IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:	**IN PROCEEDINGS IN CHAPTER 11**
OHIO BUSINESS MACHINES, INC.,	**CASE NO. 02-16558**
	ADV. PRO. 04-1356
Debtor.	**JUDGE RANDOLPH BAXTER**

BRIAN A. BASH, TRUSTEE,

Plaintiff,

v.

SUN TRUST BANKS, INC.,

Defendant.

MEMORANDUM OF OPINION AND ORDER

The matters before the Court are cross motions for summary judgment filed by the Chapter 7 Trustee (Trustee) and SunTrust Banks, Inc. (SunTrust), and an alternative motion to dismiss filed by SunTrust. Core Jurisdiction of this matter is acquired under provisions of 28 U.S.C. § 157 (a) and (b), 28 U.S.C. § 1334(b), and General Order No. 84 of this District. After a hearing on the matters, the following findings and conclusions are hereby rendered:

This adversary proceeding arises from Ohio Business Machines, Inc.'s (hereinafter "OBM" or the "Debtor") alleged purchase of certain stock warrants of its parent holding company, Point Group, Inc. ("Point Group" or "PGI") from SunTrust, Ohio Mezzanine Fund, Ltd. ("Ohio

Mezzanine") and Paul Carlo ("Carlo") on or about June 28, 2000. The Trustee alleges that, pursuant to 11 U.S.C. §544, he acquired the rights and powers of a judgment creditor and execution creditor and may avoid any transfer of property of the Debtor that is voidable by any of such entities, whether or not such entities existed at the time of the filing of the petition or case conversion.

The Trustee filed the above-styled adversary proceeding against Sun Trust for avoidance of alleged fraudulent and preferential transfers, breach of fiduciary duty and disallowance of claims by application of relevant Ohio law. The Trustee alleges, *inter alia*, that Sun Trust through its agents and/or representatives was an insider of OBM at the time of the warrant payments as a result of its attendance at OBM's board of director meetings at which Sun Trust acquired specific information regarding the financial status of OBM and/or Point Group.

The Trustee further contends that the material facts surrounding the transfers demonstrate that OBM fraudulently conveyed the warrant payments to Sun Trust in violation of the Ohio Uniform Fraudulent Transfer Act, R.C. § 1336 et seq. and that such transfers must be set aside and/or avoided as a matter of law pursuant to the certain remedies set forth in O.R.C. § 1336.07. More specifically, the Trustee contends that, the warrant payments were made to "insiders" at a time when OBM was insolvent, or alternatively, such transfers rendered OBM insolvent. He also contends that, OBM did not receive a reasonably equivalent value in exchange for the payments made.

Trustee also argues that, as a result of OBM's warrant payments, OBM depleted its assets by more than $3 Million, receiving in return warrants in Point Group whose nominal financial condition rendered such warrants worthless. In addition to the above fraudulent transfer claims, the Trustee also alleges that, as an insider of OBM, Sun Trust owed fiduciary duties to OBM's creditors, and that Sun Trust breached those duties as a result of the self-dealing it committed in negotiating and accepting

the fraudulent debt payments and warrant payments from OBM.

The Trustee now moves this Court to grant Summary Judgment pursuant to Bankruptcy Rule 7056 in his favor for all claims asserted in his Complaint against Defendant, Sun Trust. The relief sought by the Trustee includes, a request for an Order requiring (a) avoidance and recovery of fraudulent transfers made by OBM to certain insiders of OBM, and (b) the disallowance of any claims of such insiders.

BACKGROUND

OBM was incorporated under Ohio laws on November 17, 1993. From 1993 through 2000, OBM was authorized to sell business equipment made and distributed by Sharp Electronics ("Sharp"). OBM generally served as an exclusive distributor and sales agent for Sharp products throughout the Northeast Ohio region. Point Group is the sole shareholder and/or "parent holding company" of OBM, owning five hundred (500) shares of the Debtor. (*See*, Ohio Business Machines, Inc. Certificate and Articles of Incorporation, a true and accurate copy of which is attached to the Affidavit of Richard A. Szekelyi as Exhibits "1" and "2", respectively, which Affidavit is attached hereto as Exhibit "A" and incorporated herein).

On or about December 13, 1996, Sun Trust loaned the Debtor $1,500,000.00, in consideration of the following:

> (1) a Subordinated Note (hereinafter "Note") in the principal amount of $1,500,000.00 with interest accruing on the Note at the rate of 12% per annum pursuant to the terms of the Subordinated Note and Warrant Purchase Agreement. (*See,* "Subordinated Note and Stock Purchase Agreement" and "Subordinated Note" and true and accurate copies of which are attached to the Szekelyi Affidavit as Exhibits "4" and "5", respectively.)
> (2) a Stock Purchase Warrant giving Sun Trust the right to purchase from Point Group two hundred ninety-one shares of Point Group stock at the "Exercise Price" and during the "Exercise Period." (*See,* "Warrant", a true and accurate copy of which is attached to the Szyeklyi Affidavit as Exhibit "7").

The above transaction was conducted pursuant to the Subordinated Note and Warrant Purchase Agreement Sun Trust entered into with OBM and Point Group on December 13, 1996. (See, Szekelyi Affidavit, Exhibit "4"). Pursuant to the terms of the Agreement, Sun Trust agreed to purchase the note for $1,425,000 from OBM and Point Group, and Sun Trust agreed to purchase the warrant from Point Group for $75,000. *Id.* The warrant was given to Sun Trust for no additional consideration other than the loan amount. As set forth above, Sun Trust loaned $1,500,000.00 to Point Group under the note, and in exchange, Sun Trust received the Note in the principal amount of $1,500,000.00 and the warrant. In 1998, Minolta Corporation ("Minolta") approached the Debtor for the purpose of offering the Debtor a loan in exchange for a dealership agreement whereby OBM would exclusively sell Minolta products.

In 1999, a valuation of the Debtor and Point Group. was performed by Rand M. Curtiss. The valuation prepared by Curtiss specifically states:

> "The Company is not generating case flow to its owners. It is technically insolvent, as it owes more than it owns. For these reasons, its equity is valueless by conventional appraisal measures of capitalized earnings, cash flow and net asset value." (Id. at Exhibit "1", emphasis added).

Curtiss also indicated that stockholders' equity had been negative during 1996, 1997, and 1998. Id. Likewise, in 1999, Debtor's financial statements, including a Consolidated Balance Sheet of Point Group, Inc. dba Ohio Business Machines, Inc. showed stockholders' deficits for December 31, 1998 and 1999. (See, Szekelyi Affidavit, "Consolidated Balance Sheet" a true and accurate copy of which is attached thereto as part of Exhibit "11").

For several years prior to the warrant transaction, Robert Dudiack (an employee of Sun Trust) and Greg Ferrance (on behalf of Ohio Mezzanine Fund, Ltd.) regularly attended board of directors

Meetings for OBM, and had access to Debtor's financial records. (See, Meeting Minutes, true and accurate copies of which are attached to Szekelyi Affidavit at Exhibit "3"). According to the Meeting Minutes, Mr. Dudiak was present during the directors' review of financial results of Point Group and OBM. (Id.).

On or about May 3, 2000, in a letter of Intent signed by Minolta's Senior Vice President and Salvatore Spagnola, President of OBM, Minolta agreed to loan Debtor an amount of up to $3.25 Million. (See, Letter of Intent, a true and accurate copy of which is attached to the Szekelyi Affidavit as Exhibit "10"). The proceeds were to be used for repayment of the note(s) to Sun Trust Bank and Ohio Mezzanine Fund and to retire outstanding warrants held by Sun Trust Bank, Ohio Mezzanine Fund and Messers. Godfry and Carlo. (See, Szekelyi Affidavit, Exhibit "9"; see also, "Loan Agreement", a true and accurate copy of which is attached to Szekelyi Affidavit at Exhibit "10"). Pursuant to the Letter of Intent and the Loan Agreement, OBM was required to make a best-efforts attempt to negotiate with each of the warrant holders to reduce the purchase price of the warrants at the time of the reacquisition by OBM; to pay fees and to reduce OBM's open account with Minolta by $300,000.00 and the balance was to be used by OBM "for working capital in an amount to be agreed upon by Minolta and OBM." (See, Szekelyi Affidavit, Exhibits "9" and "10").

In exchange for the loan, OBM was to issue Minolta a promissory note in the principal amount of $3.25 Million. OBM also made other arrangements, including an agreement to enter into a Minolta Standard Office Systems Division Dealer Agreement, in addition to a mostly exclusive distribution arrangement to sell Minolta office products. On June 28, 2000, Minolta wired funds to fulfill its obligation under the Loan Agreement dated June 28, 2000 in the total amount of $3.25 Million, pursuant to the terms of the pay-off and wire instructions. (See, Wire Instructions, true and

accurate copies of which are attached to the Szekelyi Affidavit as Exhibit "10", following the Loan Agreement).

On June 28, 2000, Sun Trust received from OBM via wire transfers from Minolta $926,021.29 for its Point Group stock warrants and $978,987.50 to pay off the 1996 note. (Id.) Financial statements prepared in June, 2000 for OBM board meetings showed a negative shareholder equity in the amount of $1,346,024.00. (See, "Ohio Business Machines, Inc. Financial Statements for the Month Ended April 30, 2000", a true and accurate copy of which is attached to the Szekelyi Affidavit as part of Exhibit "11"). The financial statements for the partial year ending April 30, 2000 also reflected that OBM had a negative equity position and indicated that the book value of OBM's liabilities exceeded the book value of its assets. (See, Szekelyi Affidavit, para. 16).

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Trustee alleges several grounds for avoidance of the transfers referenced above under 11 U.S.C. §544. Trustee seeks avoidance of the transfers since, under relevant Ohio law, said transfer is a per se fraudulent conveyance. Further, under relevant Ohio and federal law, the transferees owed a fiduciary duty to the estate by virtue of being insiders, and breached their fiduciary duties to the estate, and therefore caused the transfer to become avoidable under 11 U.S.C. §544.

The Trustee further contends that there are significant payments made by Debtor OBM from funds received from Minolta Corporation to retire Sun Trust's and other parties' subordinated debt and outstanding warrants. Specifically, he contends that, on or about June 28, 2000, Sun Trust received from OBM $926,021.29 for its Point Group stock warrants and $978,987.50 to pay off the Sun Trust note. (See, Szekelyi Affidavit, para. 10). The Trustee also alleges that the parties, including Sun Trust Bank, knew and understood the Debtor's bleak financial position prior to the

transfer, and within two (2) years of the subject transfers, the Debtor filed for bankruptcy relief under Chapter 11. He states that, while these transfers are outside of the statutory avoidance period under the Bankruptcy Code and 11 U.S.C. § 547, the transfers are voidable as fraudulent transfers pursuant to relevant Ohio law, as set forth in R.C. 1336 *et seq*. The Trustee also contends that the undisputed material facts of this case demonstrate that (1) the transfers were made to insiders of OBM, including Sun Trust Bank; (2) that the transfers were made at a time when OBM was insolvent and/or that the transfers rendered OBM insolvent; and (3) that OBM did not receive from Sun Trust Bank (or any other transferee) anything of reasonable equivalent value in exchange for the substantial amount of money transferred.

Sun Trust moves for dismissal of the adversary complaint pursuant to Rule 12(b)(1) or, in the alternative, for summary judgment pursuant to Rule 56(c) in its favor. Firstly, Sun Trust contends that the Trustee lacks standing to assert claims belonging to OBM's corporate parent, Point Group, Inc. Secondly, Sun Trust contends that it is entitled to summary judgment on the fiduciary duty claim because it was not an officer or director of either OBM or Point Group. Thirdly, Sun Trust contends that it is entitled to summary judgment on the alleged aiding and abetting claim because the Trustee cannot demonstrate that a breach of fiduciary duty occurred to support an aiding and abetting claim.

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The Court must first determine whether the Trustee has standing to prosecute the subject proceeding.

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Motion to Dismiss

A. Standing

Under Article III of the U.S. Constitution, a party has standing to sue only if it has a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975). Furthermore, prudential limits on standing state a party cannot assert the "legal rights and interests of a third party...." *Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838, 853 (6th Cir. 2002). To have standing to pursue a fraudulent transfer, the Trustee must demonstrate that OBM had an interest in the money transferred to SunTrust to redeem the warrants. *Id.* at 853. In order to have standing, the Trustee must demonstrate that, under state law, the funds alleged to have been fraudulently transferred were property of OBM's estate. *Id.*

Rule 12(b)(1) of the Federal Rules of Civil Procedure, made applicable to this proceeding under Bankruptcy Rule 7012(b)(1), provides in relevant part that, "every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading...except (1) lack of jurisdiction over the subject matter."

"When a Rule 12(b)(1) motion attacks the factual basis for jurisdiction, the [court] must weigh the evidence and the plaintiff has the burden of proving that the court has jurisdiction over the subject matter." *Golden v. Gorno Bros.*, 410 F.3d 879, 881 (6th Cir. 2005); *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). The Sixth Circuit established that a motion under Rule 12(b)(1) differs from one made under Rule 12(b)(6):

> The factual attack [on subject matter jurisdiction], however, differs greatly for here the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.Pro. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction — its very power to hear the case — there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover the plaintiff will have the burden of proof that jurisdiction does in fact exist.

RMI Titanium Co. v. Westinghouse Electric Corp., 78 F.3d 1125, 1134 (6th Cir. 1996).

In his response to Sun Trust's motion to dismiss, the Trustee requests joinder of Point Group, Inc. as a co-plaintiff, in an apparent effort to validate his standing to pursue the complaint allegations. Sun Trust, however, has provided the relevant legal authority to properly defeat this joinder attempt with Point Group, Inc. First, OBM's and Point Group's bankruptcy cases were administratively consolidated, not substantively consolidated. Second, the statute of limitations has run against Trustee's attempt to amend the amended complaint to add Point Group. Third, Rule 15 does not allow for relation back to add a new party plaintiff. Fourth, Rule 17 only allows the substitution or addition of a deemed real party in interest if that party was unascertainable or was not included by reason of mistake or inadvertence.

A. RULE 15

Rule 15 governs the amendment of pleadings. Rule 15(c) governs the circumstances under which an amended pleading will relate back to the date of the original pleading. The Trustee argues that this rule would apply to the claims of the PGI estate against SunTrust should the Trustee be permitted to amend the Complaint to add PGI as a co-plaintiff. However, the the Sixth Circuit has established that Rule 15(c) does *not* apply to amendments seeking to *add* parties. An amendment which adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations." *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064 (6th Cir. 1973).

The *Marlowe* decision effectively explains that the 1966 Amendments to Rule 15(c) "which permits correction of misnomers does not permit the addition or substitution of new parties." *Id.* In *Collyer v. Darling*, 98 F.3d 211 (6th Cir. 1996), a case following *Marlowe*, the court explained that,

> [U]nder Rule 15(c), amendments to a complaint will relate back to the original pleading so long as the newly added party had sufficient notice of the action. *However, such amendments will not survive preclusive application of the statute of limitations unless the amendments are corrections of misnomers.*

Based on *Marlowe* and *Collyer v. Darling*, an amended complaint adding PGI as a new plaintiff would not relate back to the date of the commencement of the subject adversary proceeding. PGI is a corporate entity wholly separate from OBM. The statute of limitations for this cause of action pursuant to § 544 of the Bankruptcy Code expired in May of 2005. Therefore, the Trustee is not permitted, under Rule 15, to add PGI as a co-plaintiff herein.

B. Rule 17

Herein, the Trustee is not entitled to the relief he seeks under Rule 17, made applicable to this proceeding by Bankruptcy Rule 7017. Rule 17(a) states, in relevant part, that:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed. R. Civ. P. 17. The benefits of Rule 17(a) are "designed to avoid forfeiture and injustice when an understandable mistake has been made in selecting a party in whose name the action should be brought." *Rowland v. The Mutual Life Ins. Co. of New York*, 689 F. Supp. 793, 797 (S.D. Ohio 1988). The record reflects that the Trustee has already filed two amended complaints – the second of which

was filed four months after the commencement of this adversary proceeding. The Trustee did not add PGI in either previously filed amended complaint. It is clear that all of the relevant information regarding the transactions which the Trustee seeks to avoid was in the Trustee's possession. The Trustee has advanced no argument to show that an "understandable" mistake was made. Rather, he argues that it is impossible to "remove OBM from the transaction at issue" but makes no explanation for why he did not timely include PGI as a plaintiff in this proceeding. Furthermore, the Trustee makes no argument that the choice of plaintiff was difficult or that he was somehow prevented from accessing the information needed to choose the correct plaintiff.

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Joint administration is designed for the ease of administration. *In re Reider*, 31 F.3d at 1109; *accord Clyde Bergemann, Inc. v. Babcock & Wilcox Co. (In re Babcock & Wilcox)*, 250 F.3d 955, 959, fn. 6 (5th Cir. 2001). Joint administration is a procedural tool permitting use of a single docket for administrative matters, including the listing of filed claims, the combining of notices to creditors of the different estates, and the joint handling of other ministerial matters that may aid in expediting the cases. Fed. R. Bankr. P. 1015, Advisory Committee Note (1983); *In re Babcock & Wilcox*, 250 F.3d at 959, fn. 6. Used as a matter of convenience and cost saving, joint administration does not create substantive rights. *Id.*, 250 F.3d at 959, fn. 5; 2 COLLIER ON BANKRUPTCY ¶ 302.06. (15th ed. rev. 2005). Nor does joint administration allow creditors of one estate to assert claims against the other estates. *In re Hicks*, 300 B.R. 372, 379 (Bankr. D. Idaho 2003)(*A fortiori*, the representative of the creditors of one estate may not assert claims against the other estates' assets).

Substantive consolidation is the process by which the assets and liabilities of separate, but related, entities are combined. *In re Babcock & Wilcox*, *supra*.("'In general,

substantive consolidation results in the combination of the assets of both debtors into a single pool from which the claims of creditors of both debtors are satisfied ratably'"); *Bunker v. Peyton (In Re Bunker)*, 312 F.3d 145, 153 (4th Cir. 2002) (*quoting* 2 COLLIER ON BANKRUPTCY ¶ 105.09[3] (15th ed. rev. 1999)). In substantive consolidation, all creditors would become joint creditors. Because of its impact on a case and the rights of parties, it is to be used sparingly. *Union Savings Bank v. Augie/Restivo Baking Co. Ltd. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir. 1988).

Herein, PGI and OBM were jointly administered, not substantively consolidated. The joint administration is a procedural device, a device that did not combine PGI's and OBM's estates substantively. Because PGI and OBM remain separate corporate entities, the Trustee lacks the standing to assert a claim belonging to the estate of PGI or PGI's creditors. Accordingly, SunTrust's assertions in this regard are well premised and provide a basis for dismissal of any action against PGI.

Sun Trust attaches exhibits to its motion to dismiss reflecting that OBM and Point Group each held separate board meetings approving the Minolta Loan transaction and related transactions in separate board meetings. Furthermore, OBM and PGI were separately incorporated entities under Ohio law. Moreover, PGI and SunTrust are the only parties to the Warrant Redemption Agreement. It is clear that the party to whom the instant cause of action belongs is the estate of PGI, not that of OBM.

The record reveals that the Warrant Redemption Agreement required ***PGI, not OBM***, to pay SunTrust. Specifically, the Agreement stated, in pertinent part:

> 1.2 Payment of Redemption Price of Warrants. In return for the surrender of the Warrant Certificate..., ***PGI shall pay*** the total of $1,111,270....

1.3. *Repayment of the SunTrust Note.* In return for the surrender and cancellation of the SunTrust Note..., ***PGI shall pay*** a total of $1,029,666.67.... 1.5 Allocation of the Payments.... SunTrust and Ohio Mezzanine have jointly ***instructed PGI to allocate*** the Redemption Payment, the SunTrust Note Payment and the Ohio Mezzanine Note Payment as follows....:(Emphasis added).

Thusly, the pleadings reflect that Point Group, and not OBM, is the direct party in interest. Under Rules 15 and 17, the Trustee may not substitute Point Group as party plaintiff. Therefore, Thusly, the Trustee lacks standing to prosecute the above-styled action.

Conclusion

Accordingly, the motion of Sun Trust for dismissal is hereby granted. The cross motions for summary judgment filed by both litigants is hereby rendered moot. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 9th day of January, 2006

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT