U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
KEVCO, INC. et al.	§	**CASE NO. 01-40783-BJH-11**
	§	**Jointly administered**
Debtor.	§	
	§	
PAM CAPITAL FUNDING, L.P., ML CBO IV (Cayman), LTD., HIGHLAND LEGACY LTD., PAMCO CAYMAN LIMITED, and PROSPECT STREET HIGH INCOME PORTFOLIO, INC.,	§	
	§	
Plaintiffs,	§	**ADV. PRO. 03-4181-BJH**
- against -	§	
	§	
NEW NGC, INC., BBC DISTRIBUTION, LLC., DANIEL R. HARDIN, DALE LEDBETTER, and BANKS CORPORATION,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION and ORDER

Before the Court is a motion by all of the defendants pursuant to Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(c) for judgment on the pleadings on all of the plaintiffs' claims (the "Motion"). The Court has recently denied, by Memorandum Opinion and separate Order entered on March 18, 2004 (the "Memorandum Opinion"), the plaintiffs' motion to remand or abstain from hearing this adversary proceeding (the "Remand Motion"). In its Memorandum Opinion, the Court concluded that it has jurisdiction over this adversary proceeding. As a result, this Court has jurisdiction over the Motion. The factual and procedural recitations relevant to the Motion which are contained in the Court's Memorandum Opinion will not be repeated here.

The defendants filed the Motion on October 20, 2003. The plaintiffs filed their opposition on November 10, 2003. Both parties submitted matters outside the pleadings in support of their respective positions. The Court held a hearing on the Motion on November 24, 2003, at which the parties agreed that the Motion should be treated as one for summary judgment pursuant to Fed. R. Civ. P. 12(c) and 56. Following the hearing, the Court took the Motion under advisement.

The Court concludes that principles of judicial economy and efficient case administration dictate that consideration of the Motion be abated. As set forth in the Memorandum Opinion, the claims in the present adversary proceeding ("Pam Capital II") are exactly the same claims which the plaintiffs sought leave to amend their complaint to include in Adv. Proc. No. 02-4024 ("Pam Capital I"). The United States District Court for the Northern District of Texas ruled, in Pam Capital I, that the plaintiffs could not amend their complaint to include the claims which are the subject of Pam Capital II. First, the District Court found that the plaintiffs had unduly delayed pursuing the claims. In addition, the District Court concluded that pursuit of the claims would be futile, since the alleged representations which formed the basis for the claims were not statements of material fact, but instead an opinion and prediction of the future success of Kevco, Inc. (the "Debtor"). The District Court further concluded that to the extent the claims were based upon an alleged failure to disclose material facts, the proposed amended complaint failed to allege facts supporting a duty to disclose. Finally, the District Court concluded that the negligent misrepresentation claim which plaintiffs sought to add was barred by limitations, rejecting the plaintiffs' argument that they did not discover the wrongdoing until much later and that the statute of limitations had not yet run under the "discovery rule." The plaintiffs appealed the District Court's ruling in Pam Capital I to the United States Court of Appeals for the Fifth Circuit on October 21, 2003.[1]

If the Fifth Circuit reverses the District Court on the merits, then the plaintiffs may amend their complaint in Pam Capital I to assert the claims they now assert in Pam Capital II, and Pam Capital II will then be entirely duplicative and subject to dismissal. *See Friends of the Earth, Inc. v. Crown Central Pet. Corp.*, 95 F.3d 358 (5th Cir. 1996) (affirming dismissal of second complaint as duplicative of first and stating that a second complaint alleging the same cause of action as a prior, pending related action may be dismissed); *Oliney v. Gardner*, 771 F.2d 856 (5th Cir. 1985) (affirming dismissal of second suit based on same claim as first suit and noting that the "court must ensure that the plaintiff does not use the incorrect procedure of filing duplicative complaints to expand the procedural rights he would otherwise enjoy – particularly for the purpose of circumventing the rules pertaining to the amendment of complaints").

If the Fifth Circuit affirms the District Court on the merits, then plaintiffs will be barred by res judicata from the assertion of those same claims here. Therefore, it appears that the claims asserted by the plaintiffs in this case may never be ripe for disposition, summary or otherwise, *in this case*.

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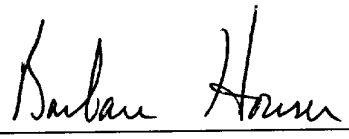
[1] Plaintiffs' Designation of Record and Statement of the Issues requests that the Fifth Circuit consider, among other things, "whether the District Court erred when it denied [plaintiffs'] Motion for Leave to Amend Pleadings." *See Designation of Record on Appeal and Statement of Issues* in Case No. 4:02-cv-00745, p. 8.

For these reasons, the Court will abate consideration of the Motion pending a disposition of the appeal in Pam Capital I, without prejudice to any parties' right to seek a ruling on the Motion at a later date, should the Fifth Circuit reverse and remand Pam Capital I with other instructions.

So Ordered.

SIGNED: March 22, 2004.



Barbara J. Houser
United States Bankruptcy Judge