

FILED

NOT FOR PUBLICATION

NOV 25 2008

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARRAMERICA REALTY
CORPORATION; CARRAMERICA
REALTY, LP; CARR OFFICE PARK,
LLC; CARR TEXAS OP, L.P.,

Plaintiffs - Appellants

and

CARLYLE FORTTRAN TRUST,

Plaintiff

v.

NVIDIA CORPORATION; NVIDIA US
INVESTMENT COMPANY; JEN-
HSUAN HUANG; JAMES C. GAITHER;
A. BROOKE SEAWELL; WILLIAM J.
MILLER; TENCH COXE; MARK A.
STEVENS; HARVEY C. JONES;
CHRISTINE HOBERG; STEPHEN
PETTIGREW; JAMES HOPKINS;
JAMES WHIMS; GORDON A.
CAMPBELL; RICHARD A.
HEDDLESON; ALEX LEUPP; SCOTT D.
SELLERS,

Defendants - Appellees

No. 06-17109

D.C. No. CV-05-00428-JW

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

3DFX INTERACTIVE, Inc.,

Debtor-in-Possession -
Appellee

WILLIAM A. BRANDT, JR.,

Trustee - Appellee

CARLYLE FORTTRAN TRUST,

Plaintiff - Appellant

v.

NVIDIA CORPORATION; NVIDIA
US INVESTMENT COMPANY;
JEN-HSUAN HUANG; JAMES C.
GAITHER; A. BROOKE SEAWELL;
WILLIAM J. MILLER; TENCH
COXE; MARK A. STEVENS;
HARVEY C. JONES; CHRISTINE
HOBERG; STEPHEN PETTIGREW;
JAMES HOPKINS; JAMES WHIMS;
GORDON A. CAMPBELL;
RICHARD A. HEDDLESON; ALEX
LEUPP; SCOTT D. SELLERS,

Defendants - Appellees

No. 07-15077

D.C. No. CV-05-00427-JW

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted July 17, 2008
San Francisco, California

Before: FARRIS, SILER,^{**} and BEA, Circuit Judges.

Plaintiffs CarrAmerica Realty Corporation (“CarrAmerica”), its related corporate entities, and Carlyle Fortran Trust (“Carlyle”) (collectively “Creditors”) appeal the order of the district court dismissing the Creditors’ complaints for lack of standing. The district court held that only the Chapter 11 bankruptcy Trustee (“Trustee”) had standing to pursue the claims. We affirm in part and reverse in part.

I. BACKGROUND

3dfx Interactive, Inc. (“3dfx”) developed and manufactured computer graphics chips. In 1995, it entered into a ten-year commercial lease with Carlyle for 77,805 square feet in an office building in California. In 1998, it leased approximately 26,000 square feet of commercial space in Texas from CarrAmerica. In mid-2000, 3dfx began to experience financial difficulties. Ultimately, 3dfx decided to sell substantially all of its assets to NVIDIA, an unrelated company that also manufactured

^{**}The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

computer graphics chips. On December 15, 2000, 3dfx and NVIDIA entered into an Asset Purchase Agreement (“APA”), pursuant to which NVIDIA agreed to pay \$70 million in cash for substantially all of 3dfx’s assets.

On December 15, 2000, after executing the APA, 3dfx terminated its employees, and NVIDIA immediately rehired them. These NVIDIA employees continued working in the premises leased from CarrAmerica for an unspecified period of time, in violation of 3dfx’s lease agreement with CarrAmerica, which agreement barred “anyone other than Tenant and its employees [from occupying] any part of the Premises.” NVIDIA instructed 3dfx to continue to pay rent to CarrAmerica and agreed to reimburse 3dfx for these rent payments at a later date.

Eventually, 3dfx stopped paying rent to CarrAmerica and Carlyle. After the Creditors sued for nonpayment of rent, 3dfx filed Chapter 11 bankruptcy in October 2002. The Chapter 11 Trustee sued NVIDIA, seeking avoidance of a fraudulent transfer and recovery under a successor liability theory. The Creditors also filed suit against NVIDIA. The district court dismissed the Creditors’ complaints for lack of standing. It held that all of the Creditors’ claims alleged generalized injuries to the bankruptcy estate, meaning only the Trustee had standing to pursue the claims. The Creditors now appeal, arguing that the Trustee lacks standing to pursue the claims.

II. DISCUSSION

The district court's holding as to the Trustee's standing is a conclusion of law that we review de novo. *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1001 (9th Cir. 2005). The allegations of the complaint are taken as true. *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1120 (9th Cir. 2007). A bankruptcy trustee is the representative of the bankrupt estate and has the capacity to sue and be sued. 11 U.S.C. § 323. Among the trustee's duties is the obligation to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(1). The "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The debtor's "causes of action" are "property of the estate." *Smith*, 421 F.3d at 1002 (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983)). Thus, the trustee "stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy." *Id.* The trustee's standing to sue on behalf of the estate is exclusive; a debtor's creditors cannot prosecute such claims belonging to the estate unless the trustee first abandons such claims. *Estate of Spiritos v. One San Bernardino County Superior Court*, 443 F.3d 1172, 1175 (9th Cir. 2006).

Here, the district court properly concluded that the Trustee has exclusive standing to sue with respect to all claims asserted by Creditors based on an underlying

injury to 3dfx. The substance of most the Creditors' claims is that 3dfx fraudulently transferred its assets to NVIDIA because the APA provided for insufficient consideration. While the Creditors were harmed by the alleged diminution of 3dfx's estate, depleting the assets available for the bankruptcy estate constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation. *Smith*, 421 F.3d at 1002.

Most of the Creditors' other arguments lack merit. The district court did not err by relying on *In re Folks*, 211 B.R. 378 (B.A.P. 9th Cir. 1997), because it is consistent with *Smith* and our other decisions on trustee standing. The Creditors' attempt to distinguish *Folks* is unpersuasive. In *Folks*, the analysis of standing to object to the discharge of a debtor rested on whether a purported creditor had standing to pursue an alter ego claim. *Id.* at 381. *Folks* cited, discussed, and properly applied *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988). *See Folks*, 211 B.R. at 385-86. We are not persuaded that the cap imposed by 11 U.S.C. § 502(b)(6)¹ gives rise to a

¹ 11 U.S.C. § 502(b)(6) limits the amount of a bankruptcy claim "of a lessor for damages resulting from the termination of a lease of real property" to the extent that the "claim exceeds

(A) the rent reserved by the lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property, plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier

particularized injury that divests the Trustee of standing. Section 502 deals with allowance of secured claims, not powers of the Trustee, so the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim. The district court properly held that the California statute of frauds barred Carlyle's claim that NVIDIA is liable for damages above the cap because Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA.

The Creditors argue that Trustee standing is barred under *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991) ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation."). However, the *Wagoner* rule has been much criticized and we decline to follow it. See *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (listing authorities rejecting *Wagoner* and concluding that the *in pari delicto* defense has nothing to do with trustee standing).

Finally, however, the district court erred in dismissing CarrAmerica's interference with contractual relations and fraud claims based on an alleged "secret agreement" between 3dfx and NVIDIA, pursuant to which agreement 3dfx continued to pay rent to CarrAmerica although NVIDIA had taken possession of the premises CarrAmerica leased to 3dfx. CarrAmerica contends that, absent the secret agreement,

of such dates. . . ."

it could have insisted either that NVIDIA execute a written assumption of the lease or that 3dfx vacate the premises so that CarrAmerica could seek a new tenant. Because these claims are based on an injury to CarrAmerica by NVIDIA, which is neither bankrupt nor protected by any stay of actions, and not an underlying injury to the bankruptcy estate of 3dfx, CarrAmerica has standing to assert these claims.

Costs to be paid by Defendants - Appellees.

AFFIRMED in part, REVERSED and REMANDED in part.

United States Court of Appeals for the Ninth Circuit
Office of the Clerk
95 Seventh Street; San Francisco, California 94103

General Information
Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the file stamp date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1, 2)

- The mandate will issue seven (7) calendar days after the expiration of the time for filing a petition for rehearing or seven (7) calendar days from the denial of a petition for rehearing, unless the court directs otherwise. If a stay of mandate is sought, an original and four (4) copies of the motion must be filed. The mandate is sent only to the district court or agency, we do not provide a copy to the parties.

Publication of Unpublished Disposition (9th Cir. R. 40-2)

- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency, or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to 4)

(1) A. Purpose (Panel Rehearing):

- A petition for panel rehearing should only be made to direct the Court's attention to one or more of the following situations:
 - ▶ A material point of fact or law overlooked in the decision;
 - ▶ A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel;
 - ▶ An apparent conflict with another decision of the court which was not addressed in the opinion.
- Petitions which merely reargue the case should not be filed.

B. Purpose (Rehearing En Banc)

- Parties should seek en banc rehearing only if one or more of the following grounds exist:
 - ▶ Consideration by the full court is necessary to secure or maintain uniformity of its decisions; or
 - ▶ The proceeding involves a question of exceptional importance; or
 - ▶ The opinion directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- ▶ A petition for rehearing may be filed within fourteen (14) days from entry of judgment. Fed. R. App. P. 40 (1)
- ▶ If the United States or an agency or officer thereof is a party in a civil appeal, the time for filing a petition for rehearing is 45 days from entry of judgment. Fed. R. App. P. 40 (1)
- ▶ If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- ▶ *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- ▶ *See 9th Cir. R. 40-2* (motion to publish unpublished disposition)

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies

- The format is governed by 9th Cir. R. 40-1 and Fed. R. App. P. 32(c)(2).
- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a certificate of compliance found at Form 11.

- If a petition for panel rehearing does not include a petition for rehearing en banc, the movant shall file an original and 3 copies.
- If the petition for panel rehearing includes a petition for rehearing en banc, the movant shall file an original and 50 copies.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The bill of costs must be filed within 14 days after entry of judgment.
- See attached form for additional information.

Attorney's Fees

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- Any relevant forms are available on our website www.ca9.uscourts.gov or by telephoning 415 355-7806.

Petition for Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourtus.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please notify **in writing within 10 days**:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor), and
 - ▶ Clerk, U.S. Court of Appeals; PO Box 193939; San Francisco, CA 94119-3939 (Attn: Opinions Clerk).

Form 10. Bill of Costs (Rev. 1-1-05)**United States Court of Appeals for the Ninth Circuit****BILL OF COSTS**

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____

CA No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.*	Pages per Doc.	Cost per Page **	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page	TOTAL COST
Excerpt of Record								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other								
TOTAL				\$	TOTAL \$			

Form 10. Bill of Costs - Continued

Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

** Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature: _____

Date: _____

Name of Counsel (printed or typed): _____

Attorney for: _____

Date: _____ Costs are taxed in the amount of \$ _____

Clerk of Court

By: _____, Deputy Clerk