UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
INTER-ACT ELECTRONICS, INC.,	)	CASE NO. B-02-11557C-7G
	)	
Debtor.	)	
	)	
	)	
CHARLES M. IVEY, III, TRUSTEE FOR THE BANKRUPTCY ESTATE OF INTER-ACT ELECTRONICS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ADVERSARY NO. 03-2035
	)	
ALBERTSON'S, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on Albertson's Inc.'s ("Albertsons") second motion to dismiss enumerated counts in the amended adversary complaint of the Chapter 7 trustee, Charles M. Ivey, III ("Trustee"), for the bankruptcy estate of Inter-Act Electronics, Inc. ("Debtor").[1] In the amended adversary complaint, the Trustee not only objects to Albertsons's $1,573,061.30 proof of claim, but also asserts that the Debtor is entitled to, inter alia, over $200,000,000 in damages arising out of a contract to install and maintain terminals in Albertsons's stores that enable shoppers to receive customized coupons.

The Court held a hearing in this matter on October 5, 2004, in Greensboro, North Carolina,

[1] In an earlier memorandum opinion and order, the Court granted Albertsons's motion to dismiss the Trustee's causes of action for fraud and breach of contract, but the Court dismissed those counts without prejudice and allowed the Trustee to amend his complaint. (Document Nos. 35 and 36). After the Trustee filed an amended complaint (Document No. 40), Albertsons filed this second motion to dismiss. (Document No. 47).

at which time the Court took the matter under advisement.[2] After considering the arguments of the parties and reviewing the relevant law, the Court will dismiss Count One of the Amended Complaint in part, and will dismiss Count Ten.

I. STANDARD OF REVIEW

In reviewing a Fed R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, as adopted by Fed. R. Bankr. P. 7012(b), a court must accept as true all of the factual allegations in the complaint as well as the reasonable inferences that can be drawn from them, and a court may dismiss the complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). "As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted by the district court only in the relatively unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to securing relief." Wright & Miller, Federal Practice and Procedure vol. 5B § 1357 (3rd ed. West 2004). See also Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974) (same); First Financial Sav. Bank, Inc. v. American Bankers Ins. Co. of Florida, Inc., 699 F.Supp. 1158, 1161 (E.D. N.C. 1988) (same). The plaintiff's allegations are to be construed "liberally, because the rules require only general or 'notice' pleading, rather than detailed fact pleading." James Wm. Moore, Moore's Federal Practice vol. 2 § 12.34[1][b] (3rd ed. Matthew Bender 2004).

II. BACKGROUND

The Debtor developed and installed terminals in stores that distributed customized coupons to customers based on information garnered from a customer's membership loyalty card. Manufacturers of products paid the Debtor for distributing their coupons and the Debtor remitted a portion of that money to a store whenever a customer redeemed a coupon. Some of the Debtor's contracts with manufactures were predicated on the Debtor servicing a minimum number of stores and maintaining a "national presence."

In 1997, the Debtor executed a Retailer Agreement ("Original Agreement") with Lucky

---

[2] Edwin R. Gatton and Charles M. Ivey appeared on behalf of the Plaintiff and Jeffery W. Oleynik and Clinton R. Pinyan appeared on behalf of the Defendant.

Stores, Inc. ("Lucky"), which had about 400 stores throughout California and Nevada that utilized customer loyalty cards. Similarly, the Debtor also executed contracts with ACME Markets, Inc. ("ACME") and Jewel Food Stores ("Jewel"). Those contracts enabled the Debtor to establish a "national presence" and secure manufacturer contracts that had previously been unavailable to it because of the Debtor's relatively small size.

From June 1999 to September 2000, Albertsons – through mergers and acquisitions – became the owner of Lucky, ACME, and Jewel. On October 15, 1999, the Debtor's representatives, Lee Armbruster and Brad McCue, met with Albertsons's representatives, Pam Powell and Chris Mielke, regarding the future of the Debtor's involvement with the former Lucky stores. Mielke allegedly stated that Albertsons was discontinuing the use of loyalty cards in those stores, that it was terminating its "arrangement" with the Debtor, and that the Debtor needed to remove its coupon terminals from those stores immediately. The former Lucky stores constituted about thirty percent of the Debtor's business, and the Debtor informed Albertsons about the severe, negative, economic impact that its actions had on the Debtor – especially considering that Albertsons's termination of that contract would place the Debtor in breach of its manufacturer contracts which required the Debtor to maintain a minimum number of stores. The Debtor also informed Albertsons that the loss of Albertsons's business would negatively impact the Debtor's efforts to raise additional capital for future expansion and its ability to negotiate future contracts with manufacturers.

In attempt to salvage its business with Albertsons and the former Lucky stores, the Debtor offered to install new terminals that would work without the use of a loyalty card, and the Debtor offered to further develop and install an internet shopping system. At this point, the Trustee alleges that Albertsons – knowing that the loss of its business would cause substantial, economic damage to the Debtor – devised a Machiavellian scheme whereby it could obtain a release of the Debtor's potential damage claims against it arising out of its termination of the Original Agreement and manipulate the Debtor into breaching a new contract yet to be entered by the parties.

According to the Trustee, the manifestations of that plot began after a December 3, 1999 meeting, when the Debtor and Albertsons began a series of negotiations, in which Albertsons insisted that the Debtor agree to pay it $616,000.00 ostensibly owed from an earlier dispute over an

egg promotion,[3] and that the Debtor sign a mutual release relieving Albertsons of any liability for terminating the Original Agreement. During the course of negotiations, the Debtor completed its development of a store terminal that did not require the use of a loyalty card, and the Debtor gave a successful demonstration of its new system to Albertsons in mid-December 1999. The Debtor was anxious to enter into a new contract with Albertsons by January 1, 2000, because without the installation of the new terminals in the former Lucky stores the Debtor was in continuing breach of many of its contracts with manufacturers.

Although Albertsons was aware that time was of the essence for the Debtor, Albertsons purportedly refused to negotiate certain items suggested by the Debtor, and because the Debtor was in desperate need of Albertsons's business, Albertsons was able to dictate the terms of the proposed contract. On February 10, 2000, Albertsons signed a contract (the "Amended Agreement") with the Debtor in which it obtained both the right to collect $616,000.00 it claimed on the disputed egg promotion, and a mutual release for any liability it had based on its termination of the Original Agreement. Under the Amended Agreement, the Debtor was to install new coupon terminals in Albertsons's stores by early March 2000, however, due to delays caused by Albertsons the installation did not begin until May 2000. The Amended Agreement is governed by Illinois law.

The Trustee argues that the Debtor could not timely install the new terminals in Albertsons's stores because Albertsons refused to timely respond regarding graphics, computer, and press release information. The Trustee also alleges that Albertsons created obstacles over issues that had already been resolved in the Original Agreement, made suggestions that involved unnecessary additional costs and then refused to cover those costs, and otherwise acted to prevent the Amended Agreement from being performed. After the Debtor began to install new terminals in Albertsons's stores in May 2000, it discovered that Albertsons purportedly failed to inform lower management of the Debtor's right of access, which resulted in further delays. Meanwhile, the Debtor had hired a team of technicians to execute the Amended Agreement with Albertsons, and those technicians were left

---

[3] The Debtor states that it agreed to fund an egg promotion in the former Lucky stores by paying .25¢ of the original purchase price for each carton of eggs sold. The Debtor asserts that Albertsons unilaterally – and wrongfully – increased that amount to .50¢, which led to a disputed claim between the parties of $616,000.00.

with nothing to do while Albertsons allegedly frustrated the Debtor's performance.

By November 2000, Albertsons had terminated the Amended Agreement under the guise that the Debtor had breached that agreement, and Albertsons had also terminated the Debtor's contracts with the former Jewel and ACME stores.

As a result of its dealings with Albertsons, the Trustee alleges that the Debtor's actual cost of performing its obligations under the Amended Agreement is $13,500,000. Also, the Debtor made the first of two scheduled payments of $308,000.00 regarding the egg promotional dispute before the Debtor realized that Albertsons was not going to honor its obligations under the Amended Agreement. The Trustee further alleges that as a result of the breach of contract by Albertsons, the Debtor's entire United States operations failed, which resulted in a loss of over $200,000,000. The loss of revenues from the former Lucky stores alone allegedly was about $92,000,000. Loss of its United States operations also damaged the Debtor's reputation in Europe, which caused its existing European business to decline by millions of dollars.

III. DISCUSSION

The Trustee's amended complaint seeks, inter alia, to preserve the Trustee's entitlement to sue for breach of contract under both the Original Agreement and the Amended Agreement. The Trustee also seeks to avoid the mutual release provision in the Amended Agreement by declaring that it was procured by Albertsons through a scheme to defraud and that it may be severed from the other provisions of that contract. In the alternative, the Trustee alleges that the entire Amended Agreement was procured by Albertsons through a scheme to defraud and that execution of the Amended Agreement constituted an avoidable fraudulent conveyance. The Trustee also seeks damages under North Carolina's Unfair and Deceptive Trade Practices Act.

Albertsons seeks to limit the Trustee's breach of contract claims to proscribe any assertion of rights that arose before the Debtor signed the mutual release in the Amended Agreement on February 10, 2000. Albertsons also asks that the Court dismiss the Trustee's counts of fraud,

fraudulent conveyance, and unfair and deceptive trade practices under North Carolina law[4] on both substantive and procedural grounds.

A. Alternative Pleadings

Albertsons complains that the Trustee has violated Federal Rule of Civil Procedure 8, as adopted by Federal Rule of Bankruptcy Procedure 7008, on the basis that the Trustee has asserted counts for relief that have an inconsistent factual basis. For example, the Trustee seeks to recover based on both breach of the Original Agreement and the Amended Agreement, while maintaining causes of action to declare the Amended Agreement partially, then wholly, void based on Albertsons's scheme to defraud the Debtor, and alternatively, fraud or constructive fraud on the part of the Debtor.

Rule 8 of the Federal Rules of Civil Procedure states that "[r]elief in the alternative or of several different types may be demanded." The Rule further provides:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.... A party may also state as many separate claims or defenses as the party has regardless of consistence and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Fed. R. Civ. P. 8(e)(2).

Under Federal Rule of Civil Procedure 11(b)(3), as adopted by Federal Rule of Bankruptcy Procedure 9011, a party's allegations and factual contentions must have evidentiary support, or be likely to have evidentiary support after further investigation and discovery. As explained in the 1983 Advisory Committee Notes to Rule 11, the standard is one of "reasonableness under the circumstances" and to satisfy the Rule, all that is required is some pre-filing inquiry into the facts and law. In tandem, Rules 8 and 11 must be construed to allow counts in a complaint, which at the

---

[4] The Trustee also alleged in the amended complaint that Albertsons had interfered with the Debtor's contractual relations, interfered with its prospective business advantage, and had violated the California, Illinois and Connecticut unfair and deceptive trade practices acts. The Trustee later voluntarily dismissed all those claims. (Documents No. 55 and 61). Allegations that Albertsons breached the Amended Agreement and the Debtor's counts for conversion, bailment, and punitive damages are not effected by Albertsons's motion to dismiss.

outset might be inconsistent, but which are nonetheless reasonable contentions under the existing evidence. James Wm. Moore, Moore's Federal Practice vol. 2 § 8.09[2] (3rd ed. Matthew Bender 2004) (stating that alternative, hypothetical, and inconsistent counts may be alleged so long as those counts have some evidentiary support). It would be inappropriate for a court to construe one claim in a complaint as an admission against the propriety of another alternative or inconsistent claim in the same complaint. Henry v. Daytop Village, 42 F.3d 89, 95 (3rd Cir. 1994).

Related to the availability of alternative pleadings is the doctrine of election of remedies, "which refers to situations where an individual pursues remedies that are legally or factually inconsistent. Alexander v. Gardner-Denver Co., 415 U.S. 36, 49, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). The doctrine does not apply to the assertion of inconsistent claims; rather, the doctrine is meant to prevent double recovery based on the same wrong. X-It Prods. LLC v. Walter Kidde Portable Equip., Inc., 227 F. Supp.2d 494, 524 (E.D. Va. 2002) ("The doctrine is remedial in nature and does no more than prevent double recovery."). At the pleading stage, Federal Rule of Civil Procedure 8(e)(2) has completely abolished the doctrine of election of remedies. Olympia Hotels Corp. C. Johnson Wax Dev. Corp., 908 F.2d 1363, 1371 (7th Cir. 1990).

In this case, the Trustee's alternative pleadings are not so untoward as to violate Federal Rules of Civil Procedure 8 and 11. The Trustee has inquired into the pre-filing facts, made allegations supporting the claim that Albertsons breached the Amended Agreement, that the Amended Agreement was procured by Albertsons under a scheme to defraud the Debtor, and that the mutual release provision in the Amended Agreement – the alleged object of Albertson's fraud – is severable from the contract with the rest being enforceable. If the Trustee is successful in undoing either the mutual release or the entire Amended Agreement, then the Trustee has stated a cause of action based on Albertsons's alleged breach of the Original Agreement. While the Trustee may eventually have to make an election of remedies insofar as the Trustee is only entitled to a single recovery, the Trustee's allegations at this stage do not violate Rules 8 and 11.

Regarding the Trustee's claim that the Amended Agreement should be avoided based on Albertsons's alleged scheme to defraud, and then the Trustee's inconsistent claim that the Amended Agreement is voidable based on the Debtor's – not Albertsons's – actual or constructive fraud, the

Court notes that both claims are supported by the allegations of the amended complaint[5] and that the Trustee is effectively asserting the rights of two separate parties. Under § 544(b)(1) a trustee has all the rights that a pre-petition unsecured creditor has to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." A Chapter 7 trustee's independent causes of action under § 544 must be separated from those causes of action that belong to a debtor on the filing of a Chapter 7 petition, which are property of the estate under § 541(a), and which the trustee administers for the benefit of the estate pursuant to § 704(1).

Thus, apart from the merits of the types of alternative pleadings allowed pursuant to Federal Rules of Civil Procedure 8 and 11, Albertsons's argument that the Trustee cannot state both that Albertsons and the Debtor each entered the Amended Agreement fraudulently is rejected inasmuch as the Trustee is both suing in his own capacity – when the Trustee alleges that the Debtor obtained the Amended Agreement fraudulently – and suing as a representative of the Debtor's estate – when stating that Albertsons obtained the Amended Agreement pursuant to a scheme to defraud. Given the latitude granted by Rule 8, the Trustee should not be precluded from bringing both these claims in a single complaint.

Accordingly, the Court does not find that it is appropriate to dismiss any claim filed by the Trustee on the basis that the claim cannot be consonantly asserted in tandem with another inconsistent claim.

B. Severability

The Trustee seeks to declare the mutual release provision of the Amended Agreement – as opposed to the entire Amended Agreement – void inasmuch as the release was allegedly procured fraudulently. The Trustee then seeks to use a contractual severability clause to extract that single provision, and then sue on both the Original Agreement and the Amended Agreement. Apart from challenging the merits of the Trustee's fraud claim, Albertsons maintains that the mutual release is not severable from the remainder of the Amended Agreement and that the Trustee is precluded from suing on both contracts.

---

[5] See infra, Parts C and D, for a more detailed discussion of the evidentiary support underlying both claims.

The severability clause incorporated into the Amended Agreement states:

> Each provision of this Agreement shall be considered severable. If a provision is for any reason held to be invalid, all remaining provisions shall be enforceable. If any provision of the Agreement is held to impose a restriction which is unenforceable in scope which could be made enforceable by limiting the scope, the parties agree to modify the scope of the provision to preserve enforceability.

(Amend. Comp. Ex. A., § 13(j)).

Fraud in the inducement gives the defrauded party the option to avoid the entire contract. Gates Rubber Co. v. USM Corp., 508 F.2d 603, 617 (7th Cir. 1975); Geiger v. Merle, 196 N.E.2d 497, 504 (Ill.) ("A contract into which a party has been induced to enter by the fraud of another party is not void but is only voidable at the election of the defrauded party."), cert. denied, 296 U.S. 630, 56 S. Ct. 154, 80 L. Ed. 448 (1935). Under limited circumstances, however, a party may be able to avoid a single contract provision when the fraud is related to that particular provision and the defrauded party accepted that provision – as contrasted with the acceptance of the entire contract – based on the fraudulent representations. Id. (stating that unless the fraud relates directly to the acceptance of a provision, there can be no partial rescission of a contract that is wholly performed). To effect a partial rescission of a contract, however, the severed portion cannot go to the contract's essence. Forman v. Round Lake Park, 525 N.E.2d 868, 875 (Ill. App. Ct.) ("Courts which will enforce a contract with a portion severed generally do so when the severed portion does not go to the contract's essence."), appeal denied 530 N.E.2d 262 (Ill. 1988). See also Corti v. Fleisher, 417 N.E.2d 764, 777 (Ill. App. Ct. 1981) ("Generally, if the legal portion of a bilateral contract is severable, legal promises on one side being wholly supported by legal promises on the other, and the illegal portion of the contract does not go to its essence, the legal part may be enforced."). It is axiomatic that a party may not claim the benefits of a contract while avoiding its burdens. International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (denying a party's attempt to avoid an arbitration clause in a contract based on an absence of a signature when that party had consistently maintained the enforceability of the contract's beneficial provisions); Adams Laboratories, Inc. v. Jacobs Engineering Co., 486 F. Supp. 383, 388 (N.D. Ill. 1980) ("[A]lthough the alleged fraud in the inducement might entitle plaintiff to damages irrespective of the contract, it does not empower the plaintiff to enforce certain provisions of the

contract which are to its liking and excise the rest.").

Here, the provision the Trustee seeks to sever and rescind is the mutual release in the Amended Agreement whereby the Debtor gave up all of its rights to sue Albertsons for its termination of the Original Agreement. According to the Trustee, however, Albertsons's express purpose for entering the Amended Agreement was to both extricate itself from any liability for its termination of the Original Agreement and to claim disputed egg money. In consideration for those items, Albertsons was willing to amend the Debtor's marketing services in California and to ostensibly continue its business relationship with the Debtor. According to the Trustee's allegations, without the mutual release there would be no Amended Agreement inasmuch as Albertsons was allegedly intending to totally terminate its involvement with the Debtor. Indeed, the Trustee asserts that Albertsons "made it clear that no agreement would be reached unless [the Debtor] ... agreed to release Albertson's from any damages caused by Albertson's breach of the [Original Agreement]." There was no quid pro quo relation between the mutual release and another contractual obligation such that the allegedly invalid portion of the contract could be separated out under the doctrine of divisibility or of agreed equivalents; rather, the mutual release forms part of the consideration for the entire Amended Agreement. In short, having alleged that Albertsons's sole purpose in executing the Amended Agreement was to procure the Debtor's mutual release of claims arising under the Original Agreement and to claim disputed egg money, the Trustee cannot now state that the essence of the Amended Agreement did not concern the mutual release such that the Trustee could sever that provision and shed that burden while seeking to enforce the remaining beneficial terms.

Accordingly, the Trustee has failed to state a claim for declaratory judgment that the mutual release in the Amended Agreement is severable inasmuch as an insuperable bar to relief exists on that claim. The mutual release in the Amended Agreement goes to the essence of the Amended Agreement. Therefore, the Trustee cannot seek to enforce the benefits of that contract while shedding its burdens.

C. Fraud

Albertsons argues that the Trustee failed to state a claim for fraud on the basis that the allegations in the amended complaint (1) fail to demonstrate the existence of a scheme to defraud

under Illinois law; (2) fail to plead fraud with particularity, and (3) that the Trustee erred in attempting to rely on statements made by Albertsons that were proscribed by the anti-modification clause of the Original Agreement and the merger and integration clause of the Amended Agreement.

1. Scheme to Defraud

"To state a cause of action for fraud, a plaintiff must allege the following elements: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) made to induce the other party to act; (4) action by the other party in justifiable reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." Ault v. C.C. Services, Inc., 597 N.E.2d 720, 722 (Ill. App. Ct. 1992).

Illinois does not recognize a cause of action for fraud based on a representation or promise of future conduct – unless that representation or promise formed part of a scheme to defraud. Borcherding v. Anderson Remodeling Co., 624 N.E.2d 887, 893 (Ill. App. Ct. 1993), appeal denied, 633 N.E.2d 2 (Ill. 1994) (Table). A "scheme" is "an artful plot or plan usu[ally] to deceive others." Black's Law Dictionary 1372 (8th ed. 2004). When a party makes a representation or promise regarding future conduct, that party must know at the time the representation or promise was made that it was untrue. Bank of Northern Illinois v. Nugent, 584 N.E.2d 948, 954 (Ill. App. Ct. 1991). "[A] contract induced by fraud is not void but only voidable at the election of the party claiming to have been defrauded." Halla v. Chicago Title & Trust Co., 104 N.E.2d 790, 795 (Ill.1952). Once a defrauded party learns of the fraud that party may nevertheless ratify the contract by accepting benefits flowing from that contract and thereby lose the right to declare the contract void. Golden v. McDermott, Will & Emery, 702 N.E.2d 581, 589 (Ill. Ct. App. 1998), appeal denied, 707 N.E.2d 1239 (Ill. 1999).

Here, the Trustee alleges that Albertsons hatched a machiavellian scheme to defraud the Debtor whereby it would extract $616,000.00 from the Debtor arising out a previous egg promotion dispute between the parties, induce the Debtor into signing a mutual release to absolve Albertsons of any wrongdoing for its termination of the Original Agreement, and then frustrate the performance of the Amended Agreement so as to cause the Debtor's financial ruin.

Specifically, the Trustee alleges Albertsons falsely stated in the Amended Agreement that

it would use its best efforts to provide the Debtor with reasonable access to its stores to install coupon terminals. The scheme was carried out in part by Pam Powell and Chris Mielke, and it included, inter alia, leading the Debtor to believe that Albertsons would expand the coupon terminals to it other non-Lucky stores, representing that Albertsons would cooperate in developing and resolving graphical and technical issues, and representing that Albertsons would advertise and promote the new coupon terminals and cooperate in press releases. Meanwhile, Albertsons was "knowingly creating a situation whereby Inter-Act would be in breach of its manufacturer contracts, thereby restricting coupons available (machine content) and then, through Chris Mielke, citing a lack of machine content as one reason for ultimately terminating the amended agreement." (Amend. Compl. ¶ 21). Contrary to Albertsons's promises, the Trustee asserts that Albertsons never had any intention of incorporating the Debtor's terminal program into the former Lucky stores – or any other of its stores; rather the sole purpose of the Amended Agreement was to induce the Debtor to pay $616,000.00 in disputed egg money, and to have the Debtor sign the mutual release.

In reliance on the Amended Agreement, the Debtor incurred great expense in developing new information technology and in hiring a team of technicians to implement the Amended Agreement.

Albertsons argues that the above-stated allegations are insufficient to establish a cause of action based on fraud. Namely, Albertsons points out that the Trustee admitted that the Debtor and Albertsons worked diligently together during the negotiations leading up to the February 10, 2000 Amended Agreement, and that Alberstons worked with the Debtor after the effective date of the Amended Agreement to resolve graphics and technical issues – even if it did act slowly. Furthermore, Albertsons and the Debtor actually performed under the Amended Agreement from May to September 2000. These facts, Albertsons asserts, are flatly inconsistent with the Trustee's allegations that Albertsons never intended to perform its obligations.

While it can be argued that the allegations regarding performance by Albertsons tend to negate the Trustee's fraud claim, such an argument is a matter to be considered on the merits and does not demonstrate an insuperable bar to relief based on the face of the Debtor's amended complaint. The fact that Albertsons may have worked with the Debtor during and after the negotiation period may be relatively insignificant considering that Albertsons's alleged goal was to

execute the Amended Agreement to obtain a mutual release of its potential liabilities stemming out of its termination of the Original Agreement and to recover amounts it claimed were due over a disputed egg promotional. Of the $616,000.00 to be paid by the Debtor to Albertsons, only $308,000.00 was due on the date the Amended Agreement was executed; the remainder was not due for an additional two months, which gave Albertsons incentive to perform its initial obligations under the Amended Agreement while ultimately intending to frustrate performance by the Debtor. Likewise, to realize the benefit of the mutual release, Albertsons could not immediately terminate the Amended Agreement out of the danger that it would lose the negotiated benefits of that contract. See Restatement (Second) Contracts § 239 (providing that the failure of one party to perform may excuse the obligations of the other party to perform under the contract). Thus, to meet its alleged goals, Albertsons had to render some performance under the Amended Agreement. Based on these allegations, there appear to be some issues of fact as to when the Debtor learned of the alleged fraud and whether the Debtor ratified that fraud by accepting Albertsons's allegedly defective performance under the Amended Agreement.

Accordingly, the Court finds that the Debtor has stated a claim for relief based on a scheme to defraud under Illinois law. The Trustee has asserted that Albertsons made false statements of material fact and falsely covenanted in the Amended Agreement that it would use its best efforts to incorporate the Debtor's coupon terminal program. Believing that Albertsons intended to fulfill its covenants under the Amended Agreement, the Debtor agreed to sign the mutual release, pay a portion of the disputed egg promotional money, and to incur expenses implementing the Amended Agreement. According to the Debtor, Albertsons knew that it was making a false covenant, which was part of its overall scheme to extricate itself from any liability for terminating the Original Agreement, reap the advantages of the mutual release, delay the Debtor's performance under the Amended Agreement causing the Debtor to lose its manufacturer contracts, and then, with *chutzpah*, to declare that the Debtor itself had breached the Amended Agreement.

2. Particularity

Albertsons also has argued that the Trustee's count for fraud should be dismissed from the amended complaint on the basis that the Trustee failed to allege fraud with particularity in

accordance with Fed. R. Civ. P. 9(b).

The requirements of particularity vary depending on the facts of a particular case, but at a minimum, a party should allege "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999). The Trustee's amended complaint meets these minimum requirements. The time and place of the false representation includes, but is not limited to, the date and place where the parties executed the Amended Agreement, at least one allegedly false representation is Albertsons's covenant in that agreement to use its best efforts to help the Debtor implement the new terminal program, and the Debtor identified Albertsons and its representatives Pam Powell and Chris Mielke as being responsible for perpetrating the fraud. The fruits of the alleged misrepresentation are the execution of the mutual release by the Debtor and the promised payment of $616,000.00.

3. Anti-Modification, Merger and Integration Clauses

Finally, Albertsons argues that the Trustee cannot state a claim of fraud because the Trustee cannot rely on statements made in the interim between the Original Agreement and the Amended Agreement on the basis that the anti-modification clause of the Original Agreement, combined with the merger and integration clause of the Amended Agreement, preclude any interim remarks made by Albertsons.

The anti-modification clause of the Original Agreement states that the agreement could not be modified except by a written instrument signed by both parties. A merger and integration clause means "that a written agreement which is complete on its face supersedes all prior agreements on the same subject matter and bars the introduction of evidence concerning any prior term or agreement on that subject matter." Barille v. Sears Roebuck & Co., 682 N.E.2d 118, 123 (Ill. Ct. App. 1997) (finding that an unambiguous integration clause may preclude a cause of action for fraud based on pre-contractual misrepresentations). As a general rule, a merger and integration clause "will not preclude a plaintiff from relying upon extrinsic evidence in order to establish a cause of action for fraud." W.W. Vincent & Co. v. First Colony Life Ins. Co., 814 N.E.2d 960 (Ill. Ct. App. 2004). Evidence of fraud is generally not precluded by a merger and integration clause because fraud

is based in tort – not in contract – and the merger and integration clause concerns disputes arising over the meaning of the contract; it has nothing to do with whether a contract was induced by fraud. Virgortone AG Products, Inc. v. PM AG Products, Inc., 316 F.3d 641, 644 (7th Cir. 2002) (stating that Barille was decided without supporting rationale and in the absence of statutory guidance the better approach was to follow the general rule that a merger and integration clause did not bar pre-contractual evidence of fraud).

In the context of this motion to dismiss, however, Albertsons's reliance on the anti-modification clause of the Original Agreement and the merger and integration clause of the Amended Agreement is misplaced. The Trustee alleges Albertsons's scheme was concocted after Albertsons's termination of the Original Agreement; the purported scheme to defraud was not a modification of the Original Agreement. Additionally, at a minimum, the Trustee has stated that it is the Amended Agreement itself that contains the fraudulent statements and statements in the Amended Agreement are not affected by the merger and integration clauses. While the Trustee does make allegations of statements made during negotiations, the Court finds that the Amended Agreement itself, and the circumstances surrounding its formation and execution as illustrated supra, are sufficient in themselves to state a claim for relief based on fraud within the context of Fed. R. Civ. P. 12(b)(6) without potentially running afoul of anti-modification, merger and integration clauses.

D. Fraudulent Transfer

Albertsons claims that the Trustee's count under § 544(b) of the Bankruptcy Code for a statutory and common law fraudulent transfer based on its execution of the Amended Agreement fails to state a claim for relief on the grounds that the fraudulent transfer is not alleged with particularity as required by Federal Rule of Civil Procedure 9(b), and that the count – which requires that the Debtor have an actual intent to defraud its creditors – is inconsistent with the Trustee's earlier allegations that the Debtor did not sign the Amended Agreement under its own free will.[6]

As noted earlier, the requirements of particularity vary depending on the facts of a particular

[6] Albertsons's contention that the Trustee fraudulent transfer action should be dismissed because it is inconsistent with the Trustee other allegations is considered supra, Part A.

case, but at a minimum, a party should allege "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Harrison, 176 F.3d at 784. Under the Illinois Fraudulent Transfer Act, a transfer of a debtor's property is fraudulent to a pre-existing creditor if the "debtor made the transfer without receiving reasonably equivalent value in exchange for the transfer ... and the debtor was insolvent at that time ...." § 740 Ill. Comp. Stat. 160/6. "The elements to be established under that provision are: (1) that a transfer was made; (2) that the transfer was made for less than reasonably equivalent value; and (3) that at the time of the transfer [the debtor] was insolvent or made insolvent." Daley v. Chang (In re Joy Recovery Tech. Corp.), 286 B.R. 54, 77 (Bankr. N.D. Ill. 2002).

Except for the time limitations, the Illinois fraudulent conveyance statutes are the functional equivalent of 11 U.S.C. § 548. Solow v. Reinhardt (In re First Com. Mgmt. Group), 279 B.R. 230, 240 (Bankr. N.D. Ill. 2002). The issue of whether a debtor received a reasonably equivalent value in return for a transaction must be evaluated as of the date of the transaction; to allow hindsight to influence a court's judgment would make any transfer that did not bring a reasonable economic equivalent within the preview of a fraudulent conveyance action. Mellon Bank v. The Official Committee of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.), 92 F.3d 139, 151 (3rd Cir. 1996) (rejecting a rule that only a successful investment could confer value on a debtor and holding that a debtor may take some risks to generate value, and even if the investment eventually fails, that failure does not mean that the investment lacked value at the time it was entered); Joy Recovery Tech. Corp., 286 B.R. at 75 ("Courts will not look with hindsight at a transaction because such an approach could transform fraudulent conveyance law into an insurance policy for creditors.").

The alleged facts in the complaint – at a minimum – support the existence of a claim under 740 Ill. Gen. Comp. Stat. § 160/6[7] and satisfies the requirements for particularity. Before the parties executed the Amended Agreement on February 10, 2000, the Trustee alleges that the Debtor was

---

[7] Finding that the Trustee has stated a claim for a constructive fraudulent conveyance sufficient to support a claim upon which relief can be granted under Count Seven of the amended complaint, the Court finds no reason to make a determination on whether Count Seven might also support a theory of actual fraud under 740 Ill. Gen. Comp. Stat. 160/5. Nothing in this Memorandum Opinion, however, limits the Trustee's entitlement to use a different theory of recovery under Count Seven.

suffering from a severe, negative, economic impact as a result of Albertsons's alleged breach of the Original Agreement, which caused the Debtor to be in a "desperate financial position." The reasonable inference from those allegations is that the Debtor was insolvent at the time it executed the Amended Agreement. It is undisputed that the Debtor transferred its right to sue under the Original Agreement and its claim to $616,000.00 in disputed egg money in the Amended Agreement. What the Debtor obtained thereby is also reasonably clear from the allegations in the Amended Complaint – the Debtor sought to forestall the termination of its existing manufacturer contracts put in jeopardy by loss of the former Lucky stores and to perpetuate the continuation of those contracts. Having alleged that it was insolvent at the time the Amended Agreement was executed, and that it had transferred property to Albertsons under that agreement, the Trustee is only required to show that the transfer was made for less than reasonably equivalent value. Whether a transfer is for a reasonably equivalent value is a question of fact based on the totality of the circumstances, and the Trustee should be afforded the opportunity to make that showing.[8] In short, the Trustee has met the requirements of particularity inasmuch as the time, place, identity, and contents of the Debtor's alleged fraudulent transfer are all identifiable from the face of the Amended Agreement. Thus, at this point, it is premature to dismiss the Trustee's fraudulent conveyance claims.

E. Unfair and Deceptive Trade Practices

The Trustee alleges that Albertsons violated the North Carolina Unfair And Deceptive Trade Practices Act[9] by procuring the Amended Agreement through fraud. The Amended Agreement is purportedly tied to consumer interests inasmuch as Albertsons's allegedly fraudulent procurement and intentional breach of the Amended Agreement prevented consumers from using the Debtor's money saving coupons. Albertsons contends that North Carolina law is inapplicable to the Trustee's cause of action and therefore the Trustee has failed to state a claim for relief.

---

[8] The Trustee also asserts that the transfer was fraudulent and avoidable under California, Connecticut, and North Carolina law. To the extent that a different state's law is applicable, all the states have nearly identical provisions and the Court analysis would not change with the application of a different state's law.

[9] The Debtor voluntarily dismissed its causes of action under similar statutes in California, Connecticut, and Illinois. (Document No. 55).

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a). The purpose of this statute "is to provide a civil means to maintain ethical standards of dealing between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." United Virginia Bank v. Air-Lift Assocs., Inc., 339 S.E.2d 90, 93 (N.C. Ct. App. 1986). The statute is not limited to actions involving consumers, however, and it may be used to protect a business even if that business was not involved in a buyer-seller relationship. United Lab., Inc. v. Kuyendall, 370 S.E.2d 375, 389 (N.C. 1988) (providing that N.C.G.S. § 75-1.1 was applicable to non-competition agreements in employment contracts and situations involving tortious interference with contracts). The statute is applicable to the full extent permissible under conflict of law principles and the Constitution. American Rockwool, Inc. v. Owens-Corning Fiberglass Corp., 640 F. Supp. 1411, 1427 (E.D. N.C. 1986) ("[F]or North Carolina's substantive law to be applied in a constitutionally permissible manner ... North Carolina must have a significant contact or significant aggregation of contacts, creating state interests, such that the application of North Carolina law is neither arbitrary nor fundamentally unfair."). Under North Carolina's conflict of laws principles, courts have applied both the "most significant relationship test" and the test of "where the injuries are sustained" to determine the governing law. See Andrew Jackson Sales v. Bi-Lo Stores, Inc., 314 S.E.2d 797, 799 (N.C. Ct. App. 1984) (applying the "most significant relationship test"); United Virginia Bank, 339 S.E.2d at 94 (noting that other courts have used the "most significant relationship" test to determine what State's laws governs an action based on N.C.G.S. § 75-1.1, but finding that the better rule is "where the injuries are sustained" standard).

Under either conflict of laws standard, North Carolina law is not applicable; thus, the Trustee has not stated a claim for relief under North Carolina law.

The "most significant relationship" test focuses various factors to determine which state has the most significant relationship to the occurrence giving rise to the suit and then applies the law of that state. Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269, 274 (4th Cir. 1982). When a claim involves allegations of fraud, those factors include:

(a) the place, or places, where the plaintiff acted in reliance upon the defendant's

representations,
(b) the place where the plaintiff received the representations,
(c) the place where the defendant made the representations,
(d) the domicil, residence, nationality, place of incorporation and place of business of the parties,
(e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement (Second) Conflict of Laws § 148 (1971).

Under these guiding factors, the face of the Trustee's amended complaint demonstrates that the only relationship North Carolina has to the underlying allegations is that the Debtor is incorporated in North Carolina, Albertsons does business on a nationwide basis, and that consumers in North Carolina might have been harmed by Albertson's alleged breach of an Illinois contract and fraudulent conduct involving the former Lucky stores in California and Nevada through the purported consequential ruin of the Debtor's business.

On the other hand, California has a much greater significant relationship to the underlying events. The former Lucky stores were mostly located in California, both the Original Agreement and the Amended Agreement called for performance in California, and the consumers most affected by the loss of the Debtor's coupon terminals were the consumers who shopped at the former Lucky stores. Thus, California has a more significant relationship to the alleged fraudulent conduct and North Carolina law is not applicable under that test.

Applying the test of "where the injuries are sustained" does not help the Trustee. The only injuries identified by the Trustee to residents of North Carolina are the injuries the Debtor itself suffered – as a North Carolina company – as a result of Albertsons's alleged, intentional, and fraudulent breach of contract in thwarting the Debtor's performance of the Amended Agreement in California and Nevada, and some vague, consequential injury suffered by the consumers of North Carolina seemingly because Albertsons's actions in California and Nevada caused the financial ruin of the Debtor – meaning that the Debtor could no longer service North Carolina residents with manufacturer coupons.

In this case, the place of the injury could be several places, none of which are North Carolina. Because the Debtor is alleging a pecuniary loss and a relinquishment of assets based on

Albertsons's scheme to defraud, the place of the injury could be the place where the Debtor agreed to relinquish its claims arising out of the Original Agreement, or where the Debtor received consideration for the relinquishment which turned out to be less than anticipated. The Debtor never alleged that the Amended Agreement was executed in North Carolina. The place where the Debtor was to receive its consideration was in the individual, former Lucky stores in California and Nevada where Albertsons allowed the Debtor to install its coupon terminals. Thus, it is apparent that the place of the allegedly tortious injury was California or Nevada where the Debtor's injuries were first manifested – not North Carolina. Accordingly, the face of the Debtor's amended complaint fails to state a claim for relief under North Carolina's Unfair and Deceptive Trade Practices Act.

IV. CONCLUSION

The Court will deny Albertsons's motion to dismiss in part, inasmuch as the Trustee has stated a claim for relief based on fraud, fraudulent conveyance, and a claim for declaratory judgment that the Amended Agreement is voidable based on that alleged fraud. The Court will grant Albertsons's motion to dismiss in part on the basis that the Trustee failed to state claim for declaratory relief that the mutual release could be severed from the Amended Agreement and on the grounds that the Trustee is not entitled to assert a claim against Albertsons based on North Carolina's Unfair and Deceptive Trade Practices Act.

Given the Court's ruling today, the Trustee will eventually have to make an election of remedies. The Trustee may either seek to enforce its right to declare the Amended Agreement void based on Albertsons's alleged fraud and pursue the breach of contract claim on the Original Agreement, or abandon that fraud claim and pursue a breach of contract claim based on the Amended Agreement. At this stage of the litigation, however, the Trustee has not violated Federal Rules of Civil Procedure 8 and 11 based on the Trustee's multiple, alternative, and cumulative causes of action.

This memorandum opinion constitutes the Court's findings of fact and conclusions of law. A separate order shall be entered pursuant to Rule 9021 of the Federal Rules of Bankruptcy Procedure.

Date: OCT 27 2004

William L. Stocks
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
INTER ACT ELECTRONICS, INC.,	)	CASE NO. B-02-11557C-7G
	)	
Debtor.	)	
	)	
CHARLES M. IVEY, III, TRUSTEE FOR THE BANKRUPTCY ESTATE OF INTER-ACT ELECTRONICS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ADVERSARY NO. 03-2035
	)	
ALBERTSON'S, INC.,	)	
	)	
Defendant.	)	

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED as follows:

(1) Albertson's Inc.'s Motion to Dismiss (Document No. 47) be and hereby is GRANTED IN PART as follows:

A. Count One of the Amended Complaint (Document No. 40) is DISMISSED IN PART inasmuch as Charles M. Ivey, III, the Chapter 7 trustee ("Trustee"), has failed to state a claim for relief that the mutual release contained in the February 10, 2000 Amended Agreement is severable from the remainder of the Amended Agreement; and

B. Count Ten of the Amended Complaint is DISMISSED;

(2) in all other respects Albertson's Inc.'s Motion to Dismiss be and hereby is DENIED; and

(3) Albertson's Inc. shall have 20 days from the date of this order within which to answer plaintiff's amended complaint.

This 27th day of October, 2004.

William C. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge