

**MANNING CURTIS BRADSHAW  
& BEDNAR LLC**

David C. Castleberry [11531]

[dcastleberry@mc2b.com](mailto:dcastleberry@mc2b.com)

Christopher M. Glauser [12101]

[cglouser@mc2b.com](mailto:cglouser@mc2b.com)

136 East South Temple, Suite 1300

Salt Lake City, UT 84111

Telephone (801) 363-5678

Facsimile (801) 364-5678

*Attorneys for Plaintiff R. WAYNE KLEIN, the  
Court-Appointed Receiver of National Note of Utah*

---

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

---

R. WAYNE KLEIN, as Receiver,

Plaintiff,

vs.

KEYBANK CARD SERVICES, KEYBANK  
CARDMEMBERS SERVICES, and/or  
KEYBANK USA

Defendants.

**MOTION FOR LEAVE TO AMEND  
THE COMPLAINT AND  
TO EXTEND DISCOVERY WITH  
MEMORANDUM IN SUPPORT**

Civil No. 2:13-CV-00589-DAK

Judge Dale A. Kimball

---

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiff R. Wayne Klein, the Court Appointed Receiver, (“Receiver”) hereby moves the Court to grant him leave to file an amended complaint and to extend discovery. The proposed First Amended Complaint (“Amended Complaint”) is attached hereto as Exhibit A.

The Receiver has obtained new information necessitating the need to amend his original complaint. After complying with this Court's Order, compelling KeyBank Card Services and KeyBank USA, National Association (collectively "KeyBank"), to produce documents responsive to the Receiver's discovery requests, it is evident that, although the transfers at issue were made out to KeyBank and appeared to have been sent to KeyBank, U.S. Bank National Association d/b/a Elan Financial Services ("Elan") and Citibank, NA ("Citibank") may have had ownership, possession, and control of the accounts that received the transfers at issue from National Note of Utah ("NNU"). For reasons more fully explained below, the Receiver respectfully asks the Court to grant the Receiver leave to file the proposed Amended Complaint. The Receiver could not have known that Elan and Citibank owned the accounts to which NNU made the transfers until KeyBank complied with the Receiver's First Set of Discovery Requests and produced agreements suggesting that Elan and Citibank were the initial transferees of the accounts at issue.

For these reasons, and as set forth in the accompanying Memorandum in Support, the Receiver respectfully requests that the Court grant his Motion for Leave to Amend the Complaint and to Extend Discovery.

### **MEMORANDUM IN SUPPORT OF MOTION**

#### **BACKGROUND**

NNU operated as a former Ponzi scheme that fraudulently solicited money from investors through Wayne Palmer. The Receiver has instituted this action to recover the value of transfers by NNU to Defendants as payments on credit cards issued to persons other than NNU. KeyBank has argued that it did not receive the transfers at issue, and instead that Citibank and Elan were

the initial transferees. KeyBank has refused to provide all the evidence necessary to establish its argument.

Throughout this litigation, Receiver has sought to ascertain the entities that received the transfers at issue and that are liable as initial transferees.<sup>1</sup> On March 13, 2014, KeyBank produced a declaration from Almedia Miller stating that KeyBank did not receive transfers to the 1219 Account and the 8516 Account, but failed to identify who had ownership, control, and possession of these accounts. Almedia Miller Decl. ¶¶ 7-14, Exhibit B. In KeyBank's responses to the Receiver's First Set of Discovery Requests, KeyBank stated that Citibank and Elan owned the 1219 Account and the 8516 Accounts but failed to provide evidence to support these assertions. Def.'s Response to First Set of Discovery Requests Interrogatory Nos. 18, 21, Aug. 8, 2014, Exhibit C. KeyBank's deficient responses forced the Receiver to file a motion to compel, which the Court granted on September 16, 2014. Order Granting Motion To Compel, Doc. No. 26.<sup>2</sup>

KeyBank complied with this order on September 30, 2014, and finally produced two Agent Bank Agreements. These Agent Bank Agreements, however, still fail to tell the entire relationship between KeyBank and Citi and Elan.<sup>3</sup> For example, at this time, KeyBank has not provided the agreement between KeyBank and Elan regarding the purchase of the 8516 Account from Elan by KeyBank, *see* Miller Decl. ¶ 12, Exhibit B, and has not provided documents and

---

<sup>1</sup> On December 3, 2013, the Court entered a Scheduling Order establishing March 14, 2014, as the deadline for adding new parties and amending pleadings. Docket No. 15. ¶ 3.

<sup>2</sup> During the hearing on the motion to compel, the issue of amending the complaint to add additional parties was raised by counsel for the Receiver, and Magistrate Judge Furse encouraged counsel for the Receiver to file a motion to compel soon after the documents from KeyBank were received and analyzed.

<sup>3</sup> The Receiver's counsel is in the process of following up with KeyBank's counsel regarding the outstanding discovery issues.

correspondence detailing any additional agreements that KeyBank may have with Citibank and Elan.

Based on the documents recently provided by KeyBank, the Receiver seeks leave to amend the original Complaint to add Citibank and Elan as parties to this litigation and to extend discovery because it is likely that Citibank and Elan are the transferees who received transfers from NNU and because additional discovery from Citibank and Elan after they are added as parties to this lawsuit may be necessary. The Receiver provided a copy of the proposed Amended Complaint to KeyBank's counsel, and KeyBank counsel has not yet provided its consent to allow the Receiver to file the amended pleading.

#### **ARGUMENT**

Adding new parties to a lawsuit requires a party to request leave to file a motion to amend under Federal Rule of Civil Procedure 15(a). *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).<sup>4</sup> A party may amend the pleadings with leave of the court or by written consent of the adverse party; leave shall be freely given when justice so requires. *Rowe v. Albertsons, Inc.*, 116 Fed.Appx. 171, 176 (10th Cir. 1004) (citing Fed. R. Civ. P. 15(a)). A motion for leave to amend will be denied only if the court finds that there was undue delay in bringing the motion or if there is undue prejudice. *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205, 1207-08 (10th Cir. 2006).

---

<sup>4</sup> In *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1204-05 n.4 (10th Cir. 2006) the Tenth Circuit held that amendments to a complaint after the deadline for making amendments are properly addressed under Federal Rule of Civil Procedure 15(a) and not Rule 16(b). Instead, courts within the Tenth Circuit determine the validity of a motion to amend under Rule 15 by determining if there was undue delay in bringing the motion to amend after the amendment deadline. *Id.*

**I. THIS MOTION FOR LEAVE TO AMEND IS TIMELY.**

Fed. R. Civ. P. 15(a)(2) allows a party to amend its pleading with the court's leave. "The court should freely give leave when justice so requires." *Id.* Leave to amend a pleading should be freely given because disputes should be decided on their merits where possible.

Here, justice requires that the Receiver be allowed to file the Amended Complaint. The checks and wire transfers from NNU at issue in this case were made payable to KeyBank, credit cards and account statements relating to the transfers at issue were always in the name of KeyBank, and the credit cards and account statements were branded as KeyBank credit cards and listed toll-free numbers such as "888-KEY-4BIZ" or "800-KEY2YOU." KeyBank provided a declaration in March 2014 stating that other banks, and not KeyBank, received the transfers at issue. In response, the Receiver sought documents that would substantiate that statement and to uncover the identity of the other banks that supposedly received the transfers at issue.

After unsuccessfully working with KeyBank through informal means to obtain the documents and information sought by the Receiver that would show the ownership of the accounts at issue, the Receiver served KeyBank with formal discovery requests. KeyBank, however, refused to produce the requested documents that would show the legal relationship between KeyBank and Citibank and Elan, although it stated for the first time in writing that Citibank and Elan were the other banks that received the transfers at issue. Without the requested documents and information from KeyBank, the Receiver, however, could not know the legal relationship between KeyBank, Citibank, and Elan, and could not know if Citibank and Elan were liable for the transfers at issue. KeyBank may have been an agent of Citibank or Elan, or Citibank or Elan may have been agents of KeyBank. KeyBank may have agreed to

indemnify Elan and Citibank for any losses on these accounts. Until KeyBank provided the agreements sought by the Receiver, the Receiver did not have an adequate basis to seek to name Citibank and Elan as defendants in this action.

The timing of a motion for leave to amend becomes an issue only if there is unjustifiable delay in bringing the motion. *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205 (10th Cir. 2006); *Velocity Press v. Key bank, NA*, 570 Fed.Appx. 783, 788 (10th Cir. 2014). The Tenth Circuit focuses on the reasons for the delay in propounding a motion for leave to amend the pleadings, stating that denial of a leave to amend is appropriate “when the party filing the motion has no adequate explanation for the delay.” *Minter*, 451 F.3d at 1206 (citing *Frank* 3 F.3d at 1365-66); *Federal Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir. 1987) (denying leave to amend because defendant waited years to assert a defense that was available and known to the defendant from documents found in discovery). "The Supreme Court has emphasized that leave to amend should generally be granted in 'the absence of any apparent or declared reason' to the contrary, such as 'undue delay' or 'undue prejudice to the opposing party by virtue of allowance of the amendment.'" *Velocity Press*, 570 Fed.Appx. at 788 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

In *Velocity Press* the Tenth Circuit affirmed a district court’s decision to grant the plaintiff’s motion to amend to add a fraud claim during a trial against KeyBank. 570 Fed.Appx. at 789 (citing *Minter*, 451 F.3d at 1206, for the proposition that a district court has discretion to deny a motion to amend when the movant’s delay is unexplained). During the course of the *Velocity Press* litigation, KeyBank had refused to produce documents relating to the case, and these discovery disputes resulted in documents being produced after the discovery deadline had

passed. *Id.* The district court allowed the requested amendment by the plaintiff on the eve of trial based on KeyBank's failure to produce timely documents during fact discovery, and on appeal, the plaintiff asserted that the motion to amend was untimely and should have been denied. *Id.* The Tenth Circuit affirmed the district court's ruling. *See id.* at 788-89.

Here, the Receiver has not delayed in bringing this motion for leave to amend once he obtained information from KeyBank demonstrating the roles of other parties to the challenged transactions. Instead, KeyBank's refusal to produce relevant and important documents in this case has been the cause of any delay in bringing this motion for leave to amend. Similar to *Velocity Press*, the Receiver has been involved in a discovery dispute with KeyBank to ascertain who owned the 1219 and 8516 Accounts. KeyBank asserted that it is not liable because it did not own the accounts where the transfers in question were made. *See Miller Decl.* ¶¶ 7-14. KeyBank's response to the Receiver's First Set of Discovery Requests stated that Citibank owns the 1219 Account and that Elan owns the 8516 Account, but it refused to produce the agreements that set forth the contractual relationship KeyBank had with these other banks. Def.'s Response to First Set of Discovery Requests Interrogatory Nos. 18, 21. The Receiver obtained certain agreements on September 30, 2014, but only after the Court compelled KeyBank to produce these agreements. Further, this recent production by KeyBank is not complete, and the Receiver is still seeking complete responses to the discovery he propounded on July 8, 2014.

Based on the recent incomplete production by KeyBank, the Receiver now has sufficient information to bring claims against Elan and Citibank. The Motion is timely, and the Receiver respectfully asks the Court to grant him leave to file the Amended Complaint.

**II. THE RECEIVER'S MOTION TO AMEND WILL NOT PREJUDICE KEYBANK.**

After assessing whether a party's motion for leave to amend is untimely, a court must determine whether the amendment will cause prejudice to the nonmoving party. *Minter*, 451 F.3d at 1207-08. Typically, prejudice is found only when the amendment unfairly affects the defendant in terms of preparing a defense to the amendment because of significantly new factual issues raised in the amendment. *Id.* at 1208. A party is not prejudiced when the moving party seeks to amend by supplementing a complaint with facts that significantly overlap between the new and existing claims. *See Velocity Press*, 570 Fed.Appx. at 789.

The Receiver's amendment will not prejudice KeyBank because the Amended Complaint introduces claims consistent with KeyBank's argument that Citibank and Elan are the recipients of NNU's transfers. From the outset of this litigation, KeyBank has known that Citibank and Elan may be the owners of the 1219 and 8516 Accounts because it had possession of agreements that detailed KeyBank's relationship with Citibank and Elan. The proposed Amended Complaint does not raise significantly new factual issues; the Amended Complaint asserts the same argument that KeyBank has made throughout this litigation; that Citibank and Elan may be the recipients of the transfers at issue in this litigation. *See Velocity Press*, 570 Fed.Appx. at 789; *see generally* First Amended Complaint, Ex. A. Additionally, KeyBank is not prejudiced because the Amended Complaint asserts facts that may limit KeyBank's liability in this case.

If anything, the Receiver has been prejudiced in this litigation because of KeyBank's failure to produce timely documents showing the legal relationship between KeyBank and Citibank and Elan. Despite KeyBank's compliance with the Court's order compelling discovery, KeyBank still has not provided all the documents and correspondence showing the



complete arrangement between KeyBank and Citibank and Elan regarding the accounts that received the transfers at issue in this case.

**III. THERE IS GOOD CAUSE TO EXTEND DISCOVERY.**

A Court may extend the deadline for discovery for good cause if the request to extend discovery is made before the extension of discovery expires. Fed. R. Civ. P. 6(b)(1)(A); *Ruleford v. Tulsa World Pub. Co.*, 266 Fed.Appx. 778, 786 (10th Cir. 2008) (denying motion to extend discovery because the plaintiff was dilatory in discovery and noticed eighteen depositions at the end of discovery). Showing good cause is not a demanding requirement. *U.S. v. Bd. of Cnty. Com'rs. Of Cnty. of Dona Ana*, 2010 WL 965607, at \*3 (D.N.M. Feb. 18, 2010).

Good cause exists to support extending discovery in this matter. The Receiver should be allowed to pursue his claims against Elan and Citibank because, based on the recent partial production by KeyBank on September 30, 2014, it appears that Citibank and Elan may be the owners of the accounts in question and that these banks may be the initial transferees. The Receiver asks the Court to allow new discovery deadlines to be set once Elan and Citibank are served and become parties to this lawsuit.

**CONCLUSION**

For the reasons explained above, the Receiver respectfully requests that the Court grant the Receiver's Motion for Leave to Amend the Complaint and to Extend Discovery.

DATED this 10<sup>th</sup> day of October, 2014.

**MANNING CURTIS BRADSHAW  
& BEDNAR LLC**

/s/ David C. Castleberry

---

David C. Castleberry  
Christopher M. Glauser  
*Attorneys for Plaintiff R. Wayne Klein*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **MOTION FOR LEAVE TO AMEND THE COMPLAINT AND TO EXTEND DISCOVERY WITH MEMORANDUM IN SUPPORT** to be served in the method indicated below to KeyBank in this action this 10<sup>th</sup> day of October, 2014.

HAND DELIVERY  
 U.S. MAIL  
 OVERNIGHT MAIL  
 FAX TRANSMISSION  
 E-MAIL TRANSMISSION  
 USDC ECF NOTICE

Heidi G. Goebel [10343]  
CHRISTENSEN & JENSEN, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101  
Telephone: (801) 323-5000  
Facsimile: (801) 355-3472

*Attorneys for KeyBank*

/s/ Melissa Aguilar

---