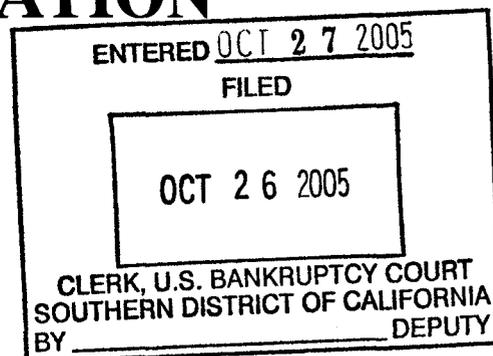


# NOT FOR PUBLICATION



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re  
NUTRISPORT, INC.,  
Debtor.

Bankruptcy No. 04-03212-JM7  
Adversary No. 04-90269

GREGORY A. AKERS, Chapter 7  
Trustee, KEVIN FIALKO and  
MICHAEL RECINE,  
Plaintiff,  
v.  
SUPPLEMENTAL RESEARCH, INC.,  
HENRY LEONARD, WILLIAM C. PENTZ,  
AND SHELTON D. REDDEN, II,  
Defendants.

MEMORANDUM DECISION

On July 7, 2005, the Court conducted a hearing on the motion ("Motion") of defendants Shelton D. Redden II and Supplemental Research ("Defendants") to dismiss this adversary proceeding for lack of standing and for failure to join an indispensable party. In the alternative, they sought an order for a more definite statement. For the reasons stated herein, the Court will DENY the motion.

Kevin Fialko and Michael Recine filed a lawsuit in the Superior

1 Court of the State of California against William Pentz ("Pentz"),  
2 Henry Leonard ("Leonard") and the Defendants in July 2003. Fialko and  
3 Recine alleged they were fraudulently induced to make loans to  
4 Nutrisport, Inc. ("Debtor"), and that when the Debtor defaulted on the  
5 loans, Pentz, Leonard and the Defendants participated in a scheme to  
6 improperly transfer the assets of the Debtor to Supplemental Research.

7 The Debtor filed for relief under Chapter 7 on April 7, 2004.  
8 Apparently there was a dispute in state court as to who had standing  
9 to pursue the claims raised by Fialko and Recine. Subsequently,  
10 Fialko and Recine removed the state court lawsuit to this court.

11 The trustee, Gregory Akers ("Trustee"), and Fialko and Recine  
12 then entered into a settlement of the claims of Fialko and Recine  
13 against the estate and an agreement for joint prosecution of the  
14 action against the Defendants. (The Trustee, Fialko and Recine are  
15 collectively referred to herein as the "Plaintiffs.") This court  
16 granted the Trustee's motion to intervene and to file an amended  
17 complaint.

18 Pentz then filed a motion for reconsideration, contesting the  
19 Trustee's right to intervene as to some of the claims. At that time,  
20 Pentz was represented by attorney Lawrence Wasserman ("Wasserman").  
21 Pentz contended that the Trustee did not have standing to pursue some  
22 of the claims raised in the complaint. The Court denied that motion.  
23 Wasserman no longer represents Pentz. But he has continued to  
24 represent the Defendants, and through him the Defendants have filed  
25 this Motion.

26 The amended complaint ("Complaint") contains five claims for  
27 relief. The Second and Third claims are to avoid fraudulent transfers  
28 under Section 544(a)(2) and California law. There is no dispute over

1 the ability of the Trustee to bring those claims.

2 The First Claim for relief is for fraud in the inducement  
3 regarding the funds advanced by Fialko and Recine to the debtor. The  
4 Fourth Claim is based on Cal.Comm.Code § 9625(b) regarding allegations  
5 of an improperly conducted foreclosure sale. The Fifth Claim is for  
6 breach of fiduciary duty based on the allegation that the defendants,  
7 as officers and directors of the debtor, violated a duty owed to  
8 creditors not to worsen the debtor's deepening insolvency problems.

9 At the April 14, 2005, hearing on Pentz' motion for  
10 reconsideration, the Court, in denying the motion, ruled that it had  
11 jurisdiction over each of the claims raised because the claims were  
12 sufficiently related to the underlying bankruptcy case. Furthermore,  
13 it would aid in the administration of the estate to have all the  
14 claims resolved expeditiously in one forum.

15 The Defendants raise the jurisdictional issues in two ways. One  
16 of the Defendants' arguments is that the Court does not have  
17 jurisdiction over the claims that are not directly related to the  
18 estate. This argument concerns the First, Fourth and Fifth Claims and  
19 is essentially the same argument put forth by Wasserman on behalf of  
20 Pentz. Furthermore, they argue that Fialko and Recine should not be  
21 joined as plaintiffs along with the Trustee on the Fourth and Fifth  
22 Claims.

23 The Court has reviewed the arguments raised by the Defendants.  
24 On the issue of this Court's jurisdiction over each of the claims  
25 raised, the ruling of Court remains the same as it did when faced with  
26 Pentz' motion for the reasons summarized above. There is no dispute  
27 over the Trustee's right to pursue the Second and Third Claims, and  
28 the estate is asserting an interest also in the Fourth and Fifth

1 Claims, independent of any rights asserted by Fialko and Recine.  
2 Also, the First, Fourth and Fifth Claims are sufficiently related to  
3 the Second and Third Claims for them to be tried together, trying all  
4 the claims together in one forum will be the most efficient and  
5 expeditious way to proceed and the estate will benefit from having  
6 Fialko and Recine liquidate their claims against the Defendants.

7 The Defendants also contend that only the Trustee on the one  
8 hand, or Fialko and Recine on the other hand, have standing to raise  
9 some of the claims in the Complaint. They argue, therefore, that the  
10 complaint should not list all parties as Plaintiffs for the Fourth and  
11 Fifth Claims.

12 Counsel for the Plaintiffs acknowledged that the reason Fialko  
13 and Recine are joined as plaintiffs with the Trustee on the Fourth and  
14 Fifth Claims is that it is not yet clear who has standing as to each  
15 claim, but in any case, either the Trustee or Fialko and Recine have  
16 standing as to each claim. The Plaintiffs pointed out that the  
17 agreement between the Trustee and Fialko and Recine simply provided  
18 for joint prosecution of the claims being asserted and did not effect  
19 an assignment of any claims. As a result, Fialko and Recine may still  
20 have rights in some of the claims and would not want to surrender any  
21 individual rights they might have as to those claims.

22 The Plaintiffs contend that the Court is not required to decide  
23 which of them has standing when at least one of them certainly does  
24 have standing, citing San Diego Unified Port District v. Gianturco,  
25 651 F.2d 1306, 1309 n.7 (9<sup>th</sup> Cir. 1981) and National Wildlife  
26 Federation v. Adams, 629 F.2d 587, 594 n.11 (9<sup>th</sup> Cir, 1980). The  
27 Court agrees with the position taken by the Plaintiffs, and the  
28 Defendants' argument on that issue is rejected.

1 The Defendants also contend that the Plaintiff failed to name an  
2 indispensable party, namely Jacob Frank ("Frank"). The Plaintiffs  
3 state that Fialko and Recine reached a settlement with Frank before  
4 the state court action was ever filed. The Plaintiffs also point out  
5 that the Defendants filed their own cross-complaint against Frank, and  
6 therefore, Frank is a party to the action to extent he needs to be.  
7 The Court agrees with the Plaintiffs that Fed.R.Civ.P. 19, as  
8 incorporated by Fed.r.Bankr.P. 7019, does not mandate the naming of  
9 Frank as a defendant.

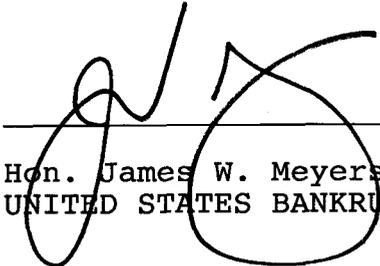
10 Finally, the Defendants request a more definite statement  
11 pursuant to Fed.R.Civ.P. 12(e), as incorporated by Fed.R.Bankr.P.  
12 7012(b). However, the Court finds that the Complaint as it presently  
13 stands is sufficient, and this request is denied.

14 For the above reasons, the Defendants' motion is DENIED in its  
15 entirety. The Defendants shall have 21 days from the date of entry  
16 of an order denying this Motion to file their answer to the First  
17 Amended Complaint.

18 Counsel for the Plaintiff is directed to file an order consistent  
19 with this Memorandum within 14 days of the filing of this Memorandum.

20  
21  
22  
23  
24  
25  
26  
27  
28

Date: OCT 26 2005

  
\_\_\_\_\_  
Hon. James W. Meyers  
UNITED STATES BANKRUPTCY JUDGE