physical therapy referrals to Heartland. These events occurred in or about November 2005 shortly after Yessenow, Wright and Sharp took over management pursuant to the merger agreement. These actions occurred before the Merger Closing and were

taken without the knowledge, consent or approval of iHealthcare, its board of directors or Heartland's board of managers which then included members of the Old Management.

c. The Defendants caused Heartland to repurchase its Munster Hospital Facility property in Munster, IN from MMH for an amount in excess of \$7 million more than the amount provided for in the repurchase terms of its lease with MMH and illegally paid this excess money to themselves and the other Munster Holdings Co-conspirators as described in paragraphs 64-74 above rather than leave it in the company and paying the IRS, State of Indiana and other creditors, including iHealthcare. This wrongful misappropriation of money was a proximate cause of iHealthcare's and Heartland's bankruptcies in March 2007. But for this misappropriation of money these companies would have survived and prospered with all creditors paid on a current basis and with ample working capital to grow and expand their businesses – thus preserving the \$25,000,000 fair market value of iHealthcare as had been determined in the Merger Agreement closing March 20, 2006.

d. In order to implement their misappropriations of funds to themselves as stated in paragraphs 64-82 above, these Defendants caused Heartland's Munster, IN main campus real estate to be sold to SSFHS for at least \$16 million less than its fair market value and all of the Heartland's equipment for at least \$5 million less than fair market. This transaction deprived iHealthcare and Heartland of over \$20 million of equity in their assets that could have been sold or refinanced to sustain, grow and expand its business and was also a proximate cause of these companies' bankruptcies in March 2007. As a result of this transaction and the Defendant's misappropriation of money described in ¶92c above, iHealthcare's investment in Heartland became worthless.

e. The Defendants paid themselves excessive and illegal compensation and benefits, distributed money to themselves for spurious or excessive claims.

f. The Defendants wrongfully terminated the employment agreements of Vijay Gupta, M.D. and Harold E. Collins immediately after the merger closing after deceiving them into compromising their contract claims for several million dollars each less than what was owed to them by promising to continue their post merger relationships with the companies and deceived the other iHealthcare selling shareholders by making the same representations. Dr. Gupta and Mr. Collins were the two largest shareholders and founders of iHealthcare and enjoyed the trust and confidence of the selling shareholders, medical staff,

employees, suppliers and bankers. Defendants never intended to continue their employment or pay the money owed to them and deceived them and other shareholders into approving the Merger by these deceitful misrepresentations, all of whom justifiably relied thereon. As a result of this wrongful conduct by the Defendants, Dr. Gupta and Mr. Collins sued Yessenow, Wright, Sharp and these companies to enforce their contracts and prevent Defendants from looting the companies. As a further result, many surgeons and physicians ceased using the hospital's facilities and the companies lost over \$5 million in revenues and Defendants were unable to conclude the additional financing transactions that the companies needed to grow and expand their business. The wrongful terminations of Dr. Gupta and Mr. Collins were a proximate cause of the companies' subsequent bankruptcies.

g. The Defendants aided and abetted Greene and SSFHS as co-conspirators in their scheme to bankrupt the companies and acquire iHealthcare's and Heartland's assets for \$20 million less than fair market value and then drive the companies into bankruptcy by mismanagement and deceit so they could loot the companies for their personal gain, including but not limited to (1) selling Holdings stock for \$.50 per share instead of \$4.00, (2) making and then repudiating the five months' rent-for-stock agreement, (3) refusing to negotiate in good faith with other prospective purchasers who were willing to pay millions of dollars more for the assets purchased by SSFHS, (4) refusing to reorganize and recapitalize the company as proposed by Dr. Gupta and the premerger iHealthcare shareholders, (5) concealing the true value of the companies and their assets from the bankruptcy court and prospective purchasers, (6) concealing the rent-for-stock agreement from the bankruptcy court and creditors, (7) failing to follow through on the pre-bankruptcy settlement agreed to by the petitioning creditors, Messrs. Robinson, May and Stovall that would have avoided their involuntary petition, (8) failing to resist the Robinson, May and Stovall involuntary petition that was patently flawed because they had no claim against Heartland or iHealthcare and (9) failing to give prospective purchasers time and information to conclude purchase offers in the bankruptcy that would have exceeded the offer of SSFHS.

h. Yessenow deceived Plaintiff and the Old Management by failing to disclose that he was the largest investor in Wright's scheme to acquire iHealthcare and loot its assets. On information and belief Yessenow invested over \$2,000,000 in R.F. Lewis, LLC which was the company used by Wright to finance the acquisition of iHealthcare and concealed this investment from Plaintiff in breach of his fiduciary duty of honesty and full disclosure of all conflicts of interest. Knowing he was CEO and the largest investor in

Heartland Holdings, Yessenow attended Plaintiff's board meeting, management meetings and managed the day-to-day business of iHealthcare, Heartland and WWC throughout the merger negotiations and pre-merger management period from October 10, 2005 to March 20, 2006 without disclosing his conflicts. During this time his acts and omissions intentionally caused damage to Plaintiff to keep it from pursuing other alternative merger opportunities and/or selling its assets for millions of dollars more than were realized under the Wright-Yessenow transaction. Plaintiff trusted and relied on Yessenow to act in the best interest of the company in these transactions, but instead he breached his fiduciary duties and aided and abetted the other Defendants in looting the company.<sup>4</sup>

As a result of these purported actions, the Complaint seeks damages in the amount of \$25 million dollars plus another \$25 million dollars in punitive damages. The second count of the Complaint alleges that the defendants entered into a conspiracy to procure the shares of iHealthcare by converting the Debtor's corporate assets to their own personal use; agreed among themselves to terminate the Plaintiff's orthopedic surgeons knowing that the loss of revenue to Heartland would make iHealthcare unattractive to a prospective buyer; and intentionally caused Heartland to cease making state and federal payroll withholding deposits with the intent to disrupt and devalue iHealthcare's business. This count also contends that through a merger agreement the Defendants paid themselves excessive compensation and expenses; deceived some of the physicians to renegotiate pre-merger employment agreements and take several million dollars less than they were entitled to; made certain representations that these physicians would remain employed after the merger – which they were not; and deceived other shareholders to take half of the compensation for their shares in convertible notes. Finally, the Complaint alleges that the defendants and another involved person – Greene – conspired as a part of the SSFHS transaction to divert over \$20 million dollars of iHealthcare's equity to SSFHS.

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<sup>4</sup> See, Plaintiff's Complaint ¶ 92.

The First Amended Complaint in the case of *Abrams v. Collins, et al.*, Adversary Proceeding #09-02068, contains a total of ten counts.<sup>5</sup> The first two counts name several defendants, including Yessenow, and allege a breach of certain fiduciary duties and self-dealing claims as to Heartland, and request that judgment be entered in favor of the liquidating trustee who represents the interests of Heartland. The next two counts are against Yessenow under 11 U.S.C. § 544 of the Bankruptcy Code and I.C. § 32-18-2-14/I.C. § 32-18-2-15 of the Indiana Uniform Fraudulent Transfer Act for the transfer of Heartland's 17.5% interest in Munster Holdings and the sum of \$2,214,647 received upon the closing of the SSFHS sale/leaseback transaction. The next count requests that these transfers be avoided pursuant to § 548 or alternatively § 550; while, the next count requests that these transfers be avoided as preferences under § 547 and seeks the disallowance of any claim filed by Yessenow pursuant to § 502(d). The remaining counts of the complaint concern Wright Capital Partners, Leroy Wright, Allen Hill and Alfred Sharp, and seek the recovery of certain transfers to these defendants as fraudulent or preferential pursuant to §§ 548, 550 and 547 of the Bankruptcy Code.

The complaint in the case of *Abrams v. Munster Medical Holdings, L.L.C., et al.*, Adversary Proceeding # 09-02069, names Yessenow as a defendant along with: Munster Medical Holdings, Eliza Investments, LLC, Neil Fribley, Fribley & Associates, LLC, Edward Kruska, Thomas McDermott, Sr., Vijay Patel, Michael W. Back and Michael W. Back, P.C. As to all the defendants, including Yessenow, the complaint seeks the avoidance of the following transfers made by Heartland: the transfer of the Munster Hospital Facility to Munster Holdings

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<sup>5</sup> In a separate opinion, the court has granted the motion of the plaintiff in A.P 09-2068 to file a second amended complaint. This second amended complaint does not differ significantly from its predecessor in relation to Yessenow, and the court in this decision will address Yessenow's contentions vis-a-vis the first amended complaint as that pleading which was the operative pleading at the time Yessenow's motion to dismiss was filed in this case.

for the benefit of the defendants, the lease payments to Munster Holdings made pursuant to a lease of the Munster hospital facility for the benefit of the Defendants, the transfer of Heartland's membership interest in Munster Holdings to various Defendants, the transfer of Broadwest Surgery Center to McDermott, and the transfer of Heartland's share of the SSFHS Sale/Leaseback transaction sale proceeds distributed to Munster Holdings and its members. The first two counts of the complaint seek to recover the foregoing transfers pursuant to 11 U.S.C. § 544 of the Bankruptcy Code and I.C. § 32-18-2-14/I.C. § 32-18-2-15 of the Indiana Uniform Fraudulent Transfer Act. The next count seeks the avoidance of these transfers under 11 U.S.C. §§ 548 and 550. The final count seeks the avoidance of certain transfers as preferences pursuant to § 547, including the transfer of Heartland's interest in Munster Holdings, the proceeds transferred which are associated with the defendants' membership interest in Munster Holdings and the proceeds of the SSFHS Sale/Leaseback distributed to these defendants. This count also seeks the disallowance of any proof of claim these defendants may file pursuant to § 502(d).

Clearly, the claims in the iHealthcare case are completely different from those pled in the Heartland Adversaries. Adversary No. 09-2068 seeks in part to recover certain transfers made by Heartland as fraudulent and/or preferential which, if successful, will inure to the benefit of **Heartland's** bankruptcy estate: these counts of the complaint – in fact all but Counts 1 and 2 of that complaint – are “core proceedings” under 28 U.S.C. §157(b)(2), and thus only Counts 1 and 2 of that complaint can possibly be subject to the arguments Yessenow makes in this case. While in part based upon the same set of transactions and facts, the iHealthcare Adversary seeks to redress certain wrongs and recover damages it alleges to have been incurred as the result of Yessenow's conduct (along with others), i.e. breach of certain fiduciary duties owed to it as a corporation, self-dealing by its officer and directors and conspiracy to

defraud. If successful any recovery will inure to the benefit of **iHealthcare's** bankruptcy estate. Additionally, the conspiracy claims in the second count of the iHealthcare Adversary were not set out in the Heartland Adversaries and were not used in formulating any of the requested relief in those cases. Adversary No. 09-2069 seeks exclusively to recover and/or avoid certain transfers made by Heartland by means of claims which, if successful, will inure to the benefit of **Heartland's** bankruptcy estate. Moreover, all counts of the complaint are "core proceedings" under 28 U.S.C. §157(b)(2). While in part based upon the same set of transactions and facts, the iHealthcare Adversary seeks to redress certain wrongs and recover damages it alleges to have incurred as the result of Yessenow's conduct (along with others), i.e. breach of certain fiduciary duties owed to it as a corporation, self-dealing by its officer and directors and conspiracy to defraud. If successful any recovery will inure to the benefit of **iHealthcare's** bankruptcy estate, and none of the claims in the iHealthcare case are core proceedings, thus conclusively establishing that the claims in this case and in Adversary No. 09-2069 are not duplicative.

The iHealthcare Adversary is not only based on different claims, but also the relief requested by the liquidating trustee in the Heartland Adversaries versus that requested by iHealthcare is totally different in focus as well. The whole point of the Heartland Adversaries is to recover or avoid transfers, or recover damages, for the benefit of Heartland – the liquidating trustee is attempting to bring property back into that bankruptcy estate for administration. In contrast, in the iHealthcare Adversary the debtor-in-possession is attempting to address wrongs allegedly perpetrated upon it by the defendants, including Yessenow, by seeking to recover both actual *and* punitive damages, for the benefit of iHealthcare. Just as iHealthcare could not recover property wrongly transferred with respect to Heartland, Heartland could not bring an action for a breach of a fiduciary duty owed to iHealthcare. In other words, each entity asserts

entirely separate claims due to the entirely separate bankruptcy estates to which any recoveries will inure. The available relief requested in the three cases is significantly different.

Finally, the plaintiff in the iHealthcare Adversary is completely different from the plaintiff in the Heartland Adversaries. Although iHealthcare and Heartland are related entities, there are two separate bankruptcy estates. The iHealthcare adversary was brought by the Debtor-in-Possession for the benefit of its estate, and the Heartland Adversaries were brought by the liquidating trustee for the benefit of that estate. The parties in the three cases are totally different.

Yessenow also claims that each of the claimed wrongs in the iHealthcare complaint was done to Heartland directly with only an indirect impact on iHealthcare as the owner of 100% of the interests in Heartland. Thus, Yessenow argues, to allow iHealthcare to bring the same claims against Yessenow that the liquidating trustee in the Heartland bankruptcy brought is the equivalent of simultaneously allowing a shareholder to sue derivatively for the same claims the corporation has already brought against the fiduciary.<sup>6</sup> For one, the court disagrees that the claims in the subject lawsuits are identical. Further, the contention that the actions of Yessenow and the other defendants only had an indirect impact on iHealthcare is a legal conclusion – Yessenow is in effect arguing that iHealthcare sustained no damages as a result of the purported acts of the defendants. Obviously this is an issue to be decided on other than Yessenow's present motion to dismiss.

Yessenow also argues that conducting the iHealthcare adversary in conjunction with the Heartland Adversaries will possibly lead to different or conflicting results.<sup>7</sup> How is this possible?

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<sup>6</sup> *See, Defendant Jeffrey Yessenow's Reply in Support of his Motion to Dismiss Plaintiff's Amended Complaint*, at pg. 5.

<sup>7</sup> *See, Defendant Jeffrey Yessenow's Memorandum of Law in Support of his Motion to Dismiss Plaintiff's Amended Complaint*, at pg.6.

The plaintiff in the Heartland Adversaries did not plead or request that this court find that Yessenow breached a duty owed to, or committed corporate waste with respect to, iHealthcare. Similarly, in the iHealthcare adversary, this court will not decide whether any of the purported transfers are recoverable as fraudulent transfers under the Bankruptcy Code or the Indiana Uniform Fraudulent Transfer Act, or as preferences. While not an issue before the court at this time, any possibility of differing factual conclusions arising from the same facts submitted in separate cases can potentially be dealt with by some form of consolidation under Fed.R.Bank.P. 7042/ Fed.R.Civ.P. 42.

Finally, Yessenow contends that the count of conspiracy pled in the iHealthcare complaint is identical to that in two cases currently pending in the Circuit Court of Cook County: *Collins v. Yessenow*, 09 L 147, and *Gupta v. Yessenow*, 06 L 6923. Whatever the individual plaintiffs are seeking to recover in those cases has nothing to do with what iHealthcare may recover in this case. In this adversary proceeding, damages recovered will inure to the benefit of the estate, and not to Collins or Gupta.

Based upon the foregoing, the court determines that Yessenow's motion to dismiss is denied.

IT IS ORDERED that Jeffrey Yessenow's motion to dismiss filed on August 13, 2010 is DENIED.

Dated at Hammond, Indiana on June 9, 2011.

/s/ J. Philip Klingeberger  
J. Philip Klingeberger, Judge  
United States Bankruptcy Court

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