A06-1309

STATE OF MINNESOTA
IN COURT OF APPEALS

Julia A. Christians, Trustee for the Bankruptcy Estate of Technimar Industries, Inc.

Appellant,

v.

Grant Thornton, LLP,

Respondent.

RESPONDENT'S BRIEF

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The Trial Court held that designating damages to creditors as "deepening insolvency" does not provide a bankruptcy Trustee with authority to recover creditor damages.

In re Senior Cottages of Am. LLC, 320 B.R. 895 (Bankr. D. Minn. 2005),

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In re CitX Corp., Inc., 448 F.3d 672 (3d Cir. 2006)

2. Is summary judgment appropriate for lack of causation when Appellant offers no factual connection between the actions of the Respondent and the alleged damages of Debtor?

The Trial Court found that summary judgment was appropriate because Appellant failed to come forward with anything other than speculation linking the alleged damages to Respondent.

Vernon J. Rockler & Co., Inc. v. Glickman, Isenberg, Lurie & Co., 273 N.W.2d 647 (Minn. 1978)

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Faimon v. Winona State Univ., 540 N.W.2d 879 (Minn. Ct. App. 1995)

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3. Is summary judgment appropriate for lack of reliance when the information allegedly relied upon by Debtor was known to Debtor?

The Trial Court held Appellant could not show justifiable reliance by the Debtor on an audit opinion given by Respondent when Debtor's senior management knew about the transaction Appellant contends should have been accounted for in Debtor's financial statements.

Vernon J. Rockler & Co., Inc. v. Glickman, Isenberg, Lurie & Co., 273 N.W.2d 647 (Minn. 1978)

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Cenco Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir. 1982)

PNC Bank, Kentucky, Inc. v. Hous. Mortgage Corp., 899 F. Supp. 1399 (W.D. Pa. 1994)

4. Where Appellant stands in the shoes of a fraudulent debtor and alleges negligence against Respondent, does the in pari delicto doctrine bar Appellant's claim?

The Trial Court found the actions of Debtor in failing to disclose a material transaction to its lenders, investors, guarantors, and its auditors were imputed to Appellant and were sufficiently fraudulent conduct to invoke the in pari delicto doctrine barring Appellant's claims.

State v. AAMCO Automatic Transmissions, Inc., 199 N.W.2d 444 (Minn. 1972)

Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006)

Kay v. Peter Motor Co. Inc., 483 N.W.2d 481 (Minn. Ct. App. 1992)

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STATEMENT OF THE CASE

This case was submitted to the Honorable John McShane, Judge of the Fourth Judicial District, Hennepin County, Minnesota. The case was brought by a trustee in bankruptcy against accountants for negligence, breach of contract, negligent misrepresentation, and contribution. Respondent moved for summary judgment on all counts.

Although the Trial Court held fact issues existed regarding whether Respondent breached a duty with regard to its provision of professional services, it nevertheless granted summary judgment on the negligence claim because

- Appellant failed to present a genuine issue of fact that Debtor was damaged;
- Appellant's proffered evidence of causation was impermissible speculation; and
- Appellant could not demonstrate reliance because Debtor independently knew the information Appellant claims should have been included in the financial statements Debtor prepared and Respondent audited.

Further, the Trial Court found that even if Appellant could satisfy all the elements of its negligence claim, those claims would be barred because the actions of Debtor in not disclosing the existence of an agreement which materially changed the terms of a $12 million bond offering, and the continued failure to reveal the transaction to subsequent investors and the auditors, was sufficiently fraudulent conduct to invoke the equitable doctrine of in pari delicto.

Finally, because Appellant did not contest the summary judgment motion with respect to the breach of contract, negligent misrepresentation, and contribution claims, the Trial Court granted summary judgment on these claims as well.

STATEMENT OF FACTS

I. OVERVIEW.

The case concerns a company called Technimar Industries, Inc. ("Technimar") and its failure to advise its lenders, guarantors, investors, and auditors of a secret agreement it had negotiated and executed which caused a material change in a financial arrangement everyone had agreed upon. Technimar failed to provide the secret agreement to its auditors and now, through Appellant, is suing the auditors for not discovering their secret.

Technimar was a family business run by Roberto Contreras, Sr. He was assisted by his sons Luis and Roberto Jr. and their chief fundraiser, David Welliver. To facilitate a bond financing to enable Technimar to buy manufacturing equipment from a company called Breton, Breton itself guaranteed \$7.6 million of a \$12 million bond repayment. Everyone understood that Technimar would try to raise money to replace Breton in the guaranty. The replacement, however, was understood to be on an "as able" basis. In other words, everyone was told that delivery of the equipment was to occur whether or not Technimar could fully replace the guaranty.

Ten days before the bond closing, however, Breton and Technimar secretly changed the deal. Technimar agreed to repay the Breton guaranty on a fixed schedule and, if the schedule was not met, the equipment would not be delivered. This was a material change to the agreement with the bond participants. Although Technimar's Chief Executive Officer ("CEO"), Roberto Contreras, Sr.; Technimar's Chief Financial Officer ("CFO"), Luis Contreras; and its chief fundraiser, David Welliver, knew of this fundamental change in the deal, and even though both Roberto and Luis Contreras attended the closing, they did not disclose this material change in the deal to the bond participants. Not only did Technimar remain silent as to the secret agreement, Technimar produced a letter at the bond closing falsely stating title to the equipment would pass once the money was disbursed from the bond offering.

Following the closing, Technimar continued to raise money without disclosing the secret agreement to its subsequent investors. Technimar also created a set of financial statements that did not account for the secret agreement. When they were audited, they did not disclose the secret agreement or the lack of any accounting treatment for it in their financials to Respondent. In fact, Luis Contreras, their CFO, misled Respondent when the auditors sought information about the transaction. The CFO insisted the original deal was still in place. This was untrue and Technimar's CFO knew it because he had been administering the secret agreement since its execution. The CFO and CEO then executed a representation letter claiming they had disclosed all material information to Respondent when they had not. Over the next two years, Technimar borrowed money and went further into debt which ultimately resulted in its bankruptcy. Appellant then sued Respondent seeking to recover the debts Technimar owed to its creditors.

II. TECHNIMAR.

A. Organization of Technimar.

Technimar was a family business organized by Roberto Contreras, Sr. and his sons, Luis and Roberto, Jr. (A 3 ¶ 4.) All three Contrerases were original and continuous members of the Technimar Board of Directors and the Board's Executive Committee. (RSR 20, 22.) They were joined on the Board and Executive Committee by Technimar's financial advisor, David Welliver. (RSR 20, 22.) Although Technimar also had three outside directors (Charles Foster, Rodney Workman, and Chandler Robinson), the business decisions of Technimar were made by the Contrerases and Welliver.[1] (SR 119 at 52; SR 453 at 38-39.)

According to directors Rodney Workman and Roberto Contreras, Jr., the ultimate decision-maker at Technimar was Roberto Contreras, Sr. (SR 270 at 34-35; SR 445 at 8.) According to director Charles Foster, the elder Contreras was "everything," he was the "face of Technimar." (SR 311 at 36-37, 312 at 38.) Contreras, Sr. was Chairman of the Technimar Board of Directors, Chairman of the Executive Committee, President and CEO of Technimar, and a principal shareholder. (A 137 ¶ 10; A 153 ¶ 9; SR 228 at 195; RSR 23.) It is undisputed that Contreras, Sr. was regarded by Technimar management and directors as having authority to negotiate and execute contracts on behalf of Technimar—including contracts regarding the purchase of the Breton equipment. (SR 453; SR 312; SR 270.) It is undisputed that Roberto Contreras, Sr. negotiated, executed, and failed to disclose the secret agreement with Breton totaling $7.6 million. See infra at 13-14.

Luis Contreras was, in addition to his role on the Board and Executive Committee, the CFO, Treasurer, Secretary, and Administrative Vice President of Technimar. (SR

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1 The Board never informed Roberto Contreras, Sr. he could not take an action or overrode an action he did take. (SR 270 at 35; RSR 46 at Interrogatory No. 3 (outside directors merely "figure heads.").) The Board did not believe it was legally required to ratify contracts negotiated and executed by Roberto Contreras, Sr. (SR 306 at 15-16.)

136; RSR 23; RSR 96-97.) Among his functions was to administer Technimar contracts. (SR 137 at 12-13; SR 453 at 39-40; SR 312 at 38.) It is undisputed that Luis Contreras knew about, administered, and failed to disclose, the secret agreement. See infra at 14-15.

David Welliver was engaged by Technimar to raise money for the company. (A 4 ¶ 7.) Welliver arranged the bond offering giving rise to this action. (A 5 ¶ 9; A 138 ¶ 11; A 153 ¶ 10); see also infra at 9-10. Welliver was not only Technimar's agent with regard to the bond offering, he was an original member of its Board of Directors and Executive Committee. (RSR 20, 22.) He rejoined the board in 1997 and caused the resignation of several directors due to his control of the company's stock. See infra at 16. It is undisputed that Welliver executed and failed to disclose the secret agreement. See infra at 13.

B. Technimar's Fraud.

1. Bond Financing.

Technimar needed specialized equipment to manufacture the product it hoped to produce. The equipment was manufactured by an Italian company called Breton. Technimar and Breton entered into a contract in which Breton agreed to sell and deliver the equipment to Technimar. (A 3 ¶ 5.) The agreement was amended on March 13, 1996. (A 3 ¶ 5; RSR 128; RSR 144.) Technimar falsely informed the bond participants that the March 13, 1996 amended contract was the final agreement controlling the purchase of the Breton equipment. (A 50; RSR 128; RSR 144; RSR 148.) In fact, the contract was secretly amended again on December 20, 1996 ("secret agreement"). (A 50.) This secret agreement, which fundamentally changed the deal to make the equipment delivery contingent upon Technimar meeting an undisclosed payment schedule, occurred only a few days before the closing. See infra at 13.

Although the equipment financing terms were complex, the parties' understanding, as documented in the two volumes of closing binders, was that the equipment would be fully paid for, and title would pass, following the bond offering. See infra at 10, 18-19. A summary of the financing is as follows: As of the summer of 1996, Technimar needed an additional $8.4 million to complete the purchase of the Breton equipment. (A 4-5 ¶¶ 7-9.) During 1996, Welliver, on behalf of Technimar, arranged an agreement between Technimar and Heller Financial Inc. ("Heller"), the City of Cohasset and the State of Minnesota to make final payment for the equipment through a $12 million industrial revenue bond. (A 5 ¶¶ 9-10.) A condition of the financing was that the proceeds would be used to pay the $8.4 million still owed to Breton to purchase the equipment, allowing the manufacturing facility to begin operations. (A 5 ¶ 9.)

As a part of the financing, the City of Cohasset issued the bonds and then assigned its interest to Heller. (A 5 ¶ 10.) The transaction became complicated when Heller required Technimar to obtain a guaranty for the entire $12 million bond. (RSR 515 ¶ 4; RSR 455-456 ¶ 3; RSR 485 ¶ 6.) The City of Cohasset agreed to guaranty $2.4 million of the $12 million. (RSR 485 ¶ 8.) The Iron Range Resources & Rehabilitation Board, ("IRRRB"), a Minnesota state agency, agreed to guaranty a further $2 million. (RSR 455-456 ¶¶ 2, 5.) These offers of public money, however, still left Technimar $7.6 million short of the guaranty Heller was demanding. In August 1996, Technimar, through

Roberto Contreras, Sr., Luis Contreras, and David Welliver, presented a solution to the $7.6 million shortfall. (RSR 456-457 ¶¶ 4-6; RSR 515-516 ¶¶ 5-7; RSR 485-486 ¶¶ 7-9.)

The solution was presented at a meeting at the St. Paul Hotel. (RSR 456-457 ¶¶ 4-6; RSR 515-516 ¶¶ 5-7; RSR 485-486 ¶¶ 7-9.) At the meeting, Technimar explained that a Welliver entity called Valent Venture Growth Fund, later re-named Rothschild Venture Growth ("RVG")[2] would guaranty the remaining $7.6 million.[3] (RSR 456-457 ¶ 6; RSR 515-516 ¶ 7; RSR 485-486 ¶ 9.) The money to fund the guaranty would not, however, come from RVG. Instead, the $7.6 million RVG guaranty would be funded by Breton. (RSR 456-457 ¶ 6; RSR 515-516 ¶ 7; RSR 485-486 ¶ 9.) The plan was for Breton to use $7.6 million of the bond proceeds it was to receive from Heller for payment of the equipment to buy $7.6 million of RVG securities. (RSR 456-457 ¶ 6; RSR 515-516 ¶ 7; RSR 485-486 ¶ 9.) RVG would then use the $7.6 million it had received from Breton to fund the remaining amount of the guaranty. (RSR 456-457 ¶ 6; RSR 515-516 ¶ 7; RSR 485-486 ¶ 9.) The parties to the bond offering understood that once the guarantees were in place and the bond proceeds were distributed, Breton would then ship all the equipment necessary to begin production. (RSR 456-457 ¶ 6; RSR 515-516 ¶ 7; RSR 485-486 ¶ 9; RSR 607 71-72.)

Breton, however, by using the bond proceeds to fund the guaranty, would then be in the position of having to wait for Technimar to pay off the installment loan to Heller

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[2] (A 5 at ¶ 12.)

[3] The names Valent Venture Growth Fund and Rothschild Venture Growth are both used in the documents concerning the guaranty put forward by Welliver. For simplicity, the fund will be referred to as "RVG."

before getting its $7.6 million. To enable Breton to get its money sooner, the plan further contemplated that Welliver would continue to raise money for Technimar and, as the money was raised, Technimar would buy out Breton's position in the RVG securities. (RSR 456-457 ¶ 6; RSR 515-516 ¶ 7; RSR 485-486 ¶ 9.) In essence, the plan was for Breton to fund the guaranty until such time as Technimar could replace Breton in the guaranty—which it would do while it was simultaneously making its payments to Heller. (RSR 456-457 ¶ 6; RSR 515-516 ¶ 7; RSR 485-486 ¶ 9.)

Negotiations between Technimar, Heller and the bond participants continued as the parties moved toward a closing. During this time, the parties, and their numerous law firms, drafted and exchanged the necessary closing documents. (RSR 606 at 58-61; RSR 623.) Among the many documents was a November 28, 1996, Breton letter to Heller Financial, Inc., the City of Cohasset, and the Minnesota Attorney General, making certain representations concerning the status of its relationship with Technimar. (RSR 144.) In the letter, Breton represented the March 13, 1996, contract for the equipment was:

> in full force and effect and has not been amended, modified, supplemented, or replaced
>
> ---
>
> the balance payable by Technimar under the Contract is $8,400,000 and upon receipt of such payment all conditions precedent to shipment under the Contract will have been satisfied by Technimar and title to the equipment to be shipped by Breton pursuant to the Contract shall pass to Technimar. Shipment of all equipment required to be delivered by Breton pursuant to the Contract shall occur promptly following Breton's receipt of such payment.

(RSR 144.)

This document was drafted by Heller's counsel as part of its documentation of the parties' understanding that once the bonds were disbursed, the equipment would be paid for and title would pass to Technimar.[4] (RSR 605 at 53, 606 at 58-60, 609 at 85, 610 at 86-88.) The bond closing was December 30, 1996. (RSR 156.) At the closing, Technimar produced another letter from Breton directing Heller to distribute the $8.4 million of bond proceeds Breton was to receive in the following manner: $800,000 was to be transferred by wire directly to Breton and the remaining $7.6 million was to be treated as follows:

> We further direct Heller Financial, Inc. to wire transfer the $7,600,000 remaining balance of the $8,400,000 equipment purchase price payable to us by Technimar Industries, Inc. to Rothschild Venture & Growth Fund, L.P.

The letter went on to state:

> Finally, we acknowledge that upon completion of these wire transfers, Technimar Industries, Inc. shall have paid the full purchase price for the Equipment and agree that title to the Equipment shall transfer to you.

(RSR 164.)

This document was required by Heller and made a part of the closing binder. (RSR 156 at Item #32; RSR 608 at 77; RSR 633; RSR 636.) In 1998, long after the audit, Breton claimed the last paragraph in the letter was forged. (RSR 165.) Appellant investigated the forgery accusation and concluded the forgery allegation was "likely a credible claim." (A 138 ¶¶ 15-16; A 154 ¶ 14.) Forged or not, it is undisputed that Technimar presented the letter to the bond participants representing that following

[4] The letter was revised and resubmitted on December 17, 1996, still containing the above language. (RSR 148.)

disbursal of the bond proceeds, the equipment would be paid in full and title would pass. The letter, however, was directly contrary to an agreement Technimar had entered into with Breton just ten days earlier.

2. The Secret Agreement.

On December 20, 1996, less than two weeks before the bond closing, Technimar entered into an agreement with Breton and Welliver setting forth a specific payment schedule for Technimar to replace the Breton guaranty, and which made Breton's delivery of the manufacturing equipment contingent upon Technimar making the scheduled payments. (A 50.) Technimar did not inform the bond participants of this agreement. (A 138 ¶ 11; A 153 ¶ 10.) Roberto Contreras, Sr., who was present at the closing, negotiated and executed the secret agreement on behalf of Technimar. (A 50; SR 205 at 103-104, 207 at 110; RSR 608 at 76-77.)

The secret agreement was entered into by Roberto Contreras, Sr. expressly to facilitate the equipment financing. (SR 207 at 110-112, 208 at 113-114.) The secret agreement specifically states what will be required of Breton and Technimar with regard to Breton's continued agreement to finance the guaranty RVG provided to Heller. (SR 207 at 110-112, 208 at 113-114; A 50.) The secret agreement was also signed by former and future Technimar director David Welliver on behalf of RVG. (SR 207 at 110-112; 208 at 113-114.) Roberto Contreras, Sr. testified he signed the secret agreement "on behalf of Technimar." (SR 205 at 104.) Contreras felt under pressure to get a deal finalized in December 1996 or risk losing any hope of financing Technimar. (SR 207 at 110-112; 208 at 113-114.) It is undisputed that Roberto Contreras, Sr. had the authority to negotiate and execute contracts concerning the purchase and financing of the Breton equipment on behalf of Technimar. (SR 312 at 38; SR 270 at 36-37; SR 453 at 39.)

Technimar did not disclose the secret agreement with Breton to Heller Financial, the City of Cohasset, the State of Minnesota, or Minnesota Power. (A 138 ¶ 11; A 153 ¶ 10; RSR 486 ¶ 11; RSR 516 ¶ 9; RSR 457-458 ¶ 9.) Nor was it made part of the bond closing documents. (A 138 ¶ 11; A 153 ¶ 10; RSR 156.) Appellant concedes the terms of the secret agreement cannot be reconciled with the terms of the November 28, 1996, or December 17, 1996, Breton letters to Heller or the letter produced at the closing stating Breton would be paid in full and title would pass upon disbursal of the bond proceeds. (SR 424 ¶ 79.)

C. Technimar Administers the Secret Agreement.

Following the bond closing, Technimar management administered the secret agreement as part of its day-to-day business. The administration of the secret agreement was, first, under the direction of Luis Contreras—Technimar's CFO. Luis Contreras, who also attended the closing, had the authority and responsibility to administer Technimar contracts. (SR 453 at 39-40; SR 312 at 38; RSR 608 at 76-77.) On January 2, 1997, Luis Contreras informed Breton that the financing with Heller had gone forward and, using language directly from the secret agreement, informed Breton that Technimar was forwarding "via swift" the first installment under the secret agreement of $1.8 million to Breton. (RSR 173; A 50 ¶ 1.) He further stated that he and Technimar's Controller, Carlos Canales, would be visiting Italy to discuss with Breton receipt of funds and shipment of machinery. (RSR 173.) On or about January 14, 1997, Luis Contreras acknowledged receipt of a share certificate equal to $1 million dollars pursuant to the secret agreement. (SR 178; A 50 ¶ 9.) The January 14, 1997 letter specifically referred to the secret agreement in its subject line. (SR 178.)[5]

On January 17, 1997, when Luis Contreras was in Italy visiting Breton, he signed another agreement which specifically referred to the secret agreement. (RSR 174.) On January 31, 1997, he faxed an Italian language copy of the secret agreement to Breton. (RSR 175.) On March 3, 1997, Luis Contreras summarized the terms of the secret agreement in a letter to Breton. (RSR 179.) When confronted with this letter at his deposition, Luis Contreras admitted he knew the terms of the secret agreement at least as early as March 3, 1997, some two-and-a-half months prior to Respondent issuing its opinion, and a month before he signed the representation letter which falsely stated Respondent had been provided with all financial records of Technimar. (SR 142 at 30.) See also infra at 20.

Between January 2, 1997, and September 11, 1997, Technimar paid RVG $5,050,000 for Breton's shares pursuant to the Agreement. (RSR 181.) These payments were made through the Technimar financial department which issued the check requests and wire transfers. (RSR 182; SR 121 at 60-61; 122 at 62-65.)

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5 Appellant, without any citation to the record, implies Respondent was provided with this letter. There is no deposition testimony, affidavit, or documentary evidence suggesting Respondent ever saw or knew about the letter. The letter was produced by the Appellant and was not in Respondent's files. There is nothing in the record linking Respondent to the letter.

D. Technimar's Subsequent Management Administers the Secret Agreement.

Throughout the time period that Respondent completed its work, issued its opinion, and for several months thereafter, everything with respect to the equipment seemed to be on track. See infra at 17. By September 1997, that was no longer the case. Jay Salmen, who would become President of Technimar in December 1997, testified he learned in September that Breton was not sending equipment to Technimar because Breton took the position Technimar had not fulfilled its obligations. (SR 84 at 163.)[6] Following receipt of this information, Salmen "went through all the files" and found documents requiring payment to Breton. (SR 85 at 167.) By this time, it was "common knowledge" throughout Technimar that Breton was withholding equipment because it claimed it had not been fully paid. (SR 452 at 36-37.)

By November 1997, David Welliver had orchestrated the removal of Roberto Contreras, Sr., and changed the composition of the Technimar Board of Directors. (SR 212 at 131-132; RSR 246.) Welliver, who was an original signatory of the secret agreement, had again become a Technimar director and controlled the majority of Technimar's stock. Welliver sent a letter to Breton stating Technimar would continue to make payments to Breton on the equipment. (RSR 247.) In February 1998, Technimar sent a letter under the signature of Roberto Contreras Jr., Technimar's vice president, assuring Breton that Technimar had fully informed its investors and creditors of its

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[6] Salmen's testimony, like Roberto Contreras, Sr. is from the action Stocke, et al. v. Berryman, et al., Case No. 99-2435, in the District Court for the State of Minnesota, Hennepin County. (SR 44 at 1; SR 180 at 1.)

obligations to Breton, including "the balance owed to Breton by Technimar." (RSR 249.) Although the younger Contreras denied it was his signature on the document, he agreed with the substance of the letter. (SR 451 at 31-33.) Finally, as late as July 21, 1998, Technimar, through its then-CEO, Doug Coy, was continuing to negotiate with Breton regarding payment for the equipment. (RSR 251.)

E. Technimar Continues to Raise Money Without Disclosing the Secret Agreement.

While Technimar was administering its secret agreement with Breton, it was publicly telling its auditors, investors, and the outside world that everything was proceeding as scheduled. For example, pursuant to the terms of the November 28, 1996, and December 17, 1996, Breton letters, Breton would ship the equipment once it received payment. (RSR 144; RSR 148.) Breton did, in fact, begin to ship portions of the equipment following the closing. (RSR 458 ¶ 11.) The equipment that did arrive was shown to representatives of the IRRRB, who were monitoring the project and to Respondent. (RSR 458 ¶ 11; RSR 617 at 50.) Meetings with investors, the community, and press releases during the Spring and early Summer 1997 all had the same message: the project is on track—the equipment is coming. (RSR 458-459 ¶ 12, 476-479 Exs. E & F; RSR 487 ¶13; 500-501 Exs. D & E.)

As Technimar was convincing the public and its auditors that everything was on track, it was allowing Welliver to raise more and more money for Technimar. The investors would later sue Welliver for fraud and Welliver would confess judgment in the amount of $14.605 million. (RSR 252.)

III. RESPONDENT'S AUDIT.

A. Scope of the Engagement.

On December 16, 1996, Technimar engaged Respondent to audit Technimar's consolidated balance sheet as of December 31, 1996. On December 16, 1996, Luis Contreras, in his capacity as Technimar's CFO, executed an Engagement Letter, dated December 9, 1996, on behalf of Technimar. (RSR 258.)

Among other things, the Engagement Letter provided that the financial statements were the responsibility of the management and Board of Directors of Technimar who were primarily responsible for the data and information set forth therein. (Id.) Further, Respondent informed Technimar that the audit would require Technimar management's cooperation and Technimar would be required to provide written representations upon which Respondent would rely, to which Technimar agreed. (Id.) Finally, Technimar agreed to indemnify and hold Respondent harmless from any liability, damages, and legal or other costs Respondent might sustain in the event the representations were knowingly untrue. (Id.)

B. Technimar's Failure to Provide Requested Documents and its False Representations to Respondent.

In preparation for conducting the audit, Respondent specifically requested all documents of continuing financial and accounting significance, and specifically requested agreements concerning the purchase of the Breton equipment. (RSR 673 ¶ 2; 265.) During the audit period, however, Technimar did not provide Respondent with the secret agreement or advise Respondent it had entered into any such agreement. (RSR 529 ¶¶ 6-7; RSR 674 ¶¶ 5-6; 650 ¶¶ 5-6.)

On the contrary, Technimar assured Respondent that it had paid for the equipment and provided Respondent with documentation to support the assurance. For example, Technimar provided Respondent with the closing documents which included Breton's letters of November 28, 1996, December 17, 1996, and December 27, 1996, as well as a disbursement requisition that directed Heller to pay to Breton $800,000 by wire transfer and $7.6 million to RVG for securities to be delivered to Breton. (RSR 620-621 at 76-77; RSR 144; RSR 156; RSR 642.) The disbursement requisition specifically states these disbursements were payments for the equipment. (RSR 620-621 at 76-77; RSR 642.) Technimar also provided Breton's confirmation that it had received the $800,000 wire transfer (SR 179), that $7.6 million had been sent to RVG (RSR 642), and Breton's confirmation it had received $7.6 million of RVG securities. (RSR 267.) Technimar also provided numerous closing documents referencing it had title in the equipment, its ability to grant a security interest in the equipment, and that it had no indebtedness as of December 31, 1996, not reflected in its previously disclosed financial statements. (RSR 268 ¶¶ 2.2(e), 3.1; RSR 305 ¶¶ 2.1, 3.4, 3.7; RSR 357 at 2, ¶ 4; RSR 378.)

During the field work for the audit, Respondent performed a review of 1997 payments of Technimar. During this review, they became aware that Technimar was making payments to Breton. (RSR 645 at 4100.01; RSR 617-618 at 51-53; RSR 650 ¶7.) Respondent investigated the nature of the payments by first asking Technimar controller Carlos Canales why the payments were being made to Breton. (RSR 617-618 at 51-54;

RSR 645 at 4100.01; RSR 650 at ¶7.) Canales responded that Technimar was buying the RVG securities from Breton. (RSR 617-618 at 51-54; RSR 645 at 4100.01; RSR 650 at ¶7.) Jim Ravell, the engagement partner for Respondent, followed up by discussing the payments with Canales and then again with Technimar CFO Luis Contreras. (RSR 617 at 51-52.) Luis Contreras simply told Ravell that Technimar was replacing Breton's position in the guaranty (the original deal). (RSR 618 at 53.)

Instead of providing Respondent with the secret agreement, on April 4, 1997, Technimar provided Respondent with its written representations that it had made available to Respondent all of its financial records. (RSR 388.) Technimar also represented it had satisfactory title to all owned assets. (Id.) Although the required payments of the undisclosed obligation totaled $7.6 million, Technimar represented it had disclosed all material liabilities, and although the secret agreement was not accounted for in Technimar's financial statements, Technimar represented all material transactions were properly recorded. (Id.) Both Roberto Contreras, Sr. as President, and Luis Contreras as CFO, signed the representation letter. (Id.) Both knew of the undisclosed $7.6 million obligation to Breton as reflected in the secret agreement. Supra at 13-15.

IV. HELLER DEFAULT NOTICE.

In December 1996, Technimar missed a payment to Heller. (RSR 392.) In addition, Heller learned that Technimar was preparing to file bankruptcy. (RSR 600-601 at 9-10.) According to Heller, it was notice of the impending bankruptcy that led to the default notice. (RSR 600-601 at 9-10.) When asked specifically, and repeatedly, if knowledge of the payments to Breton or the existence of the secret agreement would have caused Heller to issue a default, Heller representative Walter Schoultz would only say the matter would have been referred to a committee. (RSR 602 at 20; 603 at 23; 604 at 30-32.) On December 16, 1997, Heller issued its notice of default. (RSR 392.)

V. POST-DEFAULT EVENTS.

By March 3, 1998, the full story of the Technimar financing, as well as the secret agreement, had been fully detailed in the public press. (RSR 487-488 ¶16; RSR 507 Ex. H; RSR 516-517 ¶10; RSR 521 Ex. B.)

In April 1998, Technimar's latest management team, Coy & Associates, provided Respondent with information that Technimar had pre–existing obligations to Welliver in 1996 in a fixed and material amount that had not been disclosed to Respondent during its audit. (RSR 614-615 at 31, 33-34.) Respondent was also made aware for the first time of the secret agreement with Breton. (RSR 614-615 at 31, 33-34.)

Following its analysis of the pre–existing Welliver obligations, Respondent concluded it was required to withdraw its audit opinion. (RSR 615-616 at 36-37.) Respondent did so on April 29, 1998. (RSR 395.)

Technimar ultimately failed to work out an arrangement with Breton for the delivery of the remaining equipment. (A 10-11 ¶¶ 30, 32.) Technimar declared bankruptcy on July 31, 1998. (A 139-140 at ¶22; A 154 ¶ 20.) On March 2, 1999, Technimar's bankruptcy was converted to a liquidation proceeding under chapter 7 of the Bankruptcy Code. (A 139-140 ¶ 22; A 154 ¶ 20.) Although various lawsuits followed in the wake of the Technimar failure, not a single investor or creditor of Technimar brought an action against Respondent. (RSR 529 ¶ 8.)

LEGAL ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

On appeal from summary judgment the Court must determine whether there are any genuine issues of material fact and whether the Trial Court erred in its application of the law. Brookfield Trade Ctr., Inc. v. County of Ramsey, 609 N.W.2d 868, 873-874 (Minn. 2000). Appellant must show the existence of a genuine issue of material fact. DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997). A genuine issue as to material facts must be presented by substantial, specific and admissible, evidence. Brookfield Trade Ctr., 609 N.W.2d at 874; Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995). No issue of material fact exists where Appellant presents "unverified and conclusory allegations or by postulating evidence that might be developed at trial." N. States Power Co. v. Minn. Metro. Council, 684 N.W.2d 485, 491 (Minn. 2004); see also Nicollet Restoration, 533 N.W.2d at 848 ("Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial.").

II. APPELLANT STANDS IN THE SHOES OF TECHNIMAR AND IS SUBJECT TO ALL DEFENSES WHICH COULD BE MADE AGAINST TECHNIMAR.

Bankruptcy trustees stand in the shoes of the debtor corporation, and can bring only those claims which could have been brought by the corporation had it remained solvent. See Stumpf v. Albracht, 982 F.2d 275, 277 (8th Cir. 1992) ("[T]he existence of a bankruptcy cannot grant the trustee a cause of action against third parties which would have been unavailable to the debtor."); Sender v. Kidder Peabody & Co., Inc., 952 P.2d 779, 781 (Colo. Ct. App. 1997).

As such, a defendant is armed with all defenses available to it had it been sued by the corporation itself. Bank of Marin v. England, 385 U.S. 99, 101 (1966); see also Nat'l City Bank v. Coopers & Lybrand, 409 N.W.2d 862, 870 (Minn. Ct. App. 1987); Goembel v. Heesch, 4 N.W.2d 104, 105 (Minn. 1942). In other words, when "the trustee stands in the shoes of [a] . . . corporation[,] . . . [i]f his petition does not set forth probative facts sufficient to have constituted a cause of action against the defendant in favor of the corporation, if that corporation had not been adjudged bankrupt, it states no cause of action in favor of the trustee." Bosworth v. Van Laningham, 293 F. 875, 877 (8th Cir. 1923). Appellant has not challenged this law on appeal.

A. The Trial Court Correctly Found That Appellant Was Not Damaged by Respondent.

An essential element of the Appellant's claim is damages. See Vernon J. Rockler & Co., Inc. v. Glickman, Isenberg, Lurie & Co., 273 N.W.2d 647, 650 (Minn. 1978) (damages are an element of a negligence action). Appellant's failure to show damages is, therefore, sufficient by itself to entitle Respondent to summary judgment. Appellant, however, failed to come forth with facts creating an issue regarding damages. Appellant merely cites payments made by Technimar to third parties pursuant to contracts Technimar executed and debts to others Technimar chose to incur. (A 18 ¶ 67; A 20 ¶ 75.). The Trial Court correctly found that any unpaid debts were damages suffered by the specific creditors who had not been re-paid—not damages of Technimar, who received the money, services, and goods and then failed to pay for them. (A 185-186.) The Trial Court had a wealth of legal support for its holding.

The Trial Court specifically cited Holland v. Arthur Andersen & Co., 571 N.E.2d 777 (Ill. App. Ct. 1991). Unlike the majority of cases cited by Appellant, Holland was, like this case, decided at the summary judgment stage. Id. at 780-81. In Holland, the chapter 7 trustee of a bankrupt insurance company sued the company's former accountants for allegedly misrepresenting the company's financial condition, seeking damages for the company's "deepening insolvency." Id. at 778–79. Like the Appellant in this litigation, the Holland Trustee sought damages for deepening insolvency under the theory that the corporation "continued to sustain loss and incur debt it could have avoided had it known its true financial condition." Id. at 781. The Trustee identified three categories of creditors who were damaged: several banking institutions, holders of subordinated debentures, and trade creditors.[7] Id. at 780.

As Appellant tries here, the Holland Trustee attempted to re–characterize individual claims of the creditors as a generalized harm to the estate. Id. at 802–03. The Holland court rejected the argument and held the claims were personal to the creditors and, thus, could not be recovered by the trustee, whose standing to assert damages was limited to claims that could have been brought by the corporation. See id.; see also Caplin v. Marine Midland Grace Trust Co. of New York, 406 U.S. 416, 434 (1972) (bankruptcy trustee does not have standing to assert claims of creditors); see also Bondi

[7] Appellant incorrectly asserts the sole damages sought were the claims of two banks. (App. Brief 27.)

v. Citigroup, Inc., No. BER-L-10902-04, 2005 WL 975856, at *21 (N.J. Super. Ct. Law Div. Feb. 28, 2005) (RSR 397); Coroles v. Sabey, 79 P.3d 974, 983 (Utah Ct. App. 2003) ("[W]e fail to see how Ganter USA, the supposed victim of the assigned claims, was harmed by having its past–due bills and other listed expenses paid.").

The Trial Court also relied on decisions of the Federal District Court in Minnesota and the U.S. Bankruptcy Court in Minnesota which came to the same conclusion as the Holland court. See Moratzka v. Senior Cottages of Am., LLC, No. Civ. 05-809(DWF), 2005 WL 2000185 (D. Minn. Aug. 18, 2005) (RSR 531); In re Senior Cottages of Am. LLC, 320 B.R. 895 (Bankr. D. Minn. 2005). In Senior Cottages, a chapter 7 bankruptcy trustee brought a proceeding against attorneys alleging fraud and negligence. Senior Cottages, 320 B.R. at 898. The trustee alleged the estate suffered damages because defendant's action caused the estate to incur at least $7,000,000 in creditor claims. Id. Judge Kishel in the Bankruptcy Court dismissed the claim for lack of standing. Judge Kishel stated:

> [T]he issue is whether the Plaintiff has pleaded sufficiently that Senior Cottages, *in its own right*, suffered an injury that may be redressed under the legal theories of Counts I and II. It matters not that particular unsecured creditors of Senior Cottages, or even individual shareholders, can identify such an injury to their own interests. The Plaintiff did not succeed to the status of any of them, and he cannot maintain suit on any claim that they may have had in their individual capacity.
>
> . . . .
>
> . . . [T]he gravamen of the complaint goes exclusively to the impact of the transfer *on the creditors* who held claims against Senior Cottages: "as a direct result of Defendants' conduct, Plaintiff estate *is subject to creditors' claims*, interest and attorney fees to administer the estate in an amount of at least $7,000,000." Though it nominally refers to the

> bankruptcy estate, this allegation clearly envisions that entity as no more than a vehicle for a recovery to benefit creditors for the losses they had incurred prior to the liquidation of Senior Cottages in bankruptcy.

Id. at 900–901. The Minnesota Federal District Court when reviewing an amended complaint by the trustee, affirmed the Bankruptcy Court stating:

> "[the] Trustee merely removed references to the creditors and re-cast the injuries set out in the initial Complaint as belonging to Debtor. . . . Ultimately, Trustee is unable to show that Debtor would act as anything other than a conduit of recovery for creditors under the Proposed Amended Complaint.

Moratzka, 2005 WL 2000185, at *3. (RSR 531.)[8]

Since the Trial Court's ruling, the Third Circuit Court of Appeals has held that a company's continued existence past the point of insolvency resulting in the taking on of additional debt are not damages to the company. In re CitX Corp., Inc., 448 F.3d 672, 677 (3d Cir. 2006). The Third Circuit distinguished its earlier case, Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc., 267 F.3d 340 (3d Cir. 2001) which Appellant cites. In Lafferty, the Third Circuit held that deepening insolvency was a separate cause of action. Id. at 344. The CitX court clarified that Lafferty, "should not be interpreted to create a novel theory of damages for an independent cause of action like malpractice." CitX, 448 F.3d at 677; see also Trenwick Am. Litig. Trust v. Ernst & Young, LLP, No. 1571-N, 2006 WL 2434228, at *3 (Del. Ch. Aug. 10, 2006) (rejecting deepening insolvency as a cause of action because "catchy though the term may be, it does not express a coherent concept") (RSR 538); Feltman v. Prudential Bache Sec., 122

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8 In response to these cases Appellant merely claims they are "simply wrong" and that the Trial Court does not understand bankruptcy law. (App. Brief 29-30.)

B.R. 466, 473–74 (S.D. Fla. 1990); Askanase v. Fatjo, No. CW A.H.-91-3140, 1996 WL 33373364, at *25 (S.D. Tex. Apr. 1, 1996) (RSR 417).

The Trial Court also correctly distinguished the Minnesota Supreme Court case of Bonhiver v. Graf, 248 N.W.2d 291 (Minn. 1976). In Bonhiver, the court permitted a receiver statutorily authorized to recover creditor damages to pursue damages stemming from a company staying in business past the point of insolvency. Id. at 296–97. Bonhiver, thus stands for the principle that debts owed to creditors taken on and left unpaid following an insolvency are creditor claims—not claims of the estate. As the Trial Court observed, the Bonhiver receiver represented the creditors whereas the Appellant here does not. (A 186.)

Although, as the Trial Court noted and Appellant cites, (App. Brief 27-28) some cases have indicated a willingness to entertain the theoretical possibility of damage to an entity through a "deepening insolvency," all but one of the cases cited by Appellant were decided at the motion to dismiss stage. In the one case cited by Appellant which was decided at the summary judgment stage, Allard v. Arthur Anderson & Co., 924 F. Supp. 488 (S.D.N.Y. 1996), the Defendant's challenge was limited to an argument that "the theory [of deepening insolvency] is not legally recognized[.]" Id. at 494. The defendant did not challenge the factual predicate for applying the theory. Id. Thus, the Allard court, like the other cases cited by Appellant, was passing on a theoretical possibility—not a factual showing.

More instructive is the Holland case relied upon by the Trial Court. In Holland, the court rejected Defendant's motion to dismiss on the grounds that discovery could hypothetically yield some set of facts to support the trustee's theory. Holland 571 N.E.2d at 780-81. However, at the summary judgment stage the time for theorizing was over. "Upon reaching the summary judgment stage of these proceedings, we have moved beyond an examination of the sufficiency of the pleadings to a determination of whether there are any material issues of fact to advance to a full trial." Id. at 781. The Holland trustee, like Appellant in this case, never went beyond showing the entity continued to incur expenses and debts. Because the trustee could not show how the company, as opposed to its creditors, was damaged, the court granted defendant's motion.[9]

Moreover, those courts that, at the motion to dismiss stage, contemplate the theoretical possibility of deepening insolvency almost always do so in the context of allegations of a defendant's fraud—not simple negligence. For example, in In re Total Containment, Inc., 335 B.R. 589, 620 (Bankr. E.D. Pa. 2005), cited by Appellant, the court held that liability for deepening insolvency "is premised upon 'fraudulent, rather than, negligent conduct.'" The court's discussion on the need to require fraud before contemplating the imposition of the draconian damages that could theoretically be sought (and which Appellant seeks in this case) for "deepening insolvency" is instructive. The

9 Appellant's reliance on National City Bank v. Coopers & Lybrand, 409 N.W.2d 862 (Minn. Ct. App. 1987) and In re Bridge Information Systems, Inc., 344 B.R. 587 (E.D. Mo. 2006) are without merit. Both cases support the Trial Court's analysis. In National City Bank and In re Bridge, creditors sought damages for an indirect harm they suffered through the direct harm suffered by another entity. National City Bank, 409 N.W.2d at 868; In re Bridge, 344 B.R. at 595. Thus, the creditors lacked standing. In this case, it is the creditors who suffered the direct harm. Appellant here tries to argue Technimar was somehow harmed by its inability to pay its debts. Even if this is characterized as "harm," it is at best indirect. It is the Technimar creditors who actually lost their money.

In re Total Containment court specifically refers to two other cases relied upon by Appellant, both of which require a showing of fraud as part of any invocation of "deepening insolvency." Id. at 619-620 (citing Lafferty, 267 F.3d at 347-49; Schacht v. Brown, 711 F.2d 1343, 1350 (7th Cir. 1983)). Moreover, the Southern District of New York, a jurisdiction also cited by Appellant, recently held that negligence could not support a deepening insolvency claim. See Verestar, Inc. v. Am. Tower Corp., 343 B.R. 444, 476 (Bankr. S.D.N.Y. 2006). The Third Circuit has also recently held that negligence is insufficient to support a deepening insolvency claim. CitX, 448 F.3d at 680. There is no allegation that Respondent engaged in any fraud here.

In sum, the Trial Court correctly concluded that Appellant failed to meet its burden of demonstrating a genuine issue of fact exists whether Technimar was damaged in its own right. The only claim of damages put forth by Appellant are those suffered by the creditors. The federal courts in Minnesota (as well as others outside of Minnesota) who have considered similar allegations have dismissed such claims for lack of standing. Those opinions from outside of Minnesota that do permit such claims are almost always at the motion to dismiss stage and, further, almost always require fraud on the part of the defendant. There is nothing about this case that should send this Court off in a different direction.[10]

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[10] Technimar agreed to indemnify and hold Respondent harmless from any liability, damages, and legal or other costs Respondent might sustain in the event its statements in the representation letter it provided were knowingly untrue. See supra at 18. Discovery has established beyond dispute that Technimar, through Roberto Contreras, Sr. and Luis Contreras knew the representations it made to Respondent were untrue. See supra at 13-15. Should Appellant succeed in this lawsuit and Respondent is

B. The Trial Court Correctly Found That Appellant Had Not Produced Evidence Creating a Genuine Fact Question That Respondent's Action Caused Damage to Appellant.

As the Trial Court held, the lack of causation between the alleged actions of Respondent and Appellant's damage claim is fatal. MCA Fin. Corp. v. Grant Thornton, LLP, 687 N.W.2d 850, 855 (Mich. Ct. App. 2004); see also Vernon J. Rockler & Co., Inc., 273 N.W.2d at 650 (causation is an essential element of a negligence claim against an accountant). The failure to create a fact issue regarding causation is enough by itself to entitle Respondent to summary judgment. Throughout the lengthy discovery period, Appellant was unable to link the damages it claimed Technimar suffered to any action of Respondent. For example, the Complaint alleges that $5.8 million paid to Breton during 1997 are damages. (A 18 ¶ 67; A 20 ¶ 75.) These payments, however, were pursuant to a contract Technimar executed before Respondent provided its opinion. (A 6 ¶13.) Similarly, Appellant cites $3.8 million paid by Technimar to Rothschild Capital Corporation. (A 18 ¶ 67; A 20 ¶ 75.) These payments were also pursuant to a contractual obligation of Technimar entered into prior to the Respondent's opinion. (A 4 ¶ 8; A 15 ¶ 49; A 18 ¶ 67; A 20 ¶ 75.)[11]

required to pay damages, Respondent will have been harmed by an equal amount. Respondent would therefore be entitled to assert all of its set-off rights pursuant to 11 U.S.C. § 553. Inasmuch as any recovery obtained by Appellant must be returned to Respondent, there can be no damages in this case.

[11] Appellant also alleges a "loss" of $1.25 million from a March 1998 sale of operating subsidiaries and $5 million in unsuccessful attempts to reorganize following the chapter 11 bankruptcy in July 1998. (SR 342 at Response to Interrogatory No. 35.) Missing, however, is any causal connection between the actions of Respondent and these items. Respondent is not alleged to have had any involvement in the sale of the

The Complaint alleges an additional $14 million in damages but goes on to say the money was spent on operating expenses "to bring the Cohasset plant on line for manufacturing purposes." (A 18 ¶ 67; A 20 ¶ 74.) An additional $7.5 million is sought for loans owed to various investors which Technimar has yet to pay. (A 18 ¶ 67; RSR 16.) Decisions regarding what to buy and how much to borrow were made by Technimar management. Respondent was not a part of the continued operations of Technimar and is not alleged to have been involved in any of the decisions where Technimar took on added debt. Thus, Respondent's actions cannot support a causal connection between it and Technimar's added debt. In re Total Containment, 335 B.R. at 622 ("[T]he Trustee's allegations, even if proven, do not support a deepening insolvency claim against Finloc Capitol, Winston Towers, Finloc, Inc., PolyFlow or the Canam defendants, as the facts alleged do not support a finding that these defendants were involved with the continued operations of TCI").

Appellant's entire causation arguments, therefore, consists of the speculative narrative of counsel concerning things that might have happened. (App. Brief 33, 61.) Tellingly, Appellant's litany of speculation provides no citation to the record. Similarly, the only case cited in the entire argument of this issue is In re Flagship Healthcare, Inc., 269 B.R. 721 (S.D. Fla. 2001). That case, however, was decided on a motion to dismiss.

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operating subsidiaries or the reorganization. The actions occurred after the entire story of the Technimar debacle was a matter of public record. See supra at 21. Even the Appellant concedes that no one could have relied on the Respondent audit after the Heller default. (SR 429 at 99-100.) The Heller default was four months before the sale of the subsidiaries and eight months before the attempted reorganization. See supra at 21.

Although allegations of possible future events might in some courts suffice to withstand a Rule 12 motion, they are not enough to defeat a Rule 56 motion. Nicollet Restoration, Inc., 533 N.W.2d at 848 ("Speculation, general assertions and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial."). At this point, Appellant needs to come forth with specific facts which would be admissible at trial to support what she contends would have happened. Brookfield Trade Ctr., Inc., 609 N.W.2d at 874. Appellant, however, admitted in her deposition she can offer only speculation.

> Q. . . . what would have happened if the Grant Thornton opinion would have been as you believe it should have been?
>
> A. I believe Technimar would have conducted its business differently and would not have incurred the significant amount of further debt that it did.
>
> Q. How do you know that?
>
> A. It's speculation on my part.

(SR 426 at 89.)

Appellant's speculation is further undercut by the inability of her own expert to say how the financial statements should have been changed to account for the secret agreement. (SR 394-398 at 184-186, 201.) Thus, Appellants speculation does not even have an identifiable starting point. Moreover, there is no evidence in the record of what anyone would have done, let alone how things would have changed. Appellant speculates Heller would have taken action if they had known of a purported debt covenant violation or the secret agreement. (App. Brief 33, 60.) However, as the Trial Court noted, Walter Schoultz, the Heller employee who sent the default notice testified it was sent due to the impending bankruptcy. (A 182; RSR 600 at 9-10.) Further, he repeatedly testified that he did not know what action, *if any*, Heller might have taken had it known of an alleged debt covenanet violation or the secret agreement. (RSR 602 at 20, 603 at 23, 604 at 30, 32.) None of the directors offering testimony indicated what specific action they would have taken or how any action would have changed things. All that is offered are generalities such as they "would have sought immediate action." (App. Brief 33.) What that action would have been, how feasible it was, what effect it would have had on the Contrerases and Welliver is unknown because the directors did not say. No affidavits or deposition testimony—even in the form of expert opinion—sheds any light on what actually would have happened had the Technimar fraud been uncovered earlier.

Because Appellant's alleged damages are based totally on speculation, they fail as a matter of law. See, e.g., Padco, Inc. v. Kinney & Lange, 444 N.W.2d 889, 891 (Minn. Ct. App. 1989) (claim for damages in legal malpractice action based on allegation that had plaintiff been represented by one firm for the duration of the suit, its attorneys would have known more about the case and would have settled it on more favorable terms dismissed because the clients could not show a causal link between the firm's malpractice and the client's damages); Faimon v. Winona State Univ., 540 N.W.2d 879, 884 (Minn. Ct. App. 1995) (plaintiff's claim that defendant breached a union contract by failing to post a notice of vacancy that would have alerted her that her job would not be available and would allow her to have sought other opportunities rejected because it depended on the "speculative leaps" that had the employer done what it was supposed to the plaintiff would have had more information, which would have caused her to act differently, and avoid damages); Olson, Clough & Straumann v. Trayne Props., Inc., 392 N.W.2d 2, 4 (Minn. Ct. App. 1986) (speculative damages not recoverable in accountant malpractice action).[12]

C. Appellant's Inability to Establish Reliance Supports the Trial Court's Order.

As the Trial Court noted, the Minnesota Supreme Court has specifically recognized that reliance is an element in an accountant malpractice claim. Vernon J. Rockler & Co., Inc., 273 N.W.2d at 650. ("The trial court's finding on reliance was merely another way to discuss the element of factual causation.") Appellant's lack of reliance is sufficient by itself to entitle Respondent to summary judgment.

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12 Appellant comes back to her causation argument at the end of her brief. The "evidence" she cites, however, fails to establish any causal link between the Technimar debt and Respondent. Her citation to the testimony of Luis Contreras and Allen Berryman are irrelevant and inaccurate. Contreras knew about and was instrumental in the fraud on the bondholders, public entities, and investors. His actions do not rise to a level of justifiable reliance. See infra at 36. Moreover, he does not, as Appellant claims, state in the deposition that he relied on the audited financial statements. (SR 136 at 7.)

Allen Berryman was not involved in the business decisions of Technimar. See infra at 37, n.16. He represented an investor who was defrauded by Technimar. Berryman's pension fund sued Welliver. See supra at 17-18. It never brought an action against Respondent. Further, Berryman did not, as Appellant claims, testify he would have halted the loans if they had known sooner that Technimar did not have a $10 million net worth. Berryman merely said he would have taken action. (SR 282 at 13, 284 at 22-23.) What action, against whom, is not revealed. Moreover, Berryman was not even aware that the pension fund was making investments in Technimar between May and November 1997. (SR 289 at 42.) Further, the pension fund continued to make investments in Technimar even after the default and into 1998. (SR 291 at 50, 54.)

The most revealing question and answer sequence during the depositions of this case were initiated not by the lawyers but, spontaneously, by Technimar's former Controller, Carlos Canales. In the course of his deposition, Canales asked a question of Appellant's counsel:

> A. Can I ask you a question? Why is Grant Thornton being sued?
>
> Q. The allegation is that the audit that they conducted was not accurate.
>
> A. And who – I don't recall who that – who received audited financial statements?
>
> Q. Well, we'll get into that. That's one of my questions.
>
> A. I don't recall anybody relying on those statements or securities.

(SR 109-110 at 13-14.)

Not only did no one actually rely on the financial statements, this case is being brought on behalf of Technimar. Yet Technimar, through its CEO, CFO, and principal fundraiser (later its controlling shareholder) already knew about the secret agreement that Technimar failed to account for in its financials.

It is well-established that one cannot claim reliance on information it independently knows to be incorrect. See In re Trust of Hill, 499 N.W.2d 475, 484 (Minn. Ct. App. 1993); see also Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 454 (7th Cir. 1982) ("But a participant in a fraud cannot also be a victim entitled to recover damages, for he cannot have relied on the truth of the fraudulent representations, and such reliance is an essential element in a fraud case."); Fla. Dep't of Ins. v. Chase Bank of Tex. Nat'l Ass'n, 274 F.3d 924, 933 & n.35 (5th Cir. 2001) ("Florida has never responded to Chase's argument that Western Star knew full well that the CD was worthless, and so could not have relied on any representations Chase made to the contrary."); FDIC v. Ernst & Young, 967 F.2d 166, 170-72 (5th Cir. 1992) (finding where knowledge of errors in financial statements is imputed to the corporation, the corporation cannot establish reliance); PNC Bank Kentucky, Inc. v. Hous. Mortgage Corp., 899 F. Supp. 1399, 1405-06 (W.D. Pa. 1994) (finding that corporation cannot claim reliance on financial statements where its owners and officers had knowledge of fraudulent conduct affecting the accuracy of the financial statements).

Appellant nevertheless argues that the knowledge of the secret agreement by Technimar's senior management is irrelevant because its CFO claims to have believed the financial statements were accurate. This argument is simply absurd. Reliance has to be justifiable. Midland Nat'l. Bank v. Perranoski, 299 N.W.2d 404, 411-12 (Minn. 1980). The person with responsibility for creating accurate financial statements, who knew about but did not include a material financial obligation in the financial statements cannot justifiably claim he thought the financial statements were accurate. See In re Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 158, 186 (S.D.N.Y. 2003) (CFO who became aware that stock buyback program was draining company's cash position but nevertheless continued to prepare financial statements overstating company's financial position knew or should have known company was misrepresenting material facts related to the corporation or failed to review or check information he had a duty to monitor). Nor is it any argument to say that the specific accounting treatment was ambiguous or open to interpretation. The undisputed facts are that the Technimar CFO knew about the obligation and made no attempt to account for it in any fashion. Further, it is undisputed the CFO did not tell his controller about the obligation or his company's auditors. (SR 117 at 45, 121 at 58; RSR 529 ¶ 6-7; RSR 674 ¶¶5-6; RSR 650 ¶¶ 5-6.) Under these undisputed facts, there is no way to claim the CFO reasonably believed the financial statements accurately reflected the undisclosed obligation.

Technimar knew its financial condition and its obligations. It acted on both. It was the public and the auditors that were kept in the dark.[13] Because Appellant stands in the shoes of Technimar, she cannot satisfy the reliance element of her negligence claim. Thus, the Trustee's negligence claim must be dismissed.

D. The Trial Court Correctly Found Appellant's Claims Were Barred by the Doctrine of In Pari Delicto.

The Trial Court had an alternative ground for granting Respondent's motion. Even if fact issues did exist with regard to damages, causation, and reliance, Appellant's case would still have been subject to dismissal on the basis of the equitable doctrine of in pari delicto. "As a general rule, the principle of in pari delicto lies in a case where 'a bankrupt corporation has joined with a third party in defrauding its creditors.' This bars the trustee as successor to the corporation from suing the third party." Senior Cottages, 320 B.R. at 901 n.12. The in pari delicto doctrine operates in a situation where one

[13] Appellant's discussion of Rodney Workman and Allen Berryman is out of context. Workman never said he relied on, or even read, the 1996 financial statements audited by Respondent. He read unaudited 1997 internal financial statements created by Technimar. (App. Brief 31.) Allen Berryman testified he did not consider himself to be a director of Technimar, attended no meetings as a director, and never cast a vote as a director, or took any action as a director. (SR 292 at 56.)

fraudulent wrongdoer sues another who is equally at fault. See, e.g., State v. AAMCO Automatic Transmissions, Inc., 199 N.W.2d 444, 448 (Minn. 1972).

Because the in pari delicto doctrine is an equitable doctrine it is subject on appeal to an abuse of discretion review. Abers v. Elliott, No. A05-2439, 2006 WL 2053425, at *2 (Minn. Ct. App. Jul. 25, 2006) (RSR 535) (citing Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 450 (Minn. Ct. App. 2001)). Thus, the matter will not be disturbed on appeal unless the Trial Court exercised its discretion in an arbitrary and capricious manner, or based its ruling on an erroneous view of the law. See, e.g., Montgomery Ward & Co., Inc. v. County of Hennepin, 450 N.W.2d 299, 305-06 (Minn. 1990). The overwhelming record of Technimar's fraud fully supports the Trial Court's application of the in pari delicto doctrine. The record of Technimar's fraud before the Trial Court included the following:

- Technimar raised $12 million in a bond offering they said would fully fund payment of needed manufacturing equipment. See supra at 8-9.
- To obtain the bond financing they arranged for the equipment manufacturer to put up a $7.6 million guarantee that Technimar would replace. Id. at 10.
- Technimar told the bond participants and Respondent they were replacing the Breton guaranty on an "as able" basis and that the equipment would be delivered whether or not Technimar could fully replace the guaranty. Id. at 10-11.
- Ten days before the closing, Technimar and Breton entered into a secret agreement that changed the deal making the replacement of the guaranty mandatory, on a fixed schedule, and a condition precedent before all the equipment would be shipped. Id. at 13-14.
- Technimar produced a letter at the closing that indicated Breton would consider itself fully paid, and would ship the equipment once the money was disbursed following the closing. Id. at 12.

- Technimar's CEO negotiated the secret agreement and its CFO and its agent in charge of facilitating the bond offering knew about the secret agreement. Id. at 13, 15.
- Technimar did not reveal the secret agreement to its lenders. Id. at 13.
- Technimar did not reveal the secret agreement to the public entities that guaranteed a portion of Technimar's debt. Id.
- Technimar did not reveal the secret agreement to its investors. Id. at 17. (App. Brief at 32.)
- Technimar did not reveal the secret agreement to Respondent. See supra at 20.
- Appellant concedes the failure to reveal the secret agreement was a material omission. (SR 425 at 82, 83.)

Technimar's fraud, which is imputed to the Appellant (see infra at 45-50) invokes the in pari delicto doctrine and bars Appellant's claim.

Courts routinely reject deepening insolvency claims of bankruptcy trustees that arise through the fraudulent actions of the debtor. See Lafferty, 267 F.3d at 354–60; In re Exide Techs., Inc., 299 B.R. 732 (Bankr. D. Del. 2003); see also In re Advanced RISC Corp., 324 B.R. 10 (D. Mass 2005); MCA Fin. Corp., 687 N.E.2d at 855; In re Crown Advantage, Inc., No. 02-3836 MMC, 2004 WL 1635543 at *7 (N.D. Cal. Jul. 12, 2004). (RSR 440.)

Although Appellant spends nearly twenty-three pages in her brief discussing the Trial Court's in pari delicto holding she did not include any of the details of the Technimar fraud. (App. Brief 34-57.) Instead, Appellant attempts to distract this Court's attention from Technimar's undisputed fraudulent behavior by restating her negligence allegations and following with a host of irrelevant arguments.[14]

Appellant's attempt to merge the doctrines of Minnesota's Comparative Fault Statute with the common law equitable doctrine of in pari delicto ignores the distinction between the two doctrines. Comparative fault compares the fault of the Plaintiff to the negligence of the Defendant. Minn. Stat. § 604.01 (2005). The Trial Court in this case made no conclusion as to whether Respondent was negligent, leaving that determination to the jury. (A 189.) The Trial Court therefore felt it could not compare the fault of Technimar to the negligence of Respondent because the negligence of Respondent, if any, was an unknown.

The doctrine of in pari delicto, on the other hand, looks to compare the fraud of the parties. See AAMCO, 199 N.W.2d at 448. "The degree of fraud may not be precisely measurable in the application of the principle of in pari delicto but it is clear on this record that [the Plaintiff] Kugler's fraud was no less than that of AAMCO." Id. The record in this case demonstrates Technimar was engaged in fraud and Respondent was not.

The Trial Court did not, as Appellant suggests, need to set forth a mechanical formula of how it weighed the respective fault of the two parties. "Anyone who engages in a fraudulent scheme forfeits all right to protection, either at law or in equity." Abers,

[14] Appellant's lengthy restatement of her negligence allegations are irrelevant to whether the Trial Court abused its discretion in applying the in pari delicto doctrine. The doctrine is an affirmative defense that, if applicable, bars the claim whether or not the defendant was negligent. Lafferty, 267 F.3d at 354.

2006 WL 2053425, at *3 (citing AAMCO, 199 N.W.2d at 448). (RSR 535.) Technimar indisputably engaged in fraud and Respondent indisputably did not. It, therefore, follows that the undisputed Technimar fraud was greater than the lack of Respondent fraud.

Appellant's protestations that Technimar did not engage in fraud, claiming there is "No evidence in the record" that Technimar intentionally withheld or otherwise concealed the secret agreement, (App. Brief 41) simply ignores the record. The record is fully documented that Technimar negotiated, executed and administered the secret agreement starting in December 1996. According to Appellant's own brief the secret agreement was not discovered by the outside world until sometime in 1998. (App. Brief 19.) Further, Appellant admitted in response to Respondent's counterclaim that Technimar did not disclose the secret agreement to the bond participants. (A 138 ¶ 11; A 153 ¶ 10.) Appellant's brief on appeal states the pension fund investors were kept in the dark concerning the agreement. (App. Brief 32.) Appellant concedes Respondent did not obtain the secret agreement. (App. Brief 50; see also RSR 529 ¶¶ 6-7; RSR 674 ¶¶ 5-6; RSR 650 ¶¶5-6.) There is no dispute that Technimar knew about the agreement, should have disclosed the agreement, had numerous opportunities to disclose the agreement and failed to disclose the agreement.

Technimar's actions therefore satisfy any definition of fraud, including the test set forth in Hanson v. Ford Motor Co., 278 F.2d 586 (8th Cir. 1960) cited by Appellant. There were numerous representations and/or omissions to the bond participants, later investors, and auditors regarding the financial condition of Technimar, and the terms of the Breton equipment contract. See supra at 11-12, 18-20. The representations were false. Id. The representations concerned the present fact of Technimar's present financial conditions and present obligations with respect to the equipment contract. As Appellant testified and common sense dictates, the representations were material. (SR 425 at 82, 83.) Technimar, through its CEO and CFO (as well as David Welliver) knew the representations were false because each knew about the secret agreement. See supra at 13-15. Technimar intended for the recipients of the misrepresentation to act in reliance by lending millions of dollars and having others put forth millions of dollars in guaranties. In reliance on the misrepresentations, Heller issued the loan, the City of Cohasset put forth a guaranty, the state of Minnesota put forth a guaranty, the various pension funds loaned millions of dollars. See supra at 9, 17. These actions satisfy the elements of a fraud claim. (App. Brief 40-41) (citing Hanson, 278 F.2d 586.)

Appellant next argues that a trustee should not be subject to the in pari delicto defense. This "argument" is, in reality, a request to make new law. Although she claims a "division of authority" exists regarding the applicability of the in pari delicto doctrine to a bankruptcy trustee, she is simply not accurate. Appellant cites two cases where a court did not apply the doctrine to a trustee. See In re Adelphia Commc'ns Corp., 330 B.R. 364 (Bankr. S.D.N.Y. 2005); In re Fuzion Techs. Group, Inc. v. Proskauer Rose, 332 B.R. 225 (Bankr. S.D. Fla. 2005). One of the cases was not a holding, it was dicta. The Court actually held that at the motion to dismiss stage, plaintiff had sufficiently pled allegations that could invoke an exception to the doctrine. Adelphia Commc'ns, 330 B.R. at 380. Moreover, both cases were decided by a Federal District or Federal Bankruptcy judge sitting in a circuit which has held the exact opposite. Compare

Adelphia Commc'ns, 330 B.R. 364 with Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 158-166 (2d Cir. 2003) and In re Fuzion, 332 B.R. 225 with Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006).

The actual state of the law is not divided. Every federal circuit to have examined whether a bankruptcy trustee asserting a cause of action on behalf of the debtor is subject to the in pari delicto defense has concluded in the affirmative. Edwards, 437 F.3d at 1151 (citing Grassmueck v. Am. Shorthorn Ass'n, 402 F.3d 833, 837 (8th Cir. 2005)); Lafferty, 267 F.3d at 356-57; Terlecky v. Hurd (In re Dublin Sec.), 133 F.3d 377, 381 (6th Cir. 1997); Sender v. Buchanon (In re Hedged-Inv. Assocs.), 84 F.3d 1281, 1285 (10th Cir. 1996); Color Tile, 322 F.3d at 158-166). In addition to these circuits, the First Circuit also recently held that in pari delicto was applicable to a bankruptcy trustee. Baena v. KPMG, LLP, 453 F.3d 1 (1st Cir. 2006). The federal circuits analyzing the scope of this federal law have focused on the legislative history of the statute as well as the plain language of the statute. See, e.g., Lafferty, 267 F.3d at 356-57; Edwards 437 F.3d at 1150-51.

Appellant cites two U.S. Supreme Court cases that reject the in pari delicto doctrine but do so in circumstances that are different from the case at hand. (App. Brief 46.) Neither case involves the applicability of the in pari delicto doctrine to a bankruptcy trustee. Instead the cases concern passive violators of a federal statutory law which was specifically created to have a private enforcement mechanism. In Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139-41 (1968), overruled on other grounds by 467

U.S. 752 (1984), the court declined to apply in pari delicto in an antitrust case to a plaintiff who was at most a passive violator of the antitrust laws due to their participation in illegal arrangements formulated and carried out by the Defendant. Similarly, in Bateman Eichler Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985), the court in an insider trading action declined to apply the doctrine to the tippees of a securities broker who was passing on false inside information regarding the company's stock. Again, the Court believed the plaintiffs were not active participants, but were "unwitting dupes" of Defendant. Id. at 314. Further, the Court in both actions cited the public policy furthered through the private enforcement mechanisms of the two federal statutes at issue in those cases. Perma Life, 392 U.S. at 138; Bateman Eichler, 472 U.S. at 310.

Deviating from the law as interpreted by every federal circuit is not warranted in this case. Technimar was not a passive violator in this case. Technimar was the primary violator. It entered into a secret agreement ten days before executing bond documents with public entities involving millions of taxpayer dollars. It provided a letter at closing assuring the bond participants that title would pass upon completion of the bond offering knowing full well that it had just a few days earlier made delivery of the equipment contingent on meeting a payment schedule. Technimar failed to tell the entities it was dealing with about this fundamental change.

Neither is this case brought pursuant to a federal statute that created a private right of action. This is a common law negligence action brought by a trustee standing in the shoes of a fraudulent debtor. In such cases, the in pari delicto doctrine applies to the trustee. See supra at 39, 43.

Appellant finally argues that the Technimar fraud is not sufficiently "massive" to invoke the in pari delicto doctrine. This argument has no support in Minnesota law. See AAMCO, 199 N.W.2d at 448 (franchisor's participation in deceptive trade practices barred claim against national franchisor); Abers, 2006 WL 2053425, at *3 (upholding in pari delicto doctrine where plaintiff was engaged in the improper use of gambling proceeds).[15] (RSR 535.)

E. The Trial Court Correctly Concluded the Knowledge and Actions of Technimar's Senior Management is Imputed to Technimar and Thus to Appellant.

Appellant argues that the actions and knowledge of Technimar's most senior officers—Roberto Contreras, Sr. (CEO, Chairman of the Board of Directors, President, Chairman of the Executive Committee) and Luis Contreras (CFO, Director, Secretary, member of the Executive Committee) should not be imputed to Technimar and, thus, to Appellant. In so doing, Appellant ignores the law surrounding imputation as it has been applied in Minnesota and elsewhere.

Minnesota imputation law is well-settled. In Minnesota, a corporation acquires knowledge or receives notice through its officers and agents. The general rule is that the actions and knowledge of, or notice to, an agent or officer of a corporation acquired in the ordinary discharge of his or her duties for the corporation is imputed to the corporation. St. Paul Fire & Marine Ins. Co. v. FDIC, 765 F. Supp. 538, 544 (D. Minn. 1991), aff'd,

[15] Appellant's argument is also at odds with the first portion of her brief where she attempts to link the Technimar debacle to the likes of Enron, Global Crossing, and Parmelat. (App. Brief 25.)

968 F.2d 695 (8th Cir. 1992); United States v. Sawyer Transp., Inc., 337 F. Supp. 29, 30–31 (D. Minn. 1971); Sussel Co. v. First Fed. Sav. & Loan Ass'n of St. Paul, 238 N.W.2d 625, 627 (Minn. 1976); Engen v. Mitch's Bar & Grill, No. C7–95–78, 1995 WL 387738, at *2 (Minn. Ct. App. Jul. 3, 1995) (RSR 453). "If a corporate officer is acting within the scope of his or her duty, his or her knowledge is imputable to the corporation." St. Paul Fire and Marine Ins., 765 F. Supp. at 544 (citing Brooks Upholstering Co. v. Aetna Ins. Co., 149 N.W.2d 502, 506 (Minn. 1967)).

Moreover, a company cannot disclaim knowledge of its own contracts. See Helsby v. St. Paul Hosp. & Cas. Co., 195 F. Supp. 385, 392 (D. Minn. 1961). This is particularly true when the company undertakes to perform the contract. See, e.g., Tracy Cement Tile Co. v. City of Tracy, 176 N.W. 189, 190 (Minn. 1919) (stating that a city may ratify a contract by taking subsequent actions that recognize the contract as valid and subsisting); Bond v. Charlson, 374 N.W.2d 423, 429 (Minn. 1985).

Where the wrongdoer is also the senior officer of the company, imputation is particularly warranted. For example, in Kay v. Peter Motor Co., 483 N.W.2d 481, 483–85 (Minn. Ct. App. 1992), the president of a corporation had been secretly sexually harassing an employee. The employee did not report the harassment. Id. at 483. The company took the position it could not be sued because it did not have notice of the harassment. Id. The court summarily rejected the argument noting that the actor in question was the company president and chief executive officer. Id. at 483–85. His knowledge was thus imputed to the company. Id.

Similarly, in Grassmueck, 402 F.3d at 839, a bankruptcy trustee claimed the fraud of the debtor's president could not be imputed to the company because he was acting for his own interests. The Eighth Circuit rejected this argument noting that the agent committing the fraud was also the principal that should have been informed. Id. at 841. In the present action, the CEO and CFO of Technimar were the people to inform of the fraud. Those individuals, however, were themselves the fraudulent actors. Technimar's fraud was committed by Roberto Contreras, Sr., who was President, CEO, Chairman of the Board, member of the Executive Committee and "the face of Technimar." See supra at 7. He was aided by Luis Contreras who was Technimar's Treasurer, CFO, and member of the Executive Committee. Id. at 7-8. David Welliver, past and future director of Technimar and its agent with respect to raising funds, was directly involved in the fraud. Id. at 8.

These individuals were acting on behalf of Technimar. The fraud was in the name of, and for the benefit of Technimar. The contract was a Technimar contract. Technimar exchanged consideration with Breton pursuant to the contract. The contract permitted Technimar to raise additional money for its operations. Technimar sought to perform the contract for the next nineteen months under various management teams. The company's directors authorized the Contrerases to execute contracts regarding the equipment purchase and testified as to their authority to do so. See supra at 7.

The actions of Technimar's senior management are imputed to Technimar. The law is not so absurd as to permit a finding of imputation under the facts of Kay where the secret sexual harassment by the company president could be imputed to the corporation, but not have such a finding under the undisputed facts of this case where multiple members of senior management were involved in the negotiation, execution, and administration of a company contract to enable the company to obtain needed financing for a company project.

Appellant's reliance on Cenco Inc. v. Seidman & Seidman, 686 F.2d 449 (7th Cir. 1982) is misplaced. In Cenco, the actions of the corporate insiders was imputed to the corporation. Id. at 456. The Cenco corporate managers had inflated corporate inventories to inflate the price of the company stock which was, in turn, used to buy up other companies on the cheap and made it able to borrow money at lower rates than if the inventory had been accurately stated. Id. at 451. The court determined the fraud was done on behalf of the company and, therefore, imputed to the company. Id. at 454, 456. There was no holding, as Appellant suggests, that imputation would occur only if the managers appreciated how the inflated inventories would affect the financial statements. On the contrary, the Court held "here the uncontested facts show fraud permeating the top management of Cenco. In such a case, the corporation should not be allowed to shift the entire responsibility for the fraud to its auditors." Id. at 456.

As was the case in Cenco, the Technimar fraud was also on behalf of the company. The secret agreement was negotiated so the bond transaction could go forward so Technimar, if it could later raise more money, could pay off the Breton guaranty and obtain the equipment. Appellant does not suggest the point of the fraud was to loot the company; rather it was to obtain the manufacturing equipment. Because the fraud was on behalf of Technimar, Cenco supports the Trial Court's finding of imputation. See also

Baena, 453 F.3d at 8 (imputing actions of corporate managers to company because "[n]owhere does the complaint suggest that the defalcating managers were acting solely out of self-interest or otherwise attempting primarily to benefit anyone other than the company through their behavior").

Appellant's other citation, to FDIC v. Deloitte & Touche, 834 F. Supp. 1129 (E.D. Ark. 1992) is irrelevant. As with so much of Appellant's legal authority, the FDIC case was argued under a motion to dismiss standard. The Court began its opinion with the observation that the Defendant's essential argument, that it could not be held liable for telling the Plaintiff what it already knew, was "sensible." Id. at 1133. The Court, however, observed that because the case was at the motion to dismiss stage, Defendant could not show the "individuals at FirstSouth already knew what Deloitte allegedly failed to tell it[.]" Id. at 1137.

> At this point, there is no way to tell who did what, under what authority, even with respect to the examples of wrongdoing that the Complaint describes.

Id. at 1140.

The Trial Court in this case was not deciding a Rule 12 motion. Instead, as the Appellant concedes, the Trial Court had a record before it that was developed through "extensive discovery" of "voluminous exhibits and deposition transcripts." (App. Brief 24.) That record showed conclusively that the actions of Robert Contreras, Sr. and Luis Contreras were in the course of their employment, with full authority, and on behalf of Technimar. Thus, under well-settled and unchallenged Minnesota law, their actions are imputed to Technimar and from Technimar imputed to Appellant. See supra at 23.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to uphold the Trial Court's decision in granting Respondent summary judgment.

Dated: October 6, 2006

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CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to uphold the Trial Court's decision in granting Respondent summary judgment.

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IN COURT OF APPEALS
A06-1309

Julia A. Christians, Trustee for the Bankruptcy
Estate of Technimar Industries, Inc.

Appellant,

v.

Grant Thornton, LLP,

Respondent.

CERTIFICATION OF BRIEF LENGTH

I, MICHAEL E. KEYES, hereby certify that Respondent's Brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for a brief produced with proportional font. The length of this brief, exclusive of table of contents and table of authorities is 13,908 words. This brief was prepared using Microsoft Word 2003, Version SP-1.

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AFFIDAVIT OF CAUSATION OF PERSONAL SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

JODY A. DEIMLER, being first duly sworn upon oath, states that on the 6th day of October, 2006, she caused to be served the attached

1. Respondent's Brief;
2. Respondent's Appendix;
3. Respondent's Supplemental Record (Volume I);
4. Respondent's Supplemental Record-Confidential (Volume II); and
5. Certification of Brief Length.

upon the within named counsel, by placing a true and correct copy in an envelope addressed as follows:

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and depositing the same in the hands of a local personal process service agency for personal service upon said counsel. An Affidavit of Personal Service from the personal process server, when available, will be filed with the Court to accompany the referenced document.

Jody A Deimler

JODY A. DEIMLER

Subscribed and sworn to before me

this 6th day of October, 2006.

NOTARY PUBLIC

KARA JANE JORGES
Notary Public-Minnesota
My Commission Expires Jan 31, 2010

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).