UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: BKY No. 20-32155
Chapter 11

DigitalTown, Inc.,

Debtor.

Richard Pomije,

ADV No. 21-03003

Plaintiff,

v.

DigitalTown, Inc.,

Defendant.

NOTICE OF HEARING AND MOTION TO DISMISS THE COMPLAINT AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

TO: Honorable Katherine A. Constantine, Judge of United States Bankruptcy Court, Clerk of U.S. Bankruptcy Court, United States Trustee, the plaintiff, Richard Pomije, and his counsel, Mark A. Olson, Esq., Olson Law Office, 2605 Cliff Road East, Suite 100, Burnsville, MN 55337.

INTRODUCTION

These motions arise under Rules 7012, 7009 and 7056 of the Federal Rules of Bankruptcy Procedure. The defendant moves the court to dismiss the complaint, or in the alternative for summary judgment.

NOTICE OF HEARING

1. The court will hold a hearing on the plaintiff's motions to dismiss and for summary judgment at 10:30 a. m., on April 21, 2021, or as soon thereafter as counsel may be heard, before the Honorable Katherine A. Constantine, Judge

of United States Bankruptcy Court, Warrant E. Berger Federal Building and U.S. Courthouse, Courtroom 2C, 316 North Robert Street, St. Paul, Minnesota, or by remote appearances at the discretion of the court.

2. **Pursuant to Local Rule 7056-1 any response to these motions must be filed and delivered not later than, Wednesday, April 7, 2021 which is fourteen (14) days before the time set for the hearing. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

3. This court has jurisdiction over these proceedings. These proceedings are "core" proceedings within the meaning of 28 U. S. C. § 157. These motions are made pursuant to Rule 7012, 7009 and 7056 of the Federal Rules of Bankruptcy Procedure.

4. This case was commenced by the filing of a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on September 8, 2020.

5. This adversary proceeding was commenced by the filing of a complaint on January 28, 2021. As described in more detail these motions arise under Rules 7012, 7009 and 7056 under the Federal Rules of Bankruptcy Procedure.

STATEMENT OF THE RELEVANT FACTS

General Background.

6. DigitalTown, Inc., the debtor and defendant in this adversary proceeding, is a publicly traded Minnesota corporation (the "defendant" or "DTI").

7. At all times relevant in these proceedings, the plaintiff, Richard Pomije (the "plaintiff") was a majority shareholder, chief executive officer and one of two directors of DTI (see, Complaint, Docket Item No. 1, at ¶3, page 2).

8. The plaintiff had virtual unfettered control over DTI and its business operations and business affairs.

9. As a publicly traded company, DTI was required to file periodic reports with the Securities Exchange Commission ("SEC filings").

10. Because of his position as CEO and co-director, the plaintiff was uniquely responsible for the preparation and filing of the SEC filings.

The Thomas Pomije Subscription Receivable.

11. The plaintiff arranged for sales of shares of DTI stock to his brother, Thomas Pomije ("Thomas"). DTI entered into three stock purchase agreements (subscription agreements) dated December 30, 2005, October 5, 2007 and June 22, 2010 with Thomas (sometimes collectively, the "subscription agreements").

12. The subscription agreements generally had unusual and favorable terms for Thomas. For example: the 2007 subscription agreement provided for payment over a five-year term, with no payments for the first two years and the remaining balance to be paid over 36 monthly installments. That subscription agreement did not provide for interest. Under the 2007 subscription agreement, Thomas agreed to purchase 1,300,000 shares for $2.50 per share. The purchase price was subsequently modified and reduced to $0.75 per share, and the payment terms were further relaxed to the benefit of Thomas.

13. Even though Thomas was in default under the 2007 subscription agreement, the plaintiff arranged for yet another sale of shares to Thomas with a long-term payment price, by entering into the 2010 subscription agreement.

14. From time to time, the plaintiff arranged for the sale of DTI shares to third parties. Instead of selling shares directly from the company, and thereby preserving the accounts receivable, the plaintiff directed potential investors to buy shares from Thomas. These arrangements were contrary to the best interests of the company in various ways, including but not limited to: misappropriating corporate opportunities.

15. Thomas benefited by having his subscription receivable reduced at an unfair rate and the company lost the benefit of the direct sale to the new investors.

The Willard (Bill) Olson Connection.

16. Bill Olson ("Olson") was a shareholder and supporter of DTI. In February 2014, Olson entered into two agreements with DTI by which he assumed specific debts of the company and received shares. (See, Declaration of Willard Olson)

17. Both of these debt assumption agreements were in writing. In both instances, Olson acquired shares with a current trading value in excess of the amount of the debt assumed.

18. Since the shares were almost certainly subject to a six-month holding period under SEC Rule 144, and given the vagaries of the stock market, receiving shares with a face value in excess of the amount of the debt being assumed was reasonable and consistent with prevailing commercial practice.

19. The plaintiff claims that Olson entered into a third debt assumption agreement with DTI.

20. The plaintiff claims that Olson entered into an *oral* agreement by which he agreed to assume the remaining balance due on the Thomas receivables and took an assignment of Thomas' shares.

21. Olson denies that he ever entered into such agreement. There is no written record of the supposed 2013 debt assumption agreement. There is no indication on the company's books and records that the plaintiff did any underwriting of Olson's financial condition that would warrant the conclusion that he had the ability to pay over $625,000 for the shares. Although an assumption of a substantial debt asset of the company by a third party is a material event, it was never reported on the company's books and records nor on any SEC filings.

22. If the plaintiff's story is correct, Olson would have agreed to essentially buy a large block of shares for more than he could have bought the same shares in the open market.

23. In addition, it appears that in December 2013 there were defaults under the subscription agreement, so according to the plaintiff, Olson was assuming a debt that was already in default which he could have been called upon to pay immediately.

The Plaintiff's Departure from DTI.

24. In the spring of 2015, the plaintiff arranged for a substantial investment from Mr. Darvin Habben. Mr. Habben was prepared to invest at least $350,000 in the company. Mr. Habben expected to be appointed to the board of directors.

25. At the time of soliciting this investment, and before appointing Mr. Habben to the board of directors, the plaintiff announced that he was resigning from DTI. The plaintiff's resignation was his own decision.

26. In connection with his resignation, the plaintiff "negotiated" a new employment agreement with the company as an account executive. The agreement provided for salary of $125,000 and other benefits.

27. At the time he negotiated the employment agreement, the plaintiff continued to be the majority shareholder, chief executive officer and one of two directors.

28. There is no indication on the company's records that the approval of the employment agreement was submitted to the board formally, but it was signed by the other director, Mr. Jeff Mills.

29. The employment agreement was not presented to the incoming board for approval.

30. In connection with his severance from the company, the plaintiff also negotiated to take an assignment of his brother Thomas' subscription receivable. The subscription receivable was listed on the company's books and records at a value of $625,482. The plaintiff claimed that this receivable

was taken in satisfaction of $331,849 worth of debt owed to him on account of deferred and unpaid salary and other related considerations.

31. Eventually, the plaintiff sued Olson to collect from Olson on account of the debt assumption agreements, including the purported 2013 debt assumption agreement. Olson defended against those claims denying that he had any such agreement with the plaintiff. (See, Answer to Amended Complaint and Declaration of Bill Olson.)

The Plaintiff's Claims.

32. In brief summary, the plaintiff asserts the following claims supporting his demand that his debts be determined to be non-dischargeable:

1) DTI fraudulently induced him into entering into the employment agreement; and into taking an assignment of a subscription receivable;
2) DTI conspired with Bill Olson to somehow induce the plaintiff to take the assignment of the subscription receivable.
3) DTI breached a fiduciary duty;
4) DTI defamed him; and
5) DTI tortiously interfered with Pomije's contract with Bill Olson.

The defendant has denied each of these claims; denying the factual assertions and denying that the plaintiff has valid legal claims, and asserting a variety of defenses (See, Answer, Statement of Affirmative Defenses and Counterclaims dated March 2, 2021 (Docket Item No. 6)).

LEGAL MATTERS

33. By his complaint, the plaintiff seeks a determination that the debt owed to him by the debtor should be excepted from discharge pursuant to 11 U.S. C. §§ 523 (a) (2), (a) (4) and (a) (6); alleging fraud, breach of a fiduciary duty and defamation. It also appears that the plaintiff asserts a claim for tortious interference with contract, but that is not expressly alleged in the Complaint itself; and not in the *ad damnum* clause of the Complaint; but that claim is asserted in the underlying state court action.

34. DTI moves the court to dismiss the complaint and various claims of the complaint under Rule 7012 of the Federal Rules of Bankruptcy Procedure (incorporating Rule 12 of the Federal Rules of Civil Procedure).

35. Generally, as will be specified in more detail in the accompanying memorandum, DTI's motion to dismiss for failure to state a claim upon which relief may be granted because:

- The complaint fails to plead fraud with specificity in contravention of Rule 7009 of the Federal Rules of Bankruptcy Procedure (incorporating Rule 9 of the Federal Rules of Civil Procedure);
- The complaint fails to state a cause of action for fraud based on the claim that the plaintiff was fraudulently induced to enter into the employment agreement and related agreements;
- The plaintiff's claims for interference with contract are time-barred under the applicable statute of limitations;

- The plaintiff's claims for defamation are time-barred under the applicable statute of limitations.

36. In addition, DTI moves the court for summary judgment under Rule 7056 of the Federal Rules of Bankruptcy Procedure (incorporating Rule 56 of the Federal Rules of Civil Procedure). Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the matter can be determined as a matter of law.

37. Generally, and as demonstrated in more detail in the accompanying memorandum; DTI maintains that there are no genuine issues in material fact in dispute over key issues; and that it is entitled to summary judgment because:

    - There was no fraudulent inducement. The plaintiff was in control of DTI at the time the complained transactions occurred and he himself orchestrated these transactions;
    - The plaintiff, as the person in control of DTI, had full command of all of the relevant facts and therefore cannot have justifiably relied on any fraudulent representation that DTI may have made.
    - The plaintiff's alleged damages were not proximately caused by the alleged fraud;
    - There is no fiduciary duty owed by a corporation to a shareholder; and in any event, there was no breach of any duty owed to the plaintiff.

- There were no defamatory statements made by DTI; and even if made the alleged statements are not defamatory because Pomije is in fact a convicted felon and in fact breached a fiduciary duty.
- There was no tortious interference with contract.

39. DTI also moves the court for summary judgment on its first claim for relief asserted in its Counterclaim. DTI claims that it is entitled to recover a money judgment against Pomije under the Minnesota Voidable Transfers Act (Minn. Stat. §§ 513.41, et seq.). DTI is entitled to summary judgment on this issue because:

    - There are no disputes over the requisite elements of this claim: Pomije was an insider of the debtor, the debtor was insolvent, and Pomije received payments and transfers of property having an aggregate value of more than $744,00 on account of antecedent debt of not more than $500,000.

MOTIONS

DTI moves the court for its order and judgment as follows:

1. DTI moves the court to dismiss the complaint herein for cause under Rule 7012;
2. DTI moves the court for an order granting summary judgment in its favor and against the plaintiff on the Complaint; and awarding a money judgment in favor of the defendant on its first claim for relief in its counterclaim.

Respectfully submitted,

Joseph W. Dicker, P.A.

Dated: March 17, 2021

/e/ Joseph W. Dicker

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MEMORANDUM OF LAW

INTRODUCTION

The plaintiff Richard Pomije (the "plaintiff") is a creditor of the debtor/defendant DigitalTown, Inc. ("DTI" or the "company"). The plaintiff holds a pre-petition judgment in the original amount of $675,691 based on an employment claim. The plaintiff subsequently sued DTI in state court (the "2^{nd} action"). The 2^{nd} action was in its early stages when DTI filed the petition for relief under chapter 11. In the 2^{nd} action, the plaintiff alleges that he was defrauded into entering the employment agreement and asserted additional claims of fraud, breach of fiduciary duty and defamation. (A copy of the Complaint in the 2^{nd} action is appended to the Complaint in this action [See, Docket

Item No. 1] and DTI's Answer in the 2nd action is appended to the Answer in this proceeding [Docket Item No. 6].)

The plaintiff subsequently filed this adversary proceeding seeking a determination that his claims against the debtor should be excepted from discharge. DTI moves the court for relief under Rules 7012, 7009 and 7056 of the Federal Rules of Bankruptcy Procedure. DTI submits that this case can be resolved as a matter of law at this juncture. This memorandum of law, together with the accompanying declarations are submitted in support of DTI's motions to dismiss, and for summary judgment.

STATEMENT OF RELEVANT FACTS

General background: the parties and their relationships.

DTI is debtor-in-possession in a reorganization case pending under chapter 11 (BKY No. 20-32155). DTI is a Minnesota corporation whose stock is publicly traded over the counter. The company was originally incorporated in 1982 and went public in 2000.

The plaintiff, Richard Pomije, was a founder of DTI and served on its board of directors, and as chief executive officer and was a majority shareholder from the onset until he resigned in May 2015.

The company was not successful during the last ten years of Pomije's tenure. Between 2005 and May 2015, the company had total income of approximately $113,000. At the time of his resignation, the company was insolvent; with $80,553 in assets, $641,769 in liabilities, and an accumulated deficit of more than $28,000,000. See, February 2015 10-K and May 2015 10-Q, Exhibits 1 and 2 to Declaration of Sam Ciacco.

The subscription receivable

Under the plaintiff's management, DTI sold common shares of stock to the plaintiff's brother, Thomas Pomije ("Thomas"). These transactions were accomplished through three subscription agreements. The first subscription agreement was made in 2005 and provided for the sale of 4,733,333 shares at $0.75 per share for a total purchase price of $3,550,000. The second subscription agreement was made in 2007 and provided for the sale of 1,300,00 shares at $2.50 per share for a total purchase price of $3,250,000. The third subscription agreement was made in 2010 and provided for the sale of 400,000 shares at $0.75 per share for a total purchase price of $300,000. (The 2005 and 2007 subscription agreements are appended to the Declaration of Sam Ciacco as Exhibits 3 and DTI cannot currently locate a copy of the 2010 subscription agreement, but its terms are described in the company's SEC filings that Pomije filed with the SEC.) The subscription agreements provided for very favorable terms. Generally, they each provided for a deferred payment over a period of years, with a modest rate of interest (which was apparently discretionary and never actually charged, assessed or reported on the company's books and records). The subscription agreements gave Thomas downside protection if the share price dropped below his acquisition cost.

Beyond these express favorable terms, the plaintiff was even more generous with his brother. When the stock price fell below the purchase price set in the 2007 subscription agreement, Pomije amended the subscription agreement to reduce the purchase price from $2.50 per share to $0.75. The company never charged interest on these long-term payment obligations. When his brother defaulted on the payment obligations, the company took no action to collect or enforce the obligation. And, even though defaults existed under the prior agreements the company entered into the 2010 subscription agreement on similar advantageous terms.

Thomas sold shares to third parties and used the proceeds to pay down on his subscription receivable. See, Declaration of Sam Ciacco and Declaration of Darvin Habben. These sales transactions were orchestrated by DTI under the plaintiff's authority. These transactions were disadvantageous to DTI. DTI could have sold new shares to investors for new dollars preserving Thomas' obligations to pay for the shares he already purchased. In addition, the way these transactions were structured they created substantial benefits for Thomas. Because he was often able to sell shares at a price higher than his purchase price, he was able to reduce his subscription receivable at a faster pace, essentially freeing up shares for which he would not have to pay. And, this all came at the expense of the company.

The involvement of Willard (Bill) Olson

Willard (Bill) Olson was a shareholder of DTI. He was an enthusiastic supporter of the company, and through mutual friends, a personal acquaintance of the plaintiff.

Sometime in 2013, Thomas transferred a block of DTI shares to Olson. The plaintiff claims that Thomas assigned the subscription receivable to Olson and that Olson assumed financial responsibility for the subscription receivable.

There is no written documentation whatsoever of this purported assignment and assumption. There are no indications on the corporate books and records that the assignment and assumption occurred, much less was consented to by the company. There is no documentation of the purported assignment and assumption itself. There does not appear to have been any underwriting done to determine whether Olson had the financial wherewithal to take on a $625,000 financial obligation. And the change in obligor was never noted in the company's SEC filings.

Most critically, both parties to this purported transaction deny that such transaction occurred. Bill Olson maintains that he did not assume the subscription receivable, would not have done so for a variety of pragmatic reasons, and states that what he agreed to do was to take the shares and sell them and remit the net proceeds to DTI in what he believed was helping the company to raise additional money. See, Declaration of Willard (Bill) Olson.

Thomas has testified under oath that he "gifted" the shares to Bill Olson. See, Affidavit of Thomas Pomije, appended to Declaration of Joseph W. Dicker as Exhibit 1.

On February 5, 2014, Olson entered into an agreement with DTI, by which Olson assumed approximately $88,400.57 of DTI's debt and received 294,669 shares of DTI stock. On February 6, 2014, Olson entered into another agreement with DTI, by which Olson assumed $102,856.61 of debt owed by the company to Mr. Jeff Mills and Olson received an additional 342,855 shares. Mr. Mills was a shareholder and a director of DTI. The debt owed to Mr. Mills arose out of an outstanding note payable and a lease agreement by which the company leased his business premises. On February 5, 2014, the 294,669 shares Olson received had a value of $117,867 based on the market price of $0.40 per share. On February 6, 2014, the 342,855 shares Olson received had a value of $157,713 based on the market price of $0.46. Both of these debt assumption agreements were in writing; and in both instances Olson received shares that had a value greater than the amount of the debt being assumed.

In both instances, the debts assumed by Olson were removed from the company's financial statements and the exchange of debt for shares was noted in the company's books and records.

As described in more detail below, the subscription receivable was assigned by DTI to Pomije in connection with his resignation.

The plaintiff's resignation

In the spring of 2015, the plaintiff began to implement a change in direction of DTI. He engaged Mr. Rob Monster to present as the new face of the company. The plaintiff arranged for a substantial capital investment from Mr. Darvin Habben. Mr. Habben agreed to invest $350,000.00, in large measure based on the plaintiff's description of the new direction in which the company was going to be taken by Rob Monster. See, Declaration of Darvin Habben.

With arrangements made for a new CEO and new investment dollars committed, the plaintiff formally resigned on May 11, 2015, with later effective dates. See, Declaration of Darvin Habben and Declaration of Rob Monster. Subsequently, apparently by way of a severance arrangement, the plaintiff entered into an employment agreement. On May 11, 2015, DTI signed an employment agreement with the plaintiff, engaging him as an account executive. A true and correct copy of the employment agreement is appended to the Declaration of Sam Ciacco as Exhibit 7. There is no other record of any other promises made by DTI to the plaintiff in connection with the employment agreement.

In addition to his employment at a salary of $125,000 a year plus benefits as an account executive, the plaintiff negotiated an assignment of the Thomas subscription receivable. The assignment was expressly made in consideration of approximately $400,000 of deferred compensation that was purportedly due to the plaintiff.[1] See, Complaint (ECF Docket Item No. 1) at paragraphs 10, 11 and 12; and paragraph 10.l of the state court complaint appended to the Complaint in this action as Exhibit 1. The assignment of the subscription receivable was made expressly in satisfaction of an antecedent debt – that being the deferred compensation obligation owed to the plaintiff. (This employment agreement and the assignment of the Thomas Pomije subscription receivable, jointly, the **"**severance agreement".)

Events giving rise to the claims in this adversary proceeding

In August 2015, the newly constituted board of directors of DTI made several critical decisions. The board decided to close the brick and mortar office and opt for a virtual, less expensive option. The company was already paying substantial overhead, substantially in excess of its needs, leasing space far bigger than was needed for the staff that the company had. All Minnesota employees were terminated, including the plaintiff.

The company terminated Pomije's employment and stopped paying him in August 2015. DTI did pay Pomije in May, June and July 2015.

[1] The plaintiff claims that he had $431,849 of deferred compensation. It appears from the books and records of the company that $100,000 of this had been forgiven almost two years earlier. See, Declaration of Sam Ciacco. And paragraph 10.l of the state court complaint. By the time of the Complaint in this action the deferred compensation claim had swollen to "almost $500,000", Complaint at paragraph 12, page 4. See also, the Amended Complaint in *Pomije v. Olson Dakota* County Court File No. 19HA-CV-19-308 at paragraph 14, page 3, Exhibit 2 to Declaration of Willard Olson, where Pomije claims he was owed "nearly $300,000. For the purposes of the instant motion, DTI assumes the higher value is in fact deferred compensation. If this matter is tried, DTI does not intend for this treatment to be binding upon it and reserves the right to challenge this claim.

The plaintiff sued Bill Olson to enforce the subscription receivable, claiming that Olson had assumed that obligation.[2] Olson defended against that action, among other things asserting that he was not party to any such agreement involved in the assumption of the subscription receivable. See, Declaration of Willard Olson, and see Amended Answer, Exhibit 1 to Declaration of Willard Olson.

Ultimately, Olson filed for a petition for relief under Chapter 7 of the United States Bankruptcy Code on May 10, 2019. Olson was granted a discharge in *In re: Willard Olson,* BKY No. 19-31536, on August 29, 2019

Pomije sued DTI for breach of the employment agreement. Ultimately Pomije obtained a judgment against DTI in the original principal amount of $675,691.

Pomije commenced the 2nd action. DTI answered. That action was stayed by the bankruptcy filing.

Plaintiff's claims and facts relating to those claims

The plaintiff alleges three (and possibly a fourth) legal theories and claims. In Count I the plaintiff asserts that DTI "engaged in a systematic scheme to defraud Richard Pomije of more than $1.6 million dollars by artifice, trick, deceit and fraudulent misrepresentation and fraudulent inducement; and it has breached its fiduciary duty to Richard Pomije and defamed him." In the underlying state court complaint, the plaintiff claims that DTI also tortiously interfered with his contract with Olson. Although this latter claim does not appear to be specifically alleged in the adversary complaint, the state court complaint is incorporated by reference; and even though not specifically treated in

[2] The plaintiff asserted various claims including this one, but the others are not material to this action.

either Count I of the adversary complaint nor in the *ad damnum* clause, DTI assumes that there is a fourth claim of non-dischargeability for tortious interference that the plaintiff appears to allege.

At base, the plaintiff is claiming that: (1) DTI fraudulently induced him to enter into the severance agreements when in fact, DTI had no intention to perform; (including the idea that DTI somehow conspired with Olson to induce the plaintiff into accepting an assignment of the subscription receivable; (2) DTI itself breached a fiduciary duty owed to Pomije; (3) a DTI defamed the plaintiff by calling him a criminal and claiming that he had breached a fiduciary duty; and perhaps (4) that DTI tortiously interfered with Pomije's purported contract with Olson.

Facts relating to the claim of "fraudulent inducement"

- The plaintiff decided to resign *before* entering into the severance agreements.
- The plaintiff was the chief executive officer, chairman of the board of directors, one of two directors and the majority shareholder of DTI at the time he resigned in May 2015, and continued in all three capacities for a short time after tendering his resignation.
- In those capacities, the plaintiff had virtually full and unilateral control over DTI and was fully acquainted with its financial condition, business affairs and operations, and all matters relevant to the employment agreement and severance agreement.
- The plaintiff dictated, unilaterally, the terms and conditions of his resignation, employment as an account executive and the severance package.

- The plaintiff knew or should have known the circumstances surrounding the 2013 purported debt assumption agreement with Bill Olson.
- Without limiting the foregoing, the plaintiff knew that if the 2013 purported debt assumption agreement existed at all, it existed only as an oral agreement.

Facts relating to the claim of breach of fiduciary duty

- The plaintiff is suing the corporation and not officers and directors.
- The plaintiff's employment agreement was terminated in the best interests of the company as part of a business restructuring plan which involved cutting overhead and relocating the business to Washington, establishing a virtual office and eliminating unnecessary staff positions.

Facts relating to the defamation claim

- The statements attributed to DTI (the bulk of which is disputed) were made before October 2017. (The purported default that was the supposed result of the defendant's defamation occurred in sometime in late September 2017 (See, Amended Complaint dated March 27, 2019, in *Pomije v. Olson*, Dakota County District Court File No. 19HA-CV-19-308, Exhibit 2 to Willard Olson Declaration, at paragraph 21, page 4.
- The statements made in the disclosure document were made in court proceedings.
- The plaintiff is a convicted felon.
- The plaintiff arranged for the satisfaction of the debt owed by DTI to him for deferred compensation by taking the assignment of the subscription receivable.

Facts relating to the tortious interference claim

- The 2013 purported debt assumption agreement does not exist.
- DTI did not take any action to interfere with any contract between Pomije and Olson.
- The alleged breach of the purported agreement took place more than two years before Pomije commenced the 2nd action.

ARGUMENT

1. Introductory Remarks.

Rule 7012 and Rule 7056 provide for different relief. Generally, a motion under Rule 7012 to dismiss tests the legal sufficiency of a complaint, focusing only on the complaint itself and its factual allegations and legal predicates. A motion under Rule 7056 for summary judgment is appropriate when there are "no genuine issues of material fact in dispute" and that a party is entitled to judgment as a matter of law. In both instances, the movant seeks to test the legal sufficiency of a complaint.

As a general proposition, the focus of a motion under Rule 7012 is on the complaint itself, while a motion under Rule 7056 can and usually does take into account a broader consideration of factual matters, even though in both cases the question is, ultimately, whether the court can determine the outcome of the case (or a portion of the case) as a matter of law.

This distinction does sometimes get blurry. Under prevailing federal jurisprudence, a court considering a motion to dismiss under Rule 7012 is obliged to consider the plausibility of the allegations, not just the formal allegations themselves.

See, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). And, in limited circumstances, the court considering a motion under Rule 7012 may consider facts and documents beyond those specifically alleged in the complaint. See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* 551 U.S. 308 (2007).

And purely legal issues, such as the application of a statute of limitations might be determinable under Rule 7012 if all of the relevant facts are apparent in the complaint; but may also be resolved under Rule 7056 if a broader consideration of facts is necessary to establish the timing of relevant events (assuming of course those facts are not disputed).

Here, the defendant challenges both the legal sufficiency of the complaint under Rule 7012 and also moves for partial summary judgment under Rule 7056. In some instances, the analysis and arguments overlap; but for the sake of clarity, DTI approaches the motions separately.

2. This Case Should be Dismissed Under Rule 7012.

A motion to dismiss under Rule 7012 challenges the legal sufficiency of the complaint, as stated. Rule 7012, incorporating Fed. R. Civ. Pro 12, authorizes dismissal when a complaint fails to state upon which relief may be granted. Fed. R. Civ. Pro. 12 (b) (6). A complaint cannot merely state conclusory allegations. The complaint must state sufficient facts, properly pled. Even though the federal rules provide for notice pleading, a party plaintiff must allege facts sufficient to establish the claim, and not rely on mere conclusory statements. See, *Bell Atlantic Corp. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The allegations must be plausible. *Id.* See also, *Stalley v. Catholic Health Initiative,* 509 F. 3d 517, 521 (8^{th} Cir. 2007) and *Braden v. Wal-Mart Stores, Inc.,* 588 F. 3d 585 (8^{th} Cir. 2009). "Finally, the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. See *Vila v. Inter-Am. Inv. Corp*., 570 F.3d 274, 285 (D.C. Cir. 2009) (factual allegations should be "viewed in their totality"); See, *Tellabs, Inc. v. Makor Issues Rights, Ltd.,* 551 U.S. 308, 322-23; *Braden* at 594.

The complaint in this action fails to meet these fundamental pleading requirements and taken as a whole, fails to assert claims upon which relief may be granted. The defendant is entitled to dismissal under Rule 7012.

2.1 The non-dischargeability of fraud claims; generally.

We turn first to basic principles.

Bankruptcy relief is fundamentally equitable in nature. And the primary mandate of the bankruptcy laws is to afford the debtor a fresh start. Bearing in mind the equitable nature of bankruptcy law, it is equally fundamental that dishonest acts are not rewarded, and that debtors will not be discharged from debts that were incurred through fraud or other misconduct. This basic principle of bankruptcy law finds its origin in the equitable maxim that one who seeks equity must come to equity with clean hands. Normally, exceptions to discharge are narrowly construed against the creditor and liberally in favor of the debtor, thus effectuating the fresh start policy of the Bankruptcy Code. *The Merchants Nat'l. Bank of Winona v. Moen (In re Moen*), 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999). The Bankruptcy Code is "designed to afford debtors a fresh start, and we interpret liberally its provisions favoring debtors.", *In re: Bugna,* 33 F.3d 1054, 1059 (9th Cir.1994). The Code's limited exceptions to the general policy of discharge are found in § 523(a) and are to be construed narrowly, *In re Riso,* 978 F.2d 1151 (9th Cir.1992). The plaintiff in an action for determination of dischargeability under § 523(a) bears the burden of proving all elements of the claims for relief asserted by a preponderance of the evidence. See, *Grogan v. Garner*, 498 U.S. 279 (1991), and *In re: Belfry,* 862 F. 2d. 661 (8th Cir 1988*).* The intent that must be shown for a determination of non-dischargeability under § 523(a) is actual intent, not merely intent implied in law, or constructive intent.

To establish fraud under 11 U.S.C. § 523(a)(2)(A), the plaintiffs must show: (1) the debtor made a representation; (2) at the time the representation was made the debtor knew it was false; (3) the debtor made the representation deliberately and intentionally with the intent and purpose to deceive the creditor; (4) the creditor justifiably relied upon such representation; and (5) the creditor sustained injury as a proximate result of the representation. See, *Hernandez v.General Mills Fed. .Credit Union(Inre Hernandez),* see, also, *Heide v. Juve (In re Juve)*, 761 F.3d 847 (8th Cir. 2014), *.In re Moen, supra*; *Minnesota Client Security Board v. Wyant (In re Wyant),* 236 B.R. 684 (Bankr. D.Minn. 1999).

DTI will demonstrate that the complaint fails to meet the basic pleading requirements to establish fraud, and that therefore the complaint should be dismissed for failure to state a claim upon which relief may be granted under Rule 7012.

2.1.1 The complaint should be dismissed because it fails to plead fraud with particularity.

Fraud must be pled with particularity. Fed. R. Bankr. Pro. 7009. Rule 7009 also requires that time and place be specifically alleged as a general proposition. Simply stated the requirement of pleading fraud with particularity means that the party alleging fraud must specifically allege the "who, what, where and when" of the cause of action. See, *Freitas v. Wells Fargo Home Mortgage, Inc*., 703 F. 3d 436 (8th Cir. 2013) and *Crest Construction II, Inc. v. Doe* 660 F 3d 346 (8th Cir 2011). It is insufficient to merely assert conclusory statements or to merely allege the elements of the cause of action.

Here, the complaint is woefully deficient. The complaint fails to state who said what to whom, when it was said and where the statement was made. Virtually all of the allegations are conclusory in nature. The state court complaint, appended as an exhibit to the Complaint, does little to add to the story. In numerous ways the complaint and the underlying state court complaint are vague, and the allegations "mushy". Few if any details are alleged. Time is bent and compressed, and it is difficult to understand what the plaintiff alleges happened, who did it or who said what; when it was done or said and to whom.

The complaint fails to allege fraud with particularity and should be dismissed.

2.1.2 The complaint fails to allege a plausible claim for fraud.

Under prevailing Federal jurisprudence, a court considering a motion to dismiss under Rule 12, must look to both the form and substance of the allegations of the complaint. The plaintiff must plead plausible facts sufficient to make out the cause of action for which relief is sought. *Twombly, supra; and Iqbal, supr*a. For a fact claim to be plausible, the pleadings must be enough to support the reasonable inference that the defendant is liable for the conduct alleged. Iqbal, 556 U. S. at 663. The complaint must affirmatively and plausible demonstrate the right to the relief sought and must go further than merely asserting facts that are consistent with a right to relief. See, *Stalley v. Catholic Health Initiatives*, 509 F. 3d 517 (8th Cir 2007).

The plaintiff's claim of fraud is utterly implausible. Pomije claims he was fraudulently induced to resign and accept the employment agreement and the assignment of the subscription receivable. Putting aside the complete lack of clarity about who said what to him to induce him into these actions, the claim is incredible for one reason above all others: (as stated in the complaint) Pomije was the CEO, one of two directors and the majority shareholder of DTI and had been for many years. Pomije had complete access to all of the company's books and records and was intimately involved with the company's affairs and operations. In effect, Pomije was negotiating with himself. It is utterly implausible for him to claim that he was defrauded by the company when he was fully in control of the company.

More specifically; because of the positions he held, Pomije cannot prove a required element of the action for fraud; and the circumstances preclude him from proving another. Pomije cannot prove "justifiable reliance". Justifiable reliance is a requisite element of a fraud claim and the burden of proof on this element falls squarely on the plaintiff. *Field v. Mans*, 516 U.S. 59, 73-76 (1995). As the controlling person of DTI, Pomije had not just access to, but he was intimately acquainted with all of the facts and circumstances surrounding DTI's business, its affairs, and operations. He could not have justifiably relied on any purported fraudulent statement. For example, he knew that the company was insolvent and had lost money for years. He brought Rob Monster in to revive the business and pursue new ideas. Given the financial condition of the company it was reasonably predictable that the company would not be able to afford to pay his salary as an "account executive". Similarly, he had to have full knowledge about the facts and circumstances surrounding the "subscription receivable" and had to have known that its collectability and enforceability were (at least) questionable. He knew that the subscription agreement was in default. And he knew that whatever agreement existed with Bill Olson was an oral agreement and was therefore subject to dispute over its terms and possibly unenforceable under the statute of frauds. How could he have been possibly deceived into entering into these contracts; and how could he have justifiably relied upon any (purportedly) fraudulent statements when he knew the ultimate facts?

Pomije cannot establish the requisite casual connection between the alleged fraud and the alleged damages. Pomije claims damages in lost value of his shares (See paragraph Complaint, Docket Item No. 1)[3] and the loss of his wages and loss of the value of subscription receivable. The purported loss in share value cannot be causally linked to the alleged fraud. There is no suggestion that Pomije acquired his shares through fraud attributable to DTI. Share values vary over time. In fact, the share value increased substantially shortly after Pomije left the company. (See, Declaration of Sam Ciacco). Pomije could have sold his shares profitably at various points in the months that followed his resignation. He had complete control over whether and when to sell his shares and realize their value. But in any event, the value of the shares has depended on a wide

[3] Pomije claims that he lost $12 million in share value. At the time he left the company the share value was not more than $0.25; he held 21,506,213 shares as of February 28, 2015. The actual value of his shares when he resigned was $5,377,553. See Declaration of Sam Ciacco

variety of factors over a relatively long period of time and cannot be tied "proximally" to the alleged fraud.

Similarly, Pomije cannot demonstrate that the alleged fraud caused his loss of the value of the subscription receivable. The subscription receivable was of dubious value; and was of questionable enforceability having nothing to do with the alleged fraud. First the purported assumption of the subscription receivable was not in writing. That fact alone made it difficult to enforce – being open to dispute over the terms since it was an oral contract. Not being in writing made the purported assumption subject to the statute of frauds. Minnesota law requires that a "special promise to answer for the "debt, default or doings of another" be in writing. Minn. Stat. § 513.01. The enforcement of the 2013 purported debt assumption agreement was problematic because the agreement was subject to the Minnesota statute of frauds. And Bill Olson in fact asserted both of these defenses (see Amended Answer, Exhibit 3 to Declaration of Willard Olson) when he was sued. And most critically Bill Olson denied that there was any such agreement.[4] Ultimately, Pomije did not recover on account of the subscription receivable because Bill Olson filed for bankruptcy relief. (See paragraph 13 of the State Court Complaint attached as exhibit 1 to the Complaint in these proceedings. See also, Discharge Order dated August 8, 2019 in *In re: Olson*, Court File No. 19-31536, Docket Item No. 18)

While Pomije may well have sustained a loss because he was ultimately unable to collect on the subscription receivable there were numerous intervening and superseding causes that resulted in the supposed loss; none of which has anything to do with the alleged fraud. In light of these numerous circumstances that caused his so-called loss,

[4] DTI maintains that there was no such agreement in the following Sections 3.2 and 3.6, and that DTI is entitled to summary judgment on this and related issues.

Pomije cannot establish, as a matter of law, that but for the alleged fraud, Pomije would not have sustained the purported loss. Since he cannot establish this causal link, Pomije cannot establish that the alleged fraud was the proximate cause of his so-called damages.

Beyond the inability to prove requisite elements of the claim of fraud; the plaintiff cannot prove that fraud occurred here. At base, the plaintiff claims that DTI entered into an agreement with him with no intention to perform. That claim is not tenable in the first instance; and belied by the facts and circumstances. The plaintiff is vague about what fraudulent statement was made to him; but the claim appears to be that DTI just did not ever intend to perform under the employment agreement. (Notwithstanding Pomije claims about collusion and Mr. Olson and the subscription receivable, the company fully performed its obligation to assign the subscription receivable to Pomije. He knowingly assumed the rick of collecting on that receivable. Since the company fully performed that portion of its promise, the claim that the company did not intend to perform just can't relate to that aspect of the transaction.) DTI in fact employed Pomije and paid him in accordance with the employment agreement for two months. His employment was terminated for sound business reasons, having nothing to do with some fraudulent scheme. See, generally, Declaration of Rob Monster, and Declaration of Darvin Habben.

Statements about future intentions or future performance cannot form the basis of claim for non-dischargeable fraud; the alleged fraudulent statement must concern past or present fact. Future-looking statements can only support a claim of non-dischargeable fraud if the person making the statement had no intention whatsoever of performing. See, *Shea v. Shea (in re: Shea),* 221 B.R. 491 (Bankr. D. Minn. 1998). Broken promises generally do not constitute fraud, unless the plaintiff demonstrates affirmative evidence that there was no intention to perform. See, *Int'l Travel Arrangers v. NW. Airlines, Inc.,* 991 F.2d 1389, 1402 (8th Cir.1993)

Although the plaintiff attempts to fit his claim into that pigeonhole, and invokes that narrow exception, his allegations are merely conclusory. There are no factual allegations that support the claim. The Complaint fails to affirmatively demonstrate facts that support the claim that DTI did not intend to perform. Not only does the plaintiff fail to allege sufficient facts to establish such a claim and the applicability of this narrow exception; his claims are utterly implausible.

At the time that the employment agreement was signed, the plaintiff had virtual unfettered control over DTI. As stated in the complaint, he was the CEO, one of two directors and the majority shareholder. The plaintiff had run the company for many years. He was intimately acquainted with its operations and circumstances. He was, in effect, sitting on both sides of the table in negotiating the employment agreement. The plaintiff cannot possibly claim that there were any material facts withheld from him as he knew all there was to know about the company.

The plaintiff had orchestrated his transition by engaging Mr. Rob Monster as an executive employee and by bringing in new investors. But those individuals were not in place until after the employment agreement was signed. In fact, the plaintiff is claiming that he defrauded himself. That claim is implausible.

The undisputed fact that at the time of the plaintiff's resignation, the company had less than $1,600 of revenues in the prior fiscal year, and no signed customer contracts of any significance on hand. There was certainly a business risk that the company might not be able to afford to pay an account executive $125,000 a year. Nor was it unreasonable to expect under the circumstances that the board of directors might seek to aggressively cut overhead by getting of the lease.

Pomije's claim that he was defrauded are implausible.

2.2 The plaintiff's breach of fiduciary duty claim should be dismissed.

The plaintiff alleges that DTI breached a fiduciary duty to him. Pomije's claim is grounded upon Section 523(a)(4) of Title 11, which provides that a claim is not dischargeable if it arises out of "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny". The complaint alleges a series of "bad things" that DTI allegedly did that were supposedly fraudulent and comprise a breach of the fiduciary duty that the plaintiff claims was owed to him by DTI.

There is a fundamental flaw with this claim; a flaw that warrants dismissal – DTI did not owe a fiduciary duty to Pomije. It seems obvious to say; but for there to be a breach of duty, there has to be a duty in the first instance. There is no fiduciary duty owed by a corporation to its shareholders. The plaintiff's claim is ill-conceived and is not warranted under either Minnesota or Federal law and should therefore be dismissed.

Plaintiff must prove that a fiduciary relationship existed and was breached and damages. *In re: Montgomery,* 236 BR 914 (Bankr. D. N D 1999). See also, *Reisdorf v. i3, LLC*, 129 F. Supp. 3d 751, 767 (D. Minn. 2015).

The question of whether a fiduciary relationship exists for the purposes of Section 523(a)(4) is a Federal question. See, *In re: Cochrane*, 124 F. 3d 978 (8th Cir 1977) and *Arvest Mortg. Co. v. Nail (In re: Nail),* 680 F.3d 1036, 1038 (8th Cir. 2012). Not all fiduciaries are fiduciaries within the meaning of Section 523 (a) (4). Generally, the fiduciary relationship has to result from an express trust, or the express and voluntary assumption of obligations. *Arvest Mortgage.*, supra. See also, *Reshetar Systems, Inc v. Thompson (In re: Thompson)* 686 F. 3d 940 (8th Cir. 2012).

But here we don't ever reach the Federal question of whether a duty characterized as fiduciary under state law is in fact a fiduciary relationship for bankruptcy purposes -- because there is no state law fiduciary relationship. Corporations are not fiduciaries to their shareholders under Minnesota law.

"The first question in considering this contention is whether the state statute created an express trust, because § 523(a)(4) 'does not operate in the absence of an express trust.'" *Thompson, supra.* The court here must turn to Minnesota law. But unlike *Thompson* and *In re: Dloogofff*, 600 F. 2d 166 (8th Cir. 1979) where the court considered whether an existing relationship that was characterized as "fiduciary" under state law was "fiduciary" in nature for bankruptcy purposes; we are confronted with a much more basic issue. There is no fiduciary relationship here.

Contrary to the plaintiff's assertion that DTI breached a fiduciary duty, ***corporations*** do not owe a fiduciary duty to its shareholders. The plaintiff just plainly misconstrues Minnesota law in asserting that a fiduciary duty existed between DTI and Pomije.

It is certainly true that officers and directors of Minnesota corporations owe a fiduciary duty to shareholders. Those duties arise from statute. Section 302A.251 of Minnesota provides:

> Subdivision 1.Standard; liability. A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

> A person who so performs those duties is not liable by reason of being or having been a director of the corporation.

Similarly, Section 302A.361, regarding officers, provides:

> An officer shall discharge the duties of an office in good faith, in a manner the officer reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A person who so performs those duties is not liable by reason of being or having been an officer of the corporation. A person exercising the principal functions of an office or to whom some or all of the duties and powers of an office are delegated pursuant to section 302A.351 is deemed an officer for purposes of this section and sections 302A.467 and 302A.521.

While the duty owed by corporate officers and directors is often described as fiduciary in nature, that duty is personal; owed by the individual officer or director. There is no provision in the Minnesota Business Corporations Act (Minn. Stat. Ch 302A) that establishes a fiduciary duty between the corporation itself and its shareholders. And, no such duty exists.

While there are Minnesota cases that consistently describe the fiduciary duty owed by officers and directors to shareholders, we can find none that suggest that a corporation itself owes a fiduciary to shareholders. There is, however, compelling authority that no such duty exists.

Minnesota courts often look to Delaware courts for guidance on corporate law issues. See, e.g., *In re: United Health group, Inc. Shareholder Derivative Litigation* 754 N. W. 2d 544 (Minn. 2008); and *PJ Acquisition Corp. v. Skoglund*, 453 N. W. 2d 1 (Minn. 1990). In construing Minnesota corporate law, the Federal courts in Minnesota will look for guidance from Delaware caselaw when there is a paucity of Minnesota decisions. See, *Markewich ex rel. Medtronic, Inc. v. Collins*, 622 F. Supp. 2d 802 (D. Minn. 2009); and *In re: Patterson, Inc Sec., Derivative & ERISA Litigation,* 479 F. Supp.

2d 1014 (D. Minn. 2007). And see, Memorandum Opinion and Order Granting Defendants' Motions for Judgment on the Pleadings, *Lusk and St Clair Employee's Retirement System v. Arkadi et al.,* .Court File No. 0:15-cv-01911-JRT-BRT (ECF Docket Item No. 224) (D. Minn. August 6, 2017) fn. 6 at 10.

Delaware has clearly enunciated the rule that corporations do not owe a fiduciary duty to its shareholders. *In re: Wayport, Inc. Litig.,* 76 A. 3d 322-23 (Del. Ch. 2013) and see, Letter Opinion, *Buttonwood Tree Value Partners LP v. R L Polk & Co,* Civil Action No. 9250 – VCG (Del Ch August 7, 2014).

Similar holdings abound in other jurisdictions as well. For example, New York, which like Delaware has a robust body of corporate law, flatly denies that a corporation has a fiduciary duty to its shareholders. "[I]t is well-settled that corporation does not fiduciary duties to its members or shareholders. *Hyman v. New York Stock Exchange, Inc.,* 46 AD3d 335, 337 [1st Dept 2007]; see also, *Stalker v. Stewart Tenants Corp*. 93 AD 3d 550 [1st Dept. 2012], and Slip Op. 01454*, C&J Brothers Inc. v. Hunts Point Terminal Produce Cooperative Association, Inc*. [181 AD 3d 419 March 3, 2020].

Minnesota law does not expressly establish a fiduciary duty binding on a corporation in favor of its shareholders. And since those states whose corporate law serve as "voyageurs" leading the way for Minnesota's interpretation of its corporate law, resoundingly reject the notion of a corporate fiduciary duty, one must conclude that there is no fiduciary duty binding on a corporation in favor of its shareholders.

DTI is entitled to judgment dismissing the "breach of fiduciary duty" claims since Pomije cannot establish, as a matter of law, that DTI owed the plaintiff a fiduciary duty to breach. In the absence of a duty, there can be no breach.

2.3 The tortious interference with contract claim is time barred and should be dismissed.

The application of a statute of limitations is a legal matter which can warrant dismissal under Rule 7012. Here, the claims for tortious interference with contract are time-barred. While it is not perfectly clear that the plaintiff is asserting his claims for tortious interference are non-dischargeable; the underlying state court action does assert a claim for tortious interference with contract.

The underlying claim for tortious interference is brought under Minnesota law. Based on the facts alleged here, and the nature of the tortious interference, the plaintiff's claim is subject to a two-year statute of limitations as set forth in Minn. Stat. §541.07. The plaintiff claims that in approximately June 2017 Olson breached his contracts with Pomije. See, Amended Complaint in the matter of *Pomije v, Olson* , Dakota County District Court File No. 19HA-CV-19-308, paragraph 21, at page 4, Exhibit 2 to Declaration of Willard Olson. In January 2019, Pomije claimed that the breach occurred approximately 1 ½ years before the date of the amended complaint, putting the breach sometime in June 2017. Pomije started the state court action against DTI on or about April 15, 2020; at least two and one-half years after the breach allegedly occurred. The heart of the plaintiff's claim is that DTI somehow caused the breach, so the tortious interference had to occur not later than the breach itself.

Minnesota has a somewhat curious approach to the statute of limitations for tortious interference claims. The courts of Minnesota will look to the nature of the interference to determine which statute of limitations applies. When the alleged tortious interference is in the nature of a property right impinging on a contract claim, the six-year statute of limitations set forth in Minn. Stat. §541.05, applicable to contract claims, applies. But when, as here, the underlying claim is based on defamation, the two-year personal injury statute of limitations set forth in Minn. Stat. § 541.07 applies. See, *Wild v. Rarig* 193 N. W. 2d 148 (Minn. 1975). The plaintiff's claims for tortious interference with contract all sound in defamation. The plaintiff claims that some unnamed, undefined representative of the company told Bill Olson that the plaintiff was a criminal and that Olson should not do business with him. That is the fundamental nature of the interference that is claimed. That sounds in defamation. Bill Olson breached his contracts with Pomije more than two years before the state court action was commenced. The plaintiff's tortious interference claim is time-barred and cannot be sustained as a matter of law. DTI is entitled to have the tortious interference claim dismissed.

2.4 The Plaintiff's Claim for Defamation is time barred and should be dismissed.

The plaintiff asserts that DTI defamed him and that his claim for defamation should be excepted from discharge. That claim appears to be based on the allegation that DTI told Olson that Pomije was a criminal. Taking the complaint overall, it appears that this alleged statement was the same statement that supposedly induced Olson to breach his contract with Pomije. That took place more than two years before the state court action was commenced. The statute of limitations for defamation claims in Minnesota is two years. Minn. Stat. § 541.07, and *Wild, supra.*

Pomije seems to allege that there may have been other instances of defamatory statements; but they are at best vaguely described. At least one allegedly defamatory statement was made in connection with this case is privileged and therefore not actionable. But the only allegedly defamatory statement that Pomije describes with any specificity is this one statement.

Pomije's defamation claims are time barred.

3. DigitalTown is entitled to Summary Judgment .

DTI is entitled to summary judgment on each of the claims of non-dischargeability asserted by the plaintiff. The defendant will demonstrate that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. In addition, DTI moves the court for summary judgment on its first claim for relief stated in its counterclaim DTI will demonstrate below that it is entitled to judgment on its claim of avoidable transfers under the Minnesota Voidable Transfers Act.

3.1 Standards for Summary Judgment.

Rule 7056 of the Federal Rules of Civil Procedure, incorporating Rule 56 of the Minnesota Rules of Civil Procedure authorizes summary judgment. Summary judgment is appropriate when judgment may be granted, as a matter of law, when "there are no genuine issues of material fact in dispute." Summary judgment is appropriate when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.Pro. 56. While summary judgment effectively deprives a party of a trial on the merits, it is when properly applied an integral part of the federal rules as a whole which are designed to secure the just, speedy and inexpensive determination of every action." See, *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, (1986). See also, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, (1986). This circuit has reaffirmed the standards applicable in summary judgment, in *Employers Mutual Casualty Company v. Wendland & Utz, Ltd.,* 351 2.d F. 3 890 (8^{th} Cir. 2003).

3.2 Status of the purported 2013 debt assumption agreement.

Before addressing the specific bases for the summary judgment motion, we turn to the question of the existence of the purported 2013 debt assumption agreement. As will be shown, the existence, or more accurately, non-existence, of this supposed agreement is at the heart of most of the plaintiff's claims. It is prudent therefore to first consider whether the purported contract even exists.

The plaintiff claims that sometime in 2013, Olson entered into an agreement with Thomas Pomije to assume the subscription receivable. Subsequently, in connection with his severance from the company, the plaintiff took an assignment of the subscription receivable.

Here is what we know about this claim:

- There is no written debt assumption agreement.
- There is no record of the assignment, no acknowledgement of the assignment and no consent to the assumption of the purported assignment in the company's books and records.
- The purported change in obligor was not reported in any SEC filings.
- At the time of the purported assignment, Thomas Pomije was in default under the subscription agreement (see, State Court Complaint in *Pomije v. DigitalTown, Inc,* Exhibit 1 to the Complaint in this action, at paragraph 10.e at page 3.

- Thomas Pomije did in fact transfer a block of common shares of DTI to Olson in late 2013
- As Olson sold shares he remitted the net proceeds to DTI and/or Pomije.
- Most critically: Both of the parties to the purported agreement deny that any such agreement existed. See, Declaration of Willard Olson and Affidavit of Thomas Pomije, Exhibit 1 to Declaration of Joseph W. Dicker.

In addition to these specific points that bear directly on the existence of the agreement, we also know that historically when Olson entered into debt assumption agreements with DTI they were in writing. It also appears that at the time the purported debt assumption agreement was made, the shares were worth substantially less than the purchase price stated in the subscription agreement. Thomas Pomije's purchase price was $0.75 per share; and at the time this agreement was supposedly made the shares were trading at approximately $0.50 per share.[5]

The claim that the contract exists cannot be meaningfully or effectively asserted by a non-party, when the two parties to the purported contract deny that such an agreement exists. Mr. Olson outright denies that such agreement exists (which has been his consistent position in the state court litigation). And Thomas Pomije stated that the

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[5] DTI acknowledges that in the context of a summary judgment motion all reasonable inferences are to be drawn in favor of the non-moving party. While there is some inferential logic being applied here, we are not asking the court to make inferences in favor of the movant. While the plaintiff's allegations make it difficult to pinpoint the time at which this debt assumption agreement was actually made it does appear that it was made in mid-to late-December 2013, based on the company's books and records. See, declaration of Sam Ciacco. Tomas Pomije was making payment under the share subscription agreement as late as early December ,2013. The next payments that were applied to the subscription receivable were tendered by Bill Olson in January 2014. Consequently, it appears that the most likely time of the purported transfer was sometime in mid-to late-December 2013. In that timeframe, the shares were trading at or below $0.50 per share. The average trading price during all of 2013 was $0.56. And, for a short period of time in 2013 the shares were trading at $0.75 per share. Consequently, it is fair to conclude that at no point in 2013 were the shares trading at more than at Thomas Pomije's purchase price and that for most of the year the trading price was substantially less than $0.75.

transfer of shares was a "gift" to Olson in his affidavit testimony. (See Affidavit of Thomas Pomije, Exhibit 1 to Declaration of Joseph W. Dicker). The assumption of a $625,000 debt is fundamentally inconsistent with the transfer of shares being a gift. This writer knows of very few *gifts* that come with a $625,000 string attached.

Not only do the parties to the purported agreement deny it exists, but the purported agreement is utterly illogical. The plaintiff is asking this court to believe that Bill Olson knowingly and intentionally assumed a $625,000 debt obligation in consideration for receiving shares that were valued at substantially less than that. There is no logical reason why a person would buy shares of a company for more than the current trading value. Simply put, Olson could have simply bought the shares cheaper in the marketplace. The plaintiff asks the court to believe that Olson assumed a debt that was by all accounts in default and subject to legal enforcement remedies. The plaintiff asks the court to believe that Olson would have assumed a debt that he could not afford to pay. And it appears that the plaintiff did no underwriting or due diligence into the Olson's financial condition. The plaintiff asks the court to believe that the supposed transaction took place without any written acknowledgement by the company. And the plaintiff asks the court to believe that this transfer took place without any comment in the SEC filings which in itself is implausible since this supposed transaction involved a very substantial stock-related transaction of the company.

All of these facts and circumstances make the plaintiff's claims incredible. Beyond the utter lack of believability of the plaintiff's claims, Olson's testimony is compelling. Olson suggests that he accepted the shares from Thomas Pomije to do the company a favor. He would sell the shares at the plaintiff's direction to raise money for the company's benefit. As a shareholder and supporter of the company that claim makes sense and makes far more sense than the version in which Olson assumed a debt he could not afford to overpay for shares that he didn't want. Olson's testimony is consistent with Thomas Pomije's prior testimony that he gifted the shares to Olson.

There was no debt assumption agreement between Olson and Thomas Pomije by which Olson took Thomas Pomije's shares and assumed the financial liability for the subscription receivable.

3.3 DTI is entitled to summary judgment on the fraud claim.

DTI moves the court for summary judgment on the plaintiff's claims of fraud. Although claims of fraud are often fact intensive and raise questions of intent which often warrant a trial to establish such matters; here, the claims are utterly lacking in evidentiary support; and the undisputed facts warrant summary judgment in favor of the defendan

3.3.1 Preliminary remarks on the fraud claims

The plaintiff has alleged that its claim arises through fraud and therefore should be excepted from discharge under 11 U.S.C. §523(a)(2). As suggested above, the allegations of fraud are not pled with particularity so it is somewhat difficult to get a clear understanding on what is being alleged. But it appears that the plaintiff is alleging:

- That DTI fraudulently induced the plaintiff into resigning and into making the severance agreements;
- That DTI and Bill Olson fraudulently conspired to induce the plaintiff into accepting an assignment of the Thomas Pomije receivable;

- That DTI fraudulently induced Olson to breach his purported contract to assume the Thomas Pomije receivable.

These claims are patently absurd and do not establish a claim of fraud. Section 523(a)(2) establishes that claims that arose through actual fraud are excepted from discharge. The requirements for proving fraud are well established. For a statement to constitute fraud: there has to be a false statement; the statement must be made knowingly and intentionally for the purpose of inducing the plaintiff to act; there has to be justifiable reliance on the fraudulent statement and there have to be proximate damages.

Prior to May 2015, the plaintiff was and had been for more than ten years, DTI's chief executive officer, one of two directors and its majority shareholder. In that context, the plaintiff was intimately involved and knowledgeable of the company's business affairs, finances and operations. The plaintiff effectively "ran the show".

The plaintiff resigned by letter dated May 11, 2015. His resignation as chairman, director and secretary was effective on May 31, 2015 and his resignation as the chief executive officer was effective on May 18, 2015. On May 12, 2015, the plaintiff caused Mr. Darvin Habben and Mr. Rob Monster to be elected as directors. On May 13, 2015 the board approved the assignment the subscription receivable to Pomije. Consequently, on May 11, 2015, when the resignation letter was tendered, the employment agreement signed and the promise to take the assignment of the subscription receivable was made all took place, the plaintiff was still the chief executive officer, one of two directors, and the majority shareholder. The new board of directors did not come into office until the next day. In effect, the plaintiff was on both sides of the negotiating table. In essence, the plaintiff is making the impossible claim that he defrauded himself. Putting aside the circumstantial absurdity of this claim, the factual basis completely wanting. Presumably the plaintiff did not knowingly make a false statement to himself. Moreover, it appears that the plaintiff unilaterally decided to resign and withdraw from the company; that the plaintiff essentially dictated the terms of the termination including the assignment of the Thomas Pomije subscription receivable, and completely orchestrated and controlled these transactions.

There was no fraudulent statement and there was no fraudulent intent to not perform.

3.3.2 The plaintiff cannot establish a valid claim of fraud.

The plaintiff claims that DTI fraudulently induced him to resign and enter into the severance agreement without any intention to honor the promise, and somehow involving a conspiracy with Bill Olson to induce him to take on the subscription receivable.

The plaintiff claims fraud, but the plaintiff's claims are fatally flawed. First, the plaintiff's claims suffer from two major conceptual flaws: (1) the plaintiff orchestrated the events that he now claims were fraudulent; and (2) he decided to and announced his intention to resign *before* he entered into the employment agreement and took the assignment of the subscription receivable.

. The plaintiff was the self-described "CEO, one of two directors and the majority shareholder" of DTI. In that context he fully controlled the company and had full knowledge of the company's business operations, assets, liabilities and affairs. In essence, the plaintiff is asking the court to believe that he defrauded himself.

The plaintiff decided to resign *before* entering into the employment agreement and taking the assignment of the subscription receivable, and he orchestrated all of these transactions. The plaintiff recruited Rob Monster prior to May 11, 2015 with the intention of presenting him as the new face of the company going. The plaintiff solicited the investment of Darvin Habben with the representation that the company would be going in a new direction under Rob Monster's leadership. These discussions lead to a meeting on May 11, 2015. On May 11, 2015, Rob Monster flew to Minneapolis and met with the plaintiff and Darvin Habben and discussed the transactions.

There was no fraudulent inducement as the plaintiff was the primary actor in causing these events.

Beyond these conceptual failings, the plaintiff cannot prove requisite elements of the claim of fraud. Pomije cannot prove either justifiable reliance[6]; nor can he prove that his supposed damages were proximately caused by the alleged fraud.

Assuming *arguendo* that the company in fact made an affirmative false statement that it intended to honor the employment agreement, the plaintiff could not justifiably have relied upon such statement. Bearing in mind that the plaintiff was in full control of the company at the time, and had full knowledge of its financial condition, the plaintiff *knew* that the company was in dire financial straits; that it was insolvent; and that it had negligible revenues and cash flows through the date of his resignation. The company simply did not have, and the plaintiff knew that the company did not have the cash resources to pay a $125,000 salary plus benefits. By ceding control over the company and by resigning as CEO and as a director and installing new directors, the plaintiff

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[6] Justifiable reliance is something less than reasonable reliance. See, *Field v. Man,* U. S. 59 (1995). But here, even at the lower threshold the plaintiff cannot prove reliance.

knowingly put himself at risk because he no longer had control as CEO and as a director and was subject to the business decisions of the new board. He also put himself at risk of having his shares diluted. Those risks were particularly acute since the company was in dire financial straits, and it was highly likely that the company would need to raise new capital (as was the case in the Pomije- orchestrated investment from Mr. Darvin Habben). Selling shares was one obvious way the company might have brought in new capital which would inevitably resulted in dilution.

With respect to the assumption of the subscription receivable, the plaintiff was fully aware of all of the relevant circumstances – that the supposed agreement was not in writing, making it subject to a statute of frauds defense; and making subject to dispute over terms. The plaintiff knew that the subscription receivable had been in default for some time and that Bill Olson had not cured the default. [This point bears repeating: Pomije took an assignment of a receivable that he knew had been in default for some number of years previously. And yet he now claims that he suffered a loss because he has been unable to collect on the receivable.] The plaintiff cannot reasonably argue that he was deceived by some statement about the value of the subscription receivable; and he cannot argue that the company didn't perform its promise to assign it, since he did in fact take an assignment of the subscription receivable. The plaintiff either knew that Bill Olson did not have the financial wherewithal to pay the full subscription receivable or had not done any underwriting or due diligence investigations to verify Olson's financial condition; thereby assuming a financial risk of collectability.[7]

[7] There is no evidence that the purported assumption of the subscription receivable resulted in the release of Thomas Pomije; nor is there any evidence that the plaintiff has made any attempt to recover from Thomas Pomije. It appears that Pomije has taken no action to mitigate his losses by seeking recovery from Thomas

The plaintiff cannot prove as a matter of fact any causal connection between the alleged fraud and his damages. The plaintiff appears to claim several elements of damage: He now claims that his debt for unpaid payroll was somehow induced through fraud resulting in the loss of the value of the employment agreement -- salary of $125,000 and benefits; and that he lost the value of the subscription receivable.[8] None of these damages flow from the alleged fraud.

The plaintiff's termination was not the result of any fraudulent intent. But rather, the result of business exigencies for which he was largely responsible. At the time the plaintiff entered into the employment agreement the company had nominal income; and, as orchestrated by the plaintiff, was heading into a new, unproven direction. The reason that the plaintiff's employment was terminated had nothing to do with any fraudulent intent in May 2015, but hard, obdurate business realities in August 2015.

Not only was the company in dire straits, but the plaintiff depleted cash for his own benefit. In soliciting the investment of $350,000.00 from Mr. Habben, the plaintiff represented that these funds would be used to implement Rob Monster's new plan. Instead, while he remained in control, the plaintiff used a substantial portion of the new dollars invested by Mr. Habben to pay old debt to himself, family members and others, thus depleting the cash reserves upon which the company was relying. When Rob Monster did take over, he found out that the company did not have the cash reserves that had been anticipated based on the Habben investment, and his efforts to restructure the business were significantly hindered. More generally, the company had large overhead

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Pomije. See, *Adee v. Evenson*, 281 N. W. 2d 177 (Minn. 1979) and *Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 19, 250 N.W.2d 185, 189 (1977).

[8] The plaintiff also asserts a claim for damages for defamation but that does not appear to relate directly to the alleged fraud.

including rent obligations for office space that it did not need. That circumstance was compounded by the fact that Mr. Monster recommended, and the board approved closing the Minnesota office. For those reasons, the company terminated all Minnesota employees including the plaintiff.

The justification for his termination was business exigency partially created by the plaintiff himself, not some fraudulent scheme on the part of DTI.

The loss of the value of the subscription receivable was not the result of any fraudulent scheme, but other circumstances. As suggested above, the plaintiff knew that the subscription receivable was in default; either knew that Olson did not have the financial means to pay $625,000 or had taken the assignment of the subscription receivable without any consideration of Olson's financial condition; knew that the supposed assumption agreement was not in writing and that there was no record of it on the company's books and records. All of those circumstances made enforceability and collectability of the subscription receivable doubtful, fully apart from any alleged fraud. Ultimately the reason that the plaintiff has not gotten paid is because Olson filed for bankruptcy and the debt was discharged.

Pomije also suggests (somewhat obliquely) that somehow Olson conspired with DTI to induce Pomije to resign and to take the subscription receivable. That claim makes no sense on its face. If Olson was in fact in cahoots with somebody at DTI, Olson's interests would have been better served had the subscription receivable remained with DTI. On Pomije's theory, Olson caused himself to become a target for Pomije. If Olson had in fact been in cahoots with someone at DTI, his interests would have been far better served by having DTI forgive or restructure the debt, or expressly disavow the purported assumption of the debt by Olson. Olson was certainly ill-served by having this purported debt obligation assigned to Pomije, who the sued Olson and drove him into bankruptcy.

Pomije cannot establish the requisite causal link between the alleged fraud and his alleged damages.

The court's analysis in *Valspar Refinish, Inc. v. Gaylord's Inc*, 764 N. W. 2d 364 (Minn. 2009) is instructive. There, the parties entered into a refinish coat supply agreement. Following a breach, the plaintiff commenced an action alleging breach of contract. The defendant counterclaimed, alleging among other things fraudulent inducement.

> It is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place. It is true that a misrepresentation of a present intention could amount to fraud. *However, it must be made affirmatively to appear that the promisor had no intention to perform at the time the promise was made.* 764 N. W. 2d at 368. [Emphasis added.]

> Second, Gaylord's cannot demonstrate that it reasonably relied on Valspar's representations that it would solve the paint application problems. *Reliance in fraud cases is generally evaluated in the context of the aggrieved party's intelligence, experience, and opportunity to investigate the facts at issue.…* When a party conducts an independent factual investigation before it enters into a commercial transaction, that party cannot later claim that it reasonably relied on the alleged misrepresentation….Here, Valspar and Gaylord's were sophisticated business equals operating in a commercial setting, and Gaylord's conducted an investigation and experimentation regarding the quality and application of Valspar's paint product to its truck-bed lids. 764 N. W. 2d at 369. [Emphasis added. Citations omitted.]

The court's analysis suggests two critical points: the claim of fraudulent inducement based on the claim that the party had no intention to perform is constrained and the plaintiff must affirmatively demonstrate the lack of intention to perform. The second critical point is that in determining whether there was reliance, one must look to the parties' experience sophistication and relative positions. In *Valspa*r, the court found no reliance when the parties were both sophisticated business equals operating in a commercial setting with the opportunity to engage in their own investigation of the material facts.

Here, Pomije was not just an insider; but the controlling majority shareholder, CEO and one of two directors. He was sophisticated. The context was a business transaction. Pomije knew all of the materials facts. He cannot prove either fraudulent intent nor justifiable reliance.

"A plaintiff's failure to demonstrate a genuine issue of material fact on even a single element of fraud is sufficient for a court to grant summary judgment in defendant's favor." *Reisdorf v. I3, LLC,* 129 F. Supp. 3d 751 (D. Minn. 2015). Here , Pomije cannot prove that there was fraudulent statement; he cannot prove that there was no intent to perform; he cannot prove justifiable reliance; and he cannot prove damages that were the proximate result of the alleged fraud.

DTI is entitled to summary judgment on the fraud claim.

3.4 DTI is entitled to summary judgment on the breach of fiduciary duty claim.

The plaintiff's claim for breach of fiduciary duty is ill conceived and not supported by Minnesota law. There is no fiduciary duty that runs from a *corporation* to its shareholder. The fiduciary duty is personal and runs from the directors or officers. [See discussion at Section 2.2, above.]

Even where such a corporate fiduciary duty to exist, fiduciary duties established by Minnesota law are not boundless. They arise out of the related duty of good faith and fair dealing to which officers and directors are held. The nature of the duty requires that officers and directors act in good faith, in the best interest of the business enterprise. These duties run to the benefit of all shareholders, not an individual shareholder. Not all corporate decisions affect all shareholders equally. Here the actions complained of (most particularly terminating the employment agreement.) were made for sound business reasons in the best interests of the corporation. Even if corporations are subject to a fiduciary duty, DTI's actions reflect prudent decision making for the benefit of the business enterprise.

DTI did not breach a fiduciary duty.

3.5 DTI is entitled to summary judgment on the defamation claim.

In Minnesota, a plaintiff pursuing a defamation claim must prove that the defendant made: (a) a false and defamatory statement about the plaintiff; (b) in unprivileged publication to a third party; (c) that harmed the plaintiff's reputation in the community." *Weinberger v. Maplewood Rev*., 668 N.W.2d 667, 673 (Minn. 2003); see also Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn.1980). *Reisdorf v i3, LLC*, 129 F. Supp. 3d 751 (D. Minn. 2015)-.

The touchstone of any defamation claim is that the alleged defamatory statement be false. Here the alleged statements, if made, are true.

At base, Pomije complains that DTI called him a criminal and that he breached a fiduciary duty. While DTI denies that it made such statements, such statements, if made, are true. Richard Pomije is a convicted. Felon. See, Criminal Docket, *United States of America v. Richard Allen Pomije*. Court File No. 90-0081-06, Docket Items, 8,9 and 11.

(D. Minn.), appended to the Declaration of Joseph W. Dicker as Exhibit 2. Any statement to the effect that Pomije is a criminal is true and cannot be defamatory.

Richard Pomije breached a fiduciary duty. Under Minnesota law, officers and directors of an insolvent enterprise are subject to a fiduciary duty in favor of creditors. *Snyder Electric Co. v. Fleming,* 305N.W.2d 863, 869 (Minn. 1981); *26 Helm Fin. Corp. v. MNVA R.R.,* 212 F.3d 1076, 1081 (8th Cir. 2000). See also, *St. James Capital v. Pallet Recycling,* 589 N. W. 2d 511 (Minn. Ct. App. 1999). That duty prohibits self-dealing and making preferential payments. At a time when DTI was insolvent and Pomije was the majority shareholder, CEO and one of two directors, Pomije caused the company to transfer the subscription receivable to himself in full satisfaction of approximately $400,000 of debt owed to him for deferred compensation. Pomije clearly preferred himself and assured that he was paid in full. That action constitutes a breach of fiduciary under Minnesota law. The alleged statement that Pomije breached a fiduciary duty is demonstrably true for this reason alone.

Since the alleged defamatory statements are true, there is no valid cause of action for defamation.

3.6 DTI is entitled to summary judgment on the tortious interference with contract.

While it might be tautological to say, for there to be a valid claim for tortious interference with contract, there must exist a contract that was interfered with. Here the contract that was allegedly interfered with did not exist. The plaintiff claims he is the assignee of the subscription receivable that was purportedly assumed by Bill Olson. Bill Olson affirmatively denies that he ever made an agreement to assume the subscription receivable. Thomas Pomije has testified that he "gifted" his shares to Bill Olson. See, affidavit of Thomas Pomije, a true and correct copy of which is attached to the declaration of Joseph W. Dicker as Exhibit 1. There is no record that management has been able to identify that the purported assumption of this receivable was not disclosed in any SEC filings. Beyond the utter and complete lack of any documentary evidence establishing this purported assumption and assignment occurred, and the two key parties' testimony to the contrary, there are numerous other circumstances that challenge the credibility of the claim that such transaction ever occurred.

There is no indication on the records that the company did any underwriting or any evaluation to establish that Bill Olson, who was already in default on one agreement, was a more credit-worthy obligor than was Thomas Pomije.

In fact, Olson states that he could not afford to undertake an obligation of $625,000 in 2013. Subsequently, when Olson did assume obligations, the transactions were in writing with express terms. When Olson assumed other obligations, he received a benefit in the form of shares that had a value greater than the debt being assumed. That structure makes perfect business sense. There were numerous risks associated with this purported transaction. The debt purportedly being assumed was specific and fixed. The value of the shares fluctuated and at the time of the purported transfer was worth more than the amount of the debt he assumed. There would be no guarantee that the shares would be worth the same or more over time so there was an inherent risk in entering into these transactions. And even assuming the stock value was relatively stable or improving, those transactions built in a premium for Olson to assume the debt. That structure makes sound business sense.

On the other hand, the assumption of $625,000 subscription receivable makes no business sense. The subscription receivable carried a purchase price of $0.75 per share. During 2013, the trading value of the shares was between $0.37 and $0.75, with an average of $0.56.[9] It is simply irrational to believe that any reasonable person would assume a debt obligation related to these shares at an amount greater than the share value. It would certainly appear the transaction would result in an immediate loss. And more pointedly, one could have purchased the shares in the market for less money. And, presumably, one could have dealt directly with the company to buy new shares at a lower price. These factors all militate against a finding that the purported contract even existed.

DTI did not interfere with the purported contract with Olson, because there was no such contract.

3.7 DTI is entitled to summary judgment on its counterclaim of avoidable transfers

Pomije received avoidable transfers.

On May 13, 2015, the plaintiff received an assignment of the Thomas subscription receivable. The receivable had a face value of $625,482. This transfer was in consideration of the debt allegedly due to Pomije for unpaid wages of not more than $431,849. See, State Court Complaint, Exhibit 1 to the adversary complaint. In addition, Pomije received payments of $118,954.76 from DTI on account of various antecedent debts. See, Declaration of Sam Ciacco.

[9] So far as DTI is able to determine, none of the parties had yet specified the date on which these purported transactions occurred. All of the testimony and all of the actions suggest that they occurred sometime in 2013. Based on the corporate records, it appears that Thomas Pomije continued to make payments on the subscription receivable through early December 2013. Our best inference is that the purported transaction occurred in mid-to late December 2013; at that time the shares were trading at $0.48.

DTI has all of the avoiding powers of a trustee. See, 11 U.S.C. § 544. DTI can avoid those pre-petition transfers avoidable by a pre-petition judgment lien creditor. See, 11 U.S.C. § 544.

Minnesota has adopted the Uniform Avoidable Transfers Act. Minn. Stat. §513.41*, et seq.* Under the Avoidable Transfers Act, transfers made to an insider on account of an antecedent debt, at a time when the transferor was insolvent, are avoidable. Minn. Stat. § 513.45 (b). Transfers made without receiving a reasonably equivalent value when the transferor was insolvent are avoidable. Minn. Stat.§ 513.44 (a) (2).

Here the key elements of an avoidable transfer are established by the complaint itself. There can be no genuine issue of material fact in dispute.

DTI was insolvent in May 2015 and thereafter. Pomije alleges that he took the subscription receivable in consideration of deferred compensation owed to him. That allegation demonstrates that DTI was unable to pay its bills in the ordinary course. Minn. Stat. § 513.42 (b). Perhaps more acutely, the company's SEC filings demonstrate balance sheet insolvency. Minn. Stat. § 513.42 (a).

The complaint in this action clearly and unequivocally demonstrates that Pomije took the subscription receivable in consideration of deferred compensation owed to him. The transfer was indisputably made in consideration of an antecedent debt.

The complaint also demonstrates that Pomije as "CEO, one of two directors and majority shareholder" was an insider. (Minn. Stat. § 513.41 (8) (ii): "insider" includes, with respect to a corporation directors, officers and persons in control.)

The subscription receivable was worth substantially more than the debt owed to Pomije. Pomije claims the deferred compensation debt owed to him was approximately.

The subscription receivable had a value of $625,482 at the time of the transfer. Value is determined by the value at the time of the transfer. Minn. Stat. § 513.48 (c).

The plaintiff took a valuable asset of DTI in satisfaction of debt that he claims the company owed to him. The plaintiff cannot reasonably dispute either the fact of insolvency or the value of the asset and should is estopped from doing so. As chief executive officer, director and majority shareholder, the plaintiff had unique control over DTI. The plaintiff caused to be filed and signed all of the SEC filings during his tenure. The 10-K filed for February 2015 included a balance sheet, a true and correct copy of which is appended to the declaration of Sam Ciacco as Exhibit 2. That balance sheet shows: a) the company was grossly insolvent with assets of $80,553and liabilities of $641,769, and showed the value of the subscription receivable as approximately $625,000 (see , discussion of "Liquidity and Capital Resources," at 13 et seq.)[10]. That value was consistently listed in prior SEC filings. subsequent SEC filing was made after Pomije's resignation and was not prepared by him.) Since these values were reasonably contemporaneous with the transaction at issue, they are compelling evidence of both the company's insolvency and the value of the receivable. Since the plaintiff prepared these documents and swore on oath that they were true, he cannot now deny that either the company was not insolvent or that the value is something different than what he represented it to be.

And in this case and other cases, Pomije has consistently demanded damages based on the $625,000 value of the subscription receivable.

[10] The November 20, 2014 10-Q report was the last SEC filing signed by Pomije. The February 28, 2015 10-K report was prepared by the new management, but the data is fundamentally consistent.

Based on these two factors (Pomije's SEC filings and his prior litigation positions) he is judicially estopped from denying either the fact of insolvency or the value of the subscription receivable. Judicial estoppel is an equitable doctrine that prohibits a party from advancing contradictory positions. See, e.g., *Levinson v. US*, 969 F. 2d 260 (7th Cir. 1992). See also, *Port Authority of St. Paul v Harstad,,* 531 N.W. 2d 496 (Minn. Ct. App. 1995); *Jones v. Bob Evans Farms, Inc.* 811 F. 3d 1030 (8th Cir. 2016)*; Total Petroleum, Inc. v. Davis,* 822 F. 2d 734 (8th Cir, 1987); *Stallings v. Hussmann Corp*., 447 F.3d 1041. (8th Cir. 2006). Equity does not allow a party to benefit from inconsistent positions. Here, Pomije is bound by his prior statements and litigation positions and cannot contradict them.

The essential elements of the counterclaim are established almost entirely by the Complaint itself. Pomije received a transfer of the subscription receivable on account of an antecedent debt when the transfer was insolvent. He received other transfers as well.

Pomije received an avoidable transfer under Minn. Stat. § 513.41 *et seq*. DTI is entitled to judgment in its favor in the amount of $744,436.60.

CONCLUSION

Richard Pomije's claims are dischargeable in bankruptcy. He was not defrauded by DTI. DTI breached no duty owed to him. DTI did not defame him. And, DTI did not tortiously interfere with any contract of his.

Richard Pomije cannot make a sustainable claim for the non-dishargeability of the debt owed to him by DTI, and he cannot establish additional claims; much less additional non-dischargeable claims.

This adversary proceeding should be resolved now. The complaint fails to state claims upon which relief can be granted. The complaint fails to plead fraud with specificity. The complaint fails to state plausible claims. The defamation and tortious interference claim are time-barred.

DigitalTown is entitled to summary judgment in its favor on all claims asserted in the Complaint and on its counterclaim for the recovery of voidable transfers.

Respectfully submitted,

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/e/ Joseph W. Dicker

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