U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

**ENTERED**

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

**The following constitutes the order of the Court.**

**Signed June 1, 2004.**

**United States Bankruptcy Judge**

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**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

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| **IN RE:** | § | |
| | § | |
| **KEVCO, INC. et al.** | § | **CASE NO. 01-40783-BJH-11** |
| | § | **Jointly administered** |
| **Debtor.** | § | |
| | § | |
| **PLAN ADMINISTRATION AGENT, ACTING ON BEHALF OF KEVCO, INC. UNDER ITS CONFIRMED PLAN** | § | |
| | § | |
| **Plaintiff,** | § | **ADV. PRO. 02-4166-BJH** |
| **- against -** | § | |
| | § | |
| **NEW NGC, INC.; BBC DISTRIBUTION, LLC; BANKS CORPORATION, WILLIAM P. BANKS, DAN R. HARDIN, and DALE LEDBETTER,** | § | |
| | § | |
| **Defendants.** | § | |

## Memorandum Opinion and Order

Before the Court is a motion for leave to amend the complaint (the "Motion") in the above-captioned adversary proceeding. Each of the defendants opposes the Motion. The Court heard oral

argument, following which it granted the Motion in part and permitted the plaintiff to amend the complaint to add factual allegations in further support of its claims and to add a claim for corporate denudement against certain of the defendants. On March 4, 2004, the Court entered an Order to that effect. What remains before the Court is that portion of the Motion which sought leave to amend the complaint to add claims for breach of contract as against William P. Banks ("Banks") and Banks Corporation ("Banks Corp.") (collectively, the "Banks Defendants"), which the Court took under advisement.

**Factual and Procedural Background**

On February 5, 2001, Kevco, Inc., Kevco Management, Inc., Kevco Holding, Inc., Kevco GP, Inc., Kevco Components, Inc., DCM Delaware, Inc., Kevco Manufacturing, L.P., and Kevco Distribution, L.P. (collectively, "Kevco" or the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. By Order dated February 12, 2001, the Debtors' cases were jointly administered. On May 28, 2002, the Court entered an Agreed Order granting a motion by the Official Committee of Unsecured Creditors (the "Committee") for authority to pursue actions on behalf of the Debtors' estates. On June 2, 2002, the Committee filed its original complaint (the "Complaint") against the defendants thereby commencing this adversary proceeding. On November 24, 2002, the Court confirmed a Chapter 11 plan of reorganization for the Debtors. The confirmed plan appointed a Plan Administration Agent (the "Agent") and vested the Agent with authority to pursue the estates' causes of action, including those asserted in the Complaint. The plan became effective on December 5, 2002, and since that time, the Agent has prosecuted the Complaint.[1]

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[1] The Agent retained the same counsel, Baker & McKenzie, to represent him in this litigation as had the Committee. In fact, such counsel was counsel to the Committee during the Debtors' bankruptcy cases. The Agent was substituted for the Committee as plaintiff in this adversary proceeding by an Order entered on March 25, 2003.

The Complaint alleges, in general, that (i) prior to their bankruptcy filings, the Debtors were the largest distributors and manufacturers of building products for the manufactured housing and recreational vehicle industries; (ii) the largest and most profitable segment of the Debtors' businesses was its distribution group, which distributed plumbing products, building products, electrical components and hardware; (iii) the majority of goods the Debtors distributed were goods supplied by New NGC, Inc. ("New NGC"); (iv) Dan Hardin ("Hardin") was President of the distribution group from July 1999 until February 2001, and Dale Ledbetter ("Ledbetter") was Executive Vice President of Sales and Marketing; (v) while the manufactured housing and recreational vehicle industries suffered severe downturns in 1999 and 2000, the Debtors believed that they could restructure by divesting themselves of unprofitable units and retaining those which focused primarily on the distribution segment of their businesses; and (vi) the Debtors negotiated with Banks, Chief Executive Officer of Banks Corp., for a possible merger of their respective distribution operations which would benefit both the Debtors and the Banks Defendants and, to that end, those parties executed a confidentiality agreement.

The Complaint further alleges that while the Debtors' efforts at restructuring were underway, Hardin and Ledbetter were surreptitiously discussing the formation of a new manufactured housing parts distribution company - *i.e.,* BBC - with the Banks Defendants and New NGC which would consist of the Debtors' distribution managers, confidential information, largest supplier, and, eventually, the Debtors' customers. The Complaint further alleges that defendants were planning to take the Debtors' most valuable assets and undermine the Debtors' opportunity to restructure, and that on January 15, 2001 and January 26, 2001, respectively, Ledbetter and Hardin resigned from their positions with the Debtors, and that on February 16, 2001, BBC filed the necessary papers in

Delaware to begin operations. The Complaint further alleges that New NGC, Banks Corp. and/or Banks, Hardin, and Ledbetter are each principals and/or members in BBC. In short, the Complaint states claims for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, theft of trade secrets, tortious interference with both existing and prospective contracts, conspiracy to commit each of these torts, fraudulent conveyance on several theories, and recovery of unauthorized post-petition transfers under section 549 of the Bankruptcy Code.

The remaining portion of the Motion seeks leave to amend the Complaint to add claims for breach of contract against Banks and Banks Corp. The proposed amended complaint, annexed as an exhibit to the Motion, alleges that Kevco tried to generate cash by seeking partners for a possible business venture with its wood group, Sunbelt Wood Components ("Sunbelt"). One of the potential partners was Banks Corp. The proposed amended complaint alleges that Kevco's CEO, Fred Hegi, discussed a business combination between Sunbelt and Banks Corp. with Banks, and that Hegi and Banks executed a Confidentiality and Non-Solicitation Agreement (the "Agreement"), a copy of which is annexed to the Motion. The Agreement provides as follows:

> We mutually agree that, for one year after the termination of discussions between our two firms, neither Party will hire or solicit to hire, directly or indirectly, any employee of the other Party.

The proposed amended complaint alleges that Banks executed the Agreement in the name of Banks Enterprises, Inc. ("Banks Enterprises"), but that through discovery, the Agent has learned that Banks Enterprises is merely a 'holding company' for Banks Corp.'s real estate interests, and is wholly-owned and controlled by Banks and Banks Corp. The proposed breach of contract claim alleges that the Sunbelt/Banks Corp. negotiations terminated on or about January 10, 2001, but that

no later than January 29, 2001, Banks Corp.'s President was actively engaged in the solicitation of Kevco employees for defendant BBC. The proposed amended complaint further alleges that during their first meeting regarding the formation of BBC, Hardin and Ledbetter made clear to Banks that they intended to solicit and recruit key Kevco employees, that Banks Corp. financed trips taken by Hardin and Ledbetter for the purpose of recruiting Kevco employees, and that within days after their initial meetings, Banks was financially committed to BBC, a company he knew would be soliciting, recruiting and hiring Kevco's distribution employees. The proposed breach of contract claim alleges that these "actions constitute both direct and indirect solicitation of Kevco's employees, and violated the . . . Agreement."

To date, the parties have engaged in extensive written discovery. Discovery commenced in September 2002 and, after several extensions of time to complete discovery embodied in amended scheduling orders, was to have been concluded no later than February 27, 2004. The parties agree that over 30 depositions have been taken and over 60,000 documents produced pursuant to various discovery requests. Under the scheduling order in effect when the Motion was filed on January 27, 2004, all discovery was to be completed by February 27, 2004, dispositive motions were to be filed between October 31, 2003 and February 27, 2004, and trial was set for early April. *See* Amended Scheduling Order as of January 23, 2004.[2]

[2] The Court signed an Amended Scheduling Order on May 10, 2004 (the "May 10 Order"). The May 10 Order provides that "[t]he deadline to complete discovery was February 27, 2004. Except as provided herein, no additional discovery may be initiated by any party in the absence of consent of all parties or additional court order." It also retained the February 27deadline to file dispositive motions, although it recognized that the defendants filed motions for summary judgment on March 2, 2004, with the Agent's consent. In fact, the Banks Defendants, BBC, Hardin and Ledbetter filed their motions for summary judgment on February 27, 2004, and only New NGC filed its motion on March 2, 2004. The motions are voluminous and opposed, and a full day of oral argument has been scheduled in July 2004. Trial has been scheduled in November 2004 to accommodate the schedules of the litigants and the Court.

**The Standard to be Applied**

Rule 15(a) of the Federal Rules of Civil Procedure[3] mandates that leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). A decision to grant leave is within the discretion of the trial court. *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1302-03 (5th Cir. 1995). Although Rule 15 "evinces a bias in favor of granting leave to amend," *Goldstein v. MCI WorldCom,* 340 F.3d 238, 254 (5th Cir. 2003)*; Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981), it is not "automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993). Additionally, "[w]hile leave to amend must be freely given, that generous standard is tempered by the necessary power of a district court to manage a case." *Shivangi v. Dean Witter Reynolds. Inc.*, 825 F.2d 885, 891 (5th Cir. 1987); *see also Boyd v. United States*, 861 F.2d 106, 108 (5th Cir. 1988).

In deciding whether to grant leave to amend, this Court may consider such factors as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and the futility of amendment. *Schiller v. Physicians Resource Group, Inc.*, 342 F.3d 563, 566 (5th Cir. 2003); *In re Matter of Southmark Corp.*, 88 F.3d 311, 314-315 (5th Cir. 1996) (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)); *Whitaker v. City of Houston, Texas*, 963 F.2d 831, 836 (5th Cir. 1992). Although Rule 15 imposes no time limit for amendment, "[a]t some point in time delay on the part of a

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[3] Rule 15(a) applies in this adversary proceeding by virtue of Federal Rule of Bankruptcy Procedure 7015. The Court concludes that the liberal standard of Rule 15(a), and not the more stringent "good cause" standard of Rule 16(b) applies to the present request to amend the Complaint. In *S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama*, 315 F.3d 533, 535 - 536 (5th Cir. 2003), the Fifth Circuit held that Rule 16(b) governs amendment of pleadings once a scheduling order has been issued that contains a specific deadline for the filing of amended pleadings. Here, neither the Court's standard scheduling order, issued upon the filing of the Complaint, nor the parties' subsequent agreed scheduling orders, contained a deadline for filing amended pleadings and thus, modification of a scheduling order is not required.

plaintiff can be procedurally fatal." *See e.g.*, *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981); *see also Whitaker*, 963 F.2d at 836. In addition, "[a] litigant's failure to assert a claim as soon as he could have is properly a factor to be considered in deciding whether to grant leave to amend. Merely because a claim was not presented as promptly as possible, however, does not vest the district court with authority to punish the litigant." *Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982). This Court may also consider whether the facts underlying the amended complaint were known to the party when the original complaint was filed, *Southmark Corp. v. Schulte Roth & Zable (In re Southmark Corp.)*, 88 F.3d 311, 316 (5th Cir. 1996), and leave to amend is properly denied where a party has or attempted to present theories of recovery *seriatim* to the court. *Goldstein v. MCI WorldCom*, 340 F.3d 238, 254-55 (5th Cir. 2003) (citing *Southern Constructors Group, Inc. v. Dynalectric*, 2 F.3d 606, 612 (5th Cir. 1993)).

**Legal Analysis**

First, the Court notes that the claim to be added in the proposed amended complaint would substantially alter the nature of this litigation. Since June of 2002 when the Complaint was filed, this has been tort litigation. The proposed amended complaint's claim for breach of contract is an entirely new theory of recovery. Furthermore, the Court believes it significant that the agreement alleged to have been breached is an agreement which, on its face, is between Kevco and *Banks Enterprises*, *Inc*., a non-party to this litigation. The Agent's proposed breach of contract claim would propose to hold Banks and Banks Corp. liable for breach of the Agreement between Banks Enterprises and Kevco. Therefore, it is not only a breach of contract claim which is proposed to be added – it is, in essence, also a claim to pierce the corporate veil or a claim for reformation or some other legal theory upon which a non-party to the contract could be held liable for its breach. Such

a claim will necessarily expand the scope of discovery in this case.

Against this backdrop, the Court will test the remaining portion of the Motion against the relevant factors to be considered in ruling on a Rule 15(a) motion for leave to amend.

Delay and Prejudice

The "touchstone of the inquiry under rule 15(a) is whether the proposed amendment would unfairly prejudice the defense by denying the defendants notice of the nature of the complaint." *Lowrey v. Texas A&M Univ. System*, 117 F.3d 242, 246 (5th Cir. 1997). A court will more carefully scrutinize a party's attempt to raise new theories of recovery by amendment when the opposing party has filed a motion for summary judgment, *Parish v. Frazier*, 195 F.3d 761, 763 (5th Cir. 1999), though the existence of a pending motion for summary judgment does not in itself extinguish a plaintiff's right to amend. *Little v. Liquid Air Corp.*, 952 F.2d 841 (5th Cir. 1992) *reinstated in relevant part*, 37 F.3d 1069, 1073 n. 8 (5th Cir. 1994) (en banc) (*citing Zaidi v. Ehrlich*, 732 F.2d 1218 (5th Cir. 1984) and affirming denial of leave where the amended complaint would have established an entirely new factual basis for the plaintiffs' claims and thus radically altered the nature of the trial).

In this case, the Agent argues that the basis for the breach of contract claim did not become clear until depositions conducted in October, 2003 and that the earliest it could have moved to amend its complaint was in November, 2003. The Agent asserts that during depositions of Banks, Stephen Brown (Banks Corp.'s President) and Christopher Wynne (Banks Corp.'s CFO), the Agent learned for the first time that Banks Enterprises, which signed the Agreement, is merely a holding company with no operations or employees, and that it is owned and controlled by Banks, who is also its President. The Agent asserts that Banks also testified that the intent of the Agreement was that

Banks Lumber would not solicit Sunbelt's employees.

The Agent also asserts that the defendants will not be surprised or prejudiced if the Agent is permitted to add the breach of contract claim because the Agent examined Banks and Banks Corp.'s agents about the Agreement and its possible breach during depositions in September and October, 2003. In addition, the Agent points out that the Agreement itself was produced to all defendants several months before the depositions were taken. The Agent also points out that counsel for Banks questioned the Debtor's representatives about the Agreement at depositions in December, 2003.

In contrast, Banks asserts, and the Agent concedes, that Banks produced the Agreement to the Agent in November of 2002, and that the Agent did not inquire about the Agreement in its subsequent interrogatories. Banks argues that discovery, having been extended several times and having been conducted for more than a year, was almost complete at the time the Motion was filed. In addition, Banks points out that the Motion was filed on the eve of the deadline for filing summary judgment motions and that its summary judgment motion was almost completed. Banks points out that after its production of the Agreement in November 2002, the Agent "waited more than one year – allowing the case to progress through thirty two depositions, thousands of pages of documents, and to the precipice of summary judgment filings – before unveiling a new theory of liability based on this very agreement." *See Mem. in Opp. to Agent's Mot. for Leave to Amend Compl.*, p. 11.

While the Court agrees with the Agent that Banks may not be completely surprised by the proposed amendment, the Court agrees with Banks that amendment at this late date will work undue prejudice. *See Lewis v. Fresne*, 252 F.3d 352 (5th Cir. 2001) (one year delay was sufficient to deny

leave to amend). The Agent has not adequately explained its delay,[4] and the addition of this claim at this stage of the proceedings would prejudice the defendants and hinder the efficient administration of this case. Substantially all of the Agent's original claims sound in tort;[5] the proposed new claim sounds in contract and will necessarily require proof of facts in support of some theory upon which non-parties to that contract may be liable for its breach. Discovery has now been completed and, at the time the Motion was argued, the deadline to complete discovery was only four days away. Similarly, voluminous summary judgment motions were in the final stages of completion and were on file with the Court four days after oral argument on the Motion. The Agreement was in the Agent's possession more than a year prior to the filing of the Motion and, although the Agent asserts that it only learned in September and October 2003 that Banks may be liable on the Agreement, the Agent still did not file the Motion until the end of January 2004. Moreover, it appears that had the Agent inquired about the Agreement in discovery taken subsequent to its production in November 2002, the Agent could have uncovered its recently-learned facts quite a bit earlier. *See Parish v. Frazier*, 195 F.3d 761 (5th Cir. 1999 (affirming denial of leave to amend where there was a seven month delay between the filing of the original complaint and the motion could have been avoided by due diligence)

Futility

Futility exists if the proposed amended complaint would fail to state a claim upon which

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[4] The only explanation offered at oral argument was that the parties have been involved in several discovery disputes and in related litigation, and that the Agent did not, therefore, devote time and attention to this particular matter until the fall of 2003. While the Court agrees that there has been discovery motion practice in this case and motions in related adversary proceedings, the Agent's counsel is a large firm with significant resources.

[5] The Complaint does contain several statutory claims – *i.e.*, claims asserting fraudulent transfers under the Bankruptcy Code and Texas state statutes, and a claim under Section 549 under the Bankruptcy Code.

relief could be granted. *Stripling v. Jordan Production Co.,* 234 F.3d 863 (5th Cir. 2000). Banks argues that the Agent has failed to adequately allege a contract with either Banks Corp. or Banks individually. The proposed amended complaint alleges that Banks executed the Agreement in the name of Banks Enterprises, but also alleges that through discovery, the Agent has learned that Banks Enterprises is merely a 'holding company' for Banks Corp.'s real estate interests, and is wholly-owned and controlled by Banks and Banks Corp. Banks asserts that the Agent has not pled any basis to pierce the corporate veil, and that the bare fact that a corporation is wholly owned by one or two shareholders, is a holding company and/or has no employees does not make that company the alter ego of its owners. Similarly, Banks asserts that the Agent has not pled any facts which would support mistake or reformation of the Agreement.

The Court agrees. While the Agent may have other facts in support of his contention that Banks Corp. or Banks individually may be liable for the breach of a contract which is executed by an affiliate – Banks Enterprises, they are not pled in the proposed amended complaint.[6] Accordingly, the Court concludes that the proposed amendment, as presently drafted, would be futile.

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[6] The Agent asserted at oral argument that despite the fact that Banks Enterprises appears to be the signatory of the Agreement, that an ambiguity exists because Banks, who signed the contract for Banks Enterprises as its chairman and CEO, testified that he was not chairman and CEO of Banks Enterprises but was chairman and CEO of Banks Corp., and that Banks Corp. is actually the signatory to the Agreement. The Agent asserts that Banks recognized at his deposition that the Agreement should have stated "Banks Corporation." However, none of these allegations are pled in the proposed amended complaint as presently drafted. Moreover, the proposed amended complaint appears instead to be attempting to allege facts in support of an alter ego claim, not facts is support of a claim for mistake or reformation. The defendants also argue that the Agent cannot show breach based upon the contractual terms, that the parol evidence rule bars the Agent from claiming that the term "Party" as used in the Agreement was intended to mean Banks Corp., that reformation is unavailable because mistake is not pled, and that no binding Agreement was ever formed. The Court need not address these substantive arguments in the context of this Motion, however, because the Court concludes that the Agent has not pled facts in support of any theory upon which Banks and Banks Corp. could be liable for breach of the Agreement which, on its face, is with Banks Enterprises.

**Conclusion**

The Agent received a copy of the Agreement in November 2002 and waited about a year to take discovery regarding the Agreement. Then, after learning the allegedly relevant facts in October 2003, waited another three months before filing the Motion. Discovery was days from conclusion and summary judgment motions were almost due under the then current scheduling Order when the Motion was filed. The Agent simply waited too long to seek leave to amend to add his breach of contract claim. Moreover, even if allowed to be filed, the proposed amended complaint (in its current form) would fall victim to a Rule 12(b)(6) motion.

For the foregoing reasons, the remaining portion of the Motion is denied.

SO ORDERED.

# # # END OF ORDER # # #