IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
CHART INDUSTRIES, INC., *et al.*,	)	Case No. 03-12114 (WS)
	)	Jointly Administered
Debtors.	)	
	)	**Re: Docket No. 284**

OPINION DENYING REORGANIZED DEBTORS' MOTION FOR SUMMARY JUDGMENT ON ITS OBJECTION TO THE PROOF OF CLAIM OF CHARLES S. HOLMES, HPA ASSOCIATES LLC AND JAMES PINTO, BEING CLAIM NO. 38[1]

The Reorganized Debtors ("Chart") have moved for Summary Judgment seeking dismissal of a prepetition claim filed and asserted by Charles S. Holmes, HPA Associates LLC and James Pinto (the "Claimants") [June 30, 2004, Docket No. 284] (the "Motion for Summary Judgment").

No citation of authorities is needed for the proposition that summary judgment is appropriate where there is no genuine issue of material fact, viewing the facts in a light most favorable to the nonmoving parties, who in this case are the Claimants.

I. FACTS - PRIOR TO BANKRUPTCY FILING

The Court did not hold an evidentiary hearing as such, but heard oral argument based on extensive pleadings to which were attached numerous exhibits, such as correspondence, documents, memoranda, discovery materials, and importantly, for purposes of this Motion, the affidavit of Charles S. Holmes. From these sources, the Court has gleaned what appears to be either essentially uncontroverted facts deemed relevant to disposition of the Motion or facts taken in a light most favorable to the non-moving parties. In this respect, it is important to keep in

[1] This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

mind that the issue before the Court is not, at least at the moment, the substantive merit of the asserted claim(s).

Putting the issue that is before the Court in appropriate context requires reference to a period substantially prior to the filing of Chart's bankruptcy case in 2003. Arthur Holmes ("Arthur") was the Chief Executive Officer of Chart from at least 1997 to soon after Chart's 2003 Chapter 11 plan confirmation. Claimant Charles S. Holmes ("Charles"), who is Arthur Holmes's brother, had been associated with Chart as a shareholder and director at various times. Chart had been seeking additional financing and/or an investment infusion when in the winter of 2001 then pending negotiations with a third party entity began to unravel. Arthur then approached Charles about locating financing and finding a substitute investor. Charles states now that he then orally discussed and agreed with Arthur "to locate an alternate investor in return for a cash fee of 5 percent (5%) of any investment made." Charles further stated in his supporting affidavit that (1) "This oral agreement. . .is the basis for the Claim." (hereinafter referred to as the "Alleged Oral Fee Agreement"); (2) he enlisted a James Pinto ("Pinto") to aid him in locating an investor; (3) Pinto introduced Charles to an entity (which will be hereinafter referred to as "Audax,") and (4) "Audax began negotiations with Chart in April 2002."

By letter dated June 6, 2002, Charles wrote to the attorney/secretary of Chart specifically referring to a conversation with Arthur to secure new equity for Chart. In that letter, Charles stated, "In the instance of the Audax Group it is our understanding that upon a successful closing of the equity purchase that James and I will be compensated with a 5 percent (5%) commission payable in the common stock of Chart." He ended the letter by saying he would appreciate the addressee's firm documenting the arrangement.

The attorney/secretary for Chart sent a letter dated July 25, 2002, to Charles relative to the fee payable in connection with the proposed investment by the Audax Group, enclosing a summary of the fee proposal, and stating its approval by a committee of the nonemployee directors of Chart. The enclosed summary stated the fee would be paid at closing by the issuance of a number of shares of Chart common stock equal to the lesser of 5 percent (5%) of (1) the number of shares of preferred stock issued in the investment or (2) in the alternative, some other number of shares valued in a manner set forth therein. The summary ended by stating that it assumed the "economic terms of the proposed transaction as set forth in the current term sheet would not change." The reference to the "term sheet" was likely a reference to a written summary of proposed terms and conditions that Chart and Audax were then negotiating. At that time, the Audax investment apparently was going to take the form of the issuance to Audax of preferred (convertible to common) stock by Chart in return for the agreed upon consideration.

The negotiations between Chart and Audax continued well into 2003. At some point during the negotiations, Audax apparently independently began buying up Chart's secured debt. The negotiations between Chart and Audax culminated around May 2003 in an arrangement whereby Chart would file a Chapter 11 case and present a plan pursuant to which the amount owed by Chart on the secured debt acquired by Audax would be set at a certain figure under various terms and conditions, including that the secured debt could be converted by Audax to common stock in Chart, all in return for various payments and infusions or other considerations to be paid by Audax to or for the benefit of Chart.

Prior to the bankruptcy filing, the proposed Chapter 11 plan was circulated to various parties in interest, including possibly regulatory agencies. Chart then filed for protection under

Chapter 11 on July 8, 2003. Just prior to that date, by letter dated July 3, 2003, Claimants' attorney wrote to Chart's attorney/secretary, referring to the letters of June 6, and July 25, 2002, asking that payment of the finder's fee be made to Claimants as promptly as possible. That same July 3, 2003, letter also referred to a December 19, 2002, Memorandum from the attorney/secretary to Claimants regarding a fee agreement in connection with an investment in Chart by an (unnamed) "institutional investor," in a way that it indicated it too afforded a basis for Claimants' claim. Subsequently, it has become obvious, and the parties now appear to agree, that the referred to unnamed "institutional investor" was not Audax, but a bank.

The July 3, 2003, letter also made reference to an entitlement to a finder's fee in connection with a possible Chart investment by another entity that might have been introduced to Chart by Audax, as well as an ongoing investigation by Claimants of possible entitlements to fees arising out of investments made by others, but initiated by Audax.

II. FACTS - AT AND AFTER BANKRUPTCY FILING

Chart's Chapter 11 case and proposed plan of reorganization were filed on or about July 8, 2003. That plan referred to a claim by Claimants and treated it in a manner that caused Claimants to file an objection to confirmation. Chart's plan was confirmed on September 3, 2003, pursuant to a confirmation order, which, among other things, provided for (a) the withdrawal of Claimants' confirmation objection and (b) a cut off date of October 6, 2003, by which time Claimants were to file their claim. The Confirmation Order also essentially and specifically preserved to Chart and Claimants any rights, remedies and defenses incident to such a claim.

Claimants timely filed a claim on September 17, 2003 (the "Filed Claim"). Chart filed its

objections to the Filed Claim on March 12, 2004 (the "Filed Claim Objection"), to which Claimants responded by filing a pleading on May 12, 2004 (the "Claimants' Response"). Claimants' Response, while not directly or specifically dealing with Chart's various objections, stated that: (1) the basis for their claim was the oral arrangement between Arthur Holmes and Charles Holmes in the winter of 2002, *i.e.*, the Alleged Oral Fee Agreement; and (2) the legal arguments made by Chart in its Filed Claim Objections were "inapplicable" because they were premised on the notion that the fee was payable in the stock of Chart or became due solely in the event of a preferred equity investment in Chart by Audax.

III. SUMMARY JUDGMENT ISSUES

Chart's Motion for Summary Judgment essentially argues that Claimants' Response, referring as it does to the Alleged Oral Fee Agreement as being the basis for the claim (as opposed to the basis for the claim stated in the Filed Claim), in legal effect asserts a new and different claim, and one that is presented, and should be seen, as a substitute for the then abandoned Filed Claim, mandating a conclusion that: (1) the Filed Claim be dismissed; and (2) the Alleged Oral Fee Agreement also be dismissed, because it was a new and different claim filed untimely on May 12, 2004.

Claimants argue that the Alleged Oral Fee Agreement was not really a new and different claim and that the rules applicable to amendment of claims, or the assertion of an "informal" claim, are applicable here. The Claimants further argue that, if anything, the Filed Claim ought to properly be seen as a narrow or special (and partial) modification of the basic and underlying Alleged Oral Fee Agreement, further arguing that it too should be construed as applicable only to the special Audax situation and not to the entirety of the parties' agreement, thereof making the

claim both timely and justiciable.

IV. ANALYSIS

Fairly read, the Filed Claim, by reason of its very wording and contents, together with the fact that it does not appear to pick up on the additional claim possibilities referred to in the previous July 3, 2003, letter, coupled with the likely fact that the actual contents of the proposed plan and the nature of the arrangement with Audax would likely have then been known to Claimants, provides at least a reasonable basis for Chart's argument that the timely Filed Claim is narrower in scope, at least on its face, than the Alleged Oral Fee Agreement.

The question then becomes whether the Alleged Oral Fee Agreement is so different as to be considered as a new and different claim incapable of being considered as an allowable post bar date amendment to the timely Filed Claim.

There is case law to the effect that a claim amendment, whether formal or informal, is permissible only to: (1) cure a defect in the claim as originally filed; or (2) to describe the claim with greater particularity; or (3) plead a new theory of recovery on the facts set forth in the original claim, on the idea that post confirmation amendments should be carefully scrutinized to insure that the creditor is not seeking to file a new claim under the guise of an amendment. *See United States v. International Horizons, Inc. (In re International Horizons, Inc.)*, 751 F.2d 1213, 1216 (11th Cir. 1985) (citing *Szatkowski v. Meade Tool & Die Co.*, 164 F.2d 228, 230 (6th Cir. 1947); *In re G.L. Miller & Co.*, 45 F.2d 115 (2d Cir. 1930)).

A somewhat contrary, and more Claimant friendly view, is that claims and objections and amendments thereto, should be treated like pleadings in a civil case or adversary proceeding (to which a bankruptcy contested matter is akin), subject to, and governed by, liberal amendment

provisions, for purposes of deciding whether or not to consider a late filed claim as an amendment and as being able to trump time bars. *See In the Matter of Stavriotis*, 977 F.2d 1202, 1204 (7th Cir. 1992) (noting that Rule 7015 should apply by analogy to contested bankruptcy matters to keep practice before the bankruptcy courts and district courts the same); *In the Matter of Unroe*, 937 F.2d 346, 349 (7th Cir. 1991) (finding that Rule 9014 extends Rule 7015 to contested matters); *Liddle v. The Drexel Burnham Lambert Group, Inc. (In re The Drexel Burnham Lambert Group, Inc.)*, 159 B.R. 420, 425 (S.D. N.Y. 1993) ("[S]everal courts have held that the analysis for amendment of claims in bankruptcy is identical to the analysis required by Rule 15.") (citations omitted); *MK Lombard Group I, Ltd.*, 301 B.R. 812, 816 (Bankr. E.D. Pa. 2003) (noting that the trend in bankruptcy cases is to apply Federal Rule of Bankruptcy Procedure 7015 to contested matters). *See also* 11 U.S.C. § 105(a).[2]

It is to be noted that Claimants do not concede or agree that the Filed Claim, as such, is off the table. The Claimants argue entitlement to a fee under it even in the absence of the Alleged Oral Fee Agreement. In that connection they further argue, correctly, the existence of genuine material issues of fact which precludes disposition of that particular question by

[2] Section 105(a) provides, in relevant part: "No provision of this title . . . shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate . . . to prevent abuse of process." 11 U.S.C. § 105(a).

summary judgment. The Claimants recited circumstances surrounding the transaction, even limited to the parameters described in the Filed Claim, together with possibly relevant negotiations in light of the rather cursory memorializations, all considered in the context and framework of the process of adoption and approval of the contents of the Chapter 11 plan, to say nothing of the knowledge of or possible involvement therein of Claimants, as well as representatives of Chart, leave little doubt about the necessity to fully explore the matter by way of an evidentiary hearing.

Furthermore, the Claimants Response, initially raising the existence of the Alleged Oral Fee Agreement, cannot be seen or construed as an abandonment of the Filed Claim or a complete substitution of the former for the latter, despite some language in Claimants pleadings about the latter being the "basis" of their claim. The relatively contemporary Filed Claim and Claimants Response (raising the Alleged Oral Fee Agreement) and arguments simply belie the existence of the necessary intention involved in any such abandonment or intended substitution, particularly in a situation where it is clear that such could well jeopardize the justiciability of any of Claimants claims. Abandonment by conduct necessitates the presence of much clearer intent to abandon and more positive unequivocal and consistent actions than are evident here. Therefore, under any circumstances, the Filed Claim, as such, needs to be the subject of an evidentiary hearing on the merits.

What remains is whether or not such that evidentiary hearing should also encompass the merits of the Alleged Oral Fee Agreement, including, but not limited to, whether or not the indicated words were spoken, whether or not such what was said constitute an agreement, and if so, whether or not it is enforceable, and if enforceable, its treatment or effect under the

Confirmed Plan, as well as any other issues that might be involved in disposing of the merits of the claim. The Court has concluded it can and should include these issues in the evidentiary hearing for a number of reasons.

First, assuming arguendo that the Court accepts the line of cases which preclude a "new" agreement from being a justiciable subject of a tardy claim, whether newly filed or filed as an "amendment" to a timely claim, the inquiry then shifts to what "new" means in that context. Some of those cases indicate that a claim is not "new" if it puts forth a new theory of recovery on the same facts as provide the basis for the timely filed claim. If "same facts" is construed in this case to mean only the stated memorializations set forth in the June and July 2002, documentation referred to in the Filed Claim, then arguably, the Alleged Oral Fee Agreement may not be seen as the "same" or "new." However, the result is different if "same facts" is considered more broadly as pertaining to the custom and existence of a general, but enforceable, contractual commitment to pay Claimants a finder's fee incident to an "investment" in Chart by someone brought to the table by Claimants, whatever form(s) such might take.

Furthermore, a factual inquiry into the relationship between and circumstances involved to the Filed Claim and the Alleged Oral Fee Agreement is inevitable even to establish whether or not the latter might be considered as "new." Claimants essentially argue that the Filed Claim represents simply a special Audax modification of the more encompassing Alleged Oral Fee Agreement, which did and does not have the legal effect of negating the existence of the latter. Such implicates classic contractual construction and intent issues about when or if a contract modification was intended to fully or partially supercede a prior agreement, or when a merger of the two has taken place, etc. One answer might be to have an evidentiary hearing limited solely

to the issue of whether or not there is a "new" agreement. That, however, would be totally unsatisfactory and inefficient because the almost inescapable and inevitable result would in essence be a trial on the merits of both the Filed Claim and the Alleged Oral Fee Agreement. Furthermore, and predictably, if the Court ruled the Alleged Oral Fee Agreement was a non-justiciable "new" agreement, arguments would ensue in connection with the remaining hearing on the Filed Claim, as to the legal effect of that ruling on the admissibility into evidence of facts that had some otherwise irrelevant relationship to the Alleged Oral Fee Agreement - again something to be avoided. This Court thus concludes that even operating within the "new"case type of rules, under the facts of this situation a broader view of what the "same facts" are should be taken, and further, that within the rulings in those cases which permit a claim assertion or amendment to be presented in pleadings or writings other than formal proofs of claim, the Claimants Response satisfies those formulations.

Second, there is the noted line of cases that give a Bankruptcy Court the broader discretion in relation to allowance and relation back of amendments that arise from references to Federal Rule of Civil Procedure 15(a) and equitable considerations inherent in 11 U.S.C. section 105(a). *Unroe*, 937 F.2d at 349-50; *MK Lombard Group I*, 301 B.R. at 816. This Court believes these are the better reasoned decisions, and further concludes that in light of the facts in this case, the merits of the Alleged Oral Fee Agreement are properly before the Court. The existence of some sort of a fee dispute with Claimants is no surprise to anyone. What might arguably be considered a "surprise" of sorts is what is essentially presented as either (a) an alternate theory of fee recovery under an alleged agreement with somewhat different terms (that may afford a greater chance of recovery than the agreement specified in the Filed Claim), or (b) existence of two

agreements which may turn out to be compatible or incompatible, in whole or in part. The nuances of the differences are, in any event, an insufficient basis upon which to either limit the inquiry to one or the other, or to preclude any inquiry at all.

Weighing the foregoing and considerations of finality, meaningfulness of set filing deadlines and prejudice to Chart against the loss by Claimants of their day in Court on the merits of the asserted claim, as weak or as strong as they may be, thus requires denial of the motion.

The Court is setting a status conference for July 28, 2005, at 11:30 a.m. (Eastern Time), for the purpose of discussing any needed discovery, setting an evidentiary hearing date, and discussing other matters relative to properly disposing of these claims.

Dated: June 20, 2005

The Honorable Walter Shapero
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
CHART INDUSTRIES, INC., *et al.*,	)	Case No. 03-12114 (WS)
	)	Jointly Administered
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	)	**Re: Docket No. 284**

ORDER DENYING REORGANIZED DEBTORS' MOTION FOR SUMMARY JUDGMENT ON ITS OBJECTION TO THE PROOF OF CLAIM OF CHARLES S. HOLMES, HPA ASSOCIATES LLC AND JAMES PINTO, BEING CLAIM NO. 38

For the reasons set forth in the Court's Opinion of this date, the Reorganized Debtor's Motion for Summary Judgment on its Objection to the Proof of Claim of Charles S. Holmes, HPA Associates LLC and James Pinto [Docket No. 284] is **DENIED**, and it is further

ORDERED, that a status conference is hereby scheduled for **July 28, 2005, at 11:30 a.m.** [Eastern Time], for the purpose of discussing any needed discovery, setting an evidentiary hearing date, and discussing other matters relative to properly disposing of these claims.

Dated: June 20, 2005

BY THE COURT

Honorable Walter Shapero
United States Bankruptcy Judge