

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
POWERMATE HOLDING CORP., <i>et al.</i> ,	)	Case No. 08-10498 (KG)
	)	
Debtors.	)	(Jointly Administered)
_____	)	
	)	
POWERMATE CORPORATION	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 10-50810 (KG)
	)	
PHOENIX INTERNATIONAL FREIGHT,	)	
Defendant.	)	
_____	)	<b>Re Dkt. No. 19</b>

**MEMORANDUM OPINION**

Before the Court is a motion (the “Motion”) by Powermate Corporation (“Plaintiff”) for leave to amend its initial complaint for the avoidance and recovery of preferential transfers against Phoenix International Freight (“Phoenix”) under Federal Rule of Civil Procedure 15. Plaintiff filed the complaint two days prior to the expiration of the statute of limitation. Plaintiff seeks leave to amend the initial complaint after the statute of limitation has run, to include three additional transfers and correct the listed amounts of four transfers. Phoenix objects to the Motion arguing that the initial complaint did not provide sufficient notice of the transfers alleged in the amended complaint and therefore do not relate back to the date of the initial complaint. For the reasons explained in detail below, the Court will grant the Motion.

## **JURISDICTION**

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b). Venue in this district is proper in accordance with 28 U.S.C. §§ 1408 and 1409.

## **BACKGROUND**

Plaintiff is a manufacturer of electric generators, pressure washers, and accessories. Phoenix is an international freight forwarder and customs broker that provided logistics, shipping brokerage, and related services to Plaintiff with respect to importing goods. Phoenix billed the various services, which varied in amount based on the services rendered, on separate invoices, even where the services were all performed on the same day.

On March 17, 2008, Plaintiff and certain affiliates filed for relief under chapter 11 of title 11. On March 15, 2010, Plaintiff commenced this adversary proceeding by filing a complaint (the “Original Complaint”) against Phoenix seeking avoidance and recovery of preferential transfers. The Original Complaint alleged that Plaintiff made eight transfers to Phoenix, totaling \$401,907.85, during the ninety days before Plaintiff filed for bankruptcy and incorporated a spreadsheet which detailed the invoice amounts, payment methods and dates for billing and payment.

Plaintiff’s spreadsheet listed several individual invoice numbers and indicated that the invoices billed during a particular week were paid nearly two months later by the same check. This method of payment recurred on a weekly basis until January 17, 2008, when it

appears that Plaintiff began to use ACH, or Automated Clearing House, a service which processes large volumes of credit and debit transactions electronically, to pay the invoices. Following the change in payment method, Plaintiff continued to pay the separate invoices collectively on a weekly basis using ACH, rather than issuing its own check.

Following the entry of the Scheduling Order, Plaintiff and Phoenix exchanged documents and information and Plaintiff concluded that it had made errors and omissions in the Original Complaint. After Phoenix denied permission to amend the Original Complaint, Plaintiff filed the Motion, seeking to include an additional \$737,636.59, consisting of three additional transfers, made January 17, 2008, February 8 and 14, 2008 (the “Additional Transfers”), and the corrected amounts of four transfers on January 17 and 31, 2008 and February 22 and 28, 2008 (the “Corrected Transfers”), all of which were paid using ACH.

### **DISCUSSION**

Plaintiff seeks to amend the Original Complaint due to recently discovered accounting errors, revealed in the parties’ document exchange, that led to omissions in the spreadsheet submitted with the Original Complaint. Phoenix argues that the Additional Transfers do not relate back and are therefore barred by the two-year statute of limitations because they are separate and distinct transactions as each service was billed on a separate invoice. Phoenix further argues that neither the Original Complaint nor the attached spreadsheet provided any reason to conclude that Plaintiff sought to avoid and recover anything more than the amount alleged in the Original Complaint. Phoenix also claims that it will incur greater time and cost

expenditures and will likely need to adjust its defense if the Court grants leave to amend, resulting in prejudice.

A. *Leave to Amend*

Federal Rule of Civil Procedure 15, made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7015, provides in relevant part that “a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). The grant or denial of leave to amend is left to the court’s discretion, provided there is a justifying reason. *Foman v. Davis*, 371 U.S 178, 182 (1962). The Supreme Court has directed that absent “any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment,” leave to amend should be freely given. *Id.* If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Id.* Ultimately, the recovery of preferential transfers is for the benefit of creditors. *See In re J. Allen Steel Co.*, 321 B.R. 764, 769 (Bankr. W.D. Pa. 2005); *In re RJW Lumber Co.*, 262, B.R. 91, 93 (Bankr. N.D. Cal.2001).

**B. Relation Back Doctrine**

Bankruptcy Code Section 546(a) places a two-year limitation on the commencement of preference actions. 11 U.S.C. § 546(a). Where, as here, a plaintiff seeks to amend a complaint after the statute of limitations has run, the amendment must relate back to the date of the original complaint in order to be given effect. *Peltz v. CTC Direct, Inc. (In re MBC Greenhouse Co.)*, 307 B.R. 787, 789 (Bankr. D. Del. 2004). Amended claims relate back to the date of the original complaint when “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading....” Fed. R. Civ. P. 15(c)(2).

“The central consideration of Rule 15(c)(2) is whether there is a nexus between the factual allegations in the original pleading and those in the amended complaint,” that gives fair notice of the factual situation giving rise to the amended pleading. *Burtch v Dent (In re Circle Y of Yoakum, Texas)*, 354 B.R. 349, 357 (Bankr. D. Del. 2006); *In re Gerardo Leasing, Inc.*, 173 B.R. 379, 389 (Bankr. N.D. Ill. 1994) (“The most important factor in determining whether to allow an amended complaint to relate back to the date of the original filing is whether the original complaint provided the defendant with sufficient notice of what must be defended against in the amended pleading.”). However, an amendment that “states a new claim based on a materially different set of facts” does not relate back to the original complaint. *Gerardo Leasing*, 173 B.R. at 389; *Gordon v. Slaughter (In re Slaughter Co. & Assoc., Inc.)*, 242 B.R. 97, 101 (Bankr. N.D. Ga. 1999) (denying leave to amend to add an

additional transfer that would “require proof of its own unique set of facts.”).

The test for determining “whether a sufficient factual nexus exists is whether ‘the evidence with respect to the second set of allegations could have been introduced under the original complaint, liberally construed.’” *Gerardo Leasing*, 173 B.R. at 389 (quoting *In re Kruszynski*, 150 B.R. 209, 212 (Bankr. N.D. Ill. 1993)). A factual nexus must exist between the original and amended complaints even where the original complaint reserves a right to include additional transfers. *Circle Y*, 354 B.R. at 357.

Difficulty arises where the amendment seeks to add transactions similar to those already pleaded. *Gerardo Leasing*, 173 B.R. at 389. An amended claim should not be presumed to relate back to the original complaint because the additional transactions are also preferential. *Id.* The additional transfers must arise out of the same previously pleaded conduct. *Id.* Thus, an amended complaint alleging additional transfers may relate back to the date of the original complaint where the additional transfers were part of a systematic series of payments. *Circle Y*, 354 B.R. at 358; *Gerardo Leasing, Inc.*, 173, B.R. at 391.

In *MBC Greenhouse*, the court declined to allow leave to amend the complaint to include thirty-nine additional transfers because it was “not possible to reconcile the list of transactions in the proposed amended complaint with those in the original complaint.” *MBC Greenhouse*, 307 B.R. at 792. The court explained that the additional transactions were subject to different facts which would subject them to different defenses from the transactions in the original complaint and the only similarities were the characterization as

preferential transfers and common payees. *MBC Greenhouse*, 307 B.R. at 793.

In the present case, the payments appear systematic. On a weekly basis, Plaintiff made a single transfer to Phoenix which paid in full all invoices for services billed during the week nearly two months prior.<sup>1</sup> The Additional Transfers fall within what appears to be the course of conduct between the parties regarding the billing and payment of the invoices. These facts are distinguishable from those in *MBC Greenhouse*. Amending the Original Complaint to include the Additional Transfers does not require the inclusion of additional facts. Furthermore, reconciliation of the transactions is not only possible, but also fills the gaps between payments indicated on the spreadsheet, completing the pattern of weekly payments.

Although the payments were in unequal amounts, the transfers are part of the same scheme. It stands to reason, subject to proof, that the transfers regularly paid in full all invoices issued during a particular week, and any variation in amount was based on the services rendered. Given that Phoenix received payments on a weekly basis from Plaintiff, the Additional Transfers were noticeably absent from the spreadsheet. Accordingly, there was sufficient notice from the conduct of the parties that Plaintiff would seek recovery of the additional transfers.

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<sup>1</sup>The Court notes that the payment made on February 25, 2008 deviates from the pattern of weekly payments. However, the Court need not address this deviation as it was alleged in the original complaint and Plaintiff does not seek to amend the amount of this transfer.

The parties' course of conduct regarding the billing and payment of invoices, leads to the inescapable conclusion that the Original Complaint provided sufficient notice of the Corrected Transfers. The amounts in the Original Complaint were significantly lower than the amounts previously paid by check. Thus, it is reasonable to infer that the weekly payment indicated on the spreadsheet erroneously omitted some of the invoices paid during those particular weeks. The central consideration in determining whether an amendment relates back to the date of an original complaint is whether the non-moving party had notice. *Gerardo Leasing*, 173 B.R. at 389. There is no surprise here. As Plaintiff appears to have treated the payment of all invoices for a particular week as one transaction, Phoenix had notice that Plaintiff had overlooked payments and would seek to recover the entire payment made on that particular date, not the amounts paid for only certain invoices. The amendment will make full recovery a possibility. The Original Complaint clearly states that Plaintiff will also seek to recover "such additional transfer amounts that Plaintiff learns, through discovery or otherwise were made by the [Plaintiff] to [Phoenix] during the Preference Period."

The Court finds that the Additional Transfers and Corrected Transfers arose from the same conduct as the claims alleged in the Original Complaint, and thus relate back to the date of the Original Complaint. Furthermore, the Additional Transfers and the Corrected Transfers arose from the same course of conduct of the parties, Phoenix will suffer no prejudice by granting the Motion as there are no materially different facts.

**CONCLUSION**

For the foregoing reasons, the Court will grant the Motion and permit Plaintiff to amend the Original Complaint to claim both the Additional Transfers and the Corrected Transfers. An Order accompanies this Memorandum Opinion.

Dated: August 18, 2011

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

KEVIN GROSS, U.S.B.J.

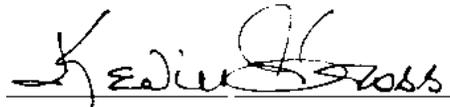
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PHOENIX INTERNATIONAL FREIGHT,	)	
Defendant.	)	
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**ORDER GRANTING LEAVE TO AMEND**

The plaintiff in this adversary proceeding has moved for leave to amend its complaint pursuant to F.R.Civ.P.15 and Bankruptcy Rule 7015 (the “Motion”). D.I. 19. The defendant opposes the Motion. For the reasons stated in the Memorandum Opinion of even date,

IT IS HEREBY ORDERED this 18<sup>th</sup> day of August, 2011, that the Motion is GRANTED.



KEVIN GROSS, U.S.B.J.